

NO. 35079-3-II

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

NATHAN A. BROOKS,

Appellant.

11-4-2019
COURT OF APPEALS
DIVISION II
07 MAY 21 PM 2:22
STATE OF WASHINGTON
BY _____

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 06-1-00673-2

HONORABLE DAVID DRAPER, Judge Pro Tem

RESPONDENT'S BRIEF

EDWARD G. HOLM
Prosecuting Attorney
in and for Thurston County

JAMES C. POWERS
Deputy Prosecuting Attorney
WSBA #12791

Thurston County Courthouse
2000 Lakeridge Drive, SW
Olympia, WA 98502
Telephone: (206) 786-5540

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A. STATEMENT OF THE ISSUES

1. The defendant having expressed dissatisfaction with his trial counsel and having requested substitute counsel, but never having expressed an interest in self-representation, whether the trial court erred in not advising the defendant of his constitutional right to represent himself.

2. Considering the evidence in the light most favorable to the State, whether there was sufficient evidence for a reasonable juror to find the defendant guilty beyond a reasonable doubt of felony violation of a no-contact order.

B. STATEMENT OF THE CASE

As of April 10, 2006, there was in effect a domestic violence order issued by the Thurston County Superior Court requiring that the defendant, Nathan Brooks, have no contact with Amber Trautman until May 11, 2009. The order had been issued by the Thurston County Superior Court on May 11, 2004. Ex. 1, Trial RP 35. On the order was a signature in the name of Nathan Brooks indicating that a copy of the order had been received by Brooks. Ex. 1, Trial RP 36.

On April 10, 2006, Thurston County Sheriff's Deputies Natahn Kenschuh and George Opplinger were

dispatched to a residence on Choker Street in Lacey to investigate a disturbance there. Trial RP 28-29, 53. Opplinger was familiar with the residence and knew that Amber Trautman lived at that location. Trial RP 54.

Konschuh was the first officer to arrive at the residence on Choker Street. Trial RP 28, 55. It took Konschuh approximately 10 minutes to drive to the residence in response to the dispatch. Trial RP 28. When Konschuh arrived at that location, he observed the defendant standing in the open doorway of Trautman's residence. Konschuh observed Amber Trautman positioned just inside her residence. She was talking with the defendant. Trial RP 31-33.

Konschuh approached the residence and made contact with the defendant, who claimed he was Nathan Zimmerman. When Konschuh expressed doubt that this was the defendant's correct last name, the defendant again insisted his last name was Zimmerman. Trial RP 33-34. Konschuh knew that the defendant was Nathan Brooks and had been

informed of the existing no-contact order before arriving at the residence. Therefore, he placed the defendant under arrest for violating the order. Trial RP 33-35.

When Deputy Oplinger arrived at the residence, he observed the defendant standing just outside the doorway of Trautman's residence while Korschuh was placing handcuffs on him. Trautman was standing in the doorway. Trial RP 55-57. Oplinger heard the defendant identify himself to Korschuh as Nathan Zimmerman. When Oplinger mentioned to the defendant Oplinger's prior contacts with him, and that the defendant had previously gone by the name of Nathan Brooks, the defendant agreed he was Nathan Brooks, but claimed that he also went by the name of Nathan Zimmerman. Trial RP 58.

At the time of the contact between the defendant and Amber Trautman, the defendant had two prior convictions for violating a domestic violence protection order or no-contact order. Ex. 3 and 4.

On April 12, 2006, the defendant was charged by Information in Thurston County Superior Court Cause No. 06-1-00673-2 with one count of Felony Violation of a No-Contact Order. CP 4.

On June 1, 2006, the defendant and his attorney appeared in court for a pre-trial hearing. The defendant requested that his attorney be replaced by a different court-appointed counsel. The defendant claimed that his attorney was not taking his best interests into consideration and was not helping him to accomplish anything. 6-1-06 Hearing RP 3-4.

The court responded that the defendant's claims were too general for the court to assess, and asked the defendant for more specific reasons for requesting new counsel. However, the only specific reason provided was that the attorney was not assisting the defendant, who was in custody, to attend domestic violence classes. 6-1-06 Hearing RP 4-5. The court responded that such a complaint had nothing to do with adequately assisting the defendant to address the charge

against him, and so denied the request. 6-1-06
Hearing RP 5-6.

On June 26, 2006, a First Amended Information
was filed adding a charge of obstructing a public
servant. CP 9-10.

Trial was originally scheduled to begin on
June 26, 2007. However, on June 28th a hearing
was held at which time the court was informed that
defense counsel was unable to be present because
he was caring for a sick child at home. 6-28-06
Hearing RP 3. The defendant made the statement
that he did wish to be represented by counsel. 6-
28-06 Hearing RP 5. The defendant's only comment
about his attorney at that hearing was that he had
experienced difficulties communicating with his
attorney and so did not oppose a continuance of
the trial. 6-28-06 Hearing RP 5-6.

