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Court of Appeals
Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON LARMAR BROOKS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01464-6

BRIEF OF RESPONDENT

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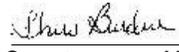
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Brooks received ineffective assistance of counsel when counsel did not move for a mistrial or a curative instruction after some evidence of a later-dismissed harassment had been admitted?

2. Whether under circumstances where the state's witness saw Brooks with the protected person twice in a short period of time the jury should have been given a multiple acts instruction to assure unanimity?

3. Whether it was error to omit the statutory list of qualifying orders found RCW 26.50.110(5) from the to-convict instruction when decision of the validity of a no-contact order is a matter of law to be decided by the court?

4. Whether Brooks's sentence exceeded the trial court's statutory authority? (Conceded and remedied by order amending judgment and sentence)

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Brandon Larmar Brooks was charged by information filed in Kitsap County Superior Court with felony violation of a court order (two priors), domestic violence, and harassment (gross misdemeanor). CP 1-2. Later, a first amended information changed the second count to

harassment threat to kill making that count a felony. CP 10.

Neither the alleged victim of the no contact order violation, Leslie Hammitt, nor the alleged victim of the harassment, Torey Riley, appeared at trial. RP 115 (prosecutor notes that Ms. Hammitt victim of the NCO violation will not testify); RP 203 (prosecution notes that Mr. Riley is sick and will not answer his phone); RP 279 (prosecutor notes that Mr. Riley is injured and will not be coming). The state moved to dismiss the harassment charge based on Mr. Riley's inability to testify and it was ordered dismissed. RP 289; CP 75. Although the jury found that the offenses was domestic violence, at sentencing the state moved to dismiss the domestic violence tag from the no contact order violation. CP 184.

No jury instruction in the case addressed the validity of either the extant order or the validity of the orders from the two prior convictions. The defense had no objection to the instructions. RP 294. The defense had no objection specifically to the "to-convict" instruction for violation of a court order. RP 306.

B. FACTS

Bremerton police were dispatched to a report of an apartment

complex employee being threatened with a gun. RP 74-75.¹ Police responded to the Parkview Terrace Apartments and contacted the manager, Jacqueline Brown. RP 75-76. Also there was the maintenance man, Tory Riley. RP 76-77.

Mr. Riley's demeanor was "shaky." RP 78. His hands were shaky and his voice quivered.² RP 78. Brooks was located a short distance from the apartments. RP 139-40. Ms. Brown and Mr. Riley were separately taken to view Brooks. RP 79. Ms. Brown said "that's him" without hesitation. RP 80. After being identified, Brooks was arrested. RP 144.

Investigation revealed that Brooks was the restrained party in a protection order issued out of Pierce County. RP 82. Leslie Hammitt was the protected person. RP 83. Ms. Brown identified Ms. Hammitt as a tenant at the Parkview Terrace. RP 189. Ms. Brown provided information from Ms. Hammitt's rental agreements and provided her unit number. RP 194. Ms. Brown identified Ms. Hammitt by a Department of Licensing photograph. RP 198.

Ms. Brown became aware of the incident by a mobile phone call from Mr. Riley the maintenance person. RP 200; RP 216. Before the call, Ms. Brown saw Ms. Hammitt and Brooks together. RP 213-14. She

¹ The volumes of the VRP are sequentially page numbered.

² The police witness also said that she understood that Mr. Riley was "scared" but a

heard something, looked again, and saw Brooks walking back by himself. RP 214. She went to Ms. Hammitt's unit and asked if there was someone there. RP 201. At the unit, Ms. Brown heard people arguing. RP 217. Unsatisfied with her contact with Ms. Hammitt, Ms. Brown remained outside the unit and called 911. RP 218. Brooks came out and started to run. RP 219. Ms. Brown provided his description to 911 and soon thereafter identified Brooks while he was in police custody. RP 220-21.

Witness Chris Hutton from the Pierce County Clerk's Office identified certified court documents that established Brooks's identity and presence when the extant no contact order was issued. RP 149-161. These documents included a clerk's minutes with notations that "Defendant acknowledges receipt of NCO. . ." and "Court signs orders." RP 161. Mr. Hutton provided foundation for admission of the order in question in the case and testified as to its contents. RP 168-174.

Witness Mary Allen of the Kitsap County Clerk's Office provided foundation for the admission of certified judgements of Brooks's two prior no contact order violations, including court documents that established Brooks's identity with regard to those prior convictions. RP 241-260.

defense objection to that statement was sustained.

