

NO. 36050-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN HINRICHSEN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-01000-9

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

ORIGINAL

SERVICE

Lise Ellner
P.O. Box 2711
Vashon, WA 98070

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED November 20, 2007, Port Orchard, WA *[Signature]*
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway
Tacoma WA 98402; Copy to counsel listed at left. *[Signature]*

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to support Hinrichsen's conviction for violation of a no-contact order by coming into direct contact with his mother and by coming within 500 feet of her home?

2. Whether the trial court properly determined as a matter of law that Hinrichsen's prior no-contact order violations were predicate offenses under the charged statute thus rendering evidence of them admissible at trial?
(Partial concession of error)

3. Whether the trial court's error in admitting evidence of one of Hinrichsen's prior offenses was harmless?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Ryan Hinrichsen was charged by amended information filed in Kitsap County Superior Court with felony violation of a no-contact order and obstruction. CP 23-25.

The felony aspect of the charge was based on Hinrichsen's having at least two prior convictions for violation of no-contact orders. At trial Hinrichsen argued that the prior offenses should not be admitted because they did not qualify as prior convictions under the statutory language. The trial court overruled his objections and redacted versions of the relevant exhibits

were admitted at trial for the jury to consider. 3RP 192-207; Exh. 3-6, 7-10, 14, 17.

The jury convicted Hinrichsen as charged. CP 47. It entered special verdicts finding that the offense was one of domestic violence, that Hinrichsen had two prior convictions for violation of a no-contact order, and that he had violated the current order both by having contact with his mother and coming within 500 feet of her home. CP 48-50.

B. FACTS

On July 1, 2006, Bremerton patrol officer Jeffrey Inklebarger went to a home at 1509 8th Street. in response to a 911 report that someone had seen or heard Ryan Hinrichsen shove his mother during a physical altercation in the backyard. 2RP 93-94.

He contacted Hinrichsen's mother, Beverly Hinrichsen-Helm, when he arrived. 2RP 96. Hinrichsen-Helm was the protected party to a no-contact order at the time. 2RP 101. The prohibited party was her son, Ryan Hinrichsen. 2RP 102. *See also* CP 12.

Hinrichsen-Helm was coming out the back door as Inklebarger approached the backyard area. 2RP 97. Inklebarger did not see anyone else around. 2RP 97.

When Inklebarger first contacted her, Hinrichsen-Helm tried to get

him to leave. 3RP 135. She was very evasive. 2RP 97. She asserted that she had been having an argument with a boyfriend. 2RP 98. She provided a description and name of the individual, and said he had left on foot but she did not know where he had gone. 2RP 98. She identified him as "David" but did not provide a last name. 2RP 99. Hinrichsen-Helm declined to sign off on Inklebarger's domestic violence report. 2RP 101.

Inklebarger spent some time looking for "David." 2RP 104. He never found him. 2RP 105.

After about 20 or 30 minutes, Inklebarger saw Hinrichsen, with whom he was familiar, walking southbound on Veneta Avenue from 8th Street. 2RP 104-05. Veneta was just east of Hinrichsen-Helm's home. 2RP 105. Hinrichsen looked down and put his hand up in front of his face as Inklebarger drove past. 2RP 105. Inklebarger looked in the mirror after he passed and saw him run down and head westbound on 7th Street. 2RP 105.

Inklebarger called the dispatcher to confirm that there was a valid no-contact order in place. 2RP 105. As soon he confirmed that there was a valid order, Inklebarger radioed the other units to look for Hinrichsen. 2RP 107.

About ten minutes later, Inklebarger saw Hinrichsen again, this time walking eastbound on 6th Street near Naval. 2RP 111. Inklebarger drove around the block so he could approach Hinrichsen at the next intersection,

which was Hewitt. 2RP 112. As he approached, Hinrichsen looked at him, and started to cross the street. 2RP 112. Hinrichsen started running after making eye contact with Inklebarger. The officer activated his lights and siren. 2RP 112. Hinrichsen ran between two houses toward 5th Street and Inklebarger lost him. 2RP 112.

When Inklebarger arrived at 5th and Hewitt, Officer Clevenger was trying to detain Hinrichsen and was instructing him to lay on the ground. 3RP 130. Inklebarger also ordered him to get on the ground. 3RP 130. Hinrichsen did not comply at first, but stood looking around as if he still wanted to run. 3RP 130. Eventually he complied and Inklebarger arrested him. 3RP 130.

