

No. 35051-7-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT,

v.

ELIODORO SALSEDA CASTANEDA, APPELLANT.

BRIEF OF RESPONDENT

David B. Trefry, WSBA #28345
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 989

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii-iii
I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF THE CASE.....	1-6
III. ARGUMENT	6-17
IV. CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases

<u>State v. Brett</u> , 126 Wn.2d 136, 174, 892 P.2d 29 (1995) (citing <u>State v. Hughes</u> , 106 Wn.2d 176, 721 P.2d 902 (1986)).....	12
<u>State v. Bruton</u> , 66 Wn.2d 111, 401 P.2d 340 (1965).....	11
<u>State v. Bryant</u> , 89 Wn.App. 857, 950 P.2d 1004 (1998).....	10
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	7
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012)	13
<u>State v. Garcia</u> , 20 Wn. App. 401, 579 P.2d 1034 (1978)	7
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	7
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980) (citing <u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).....	7
<u>State v. Jackson</u> , 62 Wn. App. 53, n.2, 813 P.2d 156 (1991)	7
<u>State v. Johnson</u> , 119 Wn.2d 167, 829 P.2d 1082 (1992).....	9, 10
<u>State v. Lindsay</u> , 180 Wn.2d 423, 326 P.3d 125 (2014).....	12
<u>State v. Price</u> , 126 Wn.App. 617, 109 P.3d 27 (2005).....	11
<u>State v. Russell</u> , 125 Wn.2d 24,85-86, 882 P.2d 747(1994).....	15
<u>State v. Shipp</u> , 93 Wn.2d 510, 610 P.2d 1322 (1980).....	10
<u>State v. Spence</u> , 81 Wn.2d 788, 506 P.2d 293 (1973), reversed on other grounds at 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)	9
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	13

<u>State v. Theroff</u> , 25 Wn. App. 590, 608 P.2d 1254, <i>aff'd</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	7
<u>State v. Thorgerson</u> , 172 Wn.2d 438, 258 P.3d 43(2011)	13, 15
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	12

Rules

RCW 9A.08.010(1)(b)	9
RCW 9A.08.010(2).....	9

I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENT OF ERROR.

1. The State failed to prove the essential element of knowledge in the charge of violation of a no contact order.
2. The prosecutor committed reversible misconduct by shifting the burden and by commenting on Castaneda's right to silence.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The State proved each element of the crime of violation of a no contact order beyond a reasonable doubt.
2. There was no prosecutorial error and if there was error it was not such that this court need overturn Castaneda's conviction.

II. STATEMENT OF THE CASE

The defendant was convicted of felony violation of a no contact order. There were only four witnesses who testified for the State, the defendant took the stand and testified on his own behalf. The charges stemmed from the following facts:

Department of Corrections (DOC) Community Corrections Officer (CCO) Augustine Perez testified that he was looking for Castaneda on behalf of Castaneda's current CCO. RP 43. The officer testified that on March 7, 2016 while acting in his official capacity he had contact with the defendant. RP 38. The contact occurred at an abandon home that is

located at 2101 South Seventh Ave. in the city of Yakima. The officer ordered Castaneda to come out of this vacant house and took him into custody. RP 41, 43. Officer Perez testified that he was looking for the Appellant because he had an active warrant for his arrest and CCO Montelongo, who was Castaneda's actual CCO, was attempting to locate Castaneda. RP 39-40

There were several other officers working with officer Perez at the time of the Appellant's apprehension. Once Castaneda was removed from the house CCO Perez contacted the Union Gap Police Department to have that department determine if there was an issue with criminal trespass due to the fact that CCO Perez knew that the house was abandon and that it was not Castaneda's residence. CCO Perez testified that it was his understanding that Castaneda had an active no contact order that was in place regarding a victim who lived in a nearby apartment. RP 40-42.

Officer Chase Kellogg of the Union Gap Police Department testified regarding the documentation that was submitted to the jury regarding the prior offenses that resulted in the Castaneda being charged with a felony violation of this statute. The officer confirmed that there had been a case from Union Gap, No. 14U-0003175 which was a court order violation involving the defendant and a protected party, Nichole Martinez Montelongo. This officer had personally contacted Ms.

