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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V

CURTIS TAYLOR

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BRIEF OF APPELLANT

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## A. Assignment of Errors

### Assignment of Errors

The evidence is insufficient to establish beyond a reasonable doubt that Mr. Taylor had actual or constructive knowledge of the terms of the Domestic Violence Protection Order (DVPO).

The evidence is insufficient to establish beyond a reasonable doubt that Mr. Taylor's false statement was reasonably likely to be relied upon by the investigating officer.

### Issues Pertaining to Assignment of Errors

In the absence of evidence that Mr Taylor served a copy of the DVPO or orally advised of the terms of the DVPO, is the evidence sufficient to establish beyond a reasonable doubt that Mr Taylor had actual or constructive knowledge of the terms of the Domestic Violence Protection Order?

In response to being told by the investigating police officer that he needed to check to make sure that everyone was fine and he needed to see everyone physically, Mr Taylor falsely told the police officer investigating a domestic violence complaint that he was alone in the apartment. Is the evidence sufficient to establish beyond a reasonable doubt that Mr. Taylor's false statement was reasonably likely to be relied upon by the officer?

## B. Statement of Facts

Curtis Taylor was charged by Information with one count of felony violation of domestic violence protection order (DVPO) and one count of making a false or misleading statement to a law enforcement officer. CP, 3. Mr. Taylor has at least two prior violations of DVPO on his criminal history. RP, 17. The case proceeded to trial by jury and he was convicted of both counts. RP, 174. Mr. Taylor was sentenced to 60 months on the DVPO violation and 364 days with 0 suspended for the false statement. RP, 197. He filed a timely notice of appeal. CP, 70.

On June 29, 2016, Curtis Taylor appeared in Lakewood Municipal Court for a court hearing in cause number 16L000472. RP, 70. Mr. Taylor appeared by video from the Nisqually Jail. RP, 69. The hearing was audio recorded. RP, 70. City Prosecutor Laura Keys was present. RP, 70. The jury heard the audio recording of the hearing. RP, 71. Exhibit 1. During the hearing, Judge Blinn signed a post-conviction DVPO pursuant to chapter 10.99 RCW prohibiting Mr. Taylor from contacting Chartrice Tillman. RP, 71, 75, Exhibit 5. The DVPO was good for five years. RP, 72. Mr. Taylor asked for a no-hostile order instead of a no contact order, a request that Judge Blinn did not specifically address. RP, 83. Although Judge Blinn orally advised Mr. Taylor he was to have no contact with Ms. Tillman, he did not go over any of the specific provisions of the order. RP,

83. Instead, he told him he was to have no contact and to see “the attached if they need to see further detail of what the order says.” RP, 81. The post-conviction has the mandatory warning language of RCW 10.99.040(4)(b) regarding consent by the victim to the contact, but Judge Blinn did not orally read it to him. RP, 82, Exhibit 5.

Mr. Taylor never signed the DVPO. RP, 11. Ms. Keys did not have any knowledge whether Mr. Taylor received a copy of the DVPO and there is nothing on the audio recording where Mr. Taylor acknowledged receipt of the DVPO. RP, 76, 80. It is the responsibility of the clerk to do the fax over a copy of the DVPO to the Nisqually Jail and Ms. Keys “assumed” that occurred, but she could not say whether that occurred or not. RP, 77. Ms. Keys conceded that defendants “need a copy of the orders” and that it is “important” for defendant to get a copy of the order because there are provisions on the order the judge may not specifically mention. RP, 79, 82.

On December 16, 2016, Officer Angel Figueroa responded to a reported “argument or physical domestic” at the Sundance Apartments in Pierce County. RP, 51-52. He went to Apartment E11 and knocked on the door, announcing he was a police officer. RP, 52. He did not initially get a response, but after “continued knocking” a male yelled through the door. RP, 52. The male was later identified as Curtis Taylor. RP, 52. Mr.

