

03664-2

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No. 63664-2-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

MATTHEW DAVID GARNER, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the defendant waived any issue regarding the trial court's comment in voir dire that the offense was not an eligible three strikes offense where defendant failed to object below, request a curative instruction or move for a mistrial.
2. Whether defense counsel was ineffective for failing to object to the trial court's comment where defense likely made a strategic decision not to object or move for a mistrial because the venire panel appeared very concerned about sentencing and no prejudice resulted where defendant admitted to all the facts underlying the offense and admitted to all the elements but one and where the jury took their obligation to deliberate seriously.
3. Whether the evidence, taken in the light most favorable to the State, was sufficient for a rational trier of fact to find the defendant guilty of violating a provision of a no contact order where the no contact order prohibited any contact whatsoever except for e-mail and U.S. mail and defendant called his wife at her residence but the wife didn't answer because the caller i.d. showed that it was the defendant who was calling.

C. FACTS

1. Procedural Facts.

On March 12, 2009 Appellant Matthew Garner was charged with two counts of Felony Violation of a No Contact Order, in violation of RCW 26.50.110 for his acts on March 6th and 7th, 2009. CP 50-52. The

jury convicted Garner of both counts of Felony Violation of a No Contact Order. CP 29. At sentencing, on a standard range of 15 to 20 months, the court imposed a sentence of 17 ½ months on each count, to run concurrently. CP 16, 19; SRP¹ 3, 25.

2. Substantive Facts.

Christi Garner (hereinafter “Christi”²) married Matthew Garner in 1996 and they had two children Samantha and Daniel, who were 9 and 5 at the time of trial. RP 102. Christi and Garner separated in 2006 and a no contact order was issued in September 2008. Id. The no contact order prohibited Garner from having any contact whatsoever with Christi, directly or indirectly, by phone or any means, except via e-mail or U.S. mail for purposes of arranging visitation with the children only. Supp CP ___, Ex. 1; RP 103-04. The order did not prohibit Garner from having contact with the children. RP 116, Ex. 1.

Garner would arrange for visitation by calling Samantha on the phone and asking her if Christi would be willing to talk to him on the phone, and if she was, they would arrange a public place for Christi to transfer the kids to him. RP 119-20, 133, 140. Garner visited the kids

¹ SRP refers to the verbatim report of proceeding for sentencing held on June 8, 2009. VDRP refers to the voir dire proceeding on May 4, 2009, and RP to the proceedings for trial on May 4-6, 2009.

² The State references Christi Garner by her first name for clarity of reference.

about once every couple weeks. RP 118-19. Both Christi and Garner were aware that this arrangement was in violation of the court order.³ RP 133. Christi had no interest in getting back together with Garner, but she allowed the phone contact so he could see his children. RP 134-35, 142, 144. After Garner stopped living in a clean and sober house and there was an incident in which Garner attempted to take her purse during a visitation Christi wasn't as interested in ensuring that visitation occurred. RP 134, 141, 144.

On March 6, 2009 Garner called Christi's house and left a voice message asking her to go to lunch with him and to call him back. RP 111-12. She didn't return the phone call and deleted the message. RP 112-13. She spoke with Garner on her daughter's cell phone later that evening. RP 139-40. Garner wanted to take the children for an overnight visit that weekend, which he had never done before, but Christi did not think this was a good idea. RP 129-30.

The next morning while she was dropping the children off at a play date, Christi got a call from a friend, concerned for her safety, informing her that Garner was parked in his van in the school parking lot located

³ Christi believed that Garner wouldn't get in trouble if Garner called Samantha and then asked if Christi was willing to talk to him. RP 123.

behind her house.⁴ RP 106-07, 153. Christi could think of no reason for Garner to be parked in the school lot. RP 107. She told the people hosting the play date, Sam and Debbie, that if Garner showed up to call her. She didn't want Garner to take the children because that was not the plan for the weekend. RP 108-09.

