

NO. 63892-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TOMMY KIRK,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEBORAH FLECK

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	4
1. THE STATE CONCEDES THERE WAS INSUFFICIENT PROBABLE CAUSE FOR KIRK'S ARREST	4
2. SUFFICIENT EVIDENCE SUPPORTS KIRK'S CONVICTION IN COUNT TWO	5
D. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Matthias v. Lehn & Fink Products Corp.,
70 Wn.2d 541, 424 P.2d 284 (1967)..... 8

State v. Fiser, 99 Wn. App. 714,
995 P.2d 107 (2000)..... 5

State v. Salinas, 119 Wn.2d 192,
829 P.2d 1068 (1992)..... 5

Statutes

Washington State:

RCW 21.50.110..... 6

Rules and Regulations

Washington State:

CrR 3.6..... 1

A. ISSUES

1. Whether Count One should be vacated because Kirk's post-arrest statement was improperly admitted?
2. Whether there is sufficient evidence to support the jury's conviction for Count Two?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Tommy Kirk was charged by amended information with two counts of felony Violation of a Court Order - Domestic Violence. CP 36-37. The State alleged that Kirk had contact with his girlfriend, Machele Mitchell, in violation of a court order. CP 36-37. Count One occurred on November 26, 2008, when Kirk admitted to living at Mitchell's house. CP 36-37. Count Two occurred earlier that month when Kirk's sister witnessed Kirk having contact with Mitchell. CP 36-37.

The Honorable Deborah Fleck denied Kirk's CrR 3.6 motion to suppress, resulting in the admission of Kirk's post-arrest

statement. CP 1-4; 2RP 45-51¹. A jury found Kirk guilty of both counts at trial. CP 91-92; 5RP 7-11. Kirk faced a standard range sentence of 22-29 months, but Judge Fleck imposed an exceptional sentence of 9 months, which amounted to credit for time served. CP 114-16. Kirk now appeals his conviction. CP 125-26.

2. SUBSTANTIVE FACTS

On March 26, 2004, King County Superior Court issued a domestic violence no contact order between Tommy Kirk and Machel Mitchell. CP 15. The order prohibited Kirk from contacting Mitchell for five years. CP 15. The order also directed that Kirk stay 500 feet from Mitchell's residence. CP 15. However, a Scrivener's error on the order listed that this residential prohibition ended on March 26, 2004, the date the order issued. Thus, Kirk was prohibited only from contact with Mitchell, not her house. While Kirk was to have no direct or indirect contact with Mitchell, the order expressly permitted to have contact with their children if

¹ The Verbatim Report of Proceedings will be referred to as follows: 1RP (06/01/09); 2RP (06/02/09); 3RP (06/03/09); 4RP (06/04/09); 5RP (06/05/09); 6RP (Sentencing 06/26/09).

organized by a third party. CP 15. Kirk was placed on community supervision. 3RP 40-41; CP 15.

In early November 2008, Kirk was still on community supervision. 3RP 40-41; CP 15. However, Department of Corrections Officer Chris Muhs could not locate Kirk. 3RP 40-43. After several trips by Muhs to Kirk's parents' house, Kirk's sister, Emma Vaughn, grew frustrated by Kirk's failure to connect with Muhs. 3RP 43-44; 4RP 36. Vaughn called Mitchell's house to locate Kirk. 4RP 11, 13, 23, 27. During this phone call, Mitchell told Vaughn that Kirk was there and handed the phone to Kirk. 4RP 35. Vaughn and Kirk got into a heated argument. 4RP 5, 8-9, 36. After the exchange, Vaughn called Kirk's probation officer, Chris Muhs. 4RP 25.

On November 26, 2008, at Muhs's request, Federal Way police conducted a welfare check at Mitchell's house. 3RP 83. Kirk answered the door and said that Mitchell was not home, that he did not live there, and that he was simply watching their children. 3RP 83-84. Believing that Kirk had violated the protection order, police arrested Kirk. 3RP 86. Kirk then admitted that he was in fact living at that residence. 3RP 89.

C. ARGUMENT

1. THE STATE CONCEDES THERE WAS INSUFFICIENT PROBABLE CAUSE FOR KIRK'S ARREST.

Kirk contends that his arrest was made without probable cause, and as such, the post-arrest statement he made to police was inadmissible. He argues that this statement formed the basis for his conviction on Count One and that particular count should be vacated.

Count One alleged that Kirk violated a no contact order on November 26, 2008. Kirk's post-arrest confession on November 26th that he was living at Mitchell's house was the sole evidence that Kirk had personal contact with Mitchell on that date. Without Kirk's post-arrest statement, there is insufficient evidence to prove his personal contact with Mitchell on the specific date alleged in Count One.² As such, the State agrees that Count One should be vacated.