Montelongo and confirmed that the person depicted in Exhibit 4 was the person whom he contacted, Ms. Montelongo. RP 45. Officer Kellogg was shown State's exhibit 2 from which he identified that the criminal violation in the findings was "No contact order violation." This document was the judgment and sentence from the violation that the officer had investigated. The date of the offense on this judgment and sentence was July 26, 2014. RP 46-7. The defendant did not object to the admission of any exhibit. RP 40, 46, 47, 56, 57

The next witness for the State was Mr. Ron Duffield who was the apartment owner/manager for the apartment unit that was jointly rented by Castaneda and the victim/protected person, Ms. Montelongo. This was the residence listed on the no contact orders with an address Unit 4 at 2107 S. Seventh Ave. Union Gap, Washington. RP 48

Mr. Duffield testified the victim and Castaneda had rented the unit together, that both had signed the rental agreement which had been executed approximately three years before the date of the trial. RP 49, 50. Mr. Duffield identified the picture that had been admitted and confirmed to be the victim as being the person who had rented that unit with Castaneda. He also identified the defendant in the courtroom and confirmed the person in the room was the defendant and was the person who had rented the unit. RP 49.

Mr. Duffield had been in a location on the date of the defendant's arrest by CCO Perez and the Union Gap Police Department to actually observe that arrest. Mr. Duffield also identified the location of the arrest and the location of the unit that was occupied by the victim. RP 50-1. This witness testified that on the day of the arrest he had actually spoken to the Ms. Montelongo and that she was in fact living in that unit. He also testified that he had seen the defendant in the area a week earlier and that Castaneda had lived in Unit 4 most of the time the victim was living there. RP 50, 51.

The final witness for the State was Officer Eric Turley of the Union Gap Police Department. This was the officer who actually arrested Castaneda and who also took a statement from him after the arrest. He identified the defendant as Castaneda, the person whom he had arrested on the date of this offense. RP 53-4. Officer Turley testified that he had arrested the Appellant in the driveway of 2101 S. Seventh Ave, initially making contact with Castaneda while he was in the back of the patrol vehicle belonging to DOC. RP 54.

This officer conducted an investigation and determined that there was a valid no contact order in place between Castaneda and Montelongo and the officer recognized Nicole Montelongo's name and knew that she lived in apartment No. 4 at 2104 Cornell. Officer Turley read the

defendant his rights per Miranda¹ Castaneda gave the officer a statement indicating that he knew there was a valid order in effect but Castaneda claimed that he did not know that Nicole lived at that address. RP 55.

Officer Turley testified regarding Exhibit 1 which was a document containing the case number 15U-001328 which indicted there was a “call of a domestic at 2104 Cornell, No. 4.” RP 55-6. The protected person was Nichole Amber Martinez. Officer Turley was the actual officer who had responded to this call on March 30, 2015 RP 56, 57. The suspect in that case was the defendant/appellant Eliodoro Salseda Castaneda. Officer contacted the Appellant regarding this incident and identified the defendant/appellant in court as being the same person contacted regarding this previous assault. RP 57.

Officer Turley conducted further investigation to determine the distance between the location of Castaneda using a standard device used by this officer. He testified that the distance from the apartment where the victim lived and the door of the vacant house where Castaneda fled was 98.1 feet. RP 57-8.

Castaneda took the stand and testified. He testified; that Ms. Montelongo was the mother of his children, that he had been in the area,

¹ Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

that he knew there was a valid no contact order in place at the time he was found at 2101 S. Seventh Ave, that he knew that location was vacant. He also testified that he was just in the area, apparently, to meet some friend or friends and/or a friend lived in the area. RP 65-66. He stated that he did not know if Montelongo was still living in Unit 4. He stated that he ran when he saw DOC. RP 67. He also acknowledged that he had prior violations of no contact orders. RP 65-66.

The defendant stated at sentencing “Just – Yeah. –just – I apologize to the court and everybody right here. I apologize for wasting everybody’s time, for taking it to trial. I should have just taken the plea bargain. I just (inaudible) was – it was – It’s my first time, you know, facing prison time – a lot of prison time, and I wasn’t willing to take the 48 months. I know I was going to lose, but I just wasn’t going to take the 48 months. I think that was – good offer, you know...” (RP Sentencing pg. 18)

III. ARGUMENT

A. There was sufficient evidence to support the elements of violation of a no contact order.

Castaneda claims that there was insufficient evidence to support the elements of violation of a no contact order. In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light

most favorable to the State to determine whether 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, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The verdict will be upheld unless no reasonable jury could have found each element proved beyond a reasonable doubt. State v. Gentry, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 599, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. Id. Evidentiary inferences favoring the defendant are not considered in a sufficiency of the evidence analysis. State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

Circumstantial evidence may be used to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). This is essentially the verbiage from instruction 3 which was given to the jury. CP 30

Two instructions given in this case set out the law for the jury regarding the specific evidence the State had to present in order to prove beyond a reasonable doubt that a crime had occurred.

