

63892-1

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COA No. 63892-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TOMMY KIRK

Appellant.

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COURT OF APPEALS
DIVISION ONE

ON APPEAL FROM THE KING COUNTY SUPERIOR COURT
IN THE STATE OF WASHINGTON

The Honorable Deborah Fleck

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. There was no probable cause to arrest the defendant for violating a court order.

2. The defendant's arrest for a misdemeanor not committed in the officer's presence violated RCW 10.31.100.

3. The defendant's post-arrest statement to police was inadmissible as fruit of the unlawful arrest.

4. The State failed to establish the *corpus delicti* of the crime charged.

5. The evidence was insufficient to establish the offense of violation of a court order, on either of the two counts charged.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was probable cause to arrest the defendant for violating a court order where he merely admitted to a police officer that he was present in the protected person's home with their children, and where the protected person was not present.

2. Whether the defendant's arrest for a misdemeanor not committed in the officer's presence violated RCW 10.31.100, where no exception applies to allow the arrest.

3. Whether the defendant's post-arrest statement to police was inadmissible as fruit of the unlawful arrest, in the absence of intervening events or any other facts showing attenuation of the taint of the illegal arrest.

4. Whether the State failed to establish the *corpus delicti* of the crime charged, rendering his statement to police inadmissible and removing it, for this additional reason, as evidence to be considered in the appellant's sufficiency challenge.

5. Whether the evidence was insufficient to establish the offense of violation of a court order, as charged in two counts.

C. STATEMENT OF THE CASE

On March 26, 2004, an order "Prohibiting Contact" was issued in State of Washington v. Tommy Kirk, King County Superior Court No. 03-1-02592-1 KNT, pursuant to RCW 10.99.050. CP 15. The order provided in pertinent part:

[A]s a condition of sentence in this matter, that the defendant shall have no contact, directly or indirectly, in person, in writing or by telephone, personally or through any other person, with*
Machelle D. Mitchell (4/20/73) until March 26, 2009.
And shall not knowingly enter, remain or come within 500 ft. (distance) or [sic] the protected person's residence, school, workplace until 3/26, 2004.

CP 15. The handwritten asterisk referred to a marginal notation that read as follows:

*Third party contact permitted only for purpose of arranging child visitation.

CP 15. Subsequently, according to the trial court's findings of fact following a combined CrR 3.5 and CrR 3.6 suppression hearing, Federal Way Police Officer Scott Parker was informed by the police dispatcher that the defendant was living with the protected party.

CP 1-2. The trial court's findings read as follows:

A. After receiving an anonymous telephone call indicating that the Defendant was living with the protected party, Machele Mitchell, in violation of a domestic violence no contact order, Federal Way police Officer Scott Parker went to Mitchell's home to do a welfare check.

B. On the way to the address, Officer Parker verified the physical description of the defendant and Ms. Mitchell and verified that the no contact order prohibiting the defendant from contacting Mitchell was valid.

C. Officer Parker arrived at the address and when he knocked on the door the defendant answered. The defendant closed the door behind him and stepped out onto the porch standing approximately five feet from Officer Parker to speak with him. The defendant was polite and conversational and Officer Parker asked him if Machele Mitchell was home. The defendant said, "this is Machele Mitchell's house, but she's at work." "I don't live here, I'm just here to

watch the kids."

D. Officer Parker then requested and the defendant gave his name and date of birth. Officer Parker inferred from the fact that the children could not have been left alone and the defendant knew of Ms. Mitchell's whereabouts that the defendant had physical contact with Ms. Mitchell and he was placed under arrest.

E. Officer Olsen read the defendant Miranda warnings from his department issued Miranda card while Officer Parker listened. The defendant indicated that he understood his rights and wanted to discuss the matter further. The defendant said to Officers Olsen and Parker, "This is where I live." "I thought the order had been lifted."

CP 1-2. Based on these findings, the trial court denied the defense CrR 3.6 motion arguing that the arrest of Mr. Kirk was absent probable cause, and the CrR 3.5 motion arguing that Mr. Kirk was subjected to custodial interrogation prior to the given Miranda warnings. 6/2/09RP at 49-51.

