

NO. 44843-2

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JESSE HUNOTTE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Vicki L. Hogan

No. 13-1-00391-2

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**Response Brief**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly allow the State to correct the jury instructions before they were given to the jury?
2. In viewing the evidence in the light most favorable to the State, was the evidence sufficient for the jury to find Defendant guilty beyond a reasonable doubt of violation of a domestic violence protection order?

B. STATEMENT OF THE CASE.

1. Procedure

On January 28, 2014, the State charged Jesse Hunotte, hereinafter referred to as “Defendant,” with one felony count of violation of a domestic violence protection order. CP 1-2, 6. Defendant’s jury trial began on April 1, 2013, before the Honorable Vicki Hogan. RP 20. On April 3, 2013, the jury found Defendant guilty as charged. CP 42-55; RP 225. On May 3, 2013, the court sentenced Defendant to the statutory maximum sentence of 60 months in custody, no contact with the victims, and standard legal financial obligations.<sup>1</sup> CP 42-55; RP 239-240.

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<sup>1</sup> Given Defendant's offender score of 9+, the standard range was 60 months in custody. CP 39-41, 46; RP 239.

## 2. Facts

On January 27, 2013, Tajha Ekstrand was at 101 South Harrison Street in Tacoma, Washington, at home with her six year old son. RP 90. She was also pregnant with Defendant's child at the time. RP 91-92. Ms. Ekstrand sought and obtained a domestic violence protection order against Defendant on October 23, 2012. RP 166.

That day, Ms. Ekstrand told her son to go to the neighbor's house and call 911 because she believed Defendant was at her apartment. RP 158. Within 11 minutes, Tacoma police Officer Edwin Hueber responded to the 911 call. RP 32-36. On arrival, he found Defendant with his brother, Justin Lamp, walking about half a mile from Ms. Ekstrand's apartment. RP 36, 112. Officer Hueber, who recognized Defendant from the previous domestic violence case, called Defendant over by his first name. RP 34-37. He asked Defendant where he was coming from, detained him, and notified his backup that he had Defendant. RP 34-38. Tacoma Officer Jared Williams spoke to Ms. Ekstrand and her son, and later met with Officer Hueber and Defendant. RP 109-112. Officer Williams conducted a records check and confirmed that Defendant was in violation of a protection order before arresting Defendant. RP 117. Officer Williams also retrieved Ms. Ekstrand's apartment keys from Defendant and returned them to Ms. Ekstrand. RP 112.

Later that day around 3:47 pm, Defendant called Ms. Ekstrand from the jail. RP 141. Pierce County corrections Officer James Scollick testified that a call went to Ms. Ekstrand's phone number from the jail booking area where Defendant was held. RP 137-141.

Officer Williams also went to the jail later that day to retrieve \$160 Ms. Ekstrand reported stolen from her purse.<sup>2</sup> RP 118-120. Defendant was found with \$160 on his person when he was booked into jail. RP 40, 119-120.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO CORRECT THE JURY INSTRUCTIONS BEFORE THE CASE WENT TO THE JURY.

To convict jury instructions must contain all the elements of the crime, or else the State has been relieved of its burden to prove every essential element beyond a reasonable doubt. *State v. Smith*, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). If the parties do not object to jury instructions, they become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

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<sup>2</sup> Ms. Ekstrand was an uncooperative witness: testifying inconsistently with Officer Williams' testimony that she reported money stolen from her purse and denying seeing Defendant at her apartment contrary to own her testimony that she told her son to call 911. RP 158-160, 162. She was held in contempt at trial. RP 154.

In a criminal case, if the State adds an unnecessary element in the to-convict instruction without objection, the added element also becomes the law of the case and the State assumes the burden of proving the added element. *Hickman*, 135 Wn.2d at 102. A criminal defendant may challenge the sufficiency of the evidence to support such added elements. *Hickman* 135 Wn.2d at 102. As noted, in a criminal case, evidence is sufficient to support a guilty verdict if, viewed in the light most favorable to the State, any rational trier of fact could find each element of the crime proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980).

In *Hickman*, the State did not object to an unnecessary element in the to-convict jury instruction before the case went to the jury. *Hickman*, 135 Wn.2d at 101-102. The *Hickman* court held that as a result, the State was required to prove the added element, based on the law of the case doctrine. *Hickman*, 135 Wn.2d at 102. The defendant could assign error on appeal, arguing that the new element was unsupported by substantial evidence in the record. *Hickman*, 135 Wn.2d at 102-103. Because the State presented no evidence at trial that the acts occurred in Snohomish County, the court reversed the conviction. *Hickman*, 135 Wn.2d at 106.