Taylor said nothing was going on in the apartment. RP, 53. Officer Figueroa told him he needed to make sure everyone was fine in the apartment and he needed to check to make sure that he could see everyone physically. RP, 53. Mr. Taylor said he was the only person in the apartment there was no one else. RP, 53. This back and forth went on for about five minutes. RP, 53.

After approximately five minutes, the door was opened by a female. RP, 53. The female was later identified as Chartrice Tillman. RP, 54. Officer Figueroa did not immediately see the male he had been communicating with and ordered him to come out. RP, 55. Ms. Tillman also told him to come out. RP, 55. Mr. Taylor came out of the kitchen and was placed into handcuffs. Officer Figueroa then did a visual check of the apartment and did not observe any other occupants. RP, 55. Mr. Taylor was placed into the patrol car. RP, 55. Ms. Tillman was interviewed. RP, 57. At some point in the investigation, Officer Figueroa learned there was a DVPO prohibiting Mr. Taylor from having contact with Ms. Tillman. RP, 56.

At the conclusion of the State's case-in-chief, Mr. Taylor moved to dismiss Count I, violation of DVPO. RP, 97. Mr. Taylor argued the State could not prove he actually received the DVPO or that he was advised of

the “parameters” of the DVPO. RP, 98. The Court denied the motion. RP, 100.

C. Argument

1. The evidence is insufficient to establish Mr. Taylor had actual or constructive notice of the terms of the post-conviction DVPO.

The appropriate test for determining the sufficiency of the evidence is whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). On this record, Mr. Taylor never signed the post-conviction DVPO nor received a physical copy. Although he was advised orally that the court was imposing a no contact order, the court did not advise him of the specific provisions of the order. The court further told him if he had questions about the scope of the order, he should consult the order itself. The issue is whether that oral advisement is sufficient to sustain a challenge to the sufficiency of the evidence.

In *Auburn v Solis-Marcial*, 119 Wn.App 398, 79 P.3d 1174 (2003) the Court addressed a similar but factually distinguishable situation. In *Solis-Marcial* the defendant had been served with a temporary DVPO but, because he failed to appear at the hearing on the DVPO, had not yet been served with the permanent DVPO. The

permanent DVPO was identical to the temporary DVPO. The trial court dismissed the charge but Division I of this Court reinstated the charges. The purpose of serving a DVPO on the restrained party is to provide constructive knowledge of the terms of the Order. The Court reasoned that actual service of the DVPO is not required as long as the restrained party is on actual notice of the Order. *Solis-Marcial* at 402-03. Mr. Solis-Marcial had received a copy of the temporary DVPO, “which contained a description of prohibited conduct, gave notice of the hearing on the permanent order, and included the warning that ‘failure to appear at the hearing may result in the court granting such relief.’” *Solis-Marcial* at 404. The Court concluded he had actual notice of the terms the Order.

In Mr. Taylor’s case, in the absence of proof of service, there is no evidence of constructive knowledge of the terms of the Order. In the opinion of the trial court, however, the evidence was sufficient to establish Mr. Taylor had actual notice of the DVPO because the jury heard the audio recording of the June 29, 2016 hearing where Judge Blinn orally advised him of the existence of the DVPO. But, even in the light most favorable to the State, there is no evidence Mr. Taylor had actual knowledge of the terms of the order. Under the logic of *Solis-Marcial*, had Judge Blinn orally read the entire Order to him, this would have constituted actual knowledge of the terms of the Order and been legally

sufficient. But Judge Blinn did not read the entire Order to him, a fact that distinguishes Mr. Taylor's case from *Solis-Marcial*. Although Mr. Solis-Marcial never received a copy of the permanent order, he did have a copy of the temporary order and the terms were identical. He was, therefore, on actual notice of all the terms of the order. Mr. Taylor, on the other hand, never received anything in writing and was not advised of all the terms of the Order orally.

In *State v. Marking*, 100 Wn App. 506, 997 P.2d 461 (2000), *overruled in part*, *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005), the Court of Appeals reviewed a post-conviction DVPO that did not contain the mandatory language required by RCW 10.99.040(4)(b) for post-conviction DVPOs: "Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order." The Court noted that the mandatory warning serves the important function of notifying people that consent does not invalidate the order, saying, "The consent warning serves an important function in deterring individuals from violating the order."