Instruction 6, (CP 32) stated “A person commits the crime of violation of a court order when he knows of the existence of a no-contact order and knowingly violates a provision of the order, and the person has twice been previously convicted for violating the provisions of a court order.” The elements from the to convict instruction that were in dispute were:

- (1) That on or about March 7, 2016, there existed a no-contact order applicable to the 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; CP 33.

The instruction which is the heart of the challenge in this appeal is number 8. (CP 34). This instruction is as follows:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that

a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

The first allegation raised concerns jury instruction 8 which is a standard WPIC. The allegation is that the State failed to prove what is set forth in the instruction. The instruction is based largely on the statutory definition of “knowledge.” RCW 9A.08.010(1)(b); RCW 9A.08.010(2). The instruction varies from the statutory language to a certain extent as do most jury instructions. The instruction includes bracketed language stating that the person need not have known that the fact at issue was unlawful or an element of a crime. This addresses the commonly stated rule that “ignorance of the law is no excuse.” See State v. Spence, 81 Wn.2d 788, 792, 506 P.2d 293 (1973), reversed on other grounds at 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974), “...all sane persons are presumed to know the law and are in law held responsible for their free and voluntary acts and deeds.” A defendant must have knowledge of the facts, circumstances, or results that constitute a crime, rather than knowledge that the facts, circumstances, and results are a crime. See State v. Johnson, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992). Shipp, however, does permit a jury to find actual knowledge from a subjective belief based

upon circumstantial evidence. It is the defendant's subjective belief that is important for culpability, not the objective state of facts. The jury is permitted to find actual subjective knowledge if there is sufficient information which would lead a reasonable person to believe that a fact exists. Therefore, a mistaken reasonable, subjective belief may constitute "knowledge" without violating Shipp.

The instruction's second paragraph expressly states that jurors may, but are not required to, infer knowledge from circumstantial evidence. See State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980), which held that the statutory definition of knowledge violated due process because jurors could interpret it as creating an impermissible mandatory presumption.

Knowledge may be based on circumstantial evidence. In State v. Johnson, 119 Wn.2d 167, 829 P.2d 1082 (1992), the Supreme Court held that an actual act of prostitution is not required to establish the offense of permitting prostitution if the defendant has subjective knowledge that the premises over which the defendant has possession or control are being used for prostitution purposes.

Instructing a jury that it may find knowledge through such a “permissive inference” was approved in State v. Bryant, 89 Wn.App. 857, 950 P.2d 1004 (1998).

The testimony was short and the facts simple. The Defendant was being looked for by DOC and when observed he fled. His own testimony when asked “You went to hide from DOC?” was “yes.” RP 67. While not stressed by the State’s attorney the law is clear “[e]vidence of flight is generally admissible as tending to show guilt, but the inference of flight must be "substantial and real" not "speculative, conjectural, or fanciful." State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). The evidence must be sufficient so as to create a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. Bruton, 66 Wn.2d at 112-13.” State v. Price, 126 Wn.App. 617, 645, 109 P.3d 27 (2005)

The State presented evidence which proved beyond a reasonable doubt each and every element of the crime charged. That evidence included: entry of exhibits that contained the prior no contact orders, the identity of the victim and the defendant, that on the date of Castaneda’s arrest Ms. Montelongo was still living in Unit 4, that the defendant was on the rental agreement at Ms. Montelongo’s apartment, the apartment owner/manager, who knew Castaneda personally, testified that he had rented the unit to both parties and that the defendant had been there recently. And on the day of his arrest it was determined that the vacant

house that he fled into was only 98 feet from Unit 4. And lastly, the defendant's testimony was not believable given the evidence presented by the State.

The essential elements of violation of a no contact order was supported by substantial evidence. Any rational trier of fact could have found all the elements proven beyond a reasonable doubt.

B. Prosecutorial error.

Castaneda alleges that there were two instances of prosecutorial error in this case. First, he claims the State commented on his right to remain silent and secondly the State shifted the burden of proof.

The first hurdle that Appellant must overcome, an insurmountable hurdle in this case, is that he did not object to these alleged errors in trial. He now raises them for the first time on appeal.

Our state Supreme court stated in State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014) "Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." State v. Brett, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995) (citing State v. Hughes, 106 Wn.2d 176, 195, 721 P.2d 902 (1986)). The defendant bears the burden of showing that the comments were improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). In the past, our court has also stated that if the defendant fails to object or request a curative

instruction at trial, the issue of misconduct is waived unless the conduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Castaneda claims the statements made by the State in closing are “commenting on his right to silence.” This might be true if he did not take the stand but Castaneda did take the stand and testified in his defense thereby subjecting himself to cross-examination and critical examination of that testimony by the State in closing. The State is allowed great latitude when addressing the evidence or lack thereof.