Here, the State was not required to prove that Defendant violated the protection order in person because the jury instructions were corrected before the case went to the jury. The proposed jury instructions contained a scrivener's error in instruction No. 10. The State pointed out that, "[t]he

third element says, the 'Defendant violated a provision of this order in person.' It should just be, 'Defendant knowingly violated a provision of this order.'" RP 198. This was an error because the State alleged that the order was violated in person and by phone, so the "in person" language was not in the information. RP 198. The error was caught before closing arguments as the instructions were being read to the jury, and the State promptly requested to correct the instruction. RP 199. Defense counsel objected, arguing that the proposed instructions had become the law of the case. RP 199- 200. The Court disagreed because the case had not gone to the jury stating,

Well, this wouldn't be the first time that the Court or either counsel had made an error in the instructions. I think it is different, and the case is distinguishable that Mr. Maltby cites. *The case is distinguishable in the fact that the jury is deliberating, and has received the case and have now been permitted to discuss the case and then the error was noticed.*

The proper procedure is for the Court to advise the jurors that there is an error in Jury Instruction No. 10, and indicate what that error is and then I will reread the instruction in its entirety, and just ask them to strike out, and I will strike out on Jury Instruction No. 10 at No. 3 "in person." And so that's the procedure that I will follow, and they will, and they can all mark out their instruction then. So, with that, that's the procedure that I will follow in this case for the instruction.

RP 200 (emphasis added) The court crossed out "in person," and read the corrected jury instructions to the jury. RP 201-202.

The proposed instructions were not the law of the case where the case had not gone to the jury. Although the jury was read the instructions requiring the State to prove that Defendant violated the protection order in person, the State promptly objected to the error well before closing arguments. Defendant claims that the proposed instructions became the law of the case because the instructions had already been read to the jury. *See* Brief of Appellant at 8-9. This claim fails because the case had not gone to the jury. Neither party had even given closing arguments. Unlike in *Hickman* where the State never objected to the error, here the State not only caught the error, but also had the jury instruction corrected well before the jury began their deliberations. The trial court properly noted this stating, “The case is distinguishable [from Hickman] in the fact that the jury [in Hickman] is deliberating, and has received the case and have now been permitted to discuss the case and then the error was noticed.” RP 200. Defendant neither cites any legal authority, nor is there any out there to support the argument that jury instructions cannot be corrected prior to deliberations. The trial court properly corrected the jury instructions, therefore the State was not required to prove that Defendant violated the protection order in person.

Assuming *arguendo* that the proposed instructions were the law of the case, the evidence was still sufficient for the jury to find Defendant guilty. In viewing the evidence in the light most favorable to the State, the evidence was sufficient to prove that Defendant violated the protection

order in person because he was found near Ms. Ekstrand's apartment with her personal belongings. Defendant had \$160 on his person that was reported missing from Ms. Ekstrand purse. He also had the keys to her apartment on him and was found only a half a mile from Ms. Ekstrand's apartment, 11 minutes after her son's 911 call. It is a reasonable inference that Defendant violated the protection order in person when he took Ms. Ekstrand's money. As the trial court corrected the jury instructions before the case went to the jury, the State was not required to prove that Defendant violated the protection order in person. As such, this Court should affirm Defendant's conviction.

2. IN VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND DEFENDANT GUILTY BEYOND A REASONABLE DOUBT OF FELONY VIOLATION OF A DOMESTIC VIOLENCE PROTECTION ORDER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

Here, the jury was instructed that in order to convict the defendant of the crime of violation of a court order, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 27th day of January, 2013, there existed a protection order, restraining order, no-contact order, or foreign protection order applicable to defendant;
2. That the defendant knew of the existence of this order;

3. That on or about said date, the defendant knowingly violated a provision of this order;
4. That the defendant has twice been previously convicted for violating the provisions of a court order; and
5. That the acts occurred in the State of Washington.

CP 17-36 (Court's Instructions to the Jury No. 10)

- a. The State presented sufficient evidence that Defendant was the person named in the Tacoma Municipal Court no contact order.

In all criminal trials, the State has the burden of proving identity through relevant evidence. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). "Identify involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identify of a person should be received and evaluated." *Hill*, 83 Wn.2d at 560.

Evidence is sufficient to connect defendant's identity to the crime where the arresting officer refers to the defendant multiple times at trial. *Hill*, 83 Wn.2d at 560. In *Hill*, the court held that the evidence was sufficient to establish the defendant's identity when there were numerous references to "the defendant" and to "Jimmy Hill" during trial. *Hill*, 83 Wn.2d at 560. The arresting officer testified that it was the "defendant" whom he observed at the scene of the arrest, that he ordered "the

defendant" to halt, and that it was the "location where the defendant was finally stopped that the Kleenex was found." *Hill*, 83 Wn.2d at 560.