² The State makes this concession relying on Kirk's appellate position that his post-arrest statement related only to the November 26th incident date. Appellant's Brief at 28.

2. SUFFICIENT EVIDENCE SUPPORTS KIRK'S
CONVICTION IN COUNT TWO.

Kirk claims that there is not sufficient evidence to support Count Two. Because the evidence established that Kirk had personal contact with Mitchell within the dates alleged in Count Two, his claim fails.

Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The appellate court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

Kirk was charged in Count Two with violating a provision of a court order. RCW 21.50.110(1); CP 36-37. This court order required that Kirk "have no contact, directly or indirectly, in person, in writing or by telephone, personally or through any other person, with Machel D. Mitchell (4-20-73) until March 26, 2009." CP 15. It was alleged in Count Two that Kirk had contact with Mitchell sometime between November 1st and 25th, 2008.

Kirk's sister, Emma Vaughn, testified that in November 2008 she called Kirk at Mitchell's house. 4RP 13, 23, 27. Vaughn said that she first spoke with Mitchell on Mitchell's cell phone.³ 4RP 11. Vaughn then engaged in a heated conversation with Kirk. 4RP 5, 8-9. After the conversation, Vaughn called Kirk's probation officer, Chris Muhs. 4RP 25. Vaughn testified that she did not remember much about the phone conversation with Kirk or her later statement to police about it. 4RP 10-14.

Since Kirk and Mitchell were apparently living together at Mitchell's house in violation of the court order, Muhs asked police to

³ Vaughn had limited recollection of any aspect of this call throughout her testimony. She first implied that before talking to Kirk, Vaughn connected with Mitchell by cell phone while Kirk and Mitchell were at Mitchell's house. 4RP 11. Later in her testimony, Vaughn indicated that Mitchell was at work when she called Mitchell's cell. 4RP 24.

check on Mitchell's safety. 3RP 49. Through a welfare check on November 26, 2008, Federal Way police confirmed that Kirk was at Mitchell's house.⁴ 3RP 83.

Det. Heather Castro took a recorded statement from Vaughn about Vaughn's phone call to Kirk. 4RP 30-33. During this interview, Castro learned that Vaughn received a message from Kirk in early November 2008. 4RP 34-35. When Vaughn called this phone number back, Mitchell answered her residential phone line. 4RP 35. Vaughn asked Mitchell if Kirk was at Mitchell's house, Mitchell confirmed that Kirk was there, and Mitchell handed the phone to Kirk. 4RP 35. An argument then ensued over the phone line between Vaughn and Kirk, because Vaughn chastised Kirk for not staying in contact with his probation officer and Kirk was upset that Vaughn was going to report him to authorities. 4RP 36.

Sufficient evidence shows that Kirk was in contact with Mitchell, as charged in Count Two. Since Mitchell said that Kirk was with Mitchell and since Mitchell handed the residential phone to Kirk, the jury could conclude beyond a reasonable doubt that the

⁴ The observations made by police as to Kirk being at the house were prior to any arrest of Kirk and are thus not implicated or affected by the State's concession, *supra* § C.1. This evidence simply corroborates the fact that Kirk would have earlier had access to Mitchell's house, as Vaughn witnessed.

two were together during the charged timeframe. Police later observed Kirk at Mitchell's house, further corroborating this fact. Kirk's personal contact with Mitchell violated the court's prohibition of contact. Because Kirk violated the court order, there is sufficient evidence to support the jury's verdict in Count Two.

Kirk argues that Vaughn's testimony, standing alone, does not establish a violation of the court order. However, the jury's consideration of evidence would not have been limited to just one witness. The jury had before it testimony from all the witnesses. There was no objection or jury instruction to limit the evidence only to Vaughn's testimony. As such, this Court should consider the testimony of all of the witnesses to consider whether sufficient evidence exists. Matthias v. Lehn & Fink Products Corp., 70 Wn.2d 541, 550, 424 P.2d 284 (1967). A review of this testimony establishes that Kirk had unlawful contact with Mitchell. Accordingly, sufficient evidence supports Kirk's conviction as to Count Two.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Kirk's conviction as to Count Two, vacate Count One, and remand for correction of the judgment and sentence.⁵

DATED this 8th day of July, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

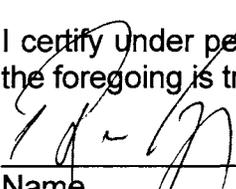
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⁵ Because Kirk's earlier sentence was an exceptional sentence, resulting in credit for time served, there appears to be no need to resentence Kirk. On remand, the trial court would only need to correct the judgment and sentence by vacating Count One.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, Washington 98101, containing a copy of the Respondent's Brief, in STATE V. TOMMY KIRK, Cause No. 63892-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, Washington

07-08-10
Date