

NO. 34944-2-II

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RICK L. JEFFERS,

Appellant.

STAMP: STATE OF WASHINGTON
THURSTON COUNTY
APR 11 2006
COURT OF APPEALS
DIVISION II

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 06-1-00364-4

HONORABLE GARY R. TABOR, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Whether the defense attorney's stipulation to the admissibility of the defendant's statements without a CrR 3.5 hearing constituted ineffective assistance of counsel.

2. Whether testimony by Officer Hinrichs about what the defendant did not mention in responding to the officer's questions, and closing argument by the prosecutor on that same subject, constituted an impermissible comment on the defendant's right to remain silent.

3. Whether it was error for the prosecutor to solicit testimony from Officer Hinrichs concerning the defendant's silence after his arrest.

4. Considering the evidence at trial in the light most favorable to the State, whether there was sufficient evidence for a rational trier of fact to find that the defendant was guilty beyond a reasonable doubt of felony violation of a no-contact order.

5. Whether the absence of Capitola Prahls testimony at the trial of this cause was the result of ineffective assistance of counsel.

6. Whether the defendant's trial attorney provided ineffective assistance when he did not move to dismiss for insufficient evidence at the end of the State's case-in-chief.

B. STATEMENT OF THE CASE

On February 24, 2006, Officer Duane Hinrichs of the Olympia Police Department was on patrol duty. At approximately 12:13 a.m. on that date,

he observed a vehicle within the city of Olympia that had a rear license plate that was not visible. He conducted a traffic stop of the vehicle, and contacted the female driver, who gave the name Capitola Prah. 5-17-06 Trial RP 10-14. There was one passenger, a male, who was the defendant.

When Hinrichs ran a check on the driver, he learned that a domestic violence no-contact order had been issued for her protection, in which Rick Loring Jeffers, date of birth 10-22-71, was the person restrained. 5-17-06 Trial RP 14-15. The order had been issued by the Lewis County Superior Court on February 3, 2006 and was in effect until February 3, 2008. It named Capitola Moyer as the person being protected by the order. Ex 1. The date of birth for Moyer on the order was the same as that of Capitola Prah. 5-17-06 Trial RP 15.

The order required Jeffers to have no contact with Capitola Moyer, but contained the following exception: "The defendant may have limited contact with Ms. Moyer solely for the purpose of child

custody + care issues." Ex 1. At trial, Hinrichs could not recall if he was made aware of that exception when dispatch informed him of the order, but stated that it was standard practice for a dispatch operator in a driver's check such as this one to provide information to the officer concerning any such exception. 5-17-06 Trial RP 25-28.

Hinrichs suspected that the male passenger in the vehicle was Rick Jeffers, based on the passenger's appearance and the physical description of Jeffers provided by dispatch. 5-17-06 Trial RP 15. He therefore contacted the passenger and asked for his identification. The passenger responded that he did not have any, but stated that his name was Terry D. Jeffers, date of birth 7-25-70. 5-17-06 Trial RP 17.

For a few more minutes, the officer continued to ask questions regarding the passenger's identity and residence. The officer asked the defendant for the social security number of Terry Jeffers, but the passenger responded that he had

mental issues and could not remember it. 5-17-06 Trial RP 18. Hinrichs also asked for the residence address of Terry Jeffers, but the passenger responded that he was not able to provide that. 5-17-06 Trial RP 19-20. The officer also asked the defendant for other information concerning Terry Jeffers, but the passenger was also unable to provide that information. 5-17-06 Trial RP 19-20.

Eventually, the passenger, who was the defendant in this case, admitted he was Rick Jeffers. 5-17-06 Trial RP 19-20. The officer did cease his questions and placed the defendant under arrest for violating the no-contact order. Trial 5-17-06 Trial RP 20-21. The period of time from the initiation of the traffic stop to the arrest of the defendant was approximately 20 minutes in duration. 5-17-06 Trial RP 22. At the point of making the arrest, Hinrichs informed the defendant of his right to an attorney, but did not inform Jeffers of the other Miranda rights. 5-17-06 Trial RP 22. Hinrichs did not question

Jeffers further after placing him under arrest.
5-17-06 Trial RP 20.

On March 1, 2006, in Thurston County Superior Court Cause No. 06-1-00364-4, the defendant was charged with felony violation of a domestic violence no-contact order, alleging that in addition to the violation on or about February 24, 2006, the defendant had two prior convictions for violating the provisions of a protection order, no-contact order, or restraining order issued pursuant an RCW section authorizing such an order.

CP 5. A jury trial was held on this charge during the period of May 17-18, 2006.

Officer Hinrichs testified concerning the traffic stop in the early morning of February 24th and his subsequent arrest of the defendant. The State also entered into evidence Exhibits 3 and 4, certified copies of judgment and sentences showing the defendant's two prior convictions for violation of a domestic violence no-contact order.

5-18-06 Trial RP 16-19. The State then rested.
5-18-06 Trial RP 19.

The defendant testified. He acknowledged that Capitola Prah1 was his previous girl friend, and that they had a daughter in common who was about 7 or 8 months old as of the alleged date of offense. 5-18-06 Trial RP 20-22. He stated that Capitola had arrived in her vehicle at the place where he was staying in Centralia at about 11 p.m. the night he was arrested. 5-18-06 Trial RP 20. He further claimed that Capitola then drove the two of them north to the rest area between Rochester and Littlerock, where they had coffee and talked about their daughter's health issues. 5-18-06 Trial RP 30.

The defendant then testified that after he and Capitola had finished talking at the rest area, they got back on the freeway heading north, with Capitola driving, so that they could go to the next exit, turn around, and head back south on the freeway to Centralia. 5-18-06 Trial RP 30-31.

According to the defendant, they accidentally went past the next exit, the Littlerock exit, because they were too busy talking. 5-18-06 Trial

RP 30-31. He testified that, for the same reason, Capitola mistakenly then drove past the second next exit at Trosper Road. He testified that for the same reason she then mistakenly drove past the third next exit at Tumwater Airdustrial. He further stated that for the same reason she mistakenly drove past the fourth next exit, also in Tumwater. He claimed that for the same reason she missed the fifth next exit by the brewery. He also stated that she then missed the sixth next exit, to State Route 101. 5-18-06 Trial RP 53-54. Finally, according to the defendant, Capitola took an exit into Olympia, and the vehicle was stopped by the officer at about a quarter after midnight. 5-18-06 Trial RP 37. At one point in this recitation, the defendant volunteered an acknowledgment that this story was hard to believe. 5-18-06 Trial RP 53.

The defendant admitted that a no-contact order had been issued against him by the Lewis County Superior Court on February 3, 2006, and that he was aware of the requirements of the

order, although he claimed he thought it expired in one year rather than two years. 5-18-06 Trial RP 24-27. As regards the provision in the order that "[t]he defendant may have limited contact with Ms. Moyer solely for the purpose of child custody + care issues", the defendant admitted he understood the order to mean that he could have contact with Capitola solely to discuss child custody and child care issues, and only for as long as it took to discuss those issues. 5-18-06 Trial RP 69-70.

The defendant claimed that he and Capitola had gotten together that night to discuss his transporting Capitola and the baby to the baby's medical appointments in Tacoma during the six months Capitola would be in drug treatment in Seattle, which was to begin in early March. 5-18-06 Trial RP 22-24. The defendant was inconsistent about whether he and Capitola had talked about other matters besides the care of their daughter.

At one point, the defendant stated that other matters were mixed into the discussion, but it was

"all about our daughter's care issues". 5-18-06 Trial RP 32-33. At another point he explained that they had missed the series of exits because they were "deep in conversation because there's a lot of major issues going on in both our lives and our daughter". 5-18-06 Trial RP 38. He later acknowledged that they had talked about other matters besides their daughter's custody and care issues, but then amended that statement to say that the other matters discussed concerned the baby. 5-18-06 Trial RP 54. He then testified that he told Officer Hinrichs that he and Capitola were together "to discuss our issues and child issues." 5-18-06 Trial RP 57. However, when confronted by the prosecutor about that statement, he contended that "our issues are our child's issues. 5-18-06 Trial RP 58. Finally, the defendant acknowledged on cross-examination that he talked with Capitola that night about other things besides his daughter. 5-18-06 Trial RP 67. Then, on re-direct examination, he contended that these other matters were related to the care and

custody of his daughter. 5-18-06 Trial RP 70-71.

The defendant claimed that he told Hinrich early on in the contact that he and Capitola were together to discuss their issues and child issues. He asserted this was before he lied about his identity to Hinrichs. 5-18-06 Trial RP 58-59. The defendant also testified that he told Hinrichs about the language in the no-contact order that he felt justified his being with Capitola at that time. 5-18-06 Trial RP 35-36. According to the defendant, Hinrichs responded that the reason he was placing the defendant under arrest was because he could not verify whether the defendant's claim was true until he received a copy of the order and could examine it. 5-18-06 Trial RP 61.

The defendant was found guilty as charged. Based on the defendant's offender score of 17 points, it was determined at sentencing that the defendant's standard sentence range was simply 60 months. The court imposed an exceptional mitigated sentence of 33 months in prison on the basis that the victim had been a willing

participant, and because of the defendant's "candor" at trial. CP 49-60.

C. ARGUMENT

1. Defense counsel did not provide ineffective assistance by stipulating to the admissibility of the defendant's statements to Officer Hinrichs.

CrR 3.5 provides for a hearing to determine the admissibility of a statement of the defendant which the State seeks to offer into evidence.

When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. . . .

CrR 35(a). A CrR 3.5 hearing is concerned with the admissibility of custodial statements. State v. McFarland, 15 Wn. App. 220, 222, 548 P.2d 569 (1976); State v. Falk, 17 Wn. App. 905, 908-909, 567 P.2d 235 (1977). The requirement of a CrR 3.5 hearing may be waived by the defense. State v. Rice, 24 Wn. App. 562, 566-567, 603 P.2d 835 (1979). Since a CrR 3.5 hearing is a procedural device designed to protect constitutional rights a defendant's trial attorney has the authority to

waive a CrR 3.5 hearing on behalf of his client. State v. Fanger, 34 Wn. App. 635, 637, 663 P.2d 120 (1983). In the present case, the defendant's attorney stipulated in the Consolidated Omnibus Order to the admissibility of the defendant's statements to Officer Hinrichs without the necessity of a CrR 3.5 hearing. CP 6-9.

On appeal, the defendant contends that this stipulation was ineffective assistance of counsel because the evidence showed there was not a sufficient advisement to the defendant by Hinrichs concerning the defendant's Miranda rights and therefore the statements could have been suppressed. To demonstrate ineffective assistance of counsel, a defendant must show: (1) that defense counsel's performance was deficient, in that it fell below an objective standard of reasonableness based on a consideration of all the circumstances; and (2) that defense counsel's performance prejudiced the defendant because there is a reasonable probability that, except for counsel's errors, the result of the proceeding

would have been different. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). When considering a claim of ineffective assistance, the court must engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

Miranda warnings are required only when an individual's freedom has been curtailed to a degree associated with a formal arrest. The test is how a reasonable person in the position of the defendant would view the situation. Berkemer v. McCarty, 468 U.S. 420, 440-442, 82 L.Ed.2d 317, 104 S.Ct.3138 (1984); Heinemann v. Whitman County, 105 Wn.2d 796, 807-808, 718 P.2d 789 (1986). The mere fact that an investigative detention is ongoing does not give rise to the requirement for an advisement regarding Miranda rights prior to the arrest of the person being detained. Berkemer, 468 U.S. at 440-442.

Here, the defendant was contacted when the officer's traffic stop expanded to an investigation concerning a possible violation of a

no-contact order, based on the information Hinrichs had received in the traffic check and the appearance of the defendant. The officer questioned the defendant pursuant to that investigation to determine the defendant's identity. The period from the initial traffic stop to the defendant's arrest was only a little over twenty minutes. 5-17-06 Trial RP 22. While the defendant was not free to leave, no greater degree of restraint was exercised. Thus, during this pre-arrest period, the defendant's detention was not such that a reasonable person would believe he was being restrained to a degree associated with a formal arrest.

Once Hinrichs confirmed the defendant's identity, he placed him under arrest. Hinrichs did not question him any further. He informed the defendant of his right to an attorney, but did not recite the other Miranda warnings. 5-17-06 Trial RP 20-22. The purpose of Miranda warnings is to protect a defendant's right not to make incriminating statements to police when in the

coercive environment of confinement to a degree associated with a formal arrest. State v. Harris, 106 Wn.2d 784, 789-790, 725 P.2d 975 (1986). Since Hinrichs did not question the defendant after placing him under arrest, he did not need to inform the defendant of the Miranda warnings at that time. Since there were no statements of the defendant admitted into evidence that were made after the point of arrest, defense counsel acted diligently and reasonably in foregoing the necessity of a CrR 3.5 hearing in this case.

2. Testimony by Officer Hinrichs about what the defendant did not mention in response to the officer's questions, and the prosecutor's references in closing argument to what the defendant chose not to say in response to Hinrichs' questions prior to the defendant's arrest, did not constitute impermissible comments on the defendant's right to remain silent, since the defendant did not choose to remain silent at that time.

Officer Hinrichs testified that the defendant tried to hide his true identity when questioned by the officer, rather than acknowledge who he was and give any sort of justification for his contact with Capitola. 5-17-06 Trial RP 17-22. In closing argument, the

prosecutor referred to the defendant's choice to claim he was someone else rather than assert that his contact with Capitola Prah1 was within the exception to the no-contact requirement in the court's order. 5-18-06 Trial RP 89-90. In Appellant's Brief, this portion of the argument is quoted at length, and the defendant asserts that this argument constituted an improper comment on the defendant's right to remain silent. However, the State responds that the defendant did not choose to remain silent in response to Hinrichs' questions. Rather, he chose to provide the officer with false information to hide his true identity. Therefore, it was appropriate for the prosecutor to refer to what the defendant chose not to say at that time, when he instead chose to tell the false story, as evidence against the credibility of the defendant's version of events.

Under the United States Constitution's Fifth Amendment and Article I, section 9, of the Washington State Constitution, a person has a

right to remain silent both before and after an arrest. Therefore, the prosecution cannot comment upon the defendant's exercise of that right before an arrest in order to infer guilt. State v. Easter, 130 Wn.2d 228, 235-239, 922 P.2d 1285 (1996). However, in this case the defendant did not choose to remain silent in the face of questioning by Officer Hinrichs. Therefore, the prosecutor did not comment on his silence when he referred to what the defendant did not say as opposed to what he did say.

In State v. Young, 89 Wn.2d 613, 574 P.2d 1171 (1978), the defendant was convicted of first-degree murder as a result of mailing a pipe bomb to a judge. Young had been arrested and transported to federal custody by two postal inspectors. During transport, the defendant chose not to remain silent, but instead made a number of damaging comments and asked a number of inculpatory questions, which were testified to at Young's state trial. In closing argument, the prosecutor argued that it was evidence of Young's

guilt that while transported by the postal inspectors, he never denied commission of the crime. Young, 89 Wn.2d at 619-620.

On appeal, Young argued that the prosecutor's remarks were an impermissible comment on his right to remain silent. However, the State Supreme Court rejected this claim, noting that Young had not chosen to remain silent. Consequently, the prosecutor could legitimately comment on what the defendant chose not to say in the course of his statements to arresting officers. Young, 89 Wn.2d at 620-621.