Based on Bremerton's street numbering system, Inklebarger estimated that Hinrichsen-Helm's house, at 1590 8th Street, would be about 90 feet from the corner of 8th and Veneta. 2RP 114. After he took Hinrichsen into custody, Inklebarger asked Clevenger to measure how far Hinrichsen had been from his mother's house when Inklebarger first saw him on Veneta. 3RP 131.

Clevenger used his LIDAR unit to make the measurement. 3RP 131. Hinrichsen-Helm's house was the second house from the corner. 3RP 152. Clevenger had to move north 30 feet from where Inklebarger first saw

Hinrichsen to take the LIDAR measurement because the neighboring house was blocking the view. 3RP 152. He measured the distance to the east (*i.e.* the closest) side of the house. 3RP 153. The device showed that the house was 99.5 feet from where he was standing. 3RP 155.

Inklebarger recontacted Hinrichsen-Helm after he arrested her son. 3RP 139. At that time she made statements that were inconsistent with her earlier statements. 3RP 140. She was angry with the officer and upset and continued to be evasive. 3RP 140.

Ella Rae had lived on 8th Street for seven years. 3RP 217. She knew Hinrichsen-Helm (as Beverly), who lived two houses down the street from her. 3RP 218. She was the one who had called 911. 3RP 218.

In the 911 call, which was played for the jury, 3RP 221, Rae reported that she was observing Bev and “Brian” engaged in a verbal and physical altercation at Hinrichsen-Helm’s home. Exh. 1A at 1. She described them as a woman in her 40’s and a man in his 20’s. Exh. 1A at 2. They were mother and son. Exh. 1A at 2. She could see the tops of their heads over the fence. Exh 1A at 3.

Later that day Hinrichsen-Helm came up to her when she was walking her dog on Veneta Avenue. 3RP 219. Hinrichsen-Helm was angry and said that she knew Rae had called 911. 3RP 219.

Hinrichsen's mother testified that she had lived at the address for 22 years. 3RP 164. Hinrichsen had lived with her until a no-contact order was issued.¹ 3RP 165. She asserted that she had had no contact with him since. 3RP 165. She testified that Hinrichsen knew about the no-contact order. 3RP 166. She was in court when it issued, as was he. 3RP 166.

Hinrichsen-Helm also asserted that her son had not been at her house on July 1. 3RP 167. She maintained that it was "David" and that they had had an argument. 3RP 167. David was in his mid-30's. 3RP 171.

After Hinrichsen was arrested, Hinrichsen-Helm asked Rae if she had called the police, which Rae denied. 3RP 170. She denied that she had threatened Rae. 3RP 170.

Hinrichsen-Helm denied telling Inklebarger that Hinrichsen was not there when the officer arrived. 3RP 173. She admitted telling Inklebarger that Hinrichsen could not go to jail because he had a broken jaw and needed his medication, and that Inklebarger asked her how she knew about the medications if Hinrichsen had not been there. 3RP 173. She denied telling him, however, that the medications were in her house. 3RP 173-74. She also claimed that Inklebarger did not ask her if Hinrichsen was staying there. 3RP

¹ In his brief Hinrichsen makes reference to the fact that the no-contact order involved in this case was subsequently withdrawn. It should be noted that the reason for that, as Hinrichsen-Helm explained, was that it was superseded by another order. 3RP 172.

174. She did say that she had picked up his medications. 3RP 174. Then she told him that they had not been picked up yet from the pharmacy. 3RP 175.

Inklebarger was recalled to the stand and testified that the first statement Hinrichsen-Helm made to him when he arrived was “Ryan is not here.” 3RP 178. He had not said anything to her yet. 3RP 178.

Hinrichsen-Helm also told him her son’s medications were in the house. 3RP 180. She said the doctor had brought them and left them for her. 3RP 180. Then she said the pharmacy delivered them. 3RP 180. He told her that seemed odd, and she responded that she had picked them up and had them. 3RP 180.

III. ARGUMENT

A. **THE EVIDENCE WAS SUFFICIENT TO SHOW THAT HINRICHSEN VISITED HIS MOTHER’S HOUSE, AND/OR THAT HE CAME WITH IN 500 FEET OF HER RESIDENCE, BOTH IN VIOLATION OF A VALID NO-CONTACT ORDER.**

Hinrichsen argues that the evidence was insufficient to show that he violated the provisions of the no contact order. When the proper standard of review is applied, it is clear this claim is without merit.

1. *Standard of Review*

It is a basic principle of law that the finder of fact at trial is the sole

and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

2. The evidence was sufficient to show a violation of the no-contact order.

The jury found Hinrichsen guilty as charged of violating the no-contact order. Additionally, the jurors entered separate special verdicts in which they separately declared that they had unanimously found that he had violated the order both by knowingly contacting his mother *and* by coming within 500 feet of her residence.

In a multiple acts or alternative means case, even if one way of committing the offense was not supported by sufficient evidence, the conviction may still be affirmed if the reviewing court can be certain the jury found the State proved the other. *State v. Bland*, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993), *overruled on other grounds*, *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007). Because the jury specifically found both that Hinrichsen had direct contact with his mother and that he came within 500 feet of her home, if the evidence is sufficient for either act, the conviction must be upheld.

a. The circumstantial evidence was sufficient to show that Hinrichsen contacted his mother.

Hinrichsen argues that the evidence was insufficient to show that he was actually at his mother's residence. His argument, however, takes the evidence in the light most favorable to him, which is contrary to the standard of review.

Taken in the light most favorable to the State, the evidence is sufficient. The neighbor who called the police, Ella Rae, testified that she had known both Hinrichsen and her son for seven years. In the 911 call Rae reported that she was observing Bev and “Brian” engaged in a verbal and physical altercation at Hinrichsen-Helm’s home. She described them as a woman in her 40’s and a man in his 20’s, and that they were mother and son. Hinrichsen-Helm, on the other hand testified that “David” was the person with whom she was fighting. She, however, described him as a man in his 30’s. Further, Hinrichsen-Helm’s changing story about her son’s medications and whether and how she came to possess them also point to his presence at her home.

Although conflicting, the evidence was sufficient for the jury to find that Hinrichsen violated the no-contact order by directly contacting his mother, particularly in light of the fact that Hinrichsen appeared three houses away a short time later.

b. The evidence was sufficient for the jury to conclude that Hinrichsen knew he was within 500 feet of the home he grew up in.

Based on his own self-serving testimony that he was on his way to buy a milkshake, and did not know how far 500 feet was, Hinrichsen claims the evidence was insufficient to support his conviction based upon the provision of the no-contacting order barring him from coming within 500 feet

of his mother's home. The problem with this argument is that, again contrary to the standard of review, it takes the evidence in the light most favorable to Hinrichsen, not to the State.

Hinrichsen's mother testified that she had lived in her home since before Hinrichsen was born. She also testified that he had lived there with her until the no-contact order was entered in 2005, when he would have been 20 years old. Hinrichsen likewise testified that he had lived in the house for 19 to 20 years.

The police testified that Hinrichsen was at most 120 feet from the house when Officer Inklebarger first saw him. There were only two houses between the sidewalk on which he was walking and his mother's house. Even accepting that Hinrichsen was not sure how far 500 feet was, it is simply unbelievable that he was unaware that he was two doors down from his home of 20 years and that that home was within the 500-foot perimeter.

Moreover, to establish knowledge the state must show the defendant knew *or should have known* the relevant facts constituting the offense. RCW 9A.08.010(b). Under this section, if a reasonable person would have known he or she was within 500 of the residence, then the evidence was sufficient for the jury to conclude that Hinrichsen knew despite his testimony to the contrary. *State v. Bryant*, 89 Wn. App. 857, 871, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017 (1999). The jury was well within its rights to

find Hinrichsen knowingly came within 500 feet of the residence. The jury's verdict should be affirmed.

B. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THREE PRIOR CONVICTIONS OF VIOLATION OF NO CONTACT ORDERS ISSUED UNDER ONE OF THE STATUTES ENUMERATED IN RCW 26.50.110(5), AND ITS ERROR IN ADMITTING THE FOURTH WAS HARMLESS.

Hinrichsen finally argues that the evidence was insufficient to show a felony violation of the no-contact order under RCW 26.50.110(5) because his prior offenses were not for violations of an order issued under one of the statutes listed in that subsection. While he is correct regarding one of the priors, the remaining three priors were for violations of orders issued under one of the requisite statutes. This claim is therefore without merit.

1. Standard of Review

Contrary to Hinrichsen's framing of the issue, the question presented is not one of sufficiency, but of the admissibility of evidence. This is critical as it affects the standard of review.

Hinrichsen relies on *State v. Arthur*, 126 Wn. App. 243, 244, 108 P.2d 169 (2005). In that case, this division of the Court held the State had to prove, as an element of the offense, that the prior convictions for no-contact orders were pursuant to one of the statutes enumerated in RCW 26.50.110(5).

Arthur, as Hinrichsen notes, specifically disagreed with the holding of Division I in *State v. Carmen*, 118 Wn. App. 655, 665, 77 P.3d 368 (2003), *review denied*, 151 Wn.2d 1039 (2004). *Arthur*, 126 Wn. App. at 244. Hinrichsen fails to note, however, that *Arthur* has since been disapproved by the Supreme Court, which endorsed the approach espoused in *Carmen*. *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005); *see also State v. Gray*, 134 Wn. App. 547, 138 P.3d 1123 (2006) (“*Miller* resolved the *Carmen-Arthur* dispute in *Carmen*’s favor”).

In *Miller*, a unanimous Supreme Court observed that in *Carmen*, the Court had determined that evaluation of the underlying no-contact order was properly a question of law for the judge, not of fact for the jury. *Miller*, 156 Wn.2d at ¶ 18 (*citing Carmen* and noting that *Arthur* “reject[ed] *Carmen*”). The Court observed that the holding in *Carmen* rested in part on the comparative expertise of a judge to make reasoned judgments about the legal authority by which predicate no-contact orders were issued. The Court went on to hold that “*Carmen* also noted, properly, that ‘[t]he very relevancy of the prior convictions depended upon whether they qualified as predicate convictions under the statute. If they had not so qualified, the jury never should have been permitted to consider them.’” *Miller*, 156 Wn.2d at ¶ 18 (*quoting Carmen*, 118 Wn. App. at 664) (alterations the Supreme Court’s).

The Court expressly rejected the notion that the validity of a no-

contact order was an element of the offense. *Miller*, 156 Wn.2d at ¶ 20. The Court specifically held that “[t]o the extent the cited cases are inconsistent, they are overruled.”

The Court rested its decision on two factors: that the validity is not listed as an element in the statute, and because issues concerning the validity of an order normally turn on questions of law, which are for the court, not the jury, to resolve. *Miller*, 156 Wn.2d at ¶ 20. The Court summarized its holding at the conclusion of the opinion:

We hold that the validity of the underlying no-contact order is not an element of the crime of violating such order. Only applicable no-contact orders which will support conviction on the crime charged are admissible. We also hold that invalid or deficient orders are properly excluded.

Miller, 156 Wn.2d at ¶ 23.

Subsequent to *Miller*, the Court of Appeals in *Gray* resolved the specific issue presented here contrary to Hinrichsen’s position. *Gray*, 134 Wn. App. ¶ 7. *Gray* specifically cited the language in *Miller* that broadly delegated any question relating to the applicability of a no-contact order to the “gatekeeper” function of the court:

“Collectively, we will refer to these issues as applying to the ‘applicability’ of the order to the crime charged. An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order.”

Gray, 134 Wn. App. at ¶ 11 (quoting *Miller*, 156 Wn.2d at 31).

The appellant in *Gray* argued that *Miller* only applied to the validity of the current no-contact order. *Gray*, 134 Wn. App. at ¶ 12. The Court rejected that contention, however, pointing out that *Miller* explicitly approved *Carmen*'s holding that whether the prior convictions qualified as predicate convictions under the statute was a threshold determination of relevance, or applicability, properly left to the court. *Gray*, 134 Wn. App. at ¶ 12. This is because there is no material difference between the two questions:

Miller's "applicability" reasoning applies equally to issues of law about previously-violated NCOs. Whether the current NCO and the previously-violated NCOs are admissible to support a felony charge under RCW 26.50.110(5) depends on whether they were issued under the listed statutes. Acting in its "gate-keeping" capacity, a court must make this determination before the jury is allowed to hear the evidence. Under *Miller*, this applicability determination is "uniquely within the province of the court."

Gray, 134 Wn. App. at ¶ 13 (quoting *Miller*, 156 Wn.2d at 31) (footnotes omitted).

Since the question presented is one of the admission of evidence, not its sufficiency, this Court reviews the trial court's decisions for an abuse of discretion. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *Id.* The State will now address the evidence admitted regarding each of Hinrichsen's four prior convictions.

2. *Case No. 13232608.*

In case number 13232608 (“08 case”),² Hinrichsen was convicted of violating an order issued pursuant to RCW ch. 10.14. Exh. 4, 17. RCW 26.50.110(5) provides that offense is to be elevated to a felony:

if the offender has at least two previous convictions for violating the provisions of an order *issued* under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

(Emphasis supplied).

The State agrees with Hinrichsen that the trial prosecutor and the trial court mistakenly relied on the RCW ch. 10.99 domestic violence “tag” alleged in the 08 case. The State has located no case directly addressing this issue. Nevertheless the plain language of the statute requires that the prior conviction be for violation of a no-contact order *issued* under one of the enumerated statutes. That the violation was *charged* under RCW ch. 10.99 does not appear to bring the prior within the ambit of RCW 26.50.110(5). Hinrichsen is thus correct that his conviction in the 08 case cannot support his enhanced conviction and should not have been admitted for that purpose.

² All cases referred to the Kitsap County Prosecuting Attorney’s Office are assigned a file number consisting of a six-digit number unique to the defendant followed by a two-digit number assigned serially for each referral pertaining to that defendant. The district and municipal courts in the county use the office’s file number as the cause number in criminal cases. The cause numbers for each of Hinrichsen’s priors are thus all the same, except for the last two digits.

3. *Case Nos. 13232611, 13232612 and 13232613.*

The remaining priors, however, bear sufficient direct and circumstantial evidence to show that they were violations of the requisite statutes. As such the trial court properly admitted them for consideration by the jury.

The first two cases were Bremerton Municipal Court cases. In the 11 case, the complaint alleges that the order violated was issued in a prior criminal case, No. 13232610. Exh. 10. Since the only provisions for issuing no-contact orders in criminal cases are found in RCW ch. 10.99, it follows that the order violated in the 11 case must have been *issued* pursuant to one of the statutes listed in RCW 26.50.110(5), and was properly presented to the jury. *See Gray*, 134 Wn. App. at 559. Although the trial court again ruled that the prior qualified based on the RCW ch. 10.99 domestic violence allegation in the charging document, *see* 3RP 193-98, rather than because the underlying order had been issued pursuant to one of the pertinent statutes, this Court may nevertheless affirm even though it rejects the trial court's legal reasoning. *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998); *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993).

In the 12 case, the amended complaint shows that the alleged violation was for an order entered in the same case. Exh 7 at 2. The case

docket shows that that order was entered when Hinrichsen was arraigned on domestic violence charges of fourth-degree assault and first-degree trespass. Exh. 8, at 1-2. Again, this order had to have been issued pursuant to RCW ch. 10.99 and was properly admitted.

The 13 case was a Kitsap County District Court case in which Hinrichsen again violated the order issued in the 12 case (three weeks after the first violation). Exh. 5. As discussed, this order would have to have been issued under RCW ch. 10.99 and thus this conviction was properly admitted.

4. Remedy

Although the trial court should not have admitted Exhibits 4 and 17, the error is harmless. To determine whether an error is harmless, Washington uses “the ‘overwhelming untainted evidence’ test.” *State v. Lord*, 161 Wn.2d 276, ¶ 48, 165 P.3d 1251 (2007). Under this test, if the untainted, admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.* Thus, error is not prejudicial if the evidence is of minor significance when compared to the overall weight of the evidence. *Id.* Here, the State had to prove that Hinrichsen had two prior violations of no-contact orders. Without the improperly admitted evidence, there still remained three properly admitted prior convictions. Their existence was in no way questioned by Hinrichsen at trial. The evidence supporting each was

essentially identical. The error was harmless.³ Hinrichsen was properly found guilty of a felony violation of a no-contact order.

IV. CONCLUSION

For the foregoing reasons, Hinrichsen's conviction and sentence should be affirmed.

DATED November 20, 2007.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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³ Even if the question were properly the sufficiency of the evidence, Hinrichsen's claim would thus be without merit. Three of the priors were properly admitted and fully support the jury's verdict.