

NO. 35814-0-II

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

STATE OF WASHINGTON, Respondent

v.

ROBB EUGENE YORK, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-02208-4

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

By way of Information (CP 1), the defendant was charged with one count of Felony Domestic Violence Court Order Violation (At Least Two Previous Convictions). The alleged date that this occurred was on or about November 2, 2006, and the protected person was Nicole McNeel. The Court's Instructions to the Jury (CP 11) included as Instruction No. 8 the elements of a domestic violence court order violation. Those elements were as follows:

1. That on or about November 2, 2006, the defendant willfully had contact with Nicole McNeel;
2. That such contact was prohibited by a no-contact order;
3. That the defendant knew of the existence of the no-contact order;
4. That the acts occurred in the State of Washington.

The jury was also supplied a special verdict form concerning whether or not the defendant had been previously convicted of two violations of no-contact orders.

The State, in its case-in-chief, called Deputy Shawn Boyle from the Clark County Sheriff's Office. He indicated that on November 2, 2006, he was assigned to patrol in Clark County. (RP 4). He testified that he was at an area in Clark County (the Ridgefield Junction Chevron gas

station) and testified that he recognized the defendant, Robb York. He indicated that he had gone to junior high school with Mr. York and had previous contacts with him while working with the Sheriff's Office. (RP 5). He indicated that he ran a records check on Mr. York and discovered that there was a no-contact order in place. He also determined that the registered owner of the vehicle that the defendant was a passenger in was Nicole McNeel. (RP 10). He also confirmed through dispatch that the protected person in the no-contact order was Nicole McNeel. Dispatch also indicated the Ms. McNeel was 5 foot 5 inches, 160 pounds with brown hair. The officer confirmed that fit the description of the person driving the Ford Explorer that the defendant was a passenger in. (RP 11-12).

The officer stopped the vehicle and in the presence of the defendant, the driver identified herself as Nicole McNeel.

QUESTION (Deputy Prosecutor): But what did you do -- did you approach the vehicle?

ANSWER (Deputy Boyle): Yes.

QUESTION: What -- from what side?

ANSWER: The passenger side.

QUESTION: And who was sitting in the passenger seat?

ANSWER: Mr. York.

QUESTION: Did you recognize him from just seeing him at the Chevron?

ANSWER: I did.

QUESTION: And did you ask the driver who she was?

ANSWER: I did.

QUESTION: And was it the same -- was the person sitting in the driver's seat at that time the same person that you saw get into the car?

ANSWER: Yes.

QUESTION: And what was her answer when you asked her -- or what did you ask her?

ANSWER: I asked if she was Nicole McNeil.

QUESTION: And what did she say?

ANSWER: "Yes."

QUESTION: Did she match -- did that person match the physical descriptions that you had received from Dispatch?

ANSWER: Yes.

QUESTION: At that point did you place the defendant under arrest?

ANSWER: I asked him to exit the vehicle.

QUESTION: Okay. And then what did you do?

ANSWER: I told him he was under arrest.

QUESTION: And what did you tell him he was under arrest for?

ANSWER: For violation of a no-contact order.

QUESTION: And at that point was the defendant in custody?

ANSWER: He wasn't in handcuffs, but, yes.

QUESTION: Did you ask him any -- immediately following putting him under -- or telling them (sic) that he was under arrest, did you ask him any other questions?

ANSWER: No.

QUESTION: Did he volunteer any statements to you?

ANSWER: Yes.

(RP 17, L.8 – 18, L. 22)

After a quick 3.5 determination, the volunteered statement by the defendant was as follows:

QUESTION (Deputy Prosecutor): After you informed Mr. York that he was under arrest for violating a no-contact order, did he volunteer any statements to you?

ANSWER (Deputy Boyle): He did.

QUESTION: What did he say?

ANSWER: He claimed the order was not served.

(RP 23, L.9-14)

The officer also testified that he confirmed the identity of the driver as Nicole McNeel by looking at her driver's license. (RP 26).

The next witness called by the State in its case-in-chief was Tracy Neuhauser. Ms. Neuhauser indicated that she worked for District Court in Clark County and indicated that her job responsibilities included archiving and certifying of District Court documents. (RP 28-29).

As part of her duties, she testified that Exhibit No. 1 was a certified copy of a no-contact order restraining the defendant from having contact with Nicole McNeel. She indicated that the date that this went into effect was March 20, 2006, and expired on March 20, 2008. (RP 39-40).

To establish the felony aspect of this case, the State submitted documentation from the District Court concerning two prior convictions for violations of no-contact orders. Exhibits 2, 3, and 5 all dealt with a violation of a no-contact order under District Court No. 14370V. Those documents were a Statement of Defendant on Plea of Guilty, a Judgment and Sentence and DV No-Contact Order. These documents were all admitted.

