

NO. 46452-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RICKY DOMERTIOUS AMES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold Johnson

No. 14-1-00127-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the State adduced sufficient evidence to support the jury verdict finding defendant guilty of violation of a court order as alleged in Count I?
2. Whether the trial court properly exercised its discretion when it considered mitigating factors in the defendant's case and chose not to impose an exceptional sentence?

B. STATEMENT OF THE CASE.

1. Procedure

On January 10, 2014, the Pierce County Prosecutor's Office charged RICKY DOMERTIOUS AMES, hereinafter "defendant" with one count of domestic violence court order violation committed during the period between August 23, 2013 and September 16, 2013 (Count I). CP 1-

2. The case proceeded to trial in front of the Honorable Garold Johnson on June 9, 2014. RP 3. That same day, the State filed an amended information adding two more counts of domestic violence court order violation (Counts II and III). CP 29-30; RP 3-4.

During the trial, defendant stipulated to the two underlying prior convictions. CP 56-57; RP 3. He was found guilty of all three counts, but the jury declined to find any of the counts were domestic violence

incidents. RP 154-155; CP 32-37. At a sentencing hearing, the State recommended a standard range sentence of 60 months on each count to run concurrently. RP 164; CP 65-69. Defendant requested an exceptional sentence downward of twelve months and one day on each count to run concurrently. RP 166-167; CP 58-64. The court chose not to impose an exceptional sentence downward and sentenced defendant to 60 months on each count to run concurrently. RP 168-169; CP 74-86.

Defendant filed a timely notice of appeal. CP 87.

2. Facts

Deshauna Hills and defendant began a relationship in 2009 or 2010 and were off and on again until June of 2013. RP 38-39. During trial, Ms. Hills testified that she lived at an apartment in Lakewood and defendant lived with her for about a year. RP 38-40. In 2011, a no contact order went into effect which prohibited the defendant from having contact with Deshauna Hills for a period of five years. RP 40, 81-83; Exhibit 5. Despite the no contact order, Ms. Hills admitted that she and defendant continued to have a relationship and he continued to reside with her. RP 40.

Ms. Hills testified that after their relationship ended in June of 2013, defendant attempted to contact her multiple times. RP 41. She testified he called her several times between August 23, 2013 and September 17, 2013, and would leave voice mails on her cell phone. RP

40-41, 56. Ms. Hills recalled that defendant came by her home on September 13, 2013 and September 17, 2013. RP 51-52, 56-57. She did not answer the door, but knew it was defendant because she saw him through the peephole. RP 51-52.

Ms. Hills called the police and on September 18, 2013, Lakewood officer Ralph Rocco and Department of Corrections officer Amanda Mullenix responded to Ms. Hills' home. RP 42-46, 61-64. Officer Rocco confirmed the no contact order was valid and in effect prohibiting the defendant from having contact with Ms. Hill. RP 81. Ms. Hill played the officers several voice mails on her phone that defendant had left her and Officer Rocco recorded them. RP 42-46, 64. During the trial, two voice messages, one from August 23, and the other from August 25, were played for the jury that Ms. Hill and Ms. Mullinex both identified as being from defendant. RP 46-48, 97; Exhibit 1.

Debra Ramberg, Deshauna Hills' neighbor, testified during the trial that she occasionally saw defendant with Ms. Hills and they seemed to get along well. RP 32-35. Ms. Ramberg remembered a day the previous fall when defendant asked her to tell Ms. Hills to get his stuff together so he could pick it up. RP 35.

During the trial, a stipulation was read to the jury stating that in year 2013, defendant had two prior convictions for violating court orders.

RP 115. Another stipulation was also read to the jury stating that from June 16, 2011 to February 7, 2013, defendant was incarcerated and released on February 8, 2013. RP 116. Defendant chose not to testify during the trial. RP 116.

C. ARGUMENT.

1. THE JURY HAD SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF VIOLATION OF A COURT ORDER AS ALLEGED IN COUNT I.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences

from the evidence must 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). Circumstantial and direct evidence are considered equally reliable. *Id.*; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said “[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

To prove defendant guilty of count I, domestic violence court order violation, the State had to convince a jury of the following elements beyond a reasonable doubt:

- (1) That during the period of the 23rd of August, 2013 and the 16th of September, 2013, there existed a protection order, restraining order, no-contact order, or foreign protection order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order, in person;
- (4) That the defendant has twice been previously convicted for violating the provisions of an order; and
- (5) That the acts occurred in the State of Washington.

CP 38-55, Jury Instruction No. 8.

Defendant disputes the jury's finding that sufficient evidence existed to prove the third element that on or about the period between August 23, 2013, and September 16, 2013, defendant violated the court order prohibiting him from contacting Ms. Hill. He argues that the only evidence presented at trial was that contact occurred on September 17, 2013, and because this was beyond the date alleged in the information, this Court should overturn his conviction on count I for insufficient evidence. However, a review of the record reveals that Ms. Hills testified defendant also contacted her at her home on September 13, 2013, and it was this contact that the State alleged constituted a violation of the order in count I.

During re-direct, Ms. Hills was asked to refresh her recollection about the incidents using a handwritten statement she had made while speaking to the police and the following exchange took place:

PROSECUTOR: Ms. Hills, there's been a lot of dates thrown at you, September dates, 17th, 18th. Earlier you said that your memory when you wrote this statement was better than your memory today?

MS. HILLS: Well, yes. At that time.

PROSECUTOR: And the day he came over, I think earlier when I asked you, you said September 17th.

MS. HILLS: Okay, yes. I get my dates mixed up a lot.

PROSECUTOR: That's fine. And would you just review this and see if it helps you remember.

MS. HILLS: Okay. Yes. **13th and the 17th he came by.** And on the 23rd, that's when he did the phone calls.

PROSECUTOR: Okay.

MS. HILLS: From the – from