The next hearing in this case was held on
July 3, 2006. Defense counsel was still not able
to appear at that time. Therefore, another
attorney from the office for public defense
appeared in his place for purposes of this

hearing. 7-3-06 Hearing RP 5. The defendant simply indicated that he did not know what was going on with his attorney and expressed concern with being ready for trial. 7-3-06 Hearing RP 7.

A further hearing was held in this case on July 7, 2006. The defendant's counsel was present for that hearing. The defendant did not express any dissatisfaction with his attorney at that time. 7-7-06 Hearing RP 3-4.

A jury trial in this cause took place on July 17, 2006. In the middle of the presentation of the State's case-in-chief, outside the presence of the jury, the defendant informed the court that he did not feel he was being represented fairly. Trial RP 48. The defendant complained there were no witnesses to testify for the defense, but made no showing to the court that there were any potential witnesses that could present relevant and potentially helpful evidence for the defense. Trial RP 49-50. The court responded that defendant's counsel appeared to be doing a "fine job" for the defendant. Trial RP 50.

At the end of the State's case, defense counsel moved to dismiss the charge of obstructing a public servant on the basis of insufficient evidence. That motion was granted by the court. Trial RP 65-67.

The defendant was convicted of violation of no-contact order, and a special verdict was entered by the jury finding it proved that the defendant had previously been convicted of two such offenses. A standard-range sentence of 36 months was imposed for the crime of felony violation of a no-contact order. CP 46-57.

C. ARGUMENT

1. While the defendant expressed dissatisfaction with his trial counsel, and asked the court for a substitution of counsel, the defendant never expressed any interest in representing himself and made statements indicating his desire to be represented by an attorney, and therefore the court did not commit error by not informing the defendant of his right to represent himself.

The defendant contends that the trial court committed error by not informing the defendant of his right to represent himself on occasions when

the defendant expressed dissatisfaction with his court-appointed attorney. However, the defendant never gave any indication he wished to represent himself or that he thought he could adequately represent himself. In fact, just the opposite is the case here. This defendant made clear in his remarks that he was seeking adequate representation by an attorney and so had no wish to represent himself.

The defendant, on appeal, has not cited any legal authority for the proposition that a court is required to inform a defendant of his right to represent himself when that defendant requests new counsel while expressing dissatisfaction with his existing attorney, where the defendant gives no indication that he has any interest in representing himself in the matter. On the other hand, there is appellate authority to the contrary. In State v. Fritz, 21 Wn. App. 354, 359, 585 P.2d 173 (1978), the Court of Appeals ruled that it was a defendant's responsibility to bring before the court the subject of self-

representation and that the court was not required to advise a defendant of that right.

At the hearing on June 1, 2006, the defendant asked that his court-appointed attorney be replaced by substitute counsel. The defendant did not indicate any interest in representing himself. The defendant's right to counsel under the Sixth Amendment to the United States Constitution does not include the right to choose any particular court-appointed attorney. State v. DeWeese, 117 Wn.2d 369, 375-376, 816 P.2d 1 (1991). A court has discretion to determine whether a particular defendant's reasons for dissatisfaction merit substitution of counsel. DeWeese, 117 Wn.2d at 376.

At this hearing, the trial court asked the defendant to provide specific reasons for his dissatisfaction. The defendant indicated that his wish was to have representation similar to that provided by an attorney who had previously represented him. 6-1-06 Hearing RP 8-9. However, beyond vague generalities, the defendant only

claimed that his attorney had failed to help him get into domestic violence treatment while he was in custody awaiting trial. 6-1-06 Hearing RP 4-5. The trial court did not abuse its discretion in finding that the defendant had failed to provide adequate reasons for a substitution of counsel.

At this hearing, the defendant clearly expressed a desire to have an attorney represent him, but wanted a change of court-appointed counsel. There is simply no reason why the court should have addressed a right to self-representation that the defendant was clearly not interested in pursuing.

At the hearing on June 26, 2006, the defendant entered a plea of not guilty to the First Amended Information. The defendant did not express any dissatisfaction with his attorney at that time. 6-26-06 Hearing RP 4-5. There certainly would not have been any reason to address the defendant's right to represent himself at this hearing.

At the hearing on 6-28-06, the defendant made

a brief comment about having trouble communicating with his attorney, but made no request for substitution of counsel and gave no indication he was at all interested in representing himself. 6-28-06 Hearing RP 5-6. In fact, the defendant specifically confirmed that he wished to be represented by counsel. 6-28-06 Hearing RP 5. Again, there would have been no reason for the court to address the defendant's right to self-representation since the defendant specifically stated he wanted legal representation.

At the 7-3-06 hearing, the defendant's attorney had been unavailable for about a week because his child was ill. The defendant simply expressed concern about being ready for trial because of what was happening with his attorney. Again, the defendant did not ask for any substitution of counsel, nor did he give any indication contrary to his 6-28-06 statement that he wanted representation by an attorney.