Similarly, in this case, the defendant chose to respond to the questions put to him by Hinrichs. It was appropriate for Hinrichs to testify to what the defendant's responses were as well as what the defendant failed to mention. Hinrich testified that the defendant tried to pretend that he was someone else, but the defendant never gave any justification for his presence with Capitola. 5-17-06 Trial RP 17-23. Pursuant to State v. Young, supra, this evidence

and the prosecutor's comments about it in closing argument did not constitute a comment on the defendant's right to remain silent.

Furthermore, the defendant chose to testify at the trial. During his testimony, the defendant claimed that he did put forth a justification for his contact with Capitola when Hinrichs first contacted him, even before he claimed a false identity. 3-18-06 Trial RP 57-58. Therefore, the prosecutor could certainly assert in closing argument that the evidence proved the contrary, that the defendant did not make any such comment to Hinrichs, without that argument constituting a comment on the defendant's right to remain silent.

In Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), Jenkins was convicted for first-degree murder. At trial, he testified, contending that he had killed in self-defense. Through cross-examination, the prosecutor brought out that the defendant did not choose to go to police to report what had

happened. In closing argument, the prosecutor argued that this failure to come forward impeached his claim of self-defense. Jenkins, 447 U.S. at 232-235.

On appeal, Jenkins contended that the prosecutor violated the Fifth Amendment by commenting on his right to remain silent. However, the United States Supreme Court disagreed, holding that since the defendant chose to testify, it was proper impeachment for the prosecutor to focus on the defendant's failure to come forward with the version of events he presented at the trial. Jenkins, 447 U.S. at 238-240.

In State v. Watkins, 53 Wn. App. 264, 766 P.2d 484 (1989), Watkins was convicted of multiple counts of first-degree robbery. At trial, she testified that she committed the robberies under duress by a man named Louis. During cross-examination, the prosecutor challenged her credibility by questioning Watkins about the fact that during the investigation of

this matter she chose to talk to police, but never made the claim of duress. Watkins, 53 Wn. App. at 267-268, 273. On appeal, Watkins contended this was an impermissible inquiry into her exercise of her right to remain silent. The Court of Appeals noted that the prosecutor's questions had addressed the defendant's failure to come forward with information concerning the defense presented at trial prior to her arrest, and held this was proper impeachment that did not violate Watkins' right to remain silent. Watkins, 53 Wn. App. at 273-274.

Similarly, in the present case, the defendant chose to testify not only that his contact with Capitola was within the exception in the no-contact order, but also that he had told this to Hinrichs. The testimony by Hinrichs that the defendant said nothing about that in response to Hinrichs' questions concerned a point before the defendant was arrested, and at a point in time when the defendant had chosen not to remain silent. This testimony was not a comment on the

defendant's exercise of the right to remain silent. Therefore, the prosecutor could legitimately argue in closing that the defendant's failure to mention this justification to Hinrichs negated the defendant's credibility without violating the defendant's right to remain silent.

3. It was error for the prosecution to solicit testimony from Officer Hinrichs concerning the defendant's silence after his arrest, but such testimony was harmless error because it is beyond a reasonable doubt that the jury would have reached the same result absent the error.

In the previous section, the State addressed testimony by Officer Hinrichs concerning what the defendant chose not to mention during questioning prior to the defendant's arrest, and the prosecutor's argument based on that testimony. However, there was also testimony elicited from Officer Hinrichs regarding what the defendant did not say after his arrest.

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 why you shouldn't arrest him?

A. No.

5-17-06 Trial RP 22.

The defendant argues on appeal that these questions and answers constituted an impermissible comment on the defendant's post-arrest silence. The State agrees that the questions were improper, but contends they constituted only harmless error.

It is constitutional error to refer to a defendant's post-arrest silence as evidence of guilt. Doyle v. Ohio, 426 U.S. 610, 617, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); State v. Fricks, 91 Wn.2d 391, 395-396, 588 P.2d 1328 (1979). At the point of the arrest in this case, Officer Hinrichs had ceased questioning the defendant. 5-17-06 Trial RP 21. Therefore, references to what the defendant did not say after that point were comments on the defendant's choice to remain silent.