The court also found that the evidence was sufficient to establish the identity of a defendant where there was testimony from a witness who personally interacted with the defendant. *State v. Hunter*, 29 Wn. App. 218, 627 P.2d 1339 (1981). In *Hunter*, the State charged the defendant with attempted escape from the jail. *Hunter*, 29 Wn. App. at 219. The State introduced two judgments and sentences in order to prove that defendant was being held "pursuant to a felony conviction." *Hunter*, 29 Wn. App. at 221. In addition, there was testimony from the probation officer who personally revoked defendant from his work release program and placed him in jail pursuant to the felony convictions. *Hunter*, 29 Wn. App. at 221. On appeal, the court held that the probation officer's testimony was independent evidence sufficient to establish that defendant was the person named in the judgments. *Hunter*, 29 Wn. App. at 221-222.

In contrast, evidence was insufficient to establish the identity of the defendant where the State presented only documentary evidence that the defendant in the court room was the same person accused of jumping bail. *State v. Huber*, 129 Wn. App. 499, 501-502, 119 P.3d 388 (2005) (quoting *State v. Kelly*, 52 Wn.2d 676, 678, 328 P.2d 362 (1958)). The court added that "[t]he State can meet [its] burden in a variety of specific ways. Depending on the circumstances, these may include otherwise admissible booking photographs, booking fingerprints, *eyewitness*

*identification*, or arguably, distinctive personal information." **Huber**, 129 Wn. App. at 503 (emphasis added).

Here, the evidence was sufficient to establish that defendant was the person named in the protection order because several eyewitnesses identified Defendant at trial: Officer Huebner, Tajha Ekstrand, and Officer Williams. RP 32, 91, 107. In addition, the testimony of these witnesses linked Defendant to the protection orders. Mrs. Ekstrand testified that she sought and obtained a protection order against Defendant. RP 166. Detective Kothstein testified that Defendant agreed to meet with him when he personally served Defendant with the temporary protection orders. RP 61-64. Officers Williams and Huebner both testified to their personal interactions with Defendant on the day of the incident. RP 34-37, 117. Officer Huebner testified that he personally recognized Defendant from a previous domestic violence case, and Officer Williams testified that he confirmed that Defendant had a protection order against him through a records check. RP 34-37, 117. It is a reasonable inference that Defendant was the person named in the protection orders where multiple witnesses identified Defendant at trial, and testified to his connection with the protection orders.

- b. The State presented sufficient evidence that Defendant had knowledge of both no contact orders.

In order to be guilty of the offense of violating a protection order, the defendant must know that the protection order exists. *State v. Philips*, 94 Wn. App. 829, 833, 974 P.2d 1245 (1999) (citing RCW 26.50.110(1)).

Here, Defendant had two protection orders against him on the date of the incident: Tacoma Municipal Court order D00045167 and Pierce County Superior Court order 12-2-03671-9. Exhibits 2, 4. Both were admitted at trial. RP 57. Defendant was charged with one count of violation of a protection order. CP 1-2. Specifically, the information alleged that Defendant willfully violated a contact order with Ms. Ekstrand: the Pierce County Superior Court order *and/or* the Tacoma Municipal Court order. As such, the jury only needed to find that Defendant knowingly violated one of the protection orders, not both.

The evidence was sufficient that Defendant had knowledge of at least the Tacoma Municipal Court order. The court order was signed by Defendant and admitted at trial. RP 57; Exhibit 2. The fact that Defendant signed the order is sufficient to prove that he had knowledge of its existence. In addition, Detective Kothstein testified that he personally

served Defendant with the temporary protection order in addition to the notice to appear for the hearing when the permanent order was entered. RP 63.

Further, it is reasonable to infer that Defendant knew of the Pierce County Superior Court order when he attended the hearing where the protection order was entered. Although Defendant left before he signed the order, he checked into the hearing. It is reasonable to infer that Defendant knew the order was being entered when he was present at the hearing up to the point where he was supposed to sign.

Defendant claims that the evidence insufficient of his knowledge of the orders was because there is no evidence, among other things, to show that the signature was placed by him. *See* Brief of Appellant at 17. This claims fails because there is no legal authority, as Defendant fails to cite, that requires the State to produce evidence in addition to the signed protection order. In viewing the evidence in the light most favorable to the State, the evidence was sufficient that Defendant had knowledge of the Tacoma Municipal Court order. As such, this Court should affirm Defendant's conviction.

D. CONCLUSION.

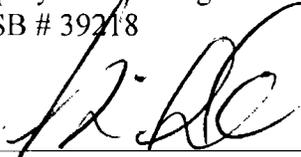
The State was not required to prove that Defendant violated the no contact order in person when the jury instruction was properly corrected before the case went to the jury. Further, in viewing the evidence in the light most favorable to the State, the evidence was sufficient that Defendant was the person named in the protection order and knew of the protection order when he was found with Ms. Ekstrand's personal property and signed the protection order.

DATED: February 14, 2014.

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\_\_\_\_\_

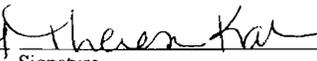
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