# Please Don't Charge the Victim

By Guest Contributor, John Rubin*

Can the person protected by a DVPO be charged with violating the order?

Here's a question I get occasionally: What language should I use to charge aiding and abetting a violation of a domestic violence protective order (DVPO)? Here's a similar one: If someone is arrested for aiding and abetting a violation of a DVPO, is the person subject to the 48-hour pretrial release law for domestic violence offenses?

I know the scenario immediately. A person protected by a DVPO (Mary) has invited the person subject to the DVPO (her ex-boyfriend, John) over to her house although the DVPO prohibits him from being there. Things deteriorate, and Mary calls the police for assistance. I also know my answers to these questions. There isn't language for charging Mary with aiding and abetting a violation of a protective order that was entered for her protection because such a charge isn't valid. For the same reason, Mary isn't subject to arrest so the 48-hour law doesn't apply. If such a charge is brought, the remedy is for the court to dismiss it for failure to state a crime.

The North Carolina appellate courts haven't addressed whether these charges are proper, but decisions from other states explain why they should not stand. In *State v. Lucas*, 795 N.E.2d 642 (Ohio 2003), the facts were similar to the above scenario. In *Patterson v. State*, 979 N.E.2d 1066 (Ind. App. 2012), the police came to the residence for other reasons (to serve a subpoena) and found the two together. In dismissing the aiding and abetting charge, the court in both cases focused on the legislature's intent in authorizing domestic violence protective orders—namely, to protect victims of domestic violence. As stated by the Ohio Supreme Court in *Lucas*, the legislature did not intend to undo those protections by "allowing abused women to be charged with complicity" in violating orders for their protection .795 N.E.2d at 648. The courts' reading of legislative intent rests on a combination of common law principles, statutory language, and policy considerations. In light of our state's commitment to protecting victims of domestic violence, I believe our appellate courts would find the reasoning persuasive.

First, a basic tenet of criminal law is that the victim of a crime cannot be charged with aiding and abetting commission of the crime. "Where the statute in question was enacted for the protection of certain defined persons thought to be in need of special protection, it would clearly be contrary to the legislative purpose to impose accomplice liability upon such a person." *See* Wayne R. LaFave, Substantive Criminal Law § 13.3(e), at 370 (2d ed. 2003). For example, a victim of statutory rape cannot, by consenting, be charged with aiding and abetting the crime.

Second, the language of the statutes indicates that the legislature did not intend for a person protected by a protective order to be held criminally liable for a violation of the order. Thus, the

Ohio statute prohibits “mutual” protective orders. That means that a court may not issue a protective order against the person who petitions for a protective order unless the respondent also files for and meets the requirements for issuance of a protective order against the petitioner. The North Carolina DVPO procedures did not originally include such a provision, but the North Carolina General Assembly amended G.S. 50B-3(b) to add it specifically. *See* S.L. 1995-591 (H 686). The Ohio and Indiana statutes contain an additional provision, not present in North Carolina’s statutes, that an invitation to return to the residence does not nullify or waive a protective order. The difference is not critical; jurisdictions without such a provision have interpreted their protective order statutes as establishing the same rule. *See, e.g., State v. Dejarlais*, 969 P.2d 90 (Wash. 1998) (so interpreting statute before legislature enacted such a provision); *accord State v. Branson*, 167 P.3d 370 (Kan. Ct. App. 2007). North Carolina’s courts likely would follow the same approach. *See* Domestic Violence Order of Protection, AOC Form AOC-CV-306 (Oct. 2013) (“Only the Court can change this order. The plaintiff cannot give you permission to violate this order.”).

Third, the policies behind protective order statutes indicate that the legislature did not intend for the victims of domestic violence to be charged with violations of orders for their protection. Such charges could “chill” enforcement of protective orders, contrary to the legislature’s intent to strengthen protections. *Lucas,* 795 N.E.2d at 647. Even though protected by a protective order, a person may be reluctant to call for help if fearful of being prosecuted for having invited the other person to her home. *See generally Branson*, 167 P.3d at 372 (noting petitioner’s testimony that she did not call police immediately because she thought she “would be in as much trouble as he was”). People in need of protective orders might even be deterred from seeking protective orders. In our Mary and John example, if Mary invites John to her house, wants him to leave, and does *not* have a protective order, she can call the police without being arrested herself; yet, if the law allowed charges of aiding abetting, Mary would be in worse shape for having a protective order.

A somewhat older case from Iowa held that a person could be held liable for, in essence, aiding and abetting a violation of a protective order. *See Henley v. Iowa District Court*, 533 N.W.2d 199 (Iowa 1995). The proceeding in that case was for contempt, but the basic question is the same: whether a person protected by a protective order may be prosecuted for consenting to a violation of the order. The court’s holding rests on far older, “turn-of-the-century” decisions in which the Iowa courts held that nonparties to orders could be held in contempt for violations if they acted in concert or were in privity with the person against whom the order was directed. *See Henley*, 533 N.W. 2d at 202, *citing Hutcheson v. Iowa District Court*, 480 N.W.2d 260, 263–64 (Iowa 1992) (reviewing history). Those decisions are unpersuasive because they recite general contempt principles only and do not consider the complex dynamics of relationships involving domestic violence or the legislature’s intent in enacting procedures for the protection of domestic violence victims.

Dealing with repeated problems with the same couples can undoubtedly be frustrating for court officials and law enforcement officers as well as counselors, family members, and friends. The solution of splitting up and staying split up seems obvious, but research shows that it’s not so simple. For many reasons, it may take a person many tries and many months, if not years, to get

out of an abusive relationship. The law's answer to this difficult problem is not to charge the person protected by a protective order with violating the order.

*Editor's Note: The above blog post was reprinted from the School of Government's criminal law blog. In response to comments to that post, the author added the following:*

First, solicitation is like aiding and abetting in that it charges a person with complicity in a crime. Under the reasoning of the decisions cited in the blog, I don't believe that solicitation would be a valid charge against the person protected by a protective order. North Carolina's statute on the classification of solicitation, G.S. 14-2.6, doesn't change the result. It sets the punishment for solicitation (two classes lower than the completed offense); it doesn't identify the circumstances in which solicitation to commit a misdemeanor is a crime under North Carolina law. *See generally* 2 Wayne R. LaFave, Substantive Criminal Law § 11.1(a), at 190–91 (2d ed. 2003) (while solicitation to commit a felony is uniformly considered a crime, solicitation of any misdemeanor is not necessarily a crime). Second, mutual stay-away restrictions are not permissible under North Carolina's DVPO statutes unless the respondent meets the requirements for issuance of a DVPO. As observed in *Lucas*, if the petitioner could be held criminally liable (based on either a complicity theory or a mutual stay-away restriction), "a violator of a protection order could create a real chill on the reporting of the violation by simply threatening to claim that an illegal visit was the result of an illegal invitation." 795 N.E.2d 642, 647 (Ohio, 2003).

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