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STATE OF WASHINGTON
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NO. 36855-2-II
Clark County No. 06-1-01351-4

STATE OF WASHINGTON,

Respondent,

vs.

JAMES JOSEPH GRUBBS

Appellant.

BRIEF OF APPELLANT

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PM 5/2/08

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR..... 1

I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MR. GRUBBS' CONVICTIONS..... 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR..... 1

I. THE STATE PRODUCED INSUFFICIENT EVIDENCE TO PROVE THAT THE APPELLANT IS THE SAME PARTY NAMED IN THE NO CONTACT ORDER FOUND IN EXHIBIT 5, AND THAT THE CORAL FRAZER WHO TESTIFIED WAS THE SAME PROTECTED PARTY NAMED IN THE NO CONTACT ORDER FOUND IN EXHIBIT 5. 1

II. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MR. GRUBBS' CONVICTION FOR RESIDENTIAL BURGLARY IN COUNT I BECAUSE CORAL FRAZER NEVER IDENTIFIED ANYONE IN THE COURTROOM AS HAVING ASSAULTED HER..... 1

C. STATEMENT OF THE CASE..... 1

1. FACTUAL HISTORY..... 1

2. PROCEDURAL HISTORY 2

D. ARGUMENT..... 4

I. THE STATE PRODUCED INSUFFICIENT EVIDENCE TO PROVE THAT THE APPELLANT IS THE SAME PARTY NAMED IN THE NO CONTACT ORDER FOUND IN EXHIBIT 5, AND THAT THE CORAL FRAZER WHO TESTIFIED WAS THE SAME PROTECTED PARTY NAMED IN THE NO CONTACT ORDER FOUND IN EXHIBIT 5. 4

II. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MR. GRUBBS' CONVICTION FOR RESIDENTIAL BURGLARY IN COUNT I BECAUSE CORAL FRAZER NEVER IDENTIFIED

**ANYONE IN THE COURTROOM AS HAVING ASSAULTED
HER..... 10**

E. CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068 (1970)	8
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983)	8
<i>State v. Brezillac</i> , 19 Wn.App. 11, 573 P.2d 1343 (1978).....	12
<i>State v. Clark</i> , 18 Wn.App. 831, 572 P.2d 734 (1977)	12
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	9
<i>State v. Harkness</i> , 1 Wn.2d 530, 96 P.2d 460 (1939)	12
<i>State v. Hunter</i> , 29 Wn.App. 218, 627 P.2d 1339 (1981).....	11, 12, 13
<i>State v. King</i> , 113 Wn.App. 243, 54 P.3d 1218 (2002)	10
<i>State v. Luther</i> , 157 Wn.2d 63, 134 P.3d 205, <i>cert. denied</i> , 127 S.Ct. 440 (2006).....	9
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	9
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	9
<i>State v. Varga</i> , 151 Wn.2d 179, 86 P.3d 139 (2004)	9

A. ASSIGNMENT OF ERROR

I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MR. GRUBBS' CONVICTIONS.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

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C. STATEMENT OF THE CASE

1. FACTUAL HISTORY

On July 9, 2007 Coral Frazier was at home in Orchards when Mr. Grubbs came over to her grandfather's house, where she lives, to get his mail. RP Vol. I, p. 11, 13, 14. According to Ms. Frazier, she and Mr. Grubbs had an agreement that he was allowed to be at the house provided she was not there. RP Vol.1, p. 25. When he arrived, Ms. Frazier claimed, they got into an argument after she asked him to leave. RP Vol. I, p. 14-15. Ms. Frazier claimed that he refused to leave and that Mr. Grubbs pushed her by back by her throat. RP Vol. I, p. 16. Later in her

testimony, however, Ms. Frazier stated that she pushed Mr. Grubbs first and started the assault. Trial RP Vol. 1, p. 27. Ms. Frazier pushed Mr. Grubbs, and he pushed back, according to her. RP Vol. I, p. 16. Ms. Frazier said that she fell against the garage door when she was pushed. RP Vol. 1, p. 16. As a result of the fall, Ms. Frazier said she received an injury on her arm and her leg. RP Vol. 1, p. 16. Ms. Frazier testified she was the protected party in a no-contact order prohibiting the “defendant” from contacting her. Trial RP I, p. 12.