Officer Parker's testimony was in fact somewhat more detailed than described in the findings. Officer Parker testified that he was dispatched to Ms. Mitchell's address for a "welfare check," which address was given as 126 S.W. 305th St., based on what he was told was an anonymous call reporting that there was a no-contact order protecting her. 6/2/09RP at 5-8. The information that

Officer Parker obtained regarding the no-contact order came from a “multidisplay terminal” or “MDT” in his patrol car which “provided information showing no-contact order where Michelle Mitchell was the petitioner and Tommy Kirk was the respondent.” 6/2/09RP at 10-11, 15.¹

Mr. Kirk told the officer in response to multiple questions that Ms. Mitchell was not at home. 6/2/09RP at 9, 11, 15. He also told the officer that this was not his house. 6/2/09RP at 10.

Officer Parker specifically testified that “because he admitted to watching their children, I believe he had contact with Michelle Mitchell at that time, that’s when I placed him under arrest for violation of a non-contact order.” 6/2/09RP at 11; see also 6/2/09RP at 13 (repeating same testimony). He stated that because Mr. Kirk was watching the children, and because “they were young enough,” he believed Mr. Kirk must have had contact with Ms. Mitchell, 6/2/09RP at 16, appearing to reason that such contact would be required in order for the care of the children to be transferred from Mitchell to Kirk. There was, however, no

¹The police report was admitted as State’s Pre-trial exhibit 1 and later renamed trial exhibit 8. Supp. CP ____, Sub # 67 (Exhibit list, State’s exhibit 8).

information that the officer had at that time regarding the age of the children in question. Later the officer stated that Mr. Kirk was arrested because "he was watching the children, he was not to have contact with her." 6/2/09RP at 17.

Officer Parker did not know that there was an exception in the no-contact order for care of the children. 6/2/09RP at 16. He testified that the "order is not that specific" and clarified that the information he possessed regarding the order was based on his MDT display, which does not provide a copy of the actual order, but merely gives a "brief description" of the order and the named persons. 6/2/09RP at 20-21.

Officer Parker was asked if he ever verified whether Mr. Kirk was allowed to have contact with the children, to which he replied that this was a "moot issue," because the no-contact order was "between him and her." 6/2/09RP at 18. He admitted again at this juncture that Mr. Kirk had told him multiple times that Ms. Mitchell was not present at the address. 6/2/09RP at 19, 20

Regarding the content of the no-contact order as reported to him on his terminal, the officer testified that he

believed the order said he wasn't supposed to be –

had to remain so many feet from her or her residence on [sic] workplace, I don't remember the exact words specifically. He wasn't to be at her residence, workplace or so many feet of her, I believe.

6/2/09RP at 12. The officer clarified that the "MDT message" was the source of the information that the address responded to was Ms. Mitchell's residence. 6/2/09RP at 15. He then retracted this statement, testifying that he "couldn't verify if it was her house." 6/2/09RP at 16.

Officer Parker placed Mr. Kirk in handcuffs and "put him in the back of the police vehicle." 6/2/09RP at 13. After Mr. Kirk was Mirandized, he "admitted to living at the residence with [Ms. Mitchell]." 6/2/09RP at 18.

Trial followed, on a two-count information alleging that the defendant violated the court order on the date of his arrest, and also sometime during the previous month based on his sister Emma Vaughn's claim that she telephoned the protected person's home and spoke with the defendant on the telephone. CP 34; Supp. CP ____, Sub # 55 (State's Trial Memorandum). The defendant's post-Miranda statement after his arrest that he had been living in Ms. Mitchell's home with her was admitted in

accordance with the court's earlier suppression rulings. 6/3/09RP at 1, 86-90.

The jury convicted Mr. Kirk as charged, although submitting an inquiry during deliberations indicating that it could not come to a verdict on one of the counts. CP 89, 91, 92. Mr. Kirk was given an exceptional sentence below the standard range based on the complainant being a willing participant in the offenses, and based on the defendant's failed defense at trial. 6/26/09RP at 28; CP 113-22.