The defendant bears the burden of proving that the prosecutor's alleged misconduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). The burden to establish prejudice requires the defendant to prove that there is a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Thorgerson, 172 Wn.2d 438, 442-43, 258 P.3d 43(2011). The failure to object to an improper remark constitutes a waiver of error unless it is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Id at 443.

Castaneda did not object to any of these statements. This court should therefore deem his arguments on this issue waived unless, the remarks were flagrant, ill-intentioned, and unable to be cured by a supplemental instruction. Id.

The defendant took the stand, he did not stand on his right to remain silent thus the State had the right, the obligation to challenge his statements and that is what the deputy prosecuting attorney (DPA) did here. The DPA did not state that Castaneda had to prove that the mother of his children was not living there; he stated, in closing argument, that she had not told him she had moved, a comment on the testimony of the defendant that he did not “know that Nichole Martinez lived nearby.” A statement that was a complete contradiction of the testimony of the landlord, a person whom Castaneda claimed was not telling the truth for some unknown reason all the while testifying that the manager was a good friend who had helped him in the past. RP 67-9

Appellant now claims error regarding closing argument and that the defendant did not state “she had told him she had moved out...” The defendant admitted on cross-examination that he knew that Ms. Montenegro no longer lived in that apartment. Clearly, he knew that she had moved, the DPA was just pointing out that contrary to his testimony some method had been employed to allow this defendant knowledge of

Montelongo's location. He testified that he did not know that she was still living in Unit 4 and yet he knew that this person whom he was legally prohibited from contacting had moved from this location at the time of trial. RP 68.

The jurors were given the court's instructions, the law of the case, and the very first instruction, instruction 1, states:

The lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions.
(RP 76, CP 27)

This court reviews a prosecutor's allegedly improper remarks in the context of the total argument. It is not misconduct, however, for a prosecutor to argue that the evidence does not support the defense theory. State v. Russell. 125 Wn.2d 24,85-86, 87, 882 P.2d 747(1994).

A prosecutor has "wide latitude" to comment on and explain its evidence in closing arguments. State v. Thorgerson. 172 Wn.2d 438, 453, 258 P.3d 43, (2011)

The DPA had stated earlier in this closing:

What does make a lot of sense is that he knew good and well that his girlfriend that he had a child in common with was living in the apartment that he himself had moved into with

her just about three years ago and lived there all the time. He was there all the time according to the landlord, Mr. Ron Duffield...I'm going to argue the defendant's testimony on this point was not credible in this case.... They lived there together in the past. He testified, Mr. Ron Duffield, that he was over there. He was living there all the time in this apartment.

Now he's saying, oh, I didn't know she was there that day. I was just down the street. I just happened to be passing by. It's pure coincidence. I just happened to be passing by and I seen the DOC officers so I ran in there to hide.

How much sense does that make? We know Mr. Duffield told us that she was there that day. She was there the day that happened. The defendant testified he's always trying to see his kids despite the no contact order. The only thing that makes sense is that he knows good and well that she still living there.

The phrase that has been challenged was taken out of context. The entire statement is as follows:

Did he tell you about something that happened where he all the sudden had some reason to believe that she'd moved after living there for three years? No. He never testified that she'd told him that she had moved.

These statements are not prosecutorial error when viewed in totality and in conjunction with the State's theory; that this defendant was there to see or make contact with the victim but that was interrupted by the visible presence of the DOC officers from which the defendant fled. The State's theory and testimony was that this man was literally on the rental agreement and had lived for years in Unit 4 with his girlfriend and his children, that he had been there in the recent past, and therefore his story,

his tale, was not believable that he suddenly did not know that Ms. Montelongo was still living in Unit 4.

Nothing in the two alleged comments rises to the level of “so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice.”

IV. CONCLUSION

For the foregoing reasons, the State asks that the court affirm the conviction. The evidence was sufficient for a rational trier of fact to find each element of the charge of violation of no contact order as charged.

The statements made by the State in closing were not, as Castaneda terms them, prosecutorial misconduct.

Respectfully submitted this 2nd day of October, 2017,

s/ David B. Trefry
DAVID B. TREFRY, WSBA #16050
Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane WA 99220
Telephone: (509) 534-3505
David.Trefry@co.wa.yakima.us

DECLARATION OF SERVICE

I, David B. Trefry, state that on October 2, 2017, I emailed a copy, by agreement of the parties, of the Respondent's Brief to: Lise Ellner at liseellnerlaw@comcast.net

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of October, 2017 at Spokane, Washington.

s/ David B. Trefry
DAVID B. TREFRY, WSBA #16050
Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane WA 99220
Telephone: (509) 534-3505
David.Trefry@co.wa.yakima.us

YAKIMA COUNTY PROSECUTORS OFFICE

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