2. PROCEDURAL HISTORY

The Clark County Prosecuting Attorney charged Mr. Grubbs with Count I: Residential Burglary (Domestic Violence), alleged to have occurred on July 9, 2006; Count II: Felony Domestic Violence Court Order Violation, alleged to have occurred on July 9, 2006; Count III: Felony Domestic Violence Court Order Violation, alleged to have occurred on July 5, 2006; and Count IV: Theft in the Third Degree. CP 1-2.

After a jury trial, Mr. Grubbs was convicted of Count I, residential burglary, Count II, felony domestic violence court order violation with a special verdict finding that Mr. Grubbs committed an assault during the course of the violation, and Count III, misdemeanor domestic violence court order violation, with the jury answering “no” on the special verdict

question of whether an assault was committed in the course of Count III.
CP 27-31.

At the jury trial, the State called three witnesses: Ms. Frazier, Deputy Adkins of the Clark County Sheriff's Department, and Deputy Yoder of the Clark County Sheriff's Department. RP, Vol. I. Ms. Frazier was asked by the Deputy Prosecutor a number of questions about whether the "defendant" came to her house on July 9, 2006 and July 5, 2006 and whether she was assaulted by him on those dates, and whether there was a no-contact order protecting her and naming the "defendant" as the restrained party. RP, Vol. 1, p. 11-43. Ms. Frazier was never asked to identify Mr. Grubbs in the courtroom, and she was never asked to state whether the person in the courtroom was the same James J. Grubbs identified in the No Contact Order found in Exhibit 5. RP Vol. 1, p. 11-43. In fact, Ms. Frazer was never shown Exhibit 5, never asked to identify it, and never asked whether she was the Coral J. Frazer named in the order. RP, Vol. I. 11-43.

Deputy Adkins never contacted Mr. Grubbs on July 9, 2006, and never spoke with Ms. Frazer. RP Vol. 1, p. 43-49. Deputy Yoder also never contacted Mr. Grubbs on July 9, 2006. RP Vol. I, p. 50-54. Deputy Yoder was shown Exhibit 5, and asked what it was. He replied: "It's a no-contact order. Domestic Violence no-contact order between Mr.

Grubbs as the respondent and Coral Frazer as the protected person.” RP Vol. I, p. 53. Exhibit 5 was admitted without objection. It contains no identifying information about either James J. Grubbs or Coral J. Frazer, except their names and purported birthdates. Exhibit 5. Deputy Adkins was not asked to identify anyone in the courtroom as being Mr. Grubbs. RP Vol. 1, p. 43-48. Deputy Yoder was asked whether, on July 9, 2006, he came into contact with anyone in the courtroom. RP Vol. 1, p. 50. He replied “no.” RP Vol. 1, p. 50. Ms. Frazer told Deputy Yoder that Mr. Grubbs had also been at her house on July 5, 2006. RP Vol. 1, p.52.¹ Deputy Yoder was asked whether he came in contact with the “defendant,” to which he replied he had on July 17, 2006, when he arrested Mr. Grubbs at Ms. Frazer’s house. RP Vol. 1, p. 54.

Mr. Grubbs was given a standard range sentence. CP 32-48, 49-59. This timely appeal followed. CP 60.

D. ARGUMENT

I. THE STATE PRODUCED INSUFFICIENT EVIDENCE TO PROVE THAT THE APPELLANT IS THE SAME PARTY NAMED IN THE NO CONTACT ORDER FOUND IN EXHIBIT 5, AND THAT THE CORAL FRAZER WHO TESTIFIED WAS THE SAME PROTECTED PARTY NAMED IN THE NO CONTACT ORDER FOUND IN EXHIBIT 5.