When she got home Debbie called and told her that Garner had shown up and wanted to take the children and that Sam and Garner were having a confrontation. RP 109. Christi called the police because it was unusual for Garner to show up at the school and at a play date and she was nervous about his actions. RP 109-10. Right after the Ferndale police arrived at her house, her phone rang – it was Garner calling on his cell phone.⁵ She recognized his cell phone number. RP 110, 155. She didn't answer because the officer had just arrived and she wasn't sure what she should do. RP 110-11. She told the officer that it was Garner calling. RP 111, 182.

Meanwhile Debbie and Garner had both called the police after he had showed up at the play date. RP 166, 240. When a Whatcom County Sheriff deputy contacted Garner about the complaint, he informed the

⁴ The lot, however, was not within the 500 feet proscribed by the no contact order.

⁵ It was about a half hour from the time Garner was seen in the school parking lot to the time Garner called his wife at her residence. RP 156

deputy that there was a no contact order between his wife and him, but none regarding his children. RP 168. He told the deputy that he had tried to call his daughter several times, but he denied calling Christi. RP 169. While talking to Garner, the deputy received information that Garner had called Christi's house from his cell phone. RP 170-71. The cell phone number the deputy was given matched Garner's cell phone number. RP 171.

Garner told the deputy that the deputy could look at the phone, but as he started to give it to the deputy, Garner stopped and turned his body away from the deputy and started pushing buttons on the cell phone. RP 171. He told the deputy he wasn't sure if the phone had a call log. Id. After about 2 minutes, he told the deputy he couldn't find the call list. Id. He then gave the phone to the deputy and when the deputy offered to find the call list, Garner told the deputy that he had found it and it was empty. RP 172. The deputy went through the dialed calls, received calls and missed calls lists and all were empty, even though Garner had just called the dispatch center. Id. When Garner said he didn't think the call log worked, the deputy called dispatch and hung up, and then found the call on the dialed call list, showing the number and time called. Id. The deputy found an option on the phone that would erase all calls. RP 173. Despite this, Garner claimed he didn't know why the lists were empty

because he'd been making calls all day. RP 174. He continued to deny calling Christi's house that day. Id. After a Ferndale officer arrived, arrested Garner for violation of a no contact order, and read him his Miranda rights, Garner finally admitted to calling Christi that day, although he initially denied it to that officer as well. RP 174-75, 187-88.

At trial on direct Garner admitted that he had called Christi on March 7th in order to tell her that he had called the police, but had not left a message. RP 242. He also admitted to calling her the day before and leaving her a message about having lunch because he wanted to discuss the possibility of having an overnight visit with the children, among other things. RP 243. On cross examination, he admitted that the order had been in effect and that it prohibited him from having any contact with Christi directly or indirectly except by mail or e-mail. RP 245. He acknowledged signing it in court on Sept. 8, 2008. RP 246. He stipulated to having been twice previously convicted of violating no contact orders. RP 193, 247. He admitted to calling Christi on March 6th and leaving a message and then later speaking to her on the phone that evening. RP 247. He admitted he called Christi's residence on March 7th before the police

arrived. RP 248. He admitted it was his sole responsibility to refrain from violating the order.⁶ RP 252.

D. ARGUMENT

1. Garner waived any issue regarding the trial court's comment about the case not qualifying as a three strikes case because he failed to raise the issue below.

Garner asserts that his convictions should be reversed because during voir dire the judge informed the jury that violation of a no contact order was not a qualifying offense for three strikes. Garner waived this issue by failing to object or move for a mistrial below and by failing to demonstrate on appeal that the comment constituted a manifest error of constitutional magnitude. Even if Garner can raise this issue for the first time on appeal any error was harmless because Garner admitted to the factual basis for all the elements of the offense and admitted all elements of the offense except that his actions constituted "contact." The juror who raised the issue of three strikes was not bumped by defense and did not deliberate. Moreover, the record shows the jury took seriously their

⁶ On appeal, Garner states that he and his wife "mutually and routinely violated the order by arranging visitation via telephone" and that they "mutually violated the order by meeting each other to transfer the children." See Appellant's brief at 3. Contrary to his assertion on appeal, the no contact order did not order Christi to refrain from contacting him, and it was his sole responsibility to refrain from violating the order.

obligation to deliberate. The judge's comment had no effect on the outcome of the trial.

