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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 failing to give a unanimity instruction on felony violation of a no contact order where the State failed to elicit sufficient evidence of both of the charged alternatives.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in not taking Stromberg's case from the jury for lack of sufficient evidence when:
  - (a) Stromberg was at Ms. Zwieg's residence for about an hour on October 18, 2007;
  - (b) Walter Zwieg witnessed Stromberg create a disturbance in his driveway on that date; and
  - (c) The distance from where Deputy Baty found Stromberg was about 40 feet from where Ms. Zwieg was situated?
2. Did the trial court err by not giving a unanimity instruction for one count of felony violation of a no contact order when:
  - (a) only one offense was charged; and
  - (b) the State presented sufficient evidence to substantially support both alternative means?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Stromberg's recitation of the procedural history and facts and adds the following:

Marsha Zwiég admitted that she was aware of the court orders that prohibited Stromberg from having contact with her and testified that she “didn’t apply for those orders; the Court did.” RP 35: 17-19. Ms. Zwiég also testified that Stromberg was at her address for “[j]ust maybe an hour” on October 18, 2007. RP 35: 22-23; 3. Although Stromberg did not go inside Ms. Zwiég’s residence, she agreed that he was outside of it and that his behavior was “okay” and that he was “just himself.” RP 36: 3-10.

Walter Zwiég testified that between 12:30 AM and 1:00 AM on October 18, 2007, he saw Stromberg: “out there in the driveway just hollerin’ and cussing and making all kinds of obscene noises and just screamin’ and hollerin’.” RP 42: 7-10. While Mr. Zwiég asked Stromberg “to quit,” he “wouldn’t do it.” RP 42: 11. Mr. Zwiég also told Stromberg that he was “supposed to be off this property,” and that “here you are back again.” RP 42: 12-13.

Stromberg testified that he had “had a couple of drinks” before he took the bus out to the Zwiég property. RP 67: 2-3. After leaving the bus, Stromberg explained that:

[I] was trying to stay out of the rain. I was soaking wet. Had to- I had walked all the way to the end of the road to catch a ride and I couldn’t catch a ride. And I came back and that’s on the very corner or what I believe is Wally’s [Zwiég] property. RP 61: 20-24.

In response to his attorney's question as to whether he had any contact with Ms. Zwieg on or about October 18, 2007, Stromberg said, "[n]o, I didn't have any contact with Marsha." RP 61: 13-15.

Deputy Baty of the Mason County Sheriff's Department arrested Stromberg and noted that Stromberg appeared to have been drinking. RP 58: 7-9. In particular, Deputy Baty "smelled a very strong odor of alcohol coming from [Stromberg's] person and his mannerisms were kind of clumsy. He wasn't able to walk real straight." RP 59: 2-4. Deputy Baty also testified that Marsha Zwieg was "fairly intoxicated." RP 59: 12-15. When asked to estimate the distance from where he contacted Marsha Zwieg to where Stromberg was, Deputy Baty said "40 feet." RP 77: 8-11. A records check by the Mason County Sheriff's Department revealed that a no-contact order was in effect between Stromberg and Ms. Zwieg at the time of Stromberg's arrest. RP 49: 14-18.

### 3. Summary of Argument

The trial court did not err in not taking Stromberg's case from the jury for lack of sufficient evidence because: (a) Stromberg was at Ms. Zwieg's residence for about an hour on October 18, 2007; (b) Walter Zwieg witnessed Stromberg create a disturbance in his driveway on this date; and (c) The distance from where Deputy Baty found Stromberg was

about 40 feet from where Ms. Zwiég was situated. Additionally, the trial court did not err by not giving a unanimity instruction for one count of felony violation of a no contact order because: (a) only one offense was charged; and (b) the State presented sufficient evidence to substantially support both alternative means. The decision of the trial court is complete, correct and should be affirmed.

#### E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN NOT TAKING STROMBERG'S CASE FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE:
  - (a) STROMBERG WAS AT MS. ZWIEG'S RESIDENCE FOR ABOUT AN HOUR ON OCTOBER 18, 2007;
  - (b) WALTER ZWIEG WITNESSED STROMBERG CREATE A DISTURBANCE IN HIS DRIVEWAY ON THIS DATE; AND
  - (c) THE DISTANCE FROM WHERE DEPUTY BATY FOUND STROMBERG WAS ABOUT 40 FEET FROM WHERE MS. ZWIEG WAS SITUATED.

The trial court did not err in not taking Stromberg's case from the jury for lack of sufficient evidence because: (a) Stromberg was at Ms. Zwiég's residence for about an hour on October 18, 2007; (b) Walter Zwiég witnessed Stromberg create a disturbance in his driveway on this date; and (c) The distance from where Deputy Baty found Stromberg was about 40 feet from where Ms. Zwiég was situated.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. State v. Ware, 111 Wash.App. 738, 741, 46 P. 3d.280 (2002). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201.

Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. State v. O'Neal, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992).

When viewed in the light most favorable to the State, the facts in Stromberg's case permit any rational trier of fact to find all of the essential elements of the crime, felony violation of a no contact order, beyond a

reasonable doubt. Ms. Zwiag saw Stromberg at her residence on October 17, 2007, as did Mr. Zwiag, who witnessed Stromberg create a disturbance on his property. RP 35: 22-23; 3; 42: 7-10. When Deputy Baty arrived, he found Stromberg within 40 feet of where Ms. Zwiag was. RP 77: 8-11. Although Stromberg asserted the he was merely trying to keep out of the rain, it was for the jury, not the judge, to resolve any conflicting testimony, evaluate the credibility of the witnesses, and to generally weigh the persuasiveness of this evidence. The trial court made the correct decision to let the jury decide this case and no error occurred.

2. THE TRIAL COURT DID NOT ERR BY NOT GIVING A UNANIMITY INSTRUCTION FOR ONE COUNT OF FELONY VIOLATION OF A NO CONTACT ORDER BECAUSE:
  - (a) ONLY ONE OFFENSE WAS CHARGED; AND
  - (b) THE STATE PRESENTED SUBSTANTIAL EVIDENCE TO SUPPORT BOTH ALTERNATIVE MEANS.

The trial court did not err by not giving a unanimity instruction for one count of felony violation of a no contact order because (a) only one offense was charged; and (b) the State presented sufficient evidence to substantially support both alternative means.

Alternative means statutes identify a single crime and provide more than one means of committing that crime. State v. Williams, 136 Wash.App. 486, 497, 150 P.3d 111 (2007). For example, under RCW

9.A.44.040(1)(a) and (b), rape in the first degree may be committed by the alternative means of either (1) using or threatening to use a deadly weapon, or (2) kidnapping the victim. Williams, 136 Wash.App. at 497; see State v. Whitney, 108 Wash.2d 506, 510-511, 739 P.2d 1150 (1987).

Where a single offense may be committed by alternative means under such a statute, unanimity is required as to guilt for the single crime charged, but not as to the means by which the crime was committed, so long as substantial evidence supports each alternative means. State v. Kitchen, 110 Wash.2d 403, 410, 756 P.2d 105 (1988); see State v. Petrich, 101 Wash.2d 566, 569, 683 P.2d 173 (1984).

The facts and procedure of Whitney can be contrasted to Stromberg's case because they show that a unanimity instruction is needed only if (a) statutory alternatives are charged and/or (b) each alternative is not supported by substantial evidence.

In Whitney, the defendant was charged with rape in the first degree, in violation of RCW 9A.44.040(1)(a) and (b). Whitney, 108 Wash.2d at 507. RCW 9A.44.040(1) provides in part:

- (1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion when the perpetrator or an accessory;
  - (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or

(b) Kidnaps the victim...Whitney, 108 Wash.2d at 507.

The Court of Appeals affirmed, holding that sufficient evidence supported the verdict. State v. Whitney, 44 Wn.App. 17, 20-21, 720 P.2d 853 (1987). In particular, the Court held that the jury need not be unanimous as to the method by which the first degree rape was committed because sufficient evidence supported each alternative way of committing the crime charged. Whitney, 108 Wn.2d at 507. The Court also reasoned that the alternative methods which are part of a first degree rape are not separate and distinct offenses but are rather alternate means by which one may commit the single offense of rape.

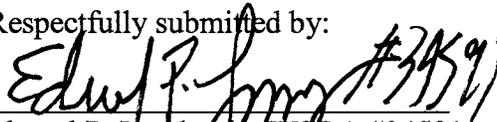
In Stromberg's case, he was charged with one count of felony violation of a no contact order under RCW 10.99.020. CP 21. Because the State presented sufficient evidence to prove that Stromberg knowingly (a) had contact with Ms. Zwieg on October 18, 2007 and (b) was at her residence on that date, a unanimity instruction was unnecessary. Applying the reasoning of Whitney, Stromberg was charged one offense that listed alternative means, and not multiple offenses that were statutorily separate and distinct; a situation that would have required that a unanimity instruction be given. No error occurred.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 14<sup>TH</sup> day of JULY, 2008

Respectfully submitted by:



Edward P. Lombardo, WSBA #34591  
Deputy Prosecuting Attorney for Respondent  
Gary P. Bureson, Prosecuting Attorney  
Mason County, WA

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

STATE OF WASHINGTON, )  
 )  
 Respondent, ) No. 37243-6-II  
 )  
 vs. ) DECLARATION OF  
 ) FILING/MAILING  
 ) PROOF OF SERVICE  
 MICHAEL A. STROMBERG, )  
 )  
 Appellant, )  
 \_\_\_\_\_ )

FILED  
COURT OF APPEALS  
DIVISION II  
08 JUL 16 AM 11:54  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

I, EDWARD P. LOMBARDO, declare and state as follows:

On MONDAY, JULY 14, 2008, I deposited in the U.S. Mail,  
postage properly prepaid, the documents related to the above cause number  
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Patricia A. Pethick  
PO Box 7269  
Tacoma, WA 98417

I, EDWARD P. LOMBARDO, declare under penalty of perjury of  
the laws of the State of Washington that the foregoing information is true  
and correct.

Dated this 14<sup>TH</sup> day of JULY, 2008, at Shelton, Washington.

*[Signature]*  
Edward P. Lombardo, WSBA #34591