III. ARGUMENT

A. **BROOKS WAS NOT PREJUDICED BY COUNSEL'S FAILURE TO SEEK A MISTRIAL OR AN INSTRUCTION TO DISREGARD RECEIVED EVIDENCE OF A HARASSMENT CHARGE THAT WAS LATER DISMISSED.**

Brooks argues that his counsel was ineffective for not seeking a mistrial or a limiting instruction when the harassment count was dismissed. This claim is without merit because the record shows an express desire by Brooks to not have the matter delayed by a mistrial, because the facts of the two allegations were not so interwoven that proof of one had an impact on proof of the other, because the granting of a mistrial is an extraordinary remedy not indicated by the circumstances of the case, and because counsel made a reasonable trial decision to ignore the slight evidence of the harassment charge instead of underlining it with further instruction. Moreover, none of counsel's decisions deprived Brooks of a fair trial.

A claim of ineffective assistance is reviewed de novo. *State v. White*, 80 Wn.App. 406, 410, 907 P.2d 310 (1995). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Brooks must “overcome a strong presumption that counsel's performance was

reasonable.” *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011). There is a wide range of professional competence and counsel is “strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *In re Nichols*, 151 Wn. App. 262, 272-73, 211 P.3d 462 (2009) (internal citation omitted). Brooks “must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct of counsel.” *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

1. ***The facts and circumstances of the case show that Brooks did not want a mistrial, that evidence received on the later-dismissed harassment charge was not extensive, and that the state’s case was easily proven without reference of alleged harassment.***

The reasonableness of counsel’s decision process with regard to a mistrial motion is seen in this trial on a different issue. When the state became aware that it would not get the testimony of Ms. Hammitt, the state went after putting a face to her name by way of a Department of Licensing photograph. RP 126. The defense objected to the photo as late discovery and argument was had. RP 126-130. The trial court ruled the picture admissible. RP 130.

In discussing remedies for the asserted discovery violation, the defense said

The Court could also rule a mistrial. I’m not requesting one. I

think that puts Mr. Brooks at a disadvantage. Mr. Brooks does not want a mistrial. A mistrial means he will be sitting in jail, probably until January, before this comes up for trial.

RP 132. There is no reason to suppose that Brooks would change his mind about the delay a mistrial would cause simply because he won one count by dismissal. Counsel expressed reasonable reasons, attributed to Brooks, for not wanting a delay. Those reasons apply as well to the possibility of a second mistrial request.

Next, factually, there is a matter of opinion. Brooks says that with regard to the dismissed harassment charge “extensive, highly prejudicial evidence had already been admitted in support of that charge.” Brief at 7. No substantive evidence was received on this point. Toney Riley, the alleged victim, never testified—he never said what Brooks said or did that led to the charge. Witness Brown and officer Corn referred to a threat toward a maintenance person and no more. The same is admissible as res gestae evidence, else there would be no reason why the police were present and doing an investigation that led to the discovery of the court order violation. Ms. Brown repeated what she said to Ms. Hammitt without objection. The evidence of the harassment charge was not extensive and whether or not it was highly prejudicial turns on trial counsel’s appreciation of all the circumstance.

Finally, the record shows that the proof of the court order violation

was strong and that the strength of that case had nothing to do with the dismissed harassment count. Ms. Brown positively identified Brooks as the man she twice saw that day in the company of Ms. Hammitt. Shortly later, she saw Brooks in police custody and identified him as the same person she had seen with Ms. Hammitt. Further, she identified Ms. Hammitt by her status as a tenant and her Department of Licensing photograph. The state's case was simple and straightforward. The witness saw the two together. All that remained was proof of the restraining provisions of the order, Brooks's knowledge of it, and the two prior violations.

2. *Even if requested, a mistrial is an extraordinary remedy that was not indicated in this case.*

“Because the trial judge is in the best position to determine the prejudice of circumstances at trial, an appellate court reviews the decision to grant or deny a mistrial for abuse of discretion.” *State v. Babcock*, 145 Wn.App. 157, 163, 185 P.3d 1213 (2008), *citing State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A mistrial should be granted only when “nothing the trial court could have said or done would have remedied the harm done to the defendant.” *Weber*, 99 Wn.2d at 165, *quoting State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809

(1979).

Mistrials are properly granted when “an irregularity in the trial proceedings is so prejudicial that it deprives the defendant of a fair trial.” *State v. Babcock*, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). The Supreme Court in *Weber* applied a three factor test that considers (1) the seriousness of the irregularity, (2) whether the evidence was cumulative, and (3) the effectiveness of the trial court’s instruction to the jury to disregard the remark. *Id.*; *see also State v. Perez-Valdez*, 172 Wn.2d 808, 818, 265 P.3d 853 (2011) (En banc) (using same test).

The third factor is not applicable as there was no limiting instruction requested or given. The second factor is questionable: that there was a threat was uttered more than once. But the point of the factor is that merely cumulative evidence would not be too prejudicial. Brooks’s point is that any of it was prejudicial after that charge was dismissed. Thus whether or not a motion for mistrial would have been granted depends on whether the circumstances in this case reveal a serious irregularity that caused prejudice to Brooks’s right to a fair trial.