¹ Although Mr. Grubbs was charged with felony violation of a no contact order for the alleged contact on July 5, 2006, based upon Ms. Frazer’s initial allegation she had been assaulted that day, the jury found she had not been assaulted, and returned a guilty verdict for misdemeanor violation of a no contact order on July 5.

As a part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, the State must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). A sufficiency claim admits the truth of the State's evidence. *State v. Luther*, 157 Wn.2d 63, 77, 134 P.3d 205, *cert. denied*, 127 S.Ct. 440 (2006). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). In considering sufficiency of the evidence, the Court will give equal weight to circumstantial and direct evidence. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The Court will not substitute its judgment for that of the jury on issues of fact. *State v. King*, 113 Wn.App. 243, 269, 54 P.3d 1218 (2002).

a. State's failure to prove that Appellant is the same James J. Grubbs named in Exhibit 5.

The State called Coral Frazer as its first witness. The State launched directly into its questions about whether the defendant had done this or that without asking Ms. Frazer whether she recognized anyone in the courtroom. She was not asked any questions about who James J. Grubbs was and whether she had any information tending to prove that the James J. Grubbs named in the no contact order found in Exhibit 5 was the same person sitting in the courtroom. Incredibly, Ms. Frazer was not even shown Exhibit 5 and asked to identify it. Ms. Frazer's general testimony that there was a no contact order, without more, is insufficient to prove that the defendant violated the no contact order found in Exhibit 5.

Deputy Yoder's testimony was of no help in this regard either. Although both he and Deputy Adkins were asked about their arrest of the defendant on July 17, 2006, they never identified anyone in the courtroom as the person they arrested. Deputy Yoder was initially asked whether he had come into contact with anyone in the courtroom on July 9, 2006, to which he replied "no." Even if either Deputy Yoder or Deputy Adkins had made an in-court identification of Mr. Grubbs, that would not cure the insufficiency of the evidence in this case. Deputy Yoder, the only witness who viewed or was asked about Exhibit 5, presented no evidence to establish that the James J. Grubbs named in the order was the same person

sitting in the courtroom. That Deputies Yoder and Adkins arrested the defendant on July 17, 2006 is of no moment. Their contact with him on that day does not prove that he was the person named in the order in Exhibit 5. There were no fingerprints admitted in this case, no booking photos, no testimony from a court clerk who might have seen the defendant sign the order, or a peace officer who may have served the order. There were no statements made by Mr. Grubbs, and Mr. Grubbs did not testify. Beyond the fact that the name “Grubbs, James J.” with a D.O.B. of 9-26-68, appeared on the face of the order, there was no evidence that the defendant on trial was the same person named in the order.

In *State v. Hunter*, 29 Wn.App. 218, 627 P.2d 1339 (1981), the court addressed the question of what constitutes substantial evidence of identity. In *Hunter*, the State charged the defendant, Dallas E. Hunter, with attempted escape, alleging that he tried to escape from the Cowlitz County Jail where he was incarcerated pursuant to a felony conviction. In order to prove that the defendant was being held “pursuant to a felony conviction,” as required under the statute, the State successfully moved to admit copies of two felony judgment and sentences out of Lewis County that named “Dallas E. Hunter” as the defendant. Following conviction the defendant appealed, arguing in part that the trial court erred when it

admitted the judgments because the State failed to present evidence that he was the person identified therein.

In addressing the argument, the court first noted that when the fact of a prior conviction is an element of the current offense, a prior judgment and sentence under the defendant's name alone is neither competent evidence to go to the jury, nor it is sufficient to prove the prior conviction.

The court stated:

Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action. *State v. Harkness*, 1 Wn.2d 530, 96 P.2d 460 (1939); *State v. Brezillac*, 19 Wn.App. 11, 573 P.2d 1343 (1978). See *State v. Clark*, 18 Wn.App. 831, 832 n. 1, 572 P.2d 734 (1977).

Hunter at 221.

The Court ultimately ruled that the State had met its burden in *Hunter*, however, because the State had also presented the evidence of a Probation Officer from the Department of Corrections who had revoked the defendant from his work release program and had him incarcerated in the Cowlitz County jail pending his return to prison pursuant to his Lewis County felony convictions. Based upon this "independent" evidence to prove that the defendant was the person named in the judgments, the Court of Appeals found no error in admitting the judgments.

Here, we have no such independent evidence. Again, there was no documentary evidence or testimony admitted which established that the gentleman sitting in the courtroom on trial for these crimes was the same James J. Grubbs named in the no contact order found in Exhibit 5.

b. State's failure to prove that the Coral Frazer who testified was the same person identified as the protected party in the no contact order found in Exhibit 5.

Although Coral Frazer testified at the trial, she was inexplicably never asked to view or identify Exhibit 5. She was never asked to give her birth date (so that it might be compared to the one written on the order), and no other identifying information (or even her signature) appear on the order. The State was not merely required to prove that there was *an* order prohibiting Mr. Grubbs from contacting Ms. Frazer, but that the order in Exhibit 5 was an order prohibiting the gentleman who sat on trial in the courtroom from contacting the Coral Frazer who testified at the trial.

The evidence is insufficient to sustain the convictions in Count II and Count III because the State failed to prove that the defendant who sat on trial in the courtroom was the same person named in the no contact order, and because it failed to prove that the Coral Frazer who testified at trial was the same Coral Frazer named as the protected party in the no contact order.

II. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MR. GRUBBS' CONVICTION FOR RESIDENTIAL BURGLARY IN COUNT I BECAUSE CORAL FRAZER NEVER IDENTIFIED ANYONE IN THE COURTROOM AS HAVING ASSAULTED HER.

Because the State failed to prove that the defendant on trial was the same person named in the no contact order found in Exhibit 5, it cannot rely on the violation of the no contact order as the predicate offense for the “crime therein” in the residential burglary charge, and it must rely solely on the assault. Although the evidence taken in the light most favorable to the State did establish that the person who assaulted Ms. Frazer on July 9, 2006 was asked to leave the residence just prior to the physical altercation, the State did not prove that the person on trial was the person who committed the assault. Again, Ms. Frazer was never asked to identify anyone in the courtroom as having assaulted her. Deputies Adkins and Yoder did not witness the assault. Mr. Grubbs made no statement admitting to the assault, and he did not testify. Just testifying to having been assaulted by the “defendant” is not sufficient to prove that the defendant on trial committed the assault. Although Mr. Grubbs was most likely introduced to the jury by his attorney prior to jury selection (as is customary in most counties and is a strategic move designed to humanize the person on trial), that is not evidence. And Although Deputy Yoder did eventually testify that he came into contact with “the defendant” (RP Vol.

1, p. 54) on July 17, 2006 (notably, he was not asked to point to or describe the person, and no identification was reflected in the record), that is not sufficient evidence to prove that the defendant assaulted Ms. Frazer on July 9, 2006.

The evidence is insufficient to sustain the conviction in Count I and it should be reversed and dismissed.

E. CONCLUSION

Mr. Grubbs' convictions in Counts I, II, and III should be reversed and dismissed.

RESPECTFULLY SUBMITTED this 2nd day of May, 2008.


ANNE M. CRUSER, WSBA# 27944
Attorney for Mr. Grubbs

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and that said envelope contained the following:

- (1) APPELLANT'S BRIEF
- (2) RAP 10.10 (TO MR. GRUBBS)
- (3) AFFIDAVIT OF MAILING

Dated this 2nd day of May, 2008


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

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

Date and Place: May 2nd, 2008, Kalama, WA

Signature: Anne M. Cruser