

NO. 34944-2-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

RICK L. JEFFERS,

Appellant.

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COURT OF APPEALS
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STATE OF WASHINGTON
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BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Gary R. Tabor, Judge

Cause No. 06-1-00364-4

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PM 12-29-06

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking the case from the jury for lack of sufficient evidence.
2. The trial court erred in allowing the State to ask Officer Hinrichs a question that resulted in an unconstitutional comment on Jeffers's right to remain silent.
3. The trial court erred in allowing Jeffers to be represented by counsel who provided ineffective assistance in failing to prevent or object the State's asking Officer Hinrichs a question that resulted in an unconstitutional comment on Jeffers's right to remain silent and in presenting his case.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to uphold Jeffers's conviction for felony violation of a no contact order? [Assignment of Error No. 1].
2. Whether the trial court erred in allowing the State to ask Officer Hinrichs a question that resulted in an unconstitutional comment on Jeffers's right to remain silent? [Assignment of Error No. 2].
3. Whether the trial court erred in allowing Jeffers to be represented by counsel who provided ineffective assistance in failing to prevent or object the State's asking Officer Hinrichs a question that resulted in an unconstitutional comment on Jeffers's right to remain silent and in presenting his case? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

1. Procedure

Rick L. Jeffers (Jeffers) was charged by information filed in Thurston County Superior Court with one count of felony violation of a no contact order. [CP 5].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Jeffers was tried by a jury, the Honorable Gary R. Tabor presiding. Jeffers had no objections and took no exceptions to the court's instructions. [5-18-06 RP 113-114]. The jury found Jeffers guilty as charged and entered a special verdict finding that Jeffers had twice "been previously convicted for violating the provisions of a no contact order" making the current conviction a felony (Exhibits Nos. 3 and 4—copies Jeffers's of prior judgments and sentences for violation of a no contact orders—being admitted without objection. [CP 23, 24; 5-18-06 RP 18-19].

The court sentenced Jeffers to an exceptional sentence downward of 33-months. [CP 49-60; 6-2-06 RP 15-21].

A notice of appeal was timely filed on June 7, 2006. [CP 61].

This appeal follows.

2. Facts

On February 24, 2006, Olympia Police Officer, Duane Hinrichs (Hinrichs), made a routine traffic stop of a vehicle that had no visible rear license plate. [5-17-06 RP 10-11]. Hinrichs contacted the driver, a woman, who did not have her driver's license on her person but told him that she was valid in both Oregon and Washington at the same time he noticed her passenger, a man. [5-17-06 RP 12, 15]. Hinrichs ran the woman's name and received word that she did have a valid driver's

license and that she also had a valid no contact order against a “Rick L. Jeffers.” [5-17-06 RP 13-14]. The description in the valid no contact order for “Rick L. Jeffers” matched that of the passenger in the woman’s truck. [5-17-06 RP 15]. Hinrichs re-contacted the woman and her passenger again noting that the passenger matched the description of the person against whom the woman had a valid no contact order. [5-17-06 RP 15-16]. Hinrichs asked the passenger for identification, and the man told him he didn’t have any, but his name was Terry Jeffers, eventually admitting he was in fact Rick L. Jeffers (Jeffers). [5-17-06 RP 16-20]. Hinrichs arrested Jeffers for violation of a no contact order telling me he had a right to an attorney, but failing to read Jeffers his complete Miranda warnings. [5-17-05 RP 20-22]. Hinrichs failed to conduct any further investigation and did not question the woman as to why she and Jeffers were together and Jeffers, according to Hinrichs’s testimony, did not speak to him after his arrest. [5-17-06 RP 22]. The no contact order, admitted as Exhibit No. 1, against Jeffers allows for limited contact “solely for the purpose of child custody and care issues.” [Supp. CP 65-66; 5-17-06 RP 16].

Jeffers testified in his defense that the only reason he and the woman (Capitola Moyer/Prahl) were together was to discuss child care and custody issues for their daughter, who has medical problems, as

Moyer/Prahl was about to enter a drug treatment program. [5-18-06 RP 20-30]. Jeffers was staying with friends, did not have a telephone or cell phone, and the only way for Moyer/Prahl to contact him to discuss legitimate child care and custody issues was to do so in person. [5-18-06 RP 30-32]. Jeffers did not initiate the contact. [5-18-06 RP 20, 32]. Jeffers's attorney did not call Moyer/Prahl as a witness, however Jeffers's counsel did provide the court with a victim statement from Moyer/Prahl as part of the motion for an exceptional sentence downward confirming the reason for the contact between herself and Jeffers at the time of his arrest, which she had initiated. [CP 42-44].

D. ARGUMENT

- (1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT JEFFERS WAS GUILTY OF FELONY VIOLATION OF A NO CONTACT ORDER.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992).

Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928. In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rationale trier of fact to find guilt beyond a reasonable doubt. State v. Bencivinga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (*citing* State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

Here, the State charged Jeffers with felony violation of a no contact order as follows:

In that the defendant, RICK LORING JEFFERS, in the State of Washington, on or about the 24th day of February, 2006, with knowledge that the Thurston [sic] County Superior Court had previously issued a protection order, restraining order, or no contact order, pursuant to Chapter 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW in state law in Cause No. 05-1-00862-2, did violate the order while the order was in effect by knowingly violating the restraint provisions therein, and furthermore, the defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

[CP 5].

The court's to-convict instruction on this charge, Instruction No. 7, [CP 19-20], set forth the elements the State bore the burden of proving beyond a reasonable doubt as follows:

- 1) That on or about the 24th day of February, 2006, the defendant willfully had contact with Capitola Prah; and
- 2) That such conduct was prohibited by a no-contact order;
- 3) That the defendant knew of the existence of the no-contact order; and
- 4) That the acts occurred in Thurston county, State of Washington.

[Emphasis added].

The sum of the State's evidence to sustain this charge and conviction was the testimony of Officer Hinrichs that he stopped a vehicle containing Capitola Prah and Jeffers, and that he confirmed the existence of a valid no-contact order issued on behalf of Prah against Jeffers. However, In order to sustain this charge and conviction, the State bore the burden of proving beyond a reasonable doubt that Jeffers's conduct (his contact with Prah) was in fact prohibited by a no-contact order (essential element No. 2 set forth above). The State cannot sustain its burden on this essential element.

First, the no-contact order, which the State admitted in evidence as Exhibit No. 1, [Supp. CP 65-66; 5-17-06 RP 16], specifically states that:

The defendant [Jeffers] may have limited contact with Ms. Moyer [Prah] solely for the purpose of child custody and care issues.

This provision does not require prior court notice, authorization, or documentation allowing for any type of contact between the parties. The State's evidence merely establishes the existence of a valid no contact order against Jeffers, and that Prah and Jeffers did in fact have contact. However, the State's evidence fails to establish the purpose for the contact—a violation of the no contact order or allowed contact under the no contact order—because Officers Hinrichs failed to engage in any further investigation, i.e. questioning Prah regarding the reason for her contact with Jeffers. While it is uncontested that the State has prosecutorial discretion in charging, absent any evidence establishing beyond a reasonable doubt that Jeffers “conduct was prohibited by a no contact order,” the State's case against Jeffers constituted nothing more than the improper pyramiding of inferences condemned by Bencivinga, supra on an essential element and this case should never have been charged let alone proceeded to a trial resulting in Jeffers conviction for felony violation of a no contact order.

Finally, while the State maintains the burden of proof on all the essential elements and Jeffers had no obligation to disprove any element—

anything else being an improper shifting of the burden of proof, Jeffers did testify in his defense. Jeffers testified that he did not initiate the contact with Prah, she did, and that the sole reason for the contact was to discuss the care and custody of their 7-month old daughter, who has health issues, as Prah was about to enter a drug treatment program, which contact was allowed under the explicit terms of the no contact order Jeffers purportedly violated. [5-18-06 RP 20-32]. Jeffers's testimony regarding the reason for his contact with Prah was confirmed by Prah's victim statement provided to the trial court for sentencing, [CP 42-44], and un-refuted by the State.

The State has failed to meet its burden of proof on all the essential elements of the crime for which Jeffers was charged and convicted as it cannot establish that Jeffers's contact with Prah was prohibited by a no contact order. This court should reverse and dismiss Jeffers's conviction for felony violation of a no contact order.

- (2) OFFICER HINRICH'S IMPROPERLY COMMENTED ON JEFFERS'S CONSTITUTIONAL RIGHT TO REMAIN SILENT WHEN CALLED AS A WITNESS FOR AND QUESTIONED BY THE STATE.

The privilege against self-incrimination, or the right to remain silent, is based upon the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination. Miranda v. Arizona, 384 U.S. 436,

479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).¹ “The purpose of the right is ... ‘to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or having to share his thoughts and beliefs with the Government.’” State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996) (*quoting Doe v. United States*, 487 U.S. 201, 213, 108 S.Ct. 2341, 1010 L.Ed.2d 184 (1988)). A defendant’s constitutional right to silence applies in both pre- and post-arrest situations. State v. Easter, 130 Wn.2d at 243. Even without an explicit reference to Miranda, a prosecutor may be deemed to have purposely elicited the fact of silence in the face of arrest. In the Ninth Circuit case of Douglas v. Cupp, 578 F..2d 266 (9th Cir. 1978), the court held the following exchange between the prosecutor and the arresting officer was the sort of inquiry forbidden by the Supreme Court in Miranda and Doyle v. Ohio, 426 U.S. 610, 618-619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

Q: Who arrested Mr. Douglas?
A: I did.
Q: Did he make any statements to you?
A: No.

¹ “[T]he protection of article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment.” State v. Earls, 116 Wn.2d 364, 374-375, 805 P.2d 211 (1991) (*citing State v. Moore*, 79 Wn.2d 51, 483 P.2d 630 (1971)). Article 1, section 9 provides:

No person shall be compelled in any criminal case to give evidence against himself....

The Fifth Amendment provides:

...nor shall [any person] be compelled in any criminal case to be a witness against himself....

State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002) (*quoting Douglas v. Cupp*, 578 F.2d at 267).

It is constitutional error for a police witness to testify that a defendant refused to speak to him or her. State v. Easter, 130 Wn.2d at 241. Likewise, it is constitutional error for the State to purposefully elicit testimony as to a defendant's silence. State v. Curtis, 110 Wn. App. at 13. Jeffers can raise this issue, which is manifest error affecting a constitutional right, for the first time on appeal. State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (*citing State v. Curtis*, 110 Wn. App. at 11; State v. Nemitz, 105 Wn. App. 205, 214, 19 P.3d 480 (2001); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); RAP 2.5(a)(3)).

The State bears the burden of overcoming the presumption that a constitutional error is prejudicial. State v. Easter, 130 Wn.2d at 242.

In this case, the State was allowed to elicit at trial the following impermissible testimony from Hinrichs commenting on Jeffers's right to remain silent:

Q: Did you ever have any—did you at any point read Mr. Jeffers what's commonly known as his Miranda warnings?

A: Not full Miranda. Just advised him he had right to any attorney.

Q: Did he understand that right?

A: Yes.

Q: Did he say anything else to you after that?

A: No.

...

Q: Did you tell Mr. Jeffers he was being placed under arrest?

A: Yes.

Q: Did he object to that?

A: No.

Q: Did he give you any reasons as to why you shouldn't arrest him?

A: No.

[Emphasis added]. [5-17-06 RP 21-22].

As previously indicated, in Easter, our Supreme Court held it is a violation of a defendant's right to silence for a police officer to testify that the defendant refused to talk to him or her. State v. Easter, 130 Wn.2d at 241. (defendant's "right to silence was violated by testimony he did not answer and looked away without speaking" when questioned by officer). Thus, a direct comment on the right to remain silent is a constitutional error requiring a constitutional harmless error analysis, State v. Easter, 130 Wn.2d at 241. A constitutional harmless error means the error is harmless only if the untainted evidence is so overwhelming that it necessarily leads

to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), *cert. denied*, 475 U.S. 1020, 89 L.Ed.2d 321, 106 S.Ct. 1208 (1986).

In the instant case, the State's questions and Hinrichs's answers, which evidence that Jeffers was not even properly mirandized, constitutes error of constitutional proportions and is not harmless. The direct implication of officer's testimony is that Jeffers was guilty by refusing to speak with Hinrichs, and in fact had some obligation to explain his contact with Prah when it was the State's burden to establish the contact was prohibited by a no contact order, which appears more egregious than the silence followed by looking away in Easter.

There was no probative value in officer's testimony. The only value was the inference that only a person who had something to hide or was guilty would remain silent. The questions and answers served no purpose other than to imply that Jeffers remaining silent "was more consistent with guilt than with innocence." *See State v. Curtis*, 110 Wn. App. at 14.