Absent the warning, one might mistakenly believe that consent to contact by the person protected under the order invalidates the order's otherwise mandatory prohibition.” *Marking* at 511. Because the DVPO at issue in Mr. Marking’s case omitted the mandatory language, the Court concluded the Order was invalid and reversed.

In *Miller*, the Supreme Court overruled *Marking* in part, holding that the validity of a no contact order is not an implied element that needs to be proved to a jury. But the Supreme Court also concluded that the *Marking* Court’s conclusion that a post-conviction DVPO that omits the mandatory language is unenforceable was an “appropriate result.” *Miller* at 31.

Like *Marking*, the post-conviction DVPO in this case was required to contain the mandatory warning language of RCW 10.99.040(4)(b). The written order contains the mandatory language. Exhibit 5. But Judge Blinn did not advise him of the warning orally and there is no evidence he ever received a copy of the Order.

In Mr. Taylor’s case, taking the facts most favorable to the State, there is no evidence Mr. Taylor received a copy of the post-conviction DVPO or that he was advised of the specific terms. Significantly, he was not advised that consent does not invalidate the Order. Because Mr. Taylor was not on actual or constructive notice of the terms of the Order,

the trial court erred by not dismissing the case. This Court should reverse and dismiss for insufficient evidence.

2. The evidence is insufficient to sustain a conviction for making a false or misleading statement to a police officer.

Lying is an art insufficiently appreciated by the Washington courts. When and where a person may, or even must, prevaricate is a question best reserved for churches and synagogues and not the courtroom. The First Amendment, with its broad protection of the right to speak, encompasses the right to tell falsehoods. No one has explained the contours of spinning a fantastic tale better than Judge Kozinski when he wrote:

Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy (“No, I don't live around here”); to avoid hurt feelings (“Friday is my study night”); to make others feel better (“Gee you've gotten skinny”); to avoid recriminations (“I only lost \$10 at poker”); to prevent grief (“The doc says you're getting better”); to maintain domestic tranquility (“She's just a friend”); to avoid social stigma (“I just haven't met the right woman”); for career advancement (“I'm sooo lucky to have a smart boss like you”); to avoid being lonely (“I love opera”); to eliminate a rival (“He has a boyfriend”); to achieve an objective (“But I love you *so* much”); to defeat an objective (“I'm allergic to latex”); to make an exit (“It's not you, it's me”); to delay the inevitable (“The check is in the mail”); to communicate displeasure (“There's nothing wrong”); to get someone off your back (“I'll call you about lunch”); to escape a nudnik (“My mother's on the other line”); to namedrop (“We go way back”); to set up a surprise party (“I need help moving the piano”); to buy time (“I'm on my way”); to keep up appearances (“We're not talking divorce”); to avoid taking

out the trash (“My back hurts”); to duck an obligation (“I’ve got a headache”); to maintain a public image (“I go to church every Sunday”); to make a point (“Ich bin ein Berliner”); to save face (“I had too much to drink”); to humor (“Correct as usual, King Friday”); to avoid embarrassment (“That wasn’t me”); to curry favor (“I’ve read all your books”); to get a clerkship (“You’re the greatest living jurist”); to save a dollar (“I gave at the office”); or to maintain innocence (“There are eight tiny reindeer on the rooftop”).

*United States v. Alvarez*, 638 F.3d 666, 674-75 (9<sup>th</sup> Cir. 2011) (Judge Kozinski, concurring in denial of en banc hearing), *affirmed*, 567 U.S. 709, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012).

In Washington, the crime of making a false or misleading statement requires that the statement be material. The jury instructions in this case advised the jury that the statement must be material and defined materiality as a “written or oral statement reasonably likely to be relied by a public servant in the discharge of his or her official powers or duties.”

CP, 45

Again, Judge Kozinski provides a humorous, but insightful analysis of when a lie is material. In *Bonds v. United States*, 784 F.3d 582 (9<sup>th</sup> Cir. 2015), the legendary baseball player Barry Bonds gave an evasive answer to a grand jury about his alleged steroid use and was convicted of obstruction. His conviction was reversed because the statement was not material. Judge Kozinski tested the limits of the federal statute when he said:

Stretched to its limits, [the statute] poses a significant hazard for everyone involved in our system of justice, because so much of what the adversary process calls for could be construed as obstruction. Did a tort plaintiff file a complaint seeking damages far in excess of what the jury ultimately awards? That could be viewed as corruptly endeavoring to “influence ... the due administration of justice” by seeking to recover more than the claim deserves. So could any of the following behaviors that make up the bread and butter of litigation: filing an answer that denies liability for conduct that is ultimately adjudged wrongful or malicious; unsuccessfully filing (or opposing) a motion to dismiss or for summary judgment; seeking a continuance in order to inflict delay on the opposing party; frivolously taking an appeal or petitioning for certiorari—the list is endless. Witnesses would be particularly vulnerable because, as the Supreme Court has noted, “[u]nder the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive.”

*Bonds* at 582 (Judge Kozinski, concurring), citing *Bronston v United States*, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed 2d 568 (1973).

In Mr. Taylor’s case, he was prosecuted for making a false or misleading statement to Officer Figueroa when he stated there was no one else in the apartment. The prosecutor, in his closing argument, made clear what the alleged false statement was, “[W]hat Mr. Taylor said is, ‘I’m the only one here.’ You don’t need to come in. I’m the only one here. And ladies and gentlemen, that was the false statement ” RP, 128. In this case, there is no possibility Mr. Taylor’s statements were “reasonably likely to be relied by” Officer Figueroa. Officer Figueroa was responding to a

domestic violence call. He had an affirmative duty to ensure that everyone was safe inside the apartment.

The Washington Courts have recognized the need for officers to investigate residences with reported domestic violence, including, if necessary, with warrantless entry into the residence. See *State v Lynd*, 54 Wn App. 18, 771 P.2d 770 (1989) (warrantless entry into a home permitted to check on the wife's well-being where a police officer had knowledge of a 911 hang-up call from defendant's home and defendant did not want the officer to enter the home). Rather than attempt force entry into the apartment, Officer Figueroa instead employed persuasion. He was ultimately successful. But it is clear from the record he was not going anywhere until he had determined that everyone in the apartment was safe. This is corroborated by the fact that even after Mr. Taylor was taken into custody, Officer Figueroa still did a visual check of the apartment for any other occupants. RP, 55.

It is also clear from the record that Mr. Taylor knew this when he made the false statement. According to the testimony, the sequence was as follows. First, Officer Figueroa knocked multiple times on the door with no response. RP, 52. Mr. Taylor shouted through the door that nothing was going on in the apartment. RP, 53. At that point, Officer Figueroa told Mr. Taylor he needed to make sure everyone was fine in the

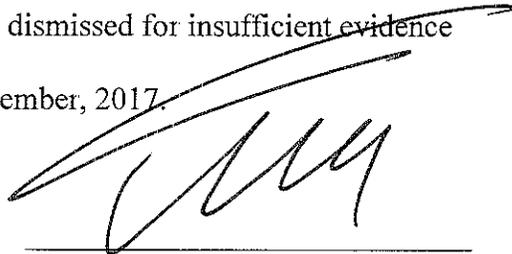
apartment and that he needed to check to make sure that he could see everyone physically. RP, 53. It was only *after* being told that Officer Figueroa was required to verify this information that Mr. Taylor made his false statement that he was the only person in the apartment there was no one else. RP, 53.

Mr. Taylor's denials of other occupants in the apartment was not "reasonably likely to be relied by" Officer Figueroa. The denials were not material and there was insufficient evidence of making a false or misleading statement. The charge should be dismissed.

D. Conclusion

Mr. Taylor's charges of felony violation of a domestic violence protection order and making a false or misleading statement to a police officer should both be reversed and dismissed for insufficient evidence

DATED this 3<sup>rd</sup> day of November, 2017.



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