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JUL 12, 2013

Court of Appeals
Division III
State of Washington

NO. 311546-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

DAVID BRUCE GUNKEL-RUST, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 12-1-00832-2

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State charged the defendant, David Bruce Gunkel-Rust, with felony violation of a post-conviction no-contact order, alleging that on or about July 11, 2012, Mr. Gunkel-Rust both physically contacted and spoke with Kali Bleichner in Keewaydin Park in Kennewick, Washington. (CP 9-10; RP¹ 34, 37-38).

At trial, Jordan Brosius testified that after she received medical treatment at Kennewick General Hospital and was walking to the bus stop, she encountered Ms. Bleichner in Keewaydin Park. (34-35). Ms. Brosius described Ms. Bleichner as a friend of approximately four years whom she had met her through Mr. Gunkel-Rust. (RP 31-33). When Ms. Brosius encountered Ms. Bleichner, she appeared to have an injury to her upper lip, which was bloody and slightly swollen. (RP 35). When Ms. Brosius noticed the injury, she offered to get Ms. Bleichner some water from a gas station near the park. (RP 36). As the two were walking to the gas station, but still inside the park, Mr. Gunkel-Rust approached Ms. Bleichner. (RP 36).

Ms. Brosius testified that Mr. Gunkel-Rust began calling Ms.

¹ "RP" refers to the September 20, 2012, Trial Verbatim Report of Proceedings filed by Court Reporter Patricia Adams.

Bleichner a slut, as well as asking whose baby she was having. (RP 37). Ms. Brosius described his tone of voice as angry. (RP 37). Ms. Bleichner attempted to walk away from Mr. Gunkel-Rust, but he continued to follow her. (RP 37). Ms. Brosius testified that Mr. Gunkel-Rust backed Ms. Bleichner against the exterior of a bathroom wall and was “directly in her face...maybe an inch apart.” (RP 37). Mr. Gunkel-Rust was making statements that made Ms. Brosius very concerned for Ms. Bleichner. (RP 37). Ms. Brosius saw Mr. Gunkel-Rust holding Ms. Bleichner’s phone up in the air out of her reach. (RP 38). Ms. Bleichner attempted to hold Mr. Gunkel-Rust’s hand, but he smacked her hands away. (RP 38). After repeatedly seeing Mr. Gunkel-Rust slapping Ms. Bleichner’s hands away and seeing his hands balled into fists, Ms. Brosius became concerned enough about the situation that she felt the need to call 911 for assistance. (RP 38-39). Ms. Brosius testified that police arrived approximately five minutes after she made the call. (RP 39).

In response to Ms. Brosius’s 911 call, Kennewick Police Officer Elizabeth Grant arrived on scene around 3:30 p.m., on July 11, 2012. (RP 42). Dispatch informed Officer Grant that an ex-boyfriend would not leave his ex-girlfriend alone, and the 911 call was made by a friend of the female. (RP 42). Officer Grant was in her fully-marked patrol vehicle when she observed a male walking away from the park bathrooms who

matched the description of the male named "Bruce" given in the 911 call. (RP 43). Officer Grant drove her patrol vehicle onto the grass and into the park. (RP 43). She testified that Mr. Gunkel-Rust looked at her, kept walking, and then sat down on a large bench with approximately ten to fifteen people. (RP 43). Officer Grant believed Mr. Gunkel-Rust was trying to blend in with the larger group. (RP 44). Officer Grant approached Mr. Gunkel-Rust and stated, "[H]ey, Bruce, come over here." (RP 44). Mr. Gunkel-Rust got up and walked over to her and provided his Washington State driver's license, which identified him as David Bruce Gunkel-Rust. (RP 44). Officer Grant placed Mr. Gunkel-Rust in handcuffs because she was concerned he might flee. (RP 44). While handcuffing him, she observed that he had a small cut on his right hand that was bleeding. (RP 44).

While Officer Grant was detaining Mr. Gunkel-Rust, another officer was on scene contacting Ms. Brosius and Ms. Bleichner. (RP 46). Officer Grant later spoke with them as well. (46-47). Officer Grant testified that she saw the same female she identified as Ms. Brosius on July 11, 2012, outside the courtroom prior to taking the stand to testify. (RP 46). Officer Grant testified that when she spoke with Ms. Bleichner

at the park, Ms. Bleichner's upper lip was swollen and appeared to be freshly bruised. (RP 47).