It is well-established that juries are not to be informed of the sentencing consequences of their verdicts. "When a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'" United States v. Shannon, 512 U.S. 573, 579, 114 S.Ct. 2419, 129 L.Ed. 2d 459 (1994) (*quoting* Rogers v. United States, 422 U.S. 35, 40, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975)). Under Washington law, sentencing is only an issue for the jury in capital cases, and otherwise, juries are not to be informed about matters that relate only to sentencing. State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001). It is error for a court or counsel to inform the venire panel that a case does not involve the death penalty. State v. Mason, 160 Wn.2d 910, 930, 162 P.3d 396 (2007), *cert. den.*, 553 U.S. 1035 (2008). The concern is that the jury will take its obligations less seriously and would be more likely to convict if it is aware that the death penalty is not involved. State v. Hicks, 163 Wn.2d 477, 487, 181 P.3d 831, *cert. den.*, Babbs v. Washington, 129 S.Ct. 278 (2008). Under Townsend, such oral instructional errors require reversal unless the error is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the

party assigning it, and in no way affected the final outcome of the case.”

Townsend, 142 Wn.2d at 848.

- a. *Garner waived this issue by failing to raise it below and by failing to demonstrate that it's a manifest error of constitutional magnitude.*

Garner bears the burden of showing that the trial court's comment that the offense was not one which in and of itself would make a person eligible for a three strikes sentence was error that he may raise for the first time on appeal. As he failed to raise the issue below, he must demonstrate that the alleged error was a manifest one of constitutional magnitude.

RAP 2.5. “Manifest” means that a showing of actual prejudice is made.

State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *see also*, State v.

Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) (error is manifest if it

had “practical and identifiable consequences” in the case). If the error was

manifest, the court must also determine if the error was harmless. Lynn,

67 Wn. App. at 345. The burden is on the defendant to identify the

constitutional error and how it actually prejudiced his defense. State v.

McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

“[C]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” State v. Swan, 114

Wn.2d 613, 661, 790 P.2d 610 (1990); *see also*, State v. Robinson, 146 Wn. App. 471, 484 n. 11, 191 P.3d 906 (2008) (“when a criminal defendant makes a tactical choice in pursuit of some real or hoped for advantage, he may not later urge his own action as a ground for reversing his conviction”). Failure to request a mistrial or curative jury instruction constitutes waiver unless manifest constitutional error is determined to have occurred. State v. Lord, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007). “A defendant generally cannot decline to ask for a mistrial or jury instruction, gamble on the outcome, and when convicted, reassert the waived objection.” *Id.*

Here, defense counsel failed to object to the judge’s comment. While he did seek a sidebar soon after juror 29’s response to the judge’s comment that the offense was not a three strike eligible offense, he did not make a record of the sidebar, nor move for a curative instruction or a mistrial at the time of the judge’s comment or before the jury was impaneled. VDRP 89. He waived the trial court’s alleged error unless he can demonstrate that it is manifest error of constitutional magnitude. Garner has failed to brief the issue as a manifest error of constitutional magnitude. Garner may not assert this alleged error for the first time on appeal.

b. Harmless error.

Even if Garner could assert the alleged error for the first time on appeal, the error was harmless. Garner asserts that the trial court's comment prejudiced him by signaling to the jury that it was a less serious case thus making the jurors more likely to convict him, asserting that the evidence on count II was uncertain and insufficient to convict him beyond a reasonable doubt. However, Garner admitted to the factual basis for each of the essential elements in this case and only argued that his actions in calling his wife on the 7th of March were not sufficient to constitute "contact" under the statute. Garner has failed to demonstrate that the judge's comment had any effect on the outcome of the case.