At the 7-6-06 hearing, the defendant's attorney was present. The defendant did not

express any dissatisfaction with his attorney at that hearing, nor did he say anything to suggest a desire to represent himself. Once again, nothing occurred that would reasonably indicate to the court a need to address the defendant's right to self-representation.

At the beginning of the jury trial on 7-17-06, the defendant did not express any dissatisfaction with his attorney, did not ask for a substitution of counsel, and made no statement indicating a desire to represent himself. It was not until the middle of the State's case-in-chief that the defendant made a vague complaint about the quality of his attorney's representation. Trial RP 49-50. Nothing was said by the defendant indicating he wished to represent himself. In any event, a request made at that point for self representation would have been untimely and could have been rejected by the court, in the reasonable exercise of its discretion, on the basis that it would have impaired the orderly administration of justice in this case. State v. Breedlove, 79 Wn.

App. 101, 107, 900 P.2d 586 (1995). Therefore, there certainly was not a requirement that the court inform the defendant of a right of self-representation at that point.

A defendant may raise a claim of manifest error of a constitutional right for the first time on appeal. RAP 2.5(a)(3). However, to establish there was manifest error, the defendant must show how, in the context of the trial, the alleged error actually prejudiced the defendant's rights. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Since in this case the defendant never evidenced any interest in self-representation, and made statements to the contrary indicating his desire to have representation by counsel, there has been no showing of any prejudice to the defendant from a lack of advisement by the court concerning his right of self-representation, and so there has been no showing of manifest error in this case with regard to that right.

2. Considering the evidence in the light most favorable to the State, there was sufficient

evidence for a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt of the crime of felony violation of a no-contact order.

The defendant contends that there was insufficient evidence to support the defendant's conviction for felony violation of a no-contact order. The evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount

theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The State certainly proved there was a domestic violence no-contact order in effect on April 10, 2006, of which the defendant had notice, requiring that the defendant have no contact with Amber Trautman. Ex. 1. There was also proof that the defendant had previously been convicted of violating such orders on two prior occasions. Ex. 3 and 4. Furthermore, all of the evidence showed that the defendant did have contact with Trautman on April 10, 2006. However, the defendant contends that the evidence was insufficient to show the defendant's contact was a willful violation of the no-contact order. The basis for this contention is the testimony of Trautman at trial claiming that her mother had arranged with the defendant to come to Trautman's house to watch

her children while she was gone, but that he unexpectedly showed up at her door before she had left. Trial RP 73-76.

As noted above, when a defendant makes a claim of evidentiary insufficiency, the evidence must be considered in the light most favorable to the State. However, the defendant's argument on appeal essentially asks this court to consider the evidence in the light most favorable to the defendant.

It was the role of the jury to make a determination with regard to the credibility of Trautman's testimony. Camarillo, 115 Wn.2d at 71. When Deputy Kenschuh arrived at the residence, the defendant was standing in the doorway speaking with Trautman and making no effort to leave. Trial RP 31-33. When contacted by Kenschuh, the defendant insisted his name was Nathan Zimmerman and never indicated he went by the last name of Brooks, even after the Deputy expressed a belief that the defendant was not being truthful about his last name. Trial RP 33-34. This response by

the defendant could have been reasonably considered by the jury as evidence of a consciousness of guilt. State v. Chase, 59 Wn. App. 501, 507, 799 P.2d 272 (1990).

At the point Trautman testified, she still considered the defendant to be her boy friend, and so the jury could have taken into account Trautman's bias. Trautman never told the Deputies this story about the defendant being there to baby sit and having unintended contact with her, even as the officers were placing the defendant under arrest as she stood close by. Jurors could reasonably have concluded that her testimony was not credible, and that the circumstantial evidence, including the name used by the defendant, showed that the violation was a willful one.

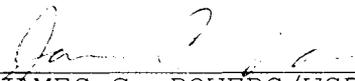
D. CONCLUSION

Based on the above, the State respectfully requests that this court find that the defendant has not shown there was any error by the trial court in this case, and that the evidence was

sufficient to support the jury's verdict of guilt,
and to therefore affirm the defendant's conviction
for felony violation of a no-contact order.

DATED this 21st day of May, 2007.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
NATHANA. BROOKS,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

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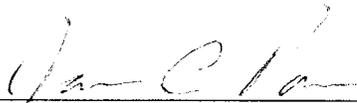
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 21st day of May, 2007, I caused to be mailed to appellant's attorney, PATRICIA A. PETHICK, a copy of the Respondent's Brief, addressing said envelope as follows:

Patricia A. Pethick,
Attorney at Law
P.O. Box 7269
Tacoma, WA 98417

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that
the foregoing is true and correct to the best of
my knowledge.

DATED this 2nd day of May, 2007 at Olympia, WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney