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COURT OF APPEALS
DIVISION II

NO. 38227-0-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON
BY *SA*
DEPUTY

STATE OF WASHINGTON,

Respondent

vs.

JUSTIN W. GROVER,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Gary R. Tabor, Judge

Cause No. 08-1-00836-7

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PM 2/6/09

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Grover his constitutional right to proceed pro se.
2. The trial court erred in not taking the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying Grover his constitutional right to proceed pro se? [Assignment of Error No. 1].
2. Whether there was sufficient evidence to uphold Grover's convictions for two counts of felony violation of a no contact order? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

Justin W. Grover (Grover) was charged by second amended information filed in Thurston County Superior Court with two counts of felony violation of a no contact order (Counts I and III)¹, and one count of harassment (Count II). [CP 19-20].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard.

An agreed order of competency was entered on July 31, 2008. [CP 11].

¹ Grover was charged in Counts I and III under RCW 26.50.110(5), which states:
A violation of a court 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 26.50.020, is a class C 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 26.50.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

Prior to trial the court denied Grover's motion to sever Count I from Counts II and III. [CP 21-24; RP 15-19]. The court also denied Grover's request to proceed pro se holding that it was not a constitutional right and that Grover would not be able to restrict his arguments to those in connection with the issues presented by his trial. [RP 21, 28-27]. Grover was tried by a jury, the Honorable Gary R. Tabor presiding. At trial, Grover stipulated to the existence of a valid no contact order at the time of the events in question, stipulated to proof of service of that no contact order, and stipulated to the fact that he has two prior convictions for violation of a no contact order domestic violence but did not stipulate under which legal provisions these prior convictions were obtained. [Supp. CP 77; RP 102-103]. Grover had no objections and took no exceptions to the court's instructions. [CP 42-53; RP 106-107]. The jury, after some confusion on how to fill out the verdict forms, found Grover guilty of Counts I and III (felony violation of a no contact order) entering special verdicts finding that the victim and Grover were "members of the same family or household," and that Grover had "twice been previously convicted for violating provisions of a no-contact protection order," and failed to reach a verdict on Count II. [CP 55, 56, 57, 58, 59, 60; RP 164-176]. The court declared a mistrial on Count II and the State indicated that it would not pursue this count further. [RP 176, 195].

After hearing arguments from the State and Grover's counsel, and after affording Grover his right to allocution, the court sentenced Grover to a standard range sentence of 27-months on Count I and to a standard range sentence of 27-months on Count III based on an undisputed offender score of 4 on both counts with both sentences running concurrently for a total sentence of 27-months. [CP 29-38, 39, 63; RP 186-195].

Timely notice of appeal was filed on August 28, 2008. [CP 25].

This appeal follows.

2. Facts

Marcia Grover, Grover's sister, testified that she lived at 2407 Bush Avenue in Thurston County. [RP 47-48]. In August of 2007, Marcia petitioned and received an order for protection against Grover that expired on August 22, 2008. [RP 49-51]. The order was admitted into evidence as State's exhibit No. 1. [CP 40-41; RP 51]. Grover stipulated to the existence of the protection order and that he had been served with the same. [RP 102-103]. Grover also stipulated that he had two prior violations of a no contact order. [Supp. CP 77; RP 102-103].

On February 7, 2008, Grover walked into Marcia's residence with a girl. [RP 51]. Marcia told Grover to leave, which he did, and she called the police. [RP 51-52]. The police responded and took Marcia's written statement. [RP 55-57].

On May 5, 2008, Marcia was at her residence with her boyfriend, David Keen (Keen). [RP 52-53, 68]. When Marcia and Keen left the residence, Grover was sitting on the front steps. [RP 52-53, 69]. Grover asked the two to take him to Wendy's for food trying to get into Keen's car, but Marcia told him no because of the "restraining order" and asked him to leave them alone. [RP 53, 69-70]. Grover responded by threatening to kill Keen, but eventually left heading across the street into Sunrise Park. [RP 53-54, 69-70]. Marcia called the police, who responded and went in search of Grover in Sunrise Park. [RP 53-55, 71].

Olympia Police officers Danny Duncan and Brian Henry were dispatched in response to Marcia's call. [RP 79-80, 85-86]. After obtaining statements from Marcia and Keen, the two went into Sunrise Park looking for Grover. [RP 55, 71-72, 80-82, 85-87]. They found Grover inside the park, and he initially told them that he had not been at Marcia's residence but then admitted to being there claiming that no one was home. [RP 80, 85-87].

Grover did not testify at trial.

D. ARGUMENT

(1) HARTMAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF.

A criminal defendant has a constitutional right to waive assistance of counsel and proceed pro se at trial. Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975); Sixth Amendment to the United States Constitution; Art. 1, section 22 of the Washington Constitution; State v. Fritz, 21 Wn. App. 354, 358, 585 P.2d 173 (1978). In order to exercise the right, a defendant's request must be unequivocal, knowingly and intelligently made, and it must be timely. State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002). To determine the validity of a defendant's self-representation request, the trial court examines the facts and circumstances and the entire record. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). The court should also engage in a colloquy with the defendant to ensure that he or she understands the risks and consequences of self-representation. State v. Vermillion, 112 Wn. App. at 851. However, a defendant's technical legal knowledge is "not relevant to an assessment of his knowing exercise of the right to defend himself." Faretta, 422 U.S. at 836.

An appellate court reviews a trial court's denial of a defendant's self-representation request for an abuse of discretion that lies along a

continuum, corresponding to the timeliness of the request: (a) if made well before the trial...unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial is about to commence or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during trial the right to proceed pro se rests largely in the informed discretion of the trial court. State v. Vermillion, 112 Wn. App. at 855, *citing* State v. Fritz, 21 Wn. App at 361. However, a defendant cannot seek self-representation in order to delay or obstruct the administration of justice, and a defendant can waive self-representation by disruptive words or misconduct. State v. Vermillion, 112 Wn. App. at 851. The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice. State v. Breedlove, 79 Wn. App. 101, 110, 900 P.2d 586 (1995).

Here, just prior to trial making no request for a continuance, Grover expressed his dissatisfaction with his appointed counsel and asserted his constitutional right to represent himself. [RP 20]. The trial court in response to Grover's request allowed him to ask questions regarding the information/discovery pertaining to his case rather than engage in the appropriate colloquy necessary to determine whether Grover was aware of the risks and consequences of self-representation. [RP 20-27]. The court did

not inquire as to Grover's level of education, did not inquire whether he had an understanding of the procedures involved in a trial including objections and cross-examination or an understanding of the rules of evidence, and did not inquire whether Grover was unequivocally asserting his right to self-representation. In fact, the court specifically informed Grover that he did not have a constitutional right to represent himself only the right to make the request [RP 21], and denied Grover's request by stating, "while you have a right to a defense, you also need the assistance of an attorney because I'm not convinced that you would be able to restrict any arguments that you have to the issues that would arise in connection with trial." [RP 26].

The trial court's reasoning in denying Grover's constitutional right to proceed pro se that Grover needed the assistance of counsel does not constitute a proper exercise of discretion in light of the record indicating that the trial court failed to make the proper inquiries at the time Grover asserted his right to proceed pro se. The trial court should have granted Grover's constitutional right to proceed pro se as it was not made for any improper reason. This court should reverse Grover's convictions and remand for a new trial in order to afford him his right to represent himself on the charges.

(2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT GROVER WAS GUILTY OF TWO COUNTS OF FELONY VIOLATION OF A NO CONTACT ORDER.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Grover was charged and convicted of two counts of felony violation of a no contact order pursuant to RCW 26.50.110(5)—this statutory provision is set forth in its entirety at footnote 1 herein. [CP 19-20, 55, 56, 59, 60]. Under the statute as charged in order to be found guilty of these felony counts, the State bore the burden of proving beyond

a reasonable doubt that Grover had at least two prior convictions for violating protection/no contact orders under the listed statutory provisions. This court, in State v. Arthur, 126 Wn. App. 243, 108 P.3d 169 (2005), specifically held that whether the prior convictions for violating a protection/no contact order fall under the listed statutory provisions is an essential element of the offense of felony violation of a no contact order that the State must prove beyond a reasonable doubt, and that the trial court is not permitted to make this determination thereby relieving the State of its burden of proof. State v. Arthur, 126 Wn. App. at 244. If there is insufficient evidence that the two prerequisite violations of protection/no contact orders involved the specified statutes any conviction for felony violation of a no contact order cannot stand. State v. Arthur, 126 Wn. App. at 247.

It is on this point—whether Grover’s two prior convictions for violating a no contact order fall under the necessary statutory provisions—that the State cannot sustain its burden of proof as to two counts of felony violation of a no contact order (Counts I and III). It cannot be disputed based on this record that Grover was aware that his sister, Marcia, had a valid no contact order in effect against him—Grover stipulated to these facts. [RP 102-103]. It cannot be disputed based on this record that Grover had contact with Marcia on February 7, 2008, and May 5, 2008, in

violation of a valid no contact order. It cannot be disputed based on this record that Grover has two prior convictions for violating a no contact order—Grover stipulated to this fact and the jury so found based on its special verdict findings. [CP 56, 60; Supp. CP 77; RP 102-103].

However, there is nothing in this record that establishes that these two prior convictions for violating a no contact order were under the necessary statutory provisions. Absent any evidence of this, the State has failed to establish an essential element of the crime of felony violation of a no contact order in both Counts I and III. This court should reverse Grover's convictions in Counts I and III.

E. CONCLUSION

Based on the above, Grover respectfully requests this court to reverse and dismiss his convictions for felony violation of a no contact order (Counts I and III).

DATED this 6th day of February 2009.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 6th day of February 2009, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 6th day of February 2009

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