In State v. Mason, the trial court admonished the jury during voir dire that it was not to be concerned with any penalty except as to make it careful. In response to a statement by a juror that s/he would have a hard time if the case involved the death penalty, the court informed the venire that the case did not involve the death penalty. Mason, 160 Wn.2d at 929. On appeal, while finding error in the trial court's statement, the court found that the error was harmless because although defense counsel objected, his objection was "at best, lukewarm," and no objection was advanced to the selection of any juror or to the panel. *Id.*

Here, defense counsel did not object. While he did exercise peremptory challenges, he did not exercise a peremptory challenge regarding juror 29, the one who had expressed concern regarding a three strikes sentence. VDRP 105. The judge had previously cautioned the panel that it was not to be concerned with sentencing and that the jury was to base its decision solely on the facts and evidence. VDRP 85-86. The issue of penalty arose because one juror, no. 3, indicated that he would not be able to sit on a jury if he didn't know what the result could be. VDRP 84-85, 88. A couple other jurors then asked questions about the extent of punishment and why they didn't get to know anything regarding it. VDRP 85-86. Another juror even ventured the possibility of asking an attorney outside the courtroom. VDRP 87. After excusing juror no. 3 for cause, juror no. 29 inquired as to whether Washington had a three strikes law for felonies. VDRP 89. The juror indicated that he would have a hard time living with sending somebody to life in prison because of "an awkward situation, say, if it was a domestic divorce with your kids or whatever."⁷ VDRP 89. The judge then commented: "I think we can safely tell you at this point that this offense is not one that in and of itself would make a

⁷ Defense counsel had previously couched the case in terms of a hypothetical where two people were trying to arrange child visitation under an unworkable no contact order, to the point where at least one juror believed that counsel was essentially requesting jury nullification because the no contact order was unfair. VDRP 72-73, 75, 77.

person eligible for three strikes.” VDRP 89. Juror 29 then stated that he would be okay, based on the facts. *Id.* Defense, however, did not bump juror 29 and, as the alternate, the juror did not deliberate. VDRP 105, 306.

There is no reason to believe that the judge’s comment had any impact on the verdict. Garner himself admitted to all the facts underlying the elements for violating a no contact order: he admitted that the order was in effect and prohibited him from contacting his wife indirectly or directly except by mail or e-mail and that he knew about the order; he stipulated to the two prior convictions for violations of no contact orders; and he admitted calling his wife on March 6th and talking to her that evening by phone and to calling her residence before the police arrived on March 7th. RP 245-48. In closing, the only element that was contested was the element of “contact,” and whether Garner’s calling his wife on her phone at her residence constituted contact. RP 291-93. There is no indication that the jury took their deliberations less seriously in this case than they would have otherwise. Despite Garner admitting to all the facts and not contesting any of the elements except contact, the jury spent approximately four hours⁸ deliberating and even sent out a juror note at one point requesting a definition for “contact.” CP 45-46; Supp. CP _____,

⁸ The State has assumed that the jury recessed for lunch for an hour during deliberations. The jury was given the case at 10:27 a.m. and returned their verdict at 3:22 p.m.

Sub Nom. 17. The judge's comment had no effect on the outcome of the case and therefore was harmless.

c. Defense was not ineffective for failing to object to the court's statement

In order to avoid the issue of waiver, Garner asserts that defense counsel was ineffective for failing to object to the trial court's informing the jury that the offense was not one in and of itself that would make someone eligible for three strikes. Defense counsel's failure to object and failure to move for a mistrial was likely tactical because he had a panel that was very concerned about sentencing. Such a strategic decision is not ineffective assistance of counsel. Moreover, Garner cannot show prejudice from the isolated comment. While Garner asserted that his conduct did not constitute "contact," he admitted to all of the facts underlying the elements and all of the elements except "contact." There is nothing in the record to show that the judge's comment had any effect on the outcome of the case.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different.