Mr. Kirk appeals. CP 125.

D. ARGUMENT

1. THE DEFENDANT'S ARREST WAS ILLEGAL PURSUANT TO STATUTE AND/OR WAS UNSUPPORTED BY PROBABLE CAUSE, AND THE DEFENDANT'S STATEMENT, ALTHOUGH MIRANDIZED, MUST BE EXCLUDED AS FRUIT OF THE ILLEGAL ARREST.

a. **Probable cause is required for an arrest, in addition to statutory authorization under RCW 10.31.100.** The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amends 4, 14. Article 1, § 7

of the Washington Constitution states that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. 1, § 7. Under both constitutions, warrantless arrests are presumptively unreasonable unless they fall into one or more of the narrowly drawn exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000).

One exception allows a police officer to make a warrantless felony arrest for criminal activity occurring in a public place, provided the arrest is supported by probable cause. State v. Solberg, 122 Wn.2d 688, 696, 861 P.2d 460 (1993).

A second exception to the constitutional prohibition on warrantless arrests allows an officer to effect such an arrest for a misdemeanor committed in the officer's presence, again of course provided the arrest is supported by probable cause. State v. Walker, 157 Wn.2d 307, 319, 138 P.3d 113 (2006) (holding constitutional RCW 10.31.100, which provides that “[a] police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer”).

However, first, RCW 26.50.110, "Violation of order--Penalties," states that a violation of any of the listed provisions of an order of protection or no-contact "is a gross misdemeanor," except as provided in subsections (4) and (5) of the statute which elevate the offense to a felony if the violation was an assault or if the person has two previous violations of court orders. RCW 26.50.110(1)(a), (4), (5). In order for the offense to be a felony, these additional facts must exist; where they do not, the offense is a misdemeanor. RCW 26.50.110(1); State v. Van Tuyl, 132 Wn. App. 750, 758, 133 P.3d 955 (2006).

Here, it is undisputed that Officer Parker had no information or basis to believe that Mr. Kirk had violated an order by assaultive conduct, or had two prior convictions. RCW 10.31.100(2)(a) does mandate that the police must arrest any person suspected of violating a Washington domestic violence or no-contact order, but only if they have probable cause to believe that the restrained person has threatened or performed acts of violence, or has entered a prohibited area. State v. Wofford, 148 Wn. App. 870, 201 P.3d 389 (2009); State v. Allen, 150 Wn. App. 300, 207 P.3d 483 (2009).

It is clear in this case that Officer Parker was arresting Mr. Kirk based on his belief that the defendant had violated a no-contact order by being in personal contact sometime in the past with Ms. Mitchell. These circumstances do not satisfy any exception in RCW 10.31.100 to the rule that a police officer may not arrest a person for a misdemeanor not committed in his or her presence. State v. Solberg, 122 Wn.2d at 696.

The arrest was illegal on this initial basis. An arrest that is impermissible as violative of the statute requires suppression of evidence gained as a product of the arrest. See, e.g., State v. Walker, 157 Wn.2d 307, 138 P.3d 113 (2006); see Part D.1.d, infra.

b. The police officer also did not have facts that allowed an inference that the defendant had violated a court order.²

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a

²This Court reviews findings of fact after a suppression hearing to determine whether they are supported by substantial evidence in the record. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The trial court's conclusions of law are reviewed de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

person of reasonable caution in a belief that an offense has been committed. State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). While probable cause requires more than a “bare suspicion of criminal activity,” it does not require facts that would establish guilt beyond a reasonable doubt. State v. Gillenwater, 96 Wn. App. 667, 670, 980 P.2d 318 (1999) (quoting Terrovona, 105 Wn.2d at 643).

However, “probable cause” requires more than an inchoate “hunch.” A “hunch is not enough for probable cause.” State v. Donohoe, 39 Wn. App. 778, 785, 695 P.2d 150 (1985) (citing State v. Thompson, 93 Wn.2d 838, 842, 613 P.2d 525 (1980)). Here, the officer did not have probable cause to believe that the defendant had been in personal contact with Ms. Mitchell in violation of the order. The assumption that the defendant must have had contact with Mitchell was based on a series of unreasonable inferences, including the inference that the children were a certain young age, where the officer had no information about the age of the children. The officer assumed that Mr. Kirk’s act of caring for the children would have required him to have had personal contact with Ms. Mitchell. This is not a reasonable inference. Probable cause

cannot be based on unreasonable inferences from facts.

The absence of specific facts to believe that Mr. Kirk and Ms. Mitchell had been in personal contact in violation of the order means that a reviewing court could rely only on "blanket inferences" to find probable cause to support the officer's arrest of the defendant in this case, as prohibited by State v. Thein, 138 Wn.2d 133, 147, 977 P.2d 582 (1999). The Thein case, although arising in a slightly different context, is instructive. The Court there stated that where warrants must be supported by specific facts linking the criminal activity to the place searched, "broad generalizations" are not enough to make the leap of faith to "probable cause" to believe that evidence of the crime is located at the place in question. Thein, 138 Wn.2d at 148-49. In Thein, the Court held that an affidavit fails to establish probable cause to search a known criminal's residence if it lacks a sufficient factual basis to conclude that evidence of illegal activity will likely be found at that residence. Thein, 138 Wn.2d at 147.

The affidavit in that case contained evidence sufficient to permit an inference that the defendant was involved in drug dealing, but asserted that on those facts alone there was probable

cause to search his residence because “it is generally a common practice for drug traffickers to store at least a portion of their drug inventory and drug related paraphernalia in their common residences.” Thein, 138 Wn.2d at 138-39. The Court held that an officer's “general conclusions” are not enough to establish the required nexus. Thein, 138 Wn.2d at 145. Here, Officer Parker's implicit assumption that Mr. Kirk must have violated the order is analogous to the generalization rejected in Thein. Probable cause in this case was supported by nothing other than unreasonable inferences from the facts. As a result, Mr. Kirk's arrest was illegal, and his post-arrest statement to the officer should have been suppressed. See Part D.1.d, infra.

c. The defendant's statement, although given following *Miranda*, was the fruit of the illegal arrest and should have been suppressed. In general, evidence uncovered following an unconstitutional search or seizure must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); see State v. Thomas, 91 Wn. App. 195, 201, 955 P.2d 420 (“Evidence that is the product of an unlawful search or seizure is not admissible”) (citing Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081

(1961)), review denied, 136 Wn.2d 1030 (1998).

Evidence, in order to be subject to suppression, must of course involve an unlawful search that “is at least the ‘but for’ cause of the discovery of the evidence.” Thomas, 91 Wn. App. at 201 (citing Segura v. United States, 468 U.S. 796, 815, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984)). But furthermore, not all evidence is “ ‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police.” Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The federal and the Washington courts have said that “derivative” evidence may be admissible if it was obtained by means sufficiently distinguishable to be purged of the primary taint of the illegal police conduct. Wong Sun, 371 U.S. at 487-88; State v. Tan Le, 103 Wn. App. 354, 361-62, 12 P.3d 653 (2000) (citing the “attenuation” analysis of Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)).

The exclusionary rule requires courts to suppress evidence obtained through violation of a defendant's constitutional rights. The purpose of the rule is to deter police from exploiting their illegal conduct and to protect individual rights. Under the “fruit of the

poisonous tree” doctrine, the exclusionary rule applies to evidence derived directly and indirectly from the illegal police conduct. Derivative evidence will be excluded unless it was not obtained by exploitation of the initial illegality or by means sufficiently distinguishable to be purged of the primary taint.

State v. Tan Le, 103 Wn. App. at 360-61. It has also been stated that the question is whether, granting establishment of the primary illegality, the evidence to which instant objection is made was obtained by exploitation of the primary illegality or instead by means sufficiently distinguishable to be purged of the primary taint. John M. Maguire, Evidence of Guilt, 221 (1959); see State v. McReynolds, 104 Wn. App. 560, 571, 17 P.3d 608 (2000).

Courts must weigh four factors to determine whether circumstances have purged the taint of an illegal arrest, as Mr. Kirk alleges occurred here: (1) the temporal proximity of the arrest and confession; (2) the presence of significant intervening circumstances between the arrest and the confession; (3) the purpose and flagrancy of the official misconduct; and (4) the giving of Miranda warnings. Brown, 422 U.S. at 603-04; State v. Armenta, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997).

However, the giving of Miranda warnings alone is not

dispositive to purge the taint. State v. Avila-Avina, 99 Wn. App. 9, 17, 991 P.2d 720 (2000). The Brown Court held that Miranda warnings, by themselves, could not attenuate the taint of an illegal arrest. Otherwise, the Court reasoned, the State could avoid the exclusionary effect of a violation of the Fourth Amendment by simply giving the defendant his Miranda rights. The rationale of this conclusion was expressed as follows

If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, [a]rrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

Brown, 422 U.S. at 596-99 (citing Davis v. Mississippi, 394 U.S. 721, 726-727, 89 S.Ct. 1394, 1397, 22 L.Ed.2d 676 (1969)); Mapp v. Ohio, 367 U.S. at 648.

In Wong Sun, the Supreme Court held that one defendant's statement as well as contraband taken from another should have been suppressed, because they were the fruits of an illegal arrest

of a first defendant. Brown, 422 U.S. at 598 (discussing Wong Sun, 371 U.S. at 484-88). This was so even though the contraband had been taken from a different scene later in the day. Wong Sun, 371 U.S. at 474-75. The Court admitted only the statement of a third individual, the now famous Wong Sun himself, because he returned to the police station several days after the arrest and made a statement of his own free will. Wong Sun, 371 U.S. at 491. Thus, the Court stated, "the connection between the arrest and the statement had become so attenuated as to dissipate the taint." Wong Sun, at 491; see also United States v. Owen, 492 F.2d 1100, 1107 (5th Cir.1974) (defendant released on bail, returned voluntarily 4 days later to give statement); Commonwealth ex rel. Craig v. Maroney, 348 F.2d 22, 29 (3d Cir.1965) (5 days elapsed between arrest and confession and the defendant spoke with his attorney before the confession).

In Brown, the Supreme Court suppressed two statements the defendant made following an illegal arrest, even though one was made almost two hours later, the other was made the next day, and both were preceded by Miranda warnings. Brown, 422 U.S. at 593-95, 604-05; see Dunaway v. New York, 442 U.S. 200,

216-17, 99 S.Ct. 2248, 2258, 60 L.Ed.2d 824 (1979) (suppression required because of absence of attenuation where the length of time between the illegal seizure and the statement was short and there were no significant intervening circumstances).

The present case is most similar to Brown, but all the more so - the case for lack of attenuation of the taint is stronger in the present case. Mr. Kirk's statements were given in the immediate aftermath of the shock of being taken into custody at the doorstep, mere minutes, at most, after he was formally arrested – a great deal less time than the periods of time deemed 'too short' for attenuation in Brown.

In other like cases, suppression has been clearly required under similar facts, as there is no attenuation of the taint. The goal of the exclusionary rule in deterring illegal police conduct in violation of the privacy rights of citizens is not furthered where “the causation factor of the illegal detention . . . has been so attenuated, as not to have been an operative factor” in securing the evidence. State v. Vangen, 72 Wn.2d 548, 555, 433 P.2d 691 (1967) (quoting State v. Traub, 151 Conn. 246, 250, 196 A.2d 755 (1963)).

However, there is no attenuation of the taint where the critical

causal chain is short and unbroken. Here, as in the case of State v. Byers, 88 Wn.2d 1, 559 P.2d 1334 (1977), there was no significant intervening event or considerable lapse of time between the arrest, and Mr. Kirk's statement that he had been living at that address, and thus “[t]here [is] no basis for segregating the two, no justification for upholding the one while denouncing the other.” Byers, 88 Wn.2d at 8. In both Byers, and Brown, supra, the defendants' convictions were reversed on the ground that their confessions were tainted, although made following Miranda warnings which advised them they had the right to refuse to talk to the police. The respective reviewing courts relied on the facts that the defendants confessed within 2 hours of their illegal arrests and that no significant events intervened between the arrests and the confessions. Byers, 88 Wn.2d at 9; Brown, 422 U.S. at 598.

In short, here, the fact that Miranda warnings were administered prior to Mr. Kirk's statement did not immunize the statement from the taint of the Fourth Amendment violation; the warning by the officer primarily served to protect only against a Fifth Amendment violation. See Brown, at 598. Courts must find more than mere voluntariness to rid a confession of the taint of

illegality. In this case, the defendant's statement occurred within a few minutes of his arrest; the statement was a direct and immediate consequence of the constitutional violation.

Indeed, the facts are clear and dispositive enough that if Mr. Kirk's arrest was illegal, his statements must be suppressed. Where it is clear, as here, that certain evidence is fruit of the unlawful arrest because of the complete absence of attenuation, the appellate court may decide the issue itself; only if the record does not reveal whether the "fruit of the poisonous tree" doctrine applies, should the matter be returned to the trial court for resolution of the factual questions necessary for suppression. See State v. Warner, 125 Wn.2d 876, 888-89, 889 P.2d 479 (1995).

d. The proper exclusion of the defendant's statement requires reversal of the convictions. The exclusionary rule requires courts to suppress evidence obtained through violation of a defendant's constitutional rights, and the failure to suppress evidence obtained in violation of a defendant's Fourth Amendment rights is constitutional error and is presumed to be prejudicial. Tan Le, 103 Wn. App. at 367. The State bears the burden of demonstrating the error is harmless. Id. Constitutional error is

harmless only if the State shows beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Here, the only possible evidence that the defendant violated the court order on the date of his arrest was his statement that he had been living at the address. See Part D.3 (argument that evidence was insufficient).

2. THE DEFENDANT'S POLICE STATEMENT IS ALSO INADMISSIBLE BECAUSE THE STATE FAILED TO ESTABLISH THE CORPUS DELICTI OF THE OFFENSE OF VIOLATION OF A COURT ORDER.

The State failed to establish the *corpus delicti* of the crime of violation of a no-contact order, requiring that the defendant's statement after *Miranda* was inadmissible and rendering the evidence insufficient. The State failed to establish the *corpus delicti* of the crime of violation of a no-contact order and therefore the defendant's admission to living at Ms. Mitchell's address cannot be considered for purposes of the appellant's challenge to the sufficiency of the evidence. Assuming arguendo that the defendant's statement to the police that he had been living at the

address was an implicative confession, it was inadmissible because the State failed to prove the “body” of the charged offense.

The *corpus delicti* is proof that someone committed a crime. State v. Ray, 130 Wn.2d 673, 679, 926 P.2d 904 (1996); 2 W. La Fave & A. Scott, Criminal Law 18 (2d ed.1986). If there is sufficient evidence to establish the *corpus delicti* with proof independent of the confession, the court may consider the confession as well. City of Bremerton v. Corbett, 106 Wn.2d 569, 574-75, 723 P.2d 1135 (1986) (quoting State v. Meyer, 37 Wn.2d 759, 763-64, 226 P.2d 204 (1951)). The independent evidence is sufficient if it *prima facie* establishes the corpus delicti; it need not be evidence beyond a reasonable doubt or even a preponderance of the proof. Corbett, 106 Wn.2d at 574-75. However, prima facie in this context means evidence of sufficient circumstances to support a logical and reasonable inference of criminal activity. State v. Smith, 115 Wn.2d 775, 783, 801 P.2d 975 (1990) (citing Corbett, 106 Wn.2d at 579).

The Court of Appeals reversed a conviction for violation of a court order under the *corpus* and sufficiency doctrines in State v.

Powers, 124 Wn. App. 92, 99 P.3d 1262 (2004). In Powers, the defendant was convicted for violating a domestic violence protection order, and argued successfully on appeal that the tape recording of the victim's 911 call was testimonial evidence which was prohibited by Sixth Amendment's confrontation clause, as the victim did not testify at trial. Powers, 124 Wn. App. at 101.

Furthermore, absent such evidence, the prosecution failed to establish the *corpus delicti* of the offense, and thus the defendant's statements to police were precluded by the *corpus delicti* rule. As a consequence, the conviction, absent the defendant's statement, was unsupported by sufficient evidence. Powers, at 102-03. The facts of the case were as follows:

T.P. called 911 to report that Powers had been in her home in violation of a no-contact order against him. Vancouver Police Officer Brian Schaffer located Powers in a parking lot two-and-one-half to three blocks away. He handcuffed Powers, gave him Miranda warnings, which Powers waived and discussed the allegations. He testified that Powers admitted visiting T.P., that he went there to talk about their relationship, that she did not know he was coming over, that he used to own the house and thought a no-contact order was unfair, that the judge should have ordered counseling instead of a no-contact order, and that some day he and T.P. would get married.

(Emphasis added.) Powers, at 94. Mr. Powers argued that, absent his admission and T.P.'s inadmissible statements, the State failed to prove that he had any contact with T.P. Powers, at 103. The Court of Appeals agreed. Powers, at 103 (citing State v. Nieto, 119 Wn. App. 157, 165, 79 P.3d 473 (2003) (absent other evidence establishing the body of the crime, defendant's confession was inadmissible and thus insufficient evidence supported the conviction)).

In assessing the sufficiency of the proof of the *corpus delicti* the reviewing court must assume the truth of the State's evidence and all reasonable inferences therefrom in a light most favorable to the State. Corbett, 106 Wn.2d at 571. However, here, the protected person was not just several "blocks" distant from where the defendant was present, rather, she was at work, a location never established. The fact that Mr. Kirk was present at the home of Ms. Mitchell fails to establish the *corpus* of the charged crime of violation of a court order, because in November of 2008 there was no provision in effect prohibiting the defendant from being at Mitchell's residence. CP 15 (providing that the defendant "shall not knowingly enter, remain or come within 500 ft. (distance) or [sic] the

protected person's residence, school, workplace until 3/26, 2004")
(Emphasis added.).

The question of sufficiency – if not decided in Mr. Kirk's favor even considering his admission post-Miranda – must be evaluated absent the defendant's statement. In such circumstances, the trial evidence is constitutionally insufficient to convict. Reversal is required. See Part D.3, infra; U.S. Const. amend. 14.

**3. THE EVIDENCE WAS INSUFFICIENT TO
CONVICT THE DEFENDANT OF VIOLATION OF A
COURT ORDER.**

a. Count 1. In order to sustain a judgment of conviction entered following a jury verdict of guilty, the verdict must be supported by evidence sufficient to prove every essential element of the crime charged. U.S. Const. amend. 14; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in a light 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. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Scoby, 117 Wn.2d 55, 61, 810

P.2d 1358 (1991). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201. The appellate courts leave credibility determinations, issues of conflicting testimony, and persuasiveness of the evidence to the fact finder. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

However, inferences must be reasonable. Additionally, it is true that for purposes of evaluating the sufficiency of the evidence, the "law makes no distinction between direct and circumstantial evidence." State v. Bencivenga, 137 Wn.2d 703, 710-11, 974 P.2d 832 (1999) (citing 11 Washington Pattern Jury Instructions: Criminal 5.01, at 124 (2d ed.1994)). This reviewing Court will thus consider circumstantial and direct evidence equally reliable, when assessing the sufficiency issue. State v. Delmarter, 94 Wn.2d 634, 618, 628 P.2d 99 (1980).

However, only if "the inferences and underlying evidence are strong enough to permit a rational fact finder to find guilt beyond a reasonable doubt [may] a conviction be properly based on 'pyramiding inferences' " of circumstantial evidence. Bencivenga, 137 Wn.2d at 711 (quoting 1 Clifford S. Fishman, Jones on

Evidence: Civil and Criminal § 5.17 at 450 (7th ed.1992)).

Here, the leaps of faith that a trier of fact would have to make to come to the conclusion that Mr. Kirk had violated a court order, by virtue of his presence at the home with the children, were individually untenable and overly numerous. Unlike Officer Parker at the time of the defendant's arrest, the jury in this case was in possession of the no-contact order in question. It was aware of the provision of the order allowing third-party contact between the defendant and Ms. Mitchell for the purposes of arranging child care and visitation. Ms. Mitchell was not present at the home when Mr. Kirk was arrested. The evidence was insufficient. Additionally, absent the defendant's statement to the police, which should have been suppressed as the fruit of an illegal arrest or pursuant to the *corpus delicti* rule, there was certainly no evidence to support a conviction for being in personal contact with Ms. Mitchell, in violation of the court order, on that date, for purposes of count 1.

b. Count 2. As to the second count, the State alleged that Mr. Kirk violated the order of no-contact by being in personal contact with Ms. Mitchell, as shown by facts that State outlined in its trial brief and expected to prove at trial. According to the State,

in November of 2008, the defendant left a threatening message on the answering machine of his sister, Emma Vaughn. The sister called the caller back using the number that was listed on her Caller ID, and discovered that it was the land line number of Machel Mitchell, who answered the phone. Vaughn asked to speak with the defendant, and Ms. Mitchell, according to Vaughn, "handed the phone to the defendant." Supp. CP ____, Sub # 55 (State's Trial Memorandum).

However, at trial, Ms. Vaughn was asked if she ever had an occasion to speak with probation officer Chris Muhs regarding her brother, Mr. Kirk, and where he was residing. 6/4/09RP at 6. Vaughn testified merely that she recalled probation officers trying to get her to speak with them. 6/4/09RP at 6. At most, Vaughn testified that she spoke with Ms. Mitchell by calling her cellular telephone while Mitchell was at work. 6/4/09RP at 11, 24. She did not recall calling Ms. Mitchell on her home phone. 6/4/09RP at 12. She spoke with Mr. Kirk at some point, and the defendant was apparently at Ms. Mitchell's home, watching the children. 6/4/09RP at 13. But she never testified to any facts that would establish that Ms. Mitchell and Mr. Kirk were in the home together. The no-

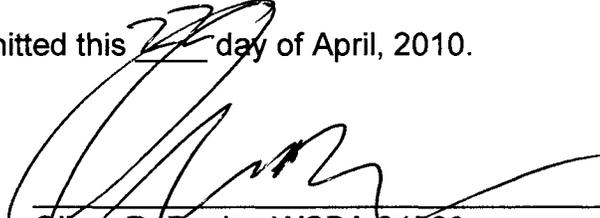
contact order expressly indicates that any prohibition on Mr. Kirk being near or in Ms. Mitchell's residence expired in 2004. CP 15 (providing that the defendant "shall not knowingly enter, remain or come within 500 ft. (distance) or [sic] the protected person's residence, school, workplace until 3/26, 2004").

Ms. Vaughn's testimony did not establish a violation of the no-contact order. Although various documents were introduced in an attempt to refresh Ms. Vaughn's memory, to impeach her, and to get her to say what the deputy prosecutor wanted her to say, this is not substantive evidence. Impeachment evidence pertains solely to a witness's credibility and is not probative of substantive facts necessary to prove the elements of a criminal charge. State v. Clinkenbeard, 130 Wn. App. 522, 569, 123 P.3d 872 (2005); State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). There was no substantive evidence of a violation of the no-contact order, even taking the testimony in the light most favorable to the State, and this count must also be reversed for insufficiency. State v. Salinas, 119 Wn.2d at 201; State v. Scoby, 117 Wn.2d at 61.

E. CONCLUSION

Based on the foregoing, Mr. Kirk respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 27 day of April, 2010.



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