

No. 35079-3-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

NATHAN A. BROOKS,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEP.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
The Honorable David Draper, Judge Pro Tem
Cause No. 06-1-00673-2

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE	1
D. ARGUMENT	4
(1) THE TRIAL COURT ERRED IN FAILING TO APPRISE BROOKS OF HIS RIGHT TO SELF-REPRESENTATION WHEN HE REPEATEDLY EXPRESSED DISSATISFACTION WITH HIS APPOINTED TRIAL COUNSEL	4
(2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT BROOKS WAS GUILTY OF FELONY VIOLATION OF A NO CONTACT ORDER	6
E. CONCLUSION	9

TABLE OF AUTHORITIES

	<u>Page(s)</u>
 <u>Washington Cases</u>	
<u>State v. Bencivinga</u> , 137 Wn.2d 703, 974 P.2d 832 (1999).....	6, 9
<u>State v. Breedlove</u> , 79 Wn. App. 101, 900 P.2d 586 (1995).....	4
<u>State v. Craven</u> , 67 Wn. App. 921, 841 P.2d 774 (1992).....	6
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	6
<u>State v. Lopez</u> , 79 Wn. App. 755, 904 P.2d 1179 (1995).....	4
<u>State v. Medlock</u> , 86 Wn. App. 89, 935 P.2d 693, <i>review denied</i> , 133 Wn.2d 1012 (1997)	4
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	6
<u>State v. Weaver</u> , 60 Wn.2d 87, 371 P.2d 1006 (1962)	7
 <u>Federal Cases</u>	
<u>Wheat v. United States</u> , 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).....	4
 <u>Constitution</u>	
Art. 1, sec. 22 (amend. 10) of the Washington Constitution.....	4, 5
Sixth Amendment to the U.S. Constitution	4, 5
 <u>Court Rules</u>	
CrR 3.5.....	1
CrR 3.6.....	1

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to apprise Brooks of his right to self-representation when he repeatedly expressed his dissatisfaction with his appointed trial counsel.
2. The trial court erred in not taking the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in failing to apprise Brooks of his right to self-representation when he repeatedly expressed his dissatisfaction with his appointed trial counsel? [Assignment of Error No. 1].
2. Whether there was sufficient evidence to uphold Brooks's conviction for felony violation of a no contact order? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

Nathan A. Brooks (Brooks) was charged by first amended information filed in Thurston County Superior Court with one count of felony violation of a no contact order (Count I), and one count of obstructing a law enforcement officer (Count II). [CP 9-10].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Prior to and during trial, Brooks expressed dissatisfaction with his appointed trial counsel to which the court order appointed trial counsel to continue representing Brooks without ever discussing Brooks's right to self-representation. [6-1-06 RP 3-6; 6-28-06 RP 5-6; 7-3-06 RP 7; 7-17-

06 RP 48-50]. Brooks, after agreeing in writing to a judge pro tem, was tried by a jury, the Honorable David Draper presiding. Prior to submitting the case to the jury, the court dismissed Count II (obstructing a law enforcement officer). [7-17-06 RP 67-68]. Brooks had no objections and took no exceptions to the court's instructions. [7-17-06 RP 80]. The jury found Brooks guilty as charged in Count I (violation of a no contact order) and entered a special verdict finding that Brooks had twice "twice previously been convicted of violation of no contact/protection orders" making the current conviction a felony (Exhibits Nos. 3 and 4—copies of Brooks's prior judgments and sentences for violation of a no contact orders—being admitted without objection). [CP 28, 29; 7-17-06 RP 78, 103-109].

Prior to sentencing, Brooks pleaded guilty to four additional counts of felony violation of a no contact order under a separate cause number, which is not the subject of the current appeal. [8-15-06 RP 2-8]. The court then sentenced Brooks to an exceptional sentence downward of 36-months on the current matter and to exceptional sentences downward of 36-months on each of the other four convictions of felony violation of a no contact order with all the sentences running concurrently for a total sentence of 36-months. [CP 46-57; 8-15-06 RP 17-20].

A notice of appeal was timely filed on August 16, 2006. [CP 15-27]. This appeal follows.

2. Facts

On April 11, 2006, Thurston County Sheriff Deputies Nathan Konschuh and George Oplinger were dispatched to the residence of Amber Trautman, 326 Choker Street Southeast No. B, Lacey, Washington, regarding a disturbance. [7-17-06 RP 27-30, 53-54]. The deputies confirmed that Ms. Trautman had a valid no contact order prohibiting Nathan Brooks from contacting her or being at her residence—said no contact order was admitted in evidence as Exhibit No. 1. [7-17-06 RP 34-35, 54-57].

Upon arriving at Trautman's residence, the deputies saw Trautman talking to a man they recognized from prior contacts as Nathan Brooks. [7-17-06 RP 30-33, 39, 54-58]. The deputies asked the man his name, and were told "Nathan Zimmerman" to which they responded they believed him to be Nathan Brooks, and arrested him for violation on a no contact order. [7-17-06 RP 33-37, 58-59].

Amber Trautman testified that she and Brooks have a child in common, and that her mother, who lives next door, had called Brooks to come and care for their child. [7-17-06 RP 74-76]. Trautman further testified that she was not supposed to be there when Brooks came to care

for their child and that she did not wish anything “bad” to happen to him for something he didn’t do because she had been there and she had contacted Brooks. [7-17-06 RP 74-77].

Brooks did not testify in his defense.

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN FAILING TO APPRISE BROOKS OF HIS RIGHT TO SELF-REPRESENTATION WHEN HE REPEATEDLY EXPRESSED DISSATISFACTION WITH HIS APPOINTED TRIAL COUNSEL.

Art. 1, sec, 22 (amendment 10) of the Washington Constitution guarantees a defendant the right to counsel. The right guaranteed by this provision of the Washington Constitution provides no more protection than that guaranteed by the Sixth Amendment to the United States Constitution. *See State v. Medlock*, 86 Wn. App. 89, 99, 935 P.2d 693, *review denied*, 133 Wn.2d 1012 (1997). A defendant does not have an absolute Sixth Amendment right to choose any particular advocate. *State v. Lopez*, 79 Wn. App. 755, 764, 904 P.2d 1179 (1995); *citing Wheat v. United States*, 486 U.S. 153, 159 n. 3, 108 S. Ct. 1692, 1697 n.3, 100 L. Ed. 2d 140 (1988). But, a defendant’s unequivocal assertion of his right to represent himself pro se that is made timely and not imposed for an improper purpose should be honored. *State v. Breedlove*, 79 Wn. App. 101, 900 P.2d 586 (1995).

Here, Brooks repeatedly expressed dissatisfaction with his appointed trial counsel. [6-1-06 RP 3-6; 6-28-06 RP 5-6; 7-3-06 RP 7; 7-17-06 RP 48-50]. In each instance, the trial court advised Brooks that as counsel had been appointed on his behalf that he did not have the right to choose the counsel appointed [6-1-06 RP 4], and that in the court's estimation that Brooks's was receiving "adequate representation." [6-1-06 RP 4-6; 7-17-06 RP 50]. However, in none of these instances did the court apprise Brooks that if he was dissatisfied with his appointed trial counsel that he had the right to represent himself. This failure on the court's part was error. This error was compounded in each instance by the court's assessment that Brooks was receiving "adequate" representation. Unfortunately, it was not for the court to make this determination; it was Brooks's right to make this determination—assert his right to self-representation or continue with appointed trial counsel. This court should find that Brooks's concerns regarding his appointed trial counsel were not properly addressed, that the trial court failed to inform him of his right to self-representation, and that the trial with its resulting conviction cannot stand as Brooks was denied his constitutional rights under the Art. 1, sec. 22 (amend. 10) of the Washington Constitution and the Sixth Amendment to the United States Constitution.

(2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT BROOKS 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 Brooks with felony violation of a no contact order, and the court's to-convict instruction on this charge, Instruction No. 6, [CP 39], set forth the elements the State bore the burden of proving beyond a reasonable doubt as follows:

- 1) That on or about the 10th day of April, 2006, the defendant willfully had contact with Amber Trautman;
- 2) That such conduct was prohibited by a domestic violence no-contact order;
- 3) That the defendant knew of the existence of the domestic violence no-contact order; and
- 4) That the acts occurred in Thurston county, State of Washington.

[Emphasis added].¹

¹ The court instructed the jury in Instruction No. 7 [CP 40], as to the definition of "willfully" as follows:

A person acts willfully when he or she acts knowingly.

The court also instructed the jury in Instruction No. 8 [CP 41], as to the definition of "knowingly" as follows:

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

The sum of the State's evidence to sustain this charge and conviction was the testimony of the deputies (Konschuh and Oplinger) that they observed Brooks talking to Trautman at her residence where they had been dispatched regarding a disturbance. However, in order to sustain this charge and conviction, the State bore the burden of proving beyond a reasonable doubt that Brooks's conduct in talking with Trautman was done "willfully." The State cannot sustain its burden on this essential element.

Trautman testified that her mother, who lives next door to her, had contacted Brooks to care for their child. Brooks did not contact Trautman, nor did Trautman contact Brooks. She also testified that she was not supposed to be home when Brooks came to care for their child. In other words, when the deputies made their observations of contact between Brooks and Trautman, Brooks had been "ambushed" by Trautman as he did not "willfully" or "knowingly" contact her—he was merely attempting to care for his child at the instigation of Trautman's mother. Given the totality of the evidence elicited at trial and given the State's burden on this essential element it cannot be said that the evidence establishes beyond a reasonable doubt all the essential elements of the crime for which Brooks was charged and convicted. The State's case against Brooks constituted nothing more than

the improper pyramiding of inferences condemned by Bencivinga, supra on an essential element.

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

E. CONCLUSION

Based on the above, Brooks respectfully requests this court to reverse and dismiss her conviction.

DATED this 1st day of February 2007.

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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 1st day of February 2007, 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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Jim Powers
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(and the transcript)

Signed at Tacoma, Washington this 1st day of February 2007.

Patricia A. Pethick
Patricia A. Pethick

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BY [Signature]