State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *review denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2w 112 (1992). "The defendant bears the burden of showing there were no 'legitimate strategic or tactical reasons' behind defense counsel's decision." State v. Rainey, 107 Wn.App. 129, 135-36, 28 P.3d 10 (2001), *rev. den.*, 145 Wn.2d 1028 (2002). It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. Wilson, 117 Wn. App. at 15. Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003).

In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999); *accord*, Townsend, 142 Wn.2d at 847 (in order to show prejudice from counsel's failure to object to trial court's statement that case did not involve death penalty, defendant had burden to demonstrate a reasonable probability that but for counsel's error the result

of the proceeding would have been different.) “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” West, 139 Wn.2d at 46. A reviewing court need not address both prongs of the test if a petitioner fails to make a sufficient showing under one prong. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.” Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

In State v. Hicks, while counsel’s comments that the case did not involve the death penalty and his failure to object to similar comments by the court and prosecution constituted deficient performance, the court found there was no prejudice to justify reversal. Hicks, 163 Wn.2d at 488. There was nothing in the record to show that the defendants were denied a fair trial or that the outcome of the trial likely would have been different but for the error. *Id.* There also was no indication that the jury did not take its obligations seriously, the trial judge having noted that the jury had actively deliberated. *Id.* The court also noted that given the abundant evidence, a “guilty verdict was likely even if the jury had not been

informed that the case was noncapital” and that a different jury in a subsequent trial on the hung count had convicted the defendants. *Id.*

In Townsend, while the court found that defense counsel’s failure to object to comments during voir dire that the case did not involve the death penalty, the court found there was no prejudice because there was overwhelming evidence of the element of the offense that defendant contested. Townsend, 142 Wn.2d at 848-49.

Defense counsel’s failure to object and failure to move for a mistrial here was likely a strategic decision because the venire panel was obviously very concerned about the possibility of punishment for violation of a no contact order that had been couched hypothetically as a technical violation of an unworkable order. Defense counsel had a reasonably good panel in terms of the defense. Similar to the Hicks case, Garner cannot show prejudice. The jury deliberations were significant here, particularly given the admissions of Garner in his testimony. There was no dispute as to what occurred or any of the elements aside from whether Garner’s call to his wife at her residence constituted “contact.” As Garner cannot prove prejudice, his ineffective assistance of counsel claim fails.

2. Taking the evidence in the light most favorable to the State, Garner's phoning his wife at her residence was sufficient evidence to establish a violation of the no contact order beyond a reasonable doubt.

Garner also asserts that there was insufficient evidence to find that he contacted his wife in violation of the order beyond a reasonable doubt. Taking the evidence in the light most favorable to the State there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Garner's phone call to his wife at her residence violated the no contact order where the order prohibited all contact with her whatsoever, directly or indirectly, by phone, except by mail and e-mail for the purpose of arranging visitation, and the reason the wife didn't answer the phone was because she knew it was Garner who was calling.

Under a sufficiency of the evidence analysis, the test 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. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). In applying this test, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* at 339. Such a challenge admits the truth of the State's evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court

defers to the trier of fact on issues of credibility of witnesses and persuasiveness of evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

In order to prove a felony violation of the no contact order regarding the second count, the State was required to prove that: (1) there was a no contact order that applied to Garner; (2) Garner knew of the existence of the order; (3) Garner knowingly violated a provision of the order; (4) Garner had two prior convictions for violating a no contact order; and (5) the offense occurred in Washington. CP 43.⁹ The order here restrained Garner from:

...

- B. Coming near and *from having any contact whatsoever*, in person or through others, *by phone, mail or any means, directly or indirectly, except for mailing or service of process of court documents by a 3rd party or contact by defendant's lawyers with the protected person(s)*
- C. Entering or knowingly coming within or knowingly remaining within 500 FEET (distance) of the protected person('s) [] residence, [] school, [] place of employment, [] daycare, [] other: ***DEFENDANT MAY CONTACT PROTECTED PARTY VIA EMAIL OR U.S. MAIL ONLY FOR THE PURPOSES OF SETTING UP THE EXCHANGE OF CHILDREN FOR SUPERVISED VISITATION. **NO TEXT MESSAGING*****

...

⁹ Defense did not except to any of the jury instructions or propose any of their own. RP 195.

Supp. CP ____ ; Ex. 1 (emphasis added, bold in the original text).

Taking the evidence in the light most favorable to the State, there was sufficient evidence beyond a reasonable doubt for the jury to find that Garner violated a provision of the order. The language of the order was very broad: it restrained Garner from any contact whatsoever, directly or indirectly, by phone or any means. It only allowed for two exceptions, aside from legal service of process, e-mail and mail, and then only for the limited purpose of arranging visitation. Garner was also specifically restrained from text messaging his wife, i.e., sending her a message via his cell phone. Garner violated the order by calling his wife on March 7th at her residence. The wife did not answer the call because she knew it was Garner calling. There is no question that it was his call that came through, his wife recognized the cell phone number that came through on her caller i.d. and he admitted he called her at trial. There also is no question that Garner knew that he was not supposed to call her, which is why he initially denied calling her to the officers and erased the call list information from his phone before handing it to the deputy.

Garner makes the same argument that was made, and rejected, in State v. Ward, 148 Wn.2d 803, 64 P.3d 640 (2003), that his contact only amounted to an attempt. In Ward the defendant called the residence of the protected party. The wife of the protected party spoke with the defendant

who told her to tell the protected party that he had heard the protected party had asked him to call. Ward, 148 Wn.2d at 809. The wife responded to the defendant, hung up and reported the incident later that day. There was no testimony that the wife told the protected party that the defendant had called. *Id.* The order in that case required the defendant to have no contact with the protected party “in person, by telephone or letter, or through an intermediary, or in any other way, except through an attorney of record.” *Id.* at 815. On appeal the defendant argued that the evidence only established an attempted violation since there was no evidence that the wife told the protected party of the conversation. *Id.* at 815-16. Rejecting this argument, the court stated:

We do not, however, find it necessary to engage in speculation as to whether [the wife] told [the protected party] of the phone call.¹⁰ The no-contact order prohibited [the defendant] from contacting [the protected party] by telephone or through an intermediary, and the evidence shows that [the defendant] called [the protected party’s] home and conveyed information about [the protected party] to [the wife]. *Based on this conduct alone*, the jury was entitled to find that [the defendant] violated the order.

Id. at 816 (footnote added).

Garner attempts to distinguish Ward, asserting that the court only found the evidence sufficient because the defendant’s contact with the

¹⁰ The Court of Appeals had upheld the conviction based on finding that the jury could reasonably infer that the wife had told the protected party about the phone call. *Id.* at 815.

wife, an intermediary, was forbidden by the order. However, just as in our case, the order forbade *contact with the protected party* via an intermediary. There is no relevant distinction between the phone call to the protected party's residence in Ward and the phone call in this case. In both cases the defendant called the residence of the protected party intending to have contact with the protected party. In both cases the phone call was received at the residence, in Ward by the wife, the intermediary, and in our case by Garner's wife, despite the fact that she did not answer the call. Under Ward, Garner's phone call to his wife at her residence with the intent to contact her and her receipt of the phone call through identification of his caller i.d. number is sufficient evidence for a jury to find beyond a reasonable doubt that Garner violated a provision of the no contact order prohibiting any contact whatsoever by phone. The second count should be upheld.

E. CONCLUSION

For the foregoing reasons, the State requests that Garner's appeal be denied and his convictions affirmed.

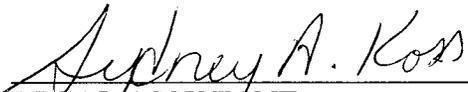
Respectfully submitted this 14th day of July, 2010.


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Appellate Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, ANDREW PETER ZINNER, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLC
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LEGAL ASSISTANT



DATE