In the present posture, this questioned needs to be considered in light of defense counsel’s appreciation of the level of prejudice he faced under the circumstances of this trial. In turn, that appreciation should be considered in light of the assertion that Brooks did not want a mistrial because of the delay involved.

In *Babcock, supra*, the hearsay of a child sexual abuse victim was allowed after a pretrial hearing. 145 Wn. App. at 161. She had told investigators that Babcock had touched her in the wrong places. *Id.* at 160. And, she testified at the child hearsay hearing that Babcock had done bad things to her. *Id.* at 161. At trial six adult witnesses repeated her hearsay.³ *Id.* at 161-62. But then the child refused to testify and the hearsay was deemed to be inadmissible. *Id.* at 162. The trial court refused a mistrial motion and instructed the jury to disregard the testimony about the child. *Id.* A second victim did testify that she had been abused by Babcock.

In deciding the case, the court found significant that there was no corroboration of the girls' testimony. 145 Wn. App. at 164. "The verdict depended solely on the jury's credibility determinations about MB's testimony."⁴ *Id.* MB's testimony had been at times inconsistent and because the hearsay of the other child related similar abuse, the court found this to be a serious irregularity in the case. 145 Wn. App. at 164.

The present case has little resemblance to the circumstances in *Babcock*. There, substantive evidence from the alleged victim was repeated by multiple witnesses. There, the later-inadmissible evidence went to the same behavior as was alleged by the other victim. This last

³ The decision does not say precisely what these witnesses said.

was important to the analysis of the effectiveness of the curative instruction: “the admission of evidence concerning a crime similar to the charged offenses is inherently difficult to disregard.” 145 Wn. App. at 164-65.

In the present case, there is no such testimony. The two crimes charged were not the same and the proof of one had little or no impact on the proof of the other. Whether or not Brooks was with Ms. Hammitt that day had nothing to do with whether or not Brooks said anything at all to Mr. Riley. The question of the manner of the alleged threat was never answered in this case. But in *Babcock*, the evidence went directly to an allegation of child molestation. The cases are not the same and the irregularity, if any, in the present case could not have been as serious as in *Babcock*.

In *State v. Escalona*, 49 Wn. App. 251, 742 P.2d 190 (1987), the Court of Appeals reversed a refusal to grant a mistrial. There, the victim of a charge of second degree assault with a knife gratuitously testified, in violation of an order in limine, that the defendant had previously stabbed someone. 49 Wn. App. at 253. This remark, so close to the mark of the charge being tried, was “inherently prejudicial.” *Id.* at 256. The remark seemed “logically relevant” even if not “legally relevant.” *Id.*

⁴ MB being the second victim.

In the present case, hearsay statements about a completely separate crime were neither legally nor logically relevant to the charge of violating a court order. Nothing in the present record allows an inference that the jury may have bound the two charges together or improperly used the hearsay evidence to convict on the court order violation. Brooks did not want a delay and the remarks admitted proved little or nothing. It was not deficient performance to follow the client's wishes. Since the two crimes were different in the proof required, the chances of prejudice are much less than in the cases considered. There was no deficient performance for failing to move for mistrial and assertions of substantial prejudice are speculative.

Similarly, there was no deficient performance in not seeking an instruction. It was a strategic decision. But Brooks asserts that there could be no reasonable strategy on this point. Brief at 13. Defense counsel knew that the statements made had nothing to do with the court order violation charge. It is completely reasonable strategy under the circumstances to not want to further address testimony about the harassment charge. If counsel thought that asking for an instruction would serve to underline that evidence, he could properly decide that the better course is to simply ignore that evidence.

And, finally, given the outline of the state's case above (§A, 1.), it is extremely difficult to see how the jury might have improperly used the

evidence. The question of whether or not Brooks threatened Mr. Riley provided the jury with no information on Ms. Brown's identification of Brooks and Ms. Hammitt. It had nothing to do with Brooks being the person restrained, his knowledge of that restraint, and the two prior convictions; nothing about his character could change or improperly color that evidence. The presumption of effective assistance applies to this reasoning. Counsel was not aware of substantial prejudice because there was none. Counsel's performance fell within the wide range of professional competence. This issue fails.

B. THE EVIDENCE SHOWS THAT BROOKS WAS CONTINUOUSLY WITH MS. HAMMITT, OR AT MINIMUM WITHIN THE 1000 FOOT PROTECTED ZONE, DURING TH ENTIRE INCIDENT AND THE COURT ORDER VIOLATION IS A CONTINUING OFFENSE THAT MAY BE CHARGED AND PROVEN IN THE ALTERNATIVE.

Brooks next claims that since there were two sightings of him in the company of Ms. Hammitt on the day of the incident and the jury was not advised which sighting supported the charge, his right to a unanimous verdict was violated. This claim is without merit because the evidence shows that it is entirely reasonable to infer that Brooks was with Ms. Hammitt, or within the 1000 foot protected zone provided by the order,

during the time period alleged and proven by the state. Further, the issue fails because the crime is a continuing offense that may be charged and proven in the alternative.

Factually, Brooks's argument alleges two separated incidents of contact with Ms. Hammitt. But the two sightings of Brooks with or in the residence of Ms. Hammitt happened the same day within a short interval of time. Ms. Brown testified that the two sightings were separated by five to ten minutes. RP 216. Under the circumstances, it very much appears that Brooks was continually in the company of Ms. Hammitt. Moreover, the order in question prohibits Brooks from being within 1000 feet of Ms. Hammitt's residence and the circumstances here show that whenever he was seen he was within this prohibited zone. Supp. CP 202. Brooks should not receive a multiple acts instruction if, for instances, the witness saw him go out to his car or take out the garbage on two separate occasions. It is entirely reasonable to infer that on October 4, 2017, Brooks was with Ms. Hammitt, and at her residence, during the entire course of this incident.

While Brooks was with Ms. Hammitt that day, he was committing a continuing offense. *State v. Spencer*, 128 Wn. App. 132, 139, 114 P.3d 1222 (2005). This holding follows a complete review of legislative intent by the court. The various permutations of court order violations, including

the permutations that raise the charge to a felony, would be superfluous if the crime was complete as soon as the defendant entered the 1000 foot protected zone. 128 Wn. App. at 137-39.

The next step in the analysis of this question is that the continuing offense may be charged by alternative means. Thus, “[i]f sufficient evidence supports each alternate means, “a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary.”” *Spencer*, 128 Wn. App. at 141, quoting *State v. Klimes*, 117 Wn. App. 758, 770, 73 P.3d 416 (2003). Here, the evidence established beyond a reasonable doubt that Brooks broke the order by being within 1000 feet of Ms. Hammitt’s residence, by being with her, and by being in her residence.

The evidence in the case supports three alternative means of proving the continuing offense. There was no error in not giving the jury a multiple acts instruction.

C. THE STATUTORY LIST OF QUALIFYING COURT ORDERS IS NOT AN ELEMENT OF THE CRIME UPON WHICH THE JURY MUST BE INSTRUCTED.

Next, Brooks argues that the trial court violated his due process rights because the jury was not instructed on the list of statutes from which

no contact orders are authorized. Since the list of statutes is not an element to be considered by the jury, this issue fails. The issue appears to raise a question of law and is reviewed de novo. *See State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005).

The Supreme Court recently provided the answer to Brooks's claim in *State v. Case*, 187 Wn.2d 85, 384 P.3d 1140 (2016). There, Case was prosecuted for a court order violation that was elevated to a felony by two prior convictions. 187 Wn.2d at 87. Case stipulated to the two priors. *Id.* On appeal, Case argued that his stipulation was insufficient because it did not include the list of qualifying orders found in RCW 26.50.110(5). In *Case*, the "to convict" instruction was identical to the one in the present case, addressing the prior conviction element as "that the defendant has twice been previously convicted of violating the provisions of a court order." 187 Wn.2d at 89; CP 68.

The Supreme Court first noted that the appropriate list of statutes was included in the information and that as a result the stipulation constituted agreement with the matter charged in that information. 187 Wn.2d at 91-92. In the present case, Brooks did not so stipulate. But the Supreme Court's more general holding solves his claim: "Moreover, whether the prior convictions met the qualifying statutory requirements is a threshold legal determination to be made by the trial judge, not a

question for the jury.” Id. at 92.

That holding followed directly from the same court’s en banc decision in *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005). There, on a challenge to the state’s failure to prove a “valid” order, the Supreme Court held that “We respectfully disagree with the Court of Appeals and hold that the validity of the no-contact order is not an element of the crime.” Id. at 31. Moreover, “issues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court.” Id.

The complained of omission in this case was not an element of the offense to be decided by the jury. This claim fails.

D. THE JUDGMENT AND SENTENCE HAS BEEN AMENDED STRIKING COMMUNITY COUSTODY, RENDERING THIS ISSUE MOOT.

Brooks next claims that his sentence was unlawful because the 12 months of community custody ordered were in addition to the maximum sentence of 60 months on his conviction for a class C felony. Brooks is correct. After sentencing, the state recognized the error. An order striking

the community custody was signed by the trial court. This court allowed this trial court action and the order was filed. Second Supp. CP 243. This issue is moot.

IV. CONCLUSION

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

DATED October 8, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross", written in a cursive style.

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