The State's evidence against Jeffers regarding the crime at issue was not overwhelming particularly given the State's inability to establish an essential element of the charge as set forth in the proceeding section of this brief. This case centered on credibility. As the State argued in

closing, seemingly forgetting it bore the burden of proof on all of the essential elements with regard to the crime it chose to prosecute and cannot shift this burden to Jeffers:

There's no issue it happened in Thurston County, there's no issue that the defendant knew he wasn't supposed to be with Ms. Prahl, also known as Capitola Moyer, and there's no issue that there was a no-contact order in place. The only issue that I can see is an attempt to allow limited contact for sole purposes. So, that's the defense. That's it, really. So what does that mean? That means in the very first instruction, "You are the sole judges of the credibility of the witnesses." That's what it comes down to, ladies and gentlemen. You heard two people. When someone takes the stand, you are evaluating what they say with the information that you have and any bias present in the person saying it. Officer Hinrichs, I'm going to be curious to hear about what kind of bias he has. What's his bias? He pulls over a car, and says hey, at some point, I don't think you two are supposed to be together. And what's the defendant's response? And this isn't controverted. I think that's the best way we can go about this. What do we both agree on? Terry Jeffers. He's not Terry Jeffers. He's Rick Jeffers. So why would he tell the officer he was Terry unless he wasn't supposed to be where he was?

Now, as you will see and I will point out, there's a reason for everything. I got an excuse for everything. I wasn't supposed to be outside of Lewis County. Why didn't he tell the officer that? He's going to say that he did. He's going to say he told the officer a lot of things. So, you have to, in essence, believe that the officer was not being truthful to believe the defendant, and that goes into bias. Why was the officer not being truthful with you? He has no vested interest; he's just doing his job.

I'll ask the question and leave it open to you till the end. Why would the defendant not be truthful with you? It's obvious.

But the defendant doesn't stop there. He admits that he continues on. Now, there's some issue of whether or not the officer—the officer said he couldn't answer a lot of questions...

[Emphasis added]. [5-18-06 RP 89-90].

Anything improperly tipping the scale in the State's favor with regard to credibility including an improper comment on Jeffers's right to remain silent with the resulting inference of guilt was prejudicial. Thus, it cannot be said the error was harmless beyond a reasonable doubt. *See State v. Easter*, 130 Wn.2d at 242-243. This court should reverse Jeffers's conviction for felony violation of a no contact order.

- (3) JEFFERS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO PREVENT THE STATE FROM OR OBJECTING TO THE STATE QUESTIONING OFFICER HINRICHS REGARDING JEFFERS'S EXERCISE OF HIS RIGHT TO REMAIN SILENT AND IN FAILING TO PROPERLY PRESENT HIS CASE.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is

determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing* State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Assuming, arguendo, this court finds that counsel waived the error claimed and argued in the preceding section of this brief, even though it has been asserted that this is a constitutional issue that can be raised for the first time on appeal in failing to object when questions posed by the State to Hinrichs resulted in a comment on Jeffers's right to remain silent, then both elements of ineffective assistance of counsel have been established. In addition, counsel's failure to make a motion pursuant to CrR 3.5 given that Hinrichs admitted during his testimony that he did not properly mirandize Jeffers, and failure to move for dismissal at the close of the State's case because the State had failed to establish an essential element of the charge (that Jeffers's contact with Prahel was in fact prohibited by the terms of the no contact order the State admitted into evidence as Exhibit No. 1), and failing that, in obtaining or preserving Prahel's testimony that would have corroborated Jeffers's testimony and exonerated Jeffers of the charge, and in failing to move upon the jury's verdict for a judgment notwithstanding the verdict (JNOV) then; for these

additional reasons, both elements of ineffective assistance of counsel have been met.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to act for any of the above-listed reasons when, if counsel had done so the trial court would have been given the opportunity to make the appropriate ruling(s)—in the final analysis dismissal of the charge against Jeffers.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent in that but for counsel's failure for the reasons set forth herein, had counsel done so, the outcome of the trial court would have been different—Jeffers would not have been convicted of felony violation of a no contact order. This court should reverse and dismiss Jeffers's conviction.

E. CONCLUSION

Based on the above, Jeffers respectfully requests this court to reverse and dismiss his conviction for felony violation of a no contact order.

DATED this 29th day of December 2006.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 29th day of December 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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(and the transcript)

Signed at Tacoma, Washington this 29th day of December 2006.

Patricia A. Pethick
Patricia A. Pethick