When such error occurs, the error is

harmless if the State can show, beyond a reasonable doubt, that a reasonable jury would have reached the same result absent the prejudicial error. Easter, 130 Wn.2d at 242. In the present case, the defendant chose to testify at trial. He claimed that his contact with Capitola during the early morning of February 24, 2006, was of a sort permitted by the exception in the no-contact order. In support of that claim, the defendant asserted that he made the same justification to Officer Hinrichs the night of his arrest.

Q. Did you tell the officer at any time that evening about this addition that had been added to a restraining order that made you believe it was okay to be with her to talk about these issues?

A. Yes. Well, yes I - -

Q. Okay.

A. I did and I did with him. I told him the restraining order was there.

Q. With Officer Hinricks (sic)?

A. Hinricks and officer that transferred me and again at the police department where Hinricks told me he's have to wait and see the facts; he had to get it faxed to him or teletyped to him to read it before he could

make the decision. By that time, I was already booked into the city jail.

Q. Okay?

A. And he read it. He said he'd let the prosecutor deal with it in the morning.

Q. Officer - so are you saying you were talking with Officer Hinricks?

A. Yes.

Q. Did he have a fax in his hand?

A. No.

Q. You're saying that he told you that he did check out the no-contact issue?

A. He said he had to wait till he got back to the police station to see what I was talking about because he had to see it before he'd believe it

5-18-06 Trial RP 35-36.

Q. And when you were placed under arrest, he told you why, didn't he?

A. Yes, he did.

Q. And your testimony today is that you then tell him no, no, no, we have an excuse, right?

A. He told me the reason why he was placing me under arrest was the fact that he couldn't verify what I told him was true or not until he received a copy of it, of the restraining order.

5-18-06 Trial RP 61.

The testimony quoted above was in conflict with Hinrichs' version of events, since Hinrichs had testified that the defendant never voiced a justification for his contact with Capitola, either before the arrest or after. 5-17-06 Trial RP 22-23. The prosecutor did not have Hinrichs come back in rebuttal after the defendant's testimony in order to assert this conflict because Hinrichs had already given that testimony. 5-18-06 Trial RP 74.

Had the prosecutor not asked the questions concerning the defendant's silence after his arrest during the State's case-in-chief, the testimony of the defendant quoted above would have opened the door to Hinrichs coming back on the stand to testify, since the State is allowed to use a defendant's post-arrest silence to impeach the defendant's version of his post-arrest conduct. State v. Kendrick, 47 Wn. App. 620, 629-631, 736 P.2d 1079 (1987); State v. Vargas, 25 Wn. App. 809, 810-812, 610 P.2d 1 (1980). Hinrichs could have then been asked the

same questions and could have given the same answers concerning the defendant's silence after the arrest, since that directly refuted the defendant's testimony concerning his alleged efforts after the arrest to justify his contact with Capitola to Hinrichs.

Thus, had the prosecutor refrained from asking the improper questions during the State's case-in-chief, the State could still have ultimately placed the exact same evidence before the jury. Such evidence was appropriately considered by the jury in evaluating the defendant's claim that he tried to assert his version of events to Hinrichs the night of the arrest. Therefore, it should be concluded beyond a reasonable doubt that, absent the error in this case, the result would have been the same.

The defendant also argues on appeal that his trial counsel provided ineffective assistance by not objecting to the erroneous questions directed to Officer Hinrichs by the prosecutor concerning the defendant's post-arrest silence. As noted

previously, to prove ineffective assistance of counsel, the defendant must show there is a reasonable probability that, absent defense counsel's error, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 334-335. For the reasons discussed above, had defense counsel objected to the prosecutor's improper questions in the State's case-in-chief, the same evidence could have still been introduced later in response to the defendant's testimony. Therefore, the defendant cannot satisfy his burden in this instance.

4. Considering the evidence in the light most favorable to the State, there was sufficient evidence for a reasonable trier of fact to find that the defendant was guilty beyond a reasonable doubt of felony violation of a no-contact order.

In the present case, the defendant was convicted for felony violation of a no-contact order. On appeal, the defendant contends that the evidence at trial was insufficient to support this conviction. The evidence is sufficient if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact

to find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, the State's burden was to prove that:
(1) on or about February 24, 2006, the defendant

had willful contact with Capitola Prah1; (2) the defendant knew of the provisions of the no-contact order; (3) the defendant's contact with Capitola Prah1 (Capitola Moyer) was prohibited by the order; (4) the contact occurred in Thurston County, Washington State; and (5) the defendant had at least twice previously been convicted for the violation of a similar order. RCW 10.99.050; RCW 26.50.110(5).

The no-contact order in this case provided for one exception, stating that "[t]he defendant may have limited contact with Ms. Moyer solely for the purpose of child custody and care issues". Ex 1. On appeal, the defendant contends that the evidence was insufficient to show that his contact with Capitola was outside the scope of that exception.

The defendant and Capitola were found together in a vehicle in Olympia at approximately 12:13 in the morning on February 24, 2006. 5-17-06 Trial RP 23. The defendant and Capitola both lived in Centralia. 5-18-06 Trial RP 20, 30. It

was certainly unlikely that these two people would drive all the way from Centralia to Olympia in the early hours of the morning simply to discuss the care and custody of their child.

When contacted by Officer Hinrichs, the defendant sought to hide his true identity by pretending to be his brother. 5-17-06 Trial RP 17. The defendant only gave up that pretense after Hinrichs pressed him for additional identification information, which he was unable to recall. 5-17-06 Trial RP 18-19.

While the defendant did not have to testify, he chose to do so. He, himself, referred to his version of events, involving inadvertently missing 5 exits from Interstate 5, as "hard to believe". 5-18-06 Trial RP 53. A reasonable juror could have concluded that the defendant's story was intended to hide the truth. In addition, the defendant was inconsistent in his testimony concerning whether his contact with Capitola was limited to discussing issues concerning the custody or care of his daughter.

At times, he acknowledged he discussed other matters with Capitola, and then tried to suggest that all such other matters were somehow linked to the care of his child. See summary of defendant's testimony in Statement of the Case. At the sentencing hearing, the defendant referred to the fact that he had admitted in testimony at trial that his contact with Capitola had expanded beyond the subject of his daughter into "other issues". 6-2-06 Hearing RP 13.

Considering the evidence in this trial as a whole, there was substantial evidence to support the conclusion that the defendant's contact with Capitola violated the terms of the no-contact order. Since the evidence also showed he had previously been convicted twice for violation of similar orders, he was properly convicted for felony violation of no-contact order.

5. There has been no showing that the absence of Capitola Prahls testimony in this trial was due to a deficient performance by the defendant's trial counsel, nor has there been shown a reasonable probability that her presence as a witness at the trial would have changed the outcome.

At the beginning of the trial, the defense counsel and the prosecutor discussed with the court the possibility of Capitola Prah1 testifying as a defense witness. Defense counsel apparently had no knowledge of her whereabouts and had been trying to locate her, although she had faxed him a written statement. 5-17-06 Trial RP 4-6. He informed the court that, through a third party, he had gotten a message to her to come and testify, but had not been in contact with her. 5-17-06 Trial RP 3. At the end of the State's case-in-chief, defense counsel simply stated that Mr. Jeffers would be the only witness for the defense. 5-18-06 Trial RP 19.

At sentencing, defense counsel submitted a memorandum arguing for an exceptional mitigated sentence in this case. He attached a copy of a Victim Impact Statement signed by Capitola Prah1 on March 28, 2006. CP 35-48. In that Victim Impact Statement, she stated as follows:

When Rick and I were together, we were merely discussing our daughter's future placement plans, because I was going to enter a treatment facility. In the No

Contact Order out of Lewis County, it states that we are allowed to have limited contact regarding our child's custody. Also, It does not stipulate a time schedule. Therefore, I do not feel that Rick Loring Jeffers has violated the no-contact order.

CP 42.

On appeal, the defendant contends that the defendant's trial counsel rendered ineffective assistance in this case because he did not present Capitola's testimony at the trial, or preserve that testimony beforehand in case she was not present at the trial. As previously noted, the defendant has the burden of showing: (1) that defense counsel's performance was deficient, in that it fell below an objective standard of reasonableness based on a consideration of all the circumstances; and (2) that defense counsel's performance prejudiced the defendant because there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995).

The record only shows that Capitola did not

testify. Whether it was because she failed to appear at court in response to defense counsel's message is unclear. Assuming that was the reason, the defendant cites no information from the record concerning what efforts were made by defense counsel to locate Capitola Prah1 prior to the trial. Therefore, the defendant cannot show that counsel's performance in that regard was deficient.

In addition, the defendant has not shown that there is a reasonable probability that if Capitola had testified that the outcome would have been any different. The only relevant statement from Capitola contained in the Victim Impact Statement was that she and the defendant had only discussed her daughter's future placement plans when Capitola entered a treatment center. CP 42. On the other hand, the defendant testified that the meeting was to discuss his transporting Capitola and the baby to medical appointments after Capitola entered into treatment. 5-18-06 Trial RP 22-24. Further, he specifically stated that

Capitola did not want to speak with him concerning custody issues, but rather concerning the child's health issues. 5-18-06 Trial RP 27-28. Finally, as discussed above, the defendant acknowledged that he and Capitola had also discussed other subjects, contrary to her claim.

Thus, it is questionable whether Capitola's testimony would have helped or hurt the defendant. Since it apparently would not have been consistent with his testimony, the effect could easily have been to further weaken the defendant's own credibility.

6. The defendant has not shown that defendant's trial counsel rendered ineffective assistance when he did not move to dismiss for insufficiency at the end of the State's case.

At the completion of the State's case-in-chief, there was no motion to dismiss for insufficient evidence. 5-18-06 Trial RP 19. On appeal, the defendant contends that this constituted ineffective assistance of counsel. The defendant's burden when making a claim of ineffective assistance has been set forth above, and that recitation is incorporated herein by

reference. The defendant has not shown that there is a reasonable probability a motion to dismiss at the close of the State's case-in-chief would have been granted.

When a challenge is made to the sufficiency of the evidence at the conclusion of the State's case-in-chief, the test is whether, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. State v. Hughes, 106 Wn.2d 176, 199, 721 P.2d 902 (1986). Such a challenge admits the truth of the State's evidence and all inferences which could reasonably be drawn from that evidence. State v. Gibson, 79 Wn.2d 856, 858-859, 490 P.2d 874 (1971).

Given the circumstances of the defendant's contact with Capitola at the time he was contacted by Officer Hinrichs, as discussed above, and the defendant's choice to lie about his identity, and making all reasonable inferences in favor of the State, a reasonable trier of fact could conclude

beyond a reasonable doubt that this was not a contact to solely address child custody or child care. Therefore, there is not a reasonable probability that a motion for insufficient evidence would have been granted at the end of the State's case-in-chief, and as a result there has not been a showing here of ineffective assistance of counsel.

D. CONCLUSION

Based on the above, the State respectfully requests that the defendant's conviction for felony violation of a no-contact order be affirmed.

DATED this 23rd day of March, 2007.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
RICK L. JEFFERS,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

STATE OF WASHINGTON
 COUNTY OF THURSTON
 07/11/2007 10:10:17 AM
 BY _____

James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 26th day of March, 2007, I caused to be mailed to appellant's attorney, PATRICIA A. PETHICK, a copy of the Respondent's Brief, addressing said envelope as follows:

Patricia A. Pethick,
Attorney at Law
P.O. Box 7269
Tacoma, WA 98417

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that
the foregoing is true and correct to the best of
my knowledge.

DATED this 26th day of March, 2007 at Olympia, WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney