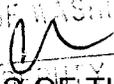


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COURT OF APPEALS
DIVISION II

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No. 42028-7-II

STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JEREMY MILLS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Thomas McPhee, Judge
Cause No. 10-1-01821-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the State presented sufficient evidence to permit a rational trier of fact to find, beyond a reasonable doubt, that the defendant was the person restrained by the domestic violence no-contact order entered into evidence as Exhibit 1 and that the Jennifer Morgan who testified was the same person protected by that order.

2. Whether the State presented sufficient evidence to permit a rational trier of fact to find, beyond a reasonable doubt, that the defendant had previously been twice convicted of violating a qualified protection order.

B. STATEMENT OF THE CASE.

The State accepts Mills' statement of the facts of the case.

Any additional facts will be incorporated into the argument.

C. ARGUMENT.

1. The State presented sufficient evidence to permit a rational trier of fact to find, beyond a reasonable doubt, that the defendant was the person restrained by, and that the Jennifer Morgan who testified was the person protected by, the domestic violence no-contact order entered into evidence as Exhibit 1.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, 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).

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). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the

persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Jeremy Mills was charged with one count of felony violation of a domestic violence no contact order, third or subsequent violation, pursuant to RCW 26.50.110(5), RCW 10.99.020, and RCW 10.99.050. [CP 2] This offense consists of three essential elements: (1) the willful contact with another; (2) the prohibition of such contact by a no-contact order; and (3) the defendant's knowledge of the no-contact order. State v. Clowes, 104 Wn. App. 935, 944, 18 P.3d 596 (2001). Mills argues that the State did not prove that he was the person named in the no-contact order or that the Jennifer Morgan who testified at trial was the person protected by the no-contact order. The order itself was admitted into evidence as Exhibit 1. [RP 56]

"It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. . . . Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary

judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated.

State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974), (internal cites omitted). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In Hill, the defendant argued that no witness had identified him in court as the person who had committed the offense, in that case possession of unlawful possession of a narcotic. Hill conceded that during the trial neither side considered the issue of identification to be “of particular significance.” Hill, 83 Wn.2d at 560. That can fairly be said of Mills’ trial. The court in Hill found that the defendant was present throughout the trial, and numerous references were made to “the defendant” and to “Jimmy Hill.” “We are satisfied that the evidence as it developed in the instant case was adequate to establish the defendant’s identity in connection with the offense for which he stood accused.” Id.

In this case, the testimony made it clear that the Jeremy Mills at the defense table was the Jeremy Mills named in the no-contact order. [Exhibit 1, Supp. CP] Thurston County Deputy

Sheriff Marlin Bryant testified that on November 2, 2010, the day of the offense, he spoke to Jennifer Morgan. [RP 55]

Q: After speaking with her, did you investigate whether or not there was a valid No Contact Order protecting Ms. Morgan?

A: Yes, I did.

Q: And I'm handing you what's been marked State's Exhibit 1. . . Do you recognize this exhibit?

A: Yes, ma'am, I do.

Q: And what is that exhibit?

A: This is the domestic violence No Contact Order that was issued between Jeremy Mills and Jennifer Morgan.

The exhibit was then admitted into evidence without objection. [RP 55-56] The deputy's testimony went on:

Q: And, Deputy, does that order address behaviors *the defendant* is restrained from doing?

A: Yes, it does.

Q: And what is *the defendant* restrained from doing?

A: *The defendant* is restrained from coming near and from having any contact whatsoever, in person or through others, by phone, mail, or any means, directly, indirectly, except for mailing or service of process of court documents by third party or contact by *defendant's* lawyer with the protected person.

Q: And who is the protected person?

A: The protected person is Jennifer Morgan.

.....
Q: Did *the defendant* sign the order?

A: Yes. There is a signature on the defendant's line.

[RP 56-58, emphasis added]

Immediately before the deputy's testimony, Jennifer Morgan testified. She identified *the defendant* as Jeremy Mills and pointed him out. [RP 48, 53] She testified that she had known *the defendant* for five years, had lived with him most of that time, and had a child with him. [RP 48] She said that she could recognize his voice on the phone. [RP 49-49] Morgan testified that when *the defendant* called her his first words were "Hey baby." [RP 49] She further testified that she did not want to report the incident to the police but had asked her mother do so only after she understood that if she did nothing about the phone call, Child Protective Services might become involved. [RP 51-52] Morgan further said that she had spoken to a deputy on the telephone about the incident. [RP 51]

During closing argument, defense counsel told the jury that "the only element that's being disputed here is whether or not the No Contact Order was violated." [RP 88] The gist of the argument

was that only Jennifer Morgan testified about the telephone call and her uncorroborated word should not be sufficient to convict. [RP 89-91] This argument indicates that at trial, the defense did not think the identity of Mills as the person restrained, or Morgan as the person protected, by the order was of concern.

Jeremy Mills was present during the entire trial and was the only defendant. No other Jeremy Mills was mentioned. Morgan identified Mills as her former boyfriend and father of her child. She did not want to report his call to the police and did so only because she was afraid that CPS might take action regarding her child. It is true that Morgan did not specifically state that she was protected by a no-contact order, or identify the defendant as the person restrained by an order, or identify Exhibit 1 as that order. However, without such an order there would be no reason for her to report the telephone call to the police. The call itself was not threatening or otherwise unlawful. Yet she felt compelled to report it, by having her mother call the Sheriff's Office, in order to avoid consequences from CPS. This fact alone is circumstantial evidence that she was indeed the protected person in the no-contact order. It is also reasonable to conclude that if the Jeremy Mills on trial was not

prohibited from contacting her, she would not identified him as the person who made the call that she then reported to the police.

Similarly, the jury could reasonably have concluded that it was exceedingly unlikely that there was another couple with the names Jeremy Mills and Jennifer Morgan in Thurston County who had a no-contact order between them, and that somehow the police and prosecutor had obtained the order pertaining to that other couple. The similarity of one name on a document may be coincidence, two less likely so.

Deputy Bryant testified that the defendant was the person named in the no-contact order without objection from the defense. Jennifer Morgan would have had no reason to report the phone call to the police had there not been a no-contact order restraining this Jeremy Mills from contacting her. In light of all the circumstances, there was more than sufficient evidence, viewed most favorably to the State, as it must be, to prove that these two people were the people named in the no-contact order.

2. The defendant's stipulation that he had been previously convicted of two violations of a no-contact order was sufficient to prove that element of the offense.

Mills argues that even though he stipulated to the fact that he had two prior convictions for violating a no-contact order [Supp

CP 37], the State still failed to prove that those convictions satisfied the element of the charged offense that he had twice been previously convicted for violating the provisions of the no-contact order or a similar no-contact order. [Jury Instruction No. 9, Supp CP 34] He claims that the stipulation did not specify that the convictions were for violations of qualifying orders as required by RCW 26.50.110(5) and therefore the State did not prove that he had violated the same or a similar no-contact order. Appellant's Opening Brief at 7-9. He is mistaken for two reasons.

First, the validity of the orders underlying the prior convictions is not an element, either express or implied, of the crime of felony violation of a no-contact order. State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005); *see also* State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003). Prior convictions are only relevant to the current charge if they were for violating no-contact orders issued under the statutes listed in RCW 26.50.110(5). This is a threshold determination to be made by the trial court before admitting them into evidence.¹ State v. Gray, 134 Wn. App. 547,

¹ As Mills concedes, the actual judgments and sentences themselves reflect that the prior convictions were for violations of orders issued pursuant to RCW 10.99, a qualifying statute. Appellant's Opening Brief at 9, fn 6, Proposed Exhibits Nos. 2 and 3] The documents were available for the trial court to review. Mills cannot

556, 138 P.3d 1123 (2006), State v. Ortega, 134 Wn. App. 617, 627, 142 P.3d 175 (2006). Although Mills is not objecting to the stipulation, he is arguing that it fails to prove that his two convictions meet the requirements of the charge against him. By failing to challenge the admissibility of those convictions, but instead stipulating to them, he waived any argument that the State failed to prove they were qualifying convictions.

In Gray, the defendant did not object when the State offered, and the court admitted, a judgment and sentence and a statement of defendant on plea of guilty to prove the two prior convictions. Id., at 551. After the State rested, Gray moved to dismiss for failure of the State to prove that one of the convictions was based on a no-contact order issued under one of the requisite statutes. The court denied his motion. Id. The Court of Appeals held that by failing to object to the adequacy of the judgment and sentence at the time it was offered, Gray waived any objection. Here Mills could have moved for dismissal at trial on the grounds that the State did not prove that the underlying convictions were qualifying convictions, although because the State had the documents to prove otherwise, that would have been a waste of time.

claim any prejudice because the court would have ruled that they were qualifying convictions.

Mills requested the stipulation that was entered into evidence in this trial and approved the language of it. [RP 43-44] It was worded as it was so that the State could not offer the judgments and sentences of the prior convictions themselves. [RP 43] Having asked the court to enter the stipulation, and approving the language of it, he waived any claim that it is insufficient. Any objections to the validity of the underlying convictions are questions of law that must be raised to the trial court, and by not only failing to object but offering a stipulation, he has waived any claim that the underlying convictions were insufficient to support the current charge of felony violation of a no-contact order.

Second, a stipulation is an express waiver in which the party concedes the truth of an alleged fact for the purposes of trial.

The premise of the waiver theory is that upon entering into a stipulation on an element, a defendant waives his right to put the government to its proof of that element. "A stipulation is '[a]n express waiver . . . conceding for the purposes of the trial the truth of some alleged fact,' with the effect that 'one party need offer no evidence to prove it and the other is not allowed to disprove it.'"

State v. Wolf, 134 Wn. App. 196, 199, 139 P.3d 414 (2006). See also United States v. Harrison, 204 F.3d 236, 240, 340 U. S. App. D.C. 198 (2000).

Mills stipulated that he had twice been convicted of violating a no-contact order. He thus waived his right to “assert the government’s duty to present evidence to the jury on the stipulated element.” Wolf, 134 Wn. App. at 199. This is particularly true because he offered the stipulation for the purpose of keeping the jury from seeing the judgments and sentences that would have proved the very thing he now claims was missing and which he asserts requires reversal of his conviction. That is not a result that the law should permit, and is certainly not what trial counsel intended.

D. CONCLUSION.

The evidence presented at trial was sufficient in every respect to support Mills’ conviction for felony violation of a no-contact order. The State respectfully asks this court to affirm his conviction.

Respectfully submitted this 17th day of August, 2011.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record, on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 17th day of August, 2011, at Olympia, Washington.



Chong McAfee