Concerning the second violation of a court order, the documentation supplied was Exhibit No. 4 which is designated as a "District Court Docket". This was designated as a short docket for an older case. The reason for that was that the matter occurred back in 1997 and those documents had been destroyed. By State law, they were

disposed of after three years. (RP 31-32). An objection was made concerning whether or not this would constitute reliable or accurate information. (RP 34). The Deputy Prosecutor indicated that it was under the business records exception act and that she believed she had laid a proper foundation for admissibility. (RP 34). The defense further indicated that it was not claiming that this was a hearsay problem, but one of reliability of the information. The Court indicated that this was a public record and the rules for keeping public records in District Court were appropriate. This was a self-authenticating document and there had been adequate explanation as to what had occurred to the other underlying documentation. (RP 35-36). The Court ruled that the documentation would be admissible. After that discussion, the testimony resumed with the indication that the defendant was the party named in that particular case and further shows that he pled guilty on March 24, 1997, of Violating a Harassment/No-Contact Order. (RP 39).

The jury found the defendant guilty of the crime of Domestic Violence Court Order Violation (Verdict – CP 33) and also found that he had twice previously been convicted of violations of no-contact orders (Special Verdict Form – CP 34). On January 12, 2007, the defendant was sentenced on those violations (Felony Judgment and Sentence – CP 36).

II. RESPONSE TO ASSIGNMENTS OF ERROR NO. 1 – 4

The first four assignments of error are basically arguments to whether or not the State has produced substantial evidence to support the elements of the crime charged. Although they are couched in terms of evidence objections, confrontation issues, and prosecutorial misconduct, they all appear to boil down to the same thing: Was there substantial evidence to establish the elements of the crime beyond a reasonable doubt?

In a claim of insufficient evidence, the Appellate Court examines whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,” viewing the evidence in a light most favorable to the State. State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). Determinations of credibility are for the fact finder and are not reviewable on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The Appellate Court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. Put another way, credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d at 71; State v. Jackson, 192 Wn. App. 95, 109, 117 P.3d 1182 (2005).

The State submits that there is substantial evidence in the record to support a finding a guilty of a violation of a domestic violence court order. There is no question but that the defendant was in contact with Nicole McNeel and that that contact had been prohibited by a no-contact order. His statement to the officer that the paperwork had not been served also establishes that he knew the existence of the no-contact order. The Washington Domestic Violence Protection Act, RCW 26.50, requires knowledge of the protection order, not personal service, as prerequisite to a criminal charge for its violation. City of Alburn v. Solis-Marcial, 119 Wn. App. 398, 79 P.3d 1174 (2003). Finally, there is no question but that the acts occurred in the State of Washington as venue was established in the evidence. (RP 4-5).

Violating the statute in question is a gross misdemeanor unless subsections 4 or 5 apply to the defendant. Clearly there is sufficient evidence to justify a conviction for the gross misdemeanor.

Counsel on appeal argues that one or some of the elements of the crime were proven by inadmissible hearsay. Yet as the trial court clearly pointed out and the testimony previously set forth in the Statement of Facts in this brief indicate, all statements concerning the identity of the occupants of the vehicle were done in the presence of the defendant. He

was clearly put on notice at that time of the nature of the arrest and was clearly there to raise any concerns he had about the identity of the young lady with him. As the court was pointing out to the defense attorney, it was all part of the initial arrest of the defendant. “She’s identified herself in his presence. He is there. He has the ability to – to disclaim it. His silence can be considered consent.” (RP 16, L.2-6). This was not an attempt by the State to use a defendant’s pre-arrest silence as substantive evidence of his guilt as was done in State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). Rather, this is close to the situation in State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996). Here, there was not discussion with the defendant nor was the officer even talking to the defendant. The objection that was made at the trial level was that this was hearsay but it cannot be hearsay if it is being done in the presence of the defendant. ER 801(d)(2) discusses the admission by a party opponent. On appeal, the question of the identity of the driver becomes mixed. The defense claim is that all statements by dispatch as well as the driver’s statements to the officer, along with her actions in giving the officer her driver’s license were testimonial for the purposes of confrontation under the Sixth Amendment. (Brief of Appellant, page 20). As a result, the defense maintains that the right of confrontation has been violated.

The State submits that certainly, some of these matters do not fit so neatly into this package. For example, the providing of the driver's license and the information that is contained on the driver's license as to name with picture and that that picture and name are the same as the person standing in front of him is something for the officer to testify to. Thus, there has been confrontation with the witness who has the information. This is not a violation of a defendant's rights under the confrontation clause because he is having his right of confrontation with that witness. State v. Mason, 127 Wn. App. 554, 560, 126 P.3d 34 (2005). With that in mind, it is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). "The correct inquiry is whether, assuming that the damaging potential of the testimony were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Deleware v. VanArsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The State submits that viewing the evidence in this case, there at the roadside, it is obvious that the defendant was present and knew what was going on and that he also indicated that he was well aware of the no-contact order as it applied to the driver of the vehicle he was in because

of his comment to the officer that it had not been served. This coupled with the officer's review of the driver's license and confirming identity of the driver, clearly demonstrated enough evidence to lead to the arrest.