Officer Grant verified there was a valid no-contact order in place between Mr. Gunkel-Rust and Ms. Bleichner. (RP 47). The no-contact order, as described by Officer Grant, prohibited Mr. Gunkel-Rust from having any contact whatsoever with Ms. Bleichner. (RP 47). The no-contact order was signed by a judge on February 17, 2010, and expires on February 17, 2015. (RP 48).

Ms. Bleichner did not testify at trial.

The State admitted a certified copy of the no-contact order prohibiting David Bruce Gunkel-Rust from having any contact with Kali Mae Bleichner, as well as four certified copies of Judgment and Sentences where Mr. Gunkel-Rust had been convicted of violating no-contact orders. (RP 14). The State also admitted booking photos of Mr. Gunkel-Rust and booking sheets that corresponded to each of the Judgment and Sentences that were admitted. (RP 21-30).

Benton County Jail Operations Lieutenant Sharon Felton testified regarding the booking process, including fingerprinting inmates, and explained how she knew that Mr. Gunkel-Rust was the person incarcerated on each of the corresponding convictions for violation of a no- contact order. (RP 15-30).

The jury found Mr. Gunkle-Rust guilty of a felony violation of the no-contact order, based on both an assault occurring during the prohibited contact as well as having two prior convictions for violating a no contact order. (CP 61-70; RP 88-89).

At sentencing, the court imposed the following term of community custody on the Judgment and Sentence:

- (A) The defendant shall be on community placement or community custody for the longer of
 - (1) the period of early release. RCW 9.94A.728(1)(2); or
 - (2) the period imposed by the court, as follows:
COUNT 1 for 12 months;

(CP 66).

The court also ordered the defendant to pay \$2,420.00 in Legal Financial Obligations (LFOs). (CP 64, 70). The court ordered that Mr. Gunkle-Rust begin paying up to \$50.00 per month, to be taken from any income earned while in the custody of the Department of Corrections. (CP 65).

This appeal then followed. (CP 73).

II. ARGUMENT

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. GUNKELRUST COMMITTED A FELONY VIOLATION OF A NO-CONTACT ORDER.

A. The standard of review is not *de novo*; it is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.

1. *Standard of Review*

“When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Ward*, 148 Wn.2d 803, 815, 64 P.3d 640 (2003). “After viewing the evidence in the light most favorable to the State, the court determines whether any rational trier of fact could have found guilt beyond a reasonable doubt.” *Id.*

In *Ward*, two defendants were convicted in separate cases of violating no-contact orders. The first defendant assaulted a former girlfriend. *Id.* at 806. The second defendant telephoned a former intimate partner, threw a brick through that person’s window, and assaulted him. *Id.* at 808. The defendants appealed and one of the petitioners argued that

they did not have willful contact with the victim, which was an essential element for the violation of the no-contact order. *Id.* at 814. Division I affirmed their convictions. *Id.* at 808. On appeal, the Washington State Supreme Court held:

When the sufficiency of evidence is challenged in a criminal case all reasonable inferences from the evidence must be drawn in favor of the State, and interpreted most strongly against the defendant. After viewing the evidence in the light most favorable to the State the court determines whether any rational trier of fact could have found guilt beyond a reasonable doubt.

Id. at 815.

The facts in the instant case are analogous to *Ward*. Here, the defendant is challenging the sufficiency of evidence for an essential element of the crime committed, as a petitioner in *Ward* also argued. The Court in *Ward* did not review the case de novo, but rather, viewed the evidence in the light most favorable to the State. This Court should take the same approach as outlined in *Ward* and view the evidence in the light most favorable to the State before making a determination whether the trier of fact could have found guilt beyond a reasonable doubt.

Mr. Gunkel-Rust argues that the case should be reviewed de novo, and relies upon *State v. Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010). However, *Schaler* addresses interplay between the threats-to-kill subsection of Washington State's harassment statute and the First

Amendment limits on freedom of speech. *Id.* at 278. The Washington State Supreme Court indicated in *Schaler* that errors regarding jury instruction should receive de novo review and that it would also independently review cases that infringed on a First Amendment right. *Id.* at 282-83. Neither of these issues has been raised in the instant case.

2. *The State proved beyond a reasonable doubt that Mr. Gunklel-Rust violated the no-contact order.*

The State has the burden of proving each element of the crime beyond a reasonable doubt. *State v. Borrero*, 147 Wn.2d 353, 364, 58 P.3d 245 (2002). The Court has identified that the identity of a *defendant* may not be proven through similarity of names alone. *State v. Huber*, 129 Wn. App. 499, 502, 119 P.3d 388 (2005). The *Huber* Court listed specific ways the identity of a defendant may be sufficiently proven, including photographs, fingerprints, or eyewitnesses. *Id.* The fact finder may also use direct or circumstantial evidence to prove identity. *State v. Hill*, 83 Wn. 2d 558, 560, 520 P.2d, 618 (1974).

The issue addressed in *Huber*, where the defendant was charged with bail jumping, was whether the State had proven that the man on trial was in fact the same man who committed the crime. *Huber*, 129 Wn. App. at 500. The State argued that when defense counsel introduced his client by name, that introduction was sufficient to establish that the person

charged with bail jumping was in fact the same person who jumped bail. *Id.* at 501. The Court held that defense counsel's introduction of his client was not sufficient to prove that the identity of the person on trial was the same as the person who jumped bail. *Id.* at 503-04.

Mr. Gunkel-Rust argues that because a defendant's identity must be proven beyond a reasonable doubt through means other than the name being the same, conceptually the same standards should apply to the victim's identity. (App. brief at 6). This argument is unsupported in case law and goes against public policy. References to fingerprinting and booking photos in *Huber* would leave a reasonable person to believe that this standard should only apply to defendants, because a victim would not have been fingerprinted or booked into jail as a result of being the victim of a crime. Extending the rationale of *Huber* to victims of crime would have a chilling effect on the State's ability to prosecute defendants in cases where the victim is reluctant to testify, such as in domestic violence cases where the victim may fear retaliation for cooperating with the State.

Extending *Huber* to the identity of a protected party is also unnecessary, because the risk of misidentification of a victim is insignificant when compared to the misidentification of a defendant. When conducting a records check on a potential suspect, the number of

same or similar names in statewide and nationwide criminal databases is potentially vast. It is easy to see how a person with the same name as a defendant could be the prohibited party in a no contact order. However, once the identity of a defendant restrained by a no contact order has been proven beyond a reasonable doubt, the same logic does not hold true regarding the identity of the protected party.

Mr. Gunkel-Rust does not challenge the jury's finding that he is prohibited by a Benton County Superior Court domestic violence no-contact order from contacting Kali Bleichner. Rather, he argues that the State cannot prove beyond a reasonable doubt that the Kali Bleichner who spoke with the police at a park in Benton County on July 11, 2012, where Mr. Gunkel-Rust was also arrested, is the same Kali Bleichner listed on the domestic violence no contact order. The potential pool of people named Kali Bleichner who have at some point been in Benton County, Washington, and whom the defendant is prohibited from contacting, is clearly much smaller than the pool of potential defendants sharing a name with Mr. Gunkel-Rust in all State and nationwide criminal databases. The odds that Mr. Gunkel-Rust would be prohibited by a domestic violence no-contact order from contacting a different Kali Bleichner than the one at

the park on July 11, 2012 are, as the jury found, beyond what a reasonable person could believe.

In addition, it is not as if the State's evidence regarding identity consisted only of Ms. Bleichner's name. When Ms. Brosius testified that Mr. Gunkle-Rust called Kali Bleichner a slut and asked her whose baby she was having, the jury could infer that the two had a previous intimate relationship. (RP 37). Ms. Brosius also testified that she met Ms. Bleichner through Mr. Gunkel-Rust, confirming that the two know each other. (RP 31-33). The jury's inference that the two had a previous intimate relationship could lead a reasonable person to believe that the person listed in the Benton County domestic violence no-contact order under the name Kali Bleichner and the victim here, also named Kali Bleichner and also in Benton County, were actually one and the same.

The jury was also free to consider Mr. Gunkel-Rust's attempts at blending into the crowd once police arrived at the park; as an indication that the defendant knew he was not supposed to be having contact with the same Kali Bleichner that was at the park with him.

2. MR. GUNKEL-RUST'S ARGUMENT THAT HIS LFO PAYMENTS SHOULD BE STRICKEN FROM THE RECORD IS NOT YET RIPE FOR APPEAL BECAUSE HE HAS NOT BEEN RELEASED FROM PRISON, AND THE STATE HAS YET TO SEEK COLLECTION OR SANCTIONS FOR NON-PAYMENT OF LFOS.

A superior court has the power upon conviction of a defendant to order the defendant to pay legal financial obligations. RCW 9.94A.760(1). Accordingly, during sentencing or on subsequent order to pay, the court must designate (1) the total amount of LFOs and (2) segregate the amount among the separate assessments made for restitution, costs, fines, and other assessments. *Id.* A trial court's error in an LFO order imposing costs on a defendant without considering his ability to pay is not of constitutional magnitude, and thus, does not require resentencing. *State v. Phillips*, 65 Wn. App. 239, 828 P.2d 42 (1992). Neither Washington Revised Code Section 10.10.160 nor the constitution requires the court to enter formal, specific findings regarding a defendant's ability to pay court costs. *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992). Additionally, LFOs may not be waived for indigent defendants, and the statute is not unconstitutional on its face. *Id.* Inquiry into a defendant's ability to pay comes when collection and sanctions are sought

for nonpayment. *State v. Nason*, 168 Wn.2d 936, 945, 233 P.3d 848 (2010).

RCW 9.94A.760(1) provides that the Department of Corrections is the custodian of inmate accounts and is authorized to disperse money from such accounts to pay an inmate's LFOs. *In re Martin*, 129 Wn. App. 135, 143-44, 118 P.3d 387 (2005).

Mr. Gunkel-Rust does not allege any action by the State in attempting to collect payment or sanction him for non-payment of his LFOs. Because there is no allegation of collection or sanction at the time he was sentenced or at any time thereafter, there has been no need to address Mr. Gunkel-Rust's current ability to pay. Like anyone else going to prison, Mr. Gunkel-Rust had no current job prospects for employment at the time of sentencing. Inquiry at the time of sentencing and prior to any attempt by the State to collect LFOs would have been premature and ultimately not a good use of the court's time given that Mr. Gunkel-Rust was being sentenced to the custody of the Department of Corrections for thirteen months. (CP 66).

3. THE SENTENCING COURT DID NOT IMPOSE A VARIABLE TERM OF COMMUNITY CUSTODY.

A court cannot sentence an offender to a variable term of community custody under RCW 9.94A.701. *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011). An example of a variable term of community custody would be if the judge sentenced Mr. Gunkle-Rust to twelve to eighteen months of community custody without expressing a precise amount of time. Here, the judge may have misspoken on the record when using the phrase “up to twelve months,” but the Judgment and Sentence clearly places Mr. Gunkel-Rust on twelve months of community custody. (CP 66). That is not a variable term of community custody and is in accordance with RCW 9.94A.701.

4. THE JUDGMENT AND SENTENCE DOES NOT CONTAIN A SCRIVENER’S ERROR.

The Judgment and Sentence states, “If the crime is a drug offense, the type of drug involved is:” followed by a blank space to fill in what type of drug, if any, was involved. (CP 61). In this case, no specific drug is listed because this case is not a drug offense. The next line reads “(X) as charged in the Amended information.” An Amended Information was

filed in this case. (CP 7-8, 61). There is no scrivener's error to be corrected on the Judgment and Sentence.

III. CONCLUSION

Based on the foregoing facts and arguments, the State respectfully requests this Court to affirm the defendant's conviction.

RESPECTFULLY SUBMITTED this 11th day of July 2013.

ANDY MILLER

Prosecutor



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

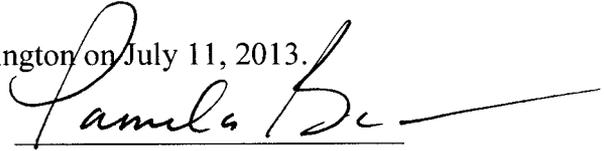
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Signed at Kennewick, Washington on July 11, 2013.



Pamela Bradshaw
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DAVID BRUCE GUNKEL-RUST,

Appellant.

NO. 311546

**STATEMENT OF ADDITIONAL
AUTHORITIES**

Pursuant to RAP 10.8, the State having filed its brief in the above matter submits as an additional authority *State v. Kuster*, 30548-1-III, 2013 WL 3498241 (Wash. Ct. App. July 11, 2013).

DATED this 25th day of July 2013

Respectfully submitted,

ANDY MILLER
Prosecuting Attorney



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on July 25, 2013.



Pamela Bradshaw
Legal Assistant