Counsel on appeal also claims that the deputy prosecutor trying the case committed misconduct and denied the defendant a fair trial by arguing substance from testimony that the Court did not admit as substantive evidence. It is true that early on in the case there was colloquy among the attorneys and the judge concerning the ground rules for admissibility of some of the evidence. But, just prior to closing arguments, the Court again reviewed this information and determined that much of it was of substantive nature. Thus, matters dealing with the physical description of Ms. McNeel, the registration of the car to her, and her statement that she was Nicole McNeel were all allowed to go to the jury as substantive evidence. (RP 58, L.8-23).

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 5

The fifth assignment of error raised by the defendant is that trial counsel provided ineffective assistance by not attempting to prevent admission of Exhibits 1 through 5. Those documents deal with the no-contact order that was violated in our substantive case and the documentation supporting the two prior convictions for the aggravator

raising this from a gross misdemeanor to a class C felony. To demonstrate ineffective assistance, defendant must establish that counsel's errors were so serious as to deprive him of a fair trial. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This showing is made when there is a reasonable probability but for counsel's errors, the result of the trial would have been different. If an action the defendant complains of can fairly be characterized as legitimate trial strategy or tactic, then that action cannot form the basis of an ineffective assistance of counsel claim. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1995).

In this case, the defense attorney at trial did not oppose the majority of documentation that was supplied. Rather, he attempted to show that at least one of these documents was unreliable and because of that, the jury should not find the defendant guilty of the class C felony. His first claim is that he has no problem with the identification or the type of documentation that has been supplied as it relates to the more recent conviction. He indicates that all the proper paperwork is there and that the defendant is the person named in the documentation. His argument is that the older conviction which is documented by only the one-page District Court Docket (Exhibit No. 4) is unreliable and should be subject to close

scrutiny by the jury. Because the felony conviction requires two convictions, he is arguing that one of those convictions is not reliable and thus should not support the enhancement. His argument to the jury concerning this went as follows:

In regards to the two prior convictions, there's another problem there. Again, it's not - - you're not here to decide whether he probably had two prior convictions, you're here to decide whether they proved to you beyond a reasonable doubt that he had two convictions.

Okay, now, perhaps it's not the State's fault that these files are destroyed, but what's the best evidence to show someone had a conviction?

(Discussion with the clerk regarding exhibit.)

Well, the Statement of Defendant on Plea of Guilty, Exhibit 2. This is where on one occasion Robert York pled guilty. All right, we can see that.

And we know that, we can back that up, because there's also this other document called Judgment and Sentence signed by Judge Schreiber showing that he was convicted. That's how we know.

Now, this is good proof. This is great proof. This is proof beyond a reasonable doubt that he had one prior conviction.

So I concede that point. Yes, he has one prior conviction and they've proven that beyond a reasonable doubt.

But there's that second one. Well, what did we hear? What was the testimony? We know that - - we know that she's had to go back and correct mistakes. We know mistakes happen. Everybody who know - - who does - - has ever had computers, who's ever worked in data entry,

anyone who's ever had a job knows mistakes happen all the time.

And when you're entering information into a computer, mistakes can happen. Perhaps he's found guilty on one thing but not on another thing and they incorrectly put it.

And the only difference between guilty and not guilty is the not; right?

Did we hear any testimony today about the accuracy of data entry into the system? Do we know that they're 99 percent accurate? Did we hear anything like that? No. So there's no testimony, no information given about what kind of accuracy there is in the system.

Maybe they're mistakes one and two. We don't know, no testimony. Maybe it's much rarer than that.

The question - - the point is, we don't know. All we know is that mistakes happen. That's all we know, that mistakes happen.

They haven't proven to you beyond a reasonable doubt that he has a second conviction. They haven't brought in the documentation.

Now, some of you probably think, Yeah, but he probably did it. I mean, what are the chances that it's the one mistake. The issue is not probably, ladies and gentlemen. Your duty to the court is to ask yourself, did they prove the case beyond a reasonable doubt? Is it unreasonable to believe that a mistake could have happened? Is that unreasonable?

No. It's not unreasonable. In fact, that's very plausible. So did they prove that element beyond a reasonable doubt? No. Because it's very reasonable that a mistake could have happened.

(RP 72, L.18 – 75, L.6)

The State submits that this was a trial tactic used by the defense to avoid conviction on the felony. The strong presumption that counsel's representation was effective can only be overcome by a clear showing of ineffectiveness derived from the record as a whole. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The actions that the defendant complains of now can fairly be characterized as a legitimate trial strategy or tactic. The defendant received effective assistance of counsel.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 24 day of August, 2007.

Respectfully submitted:

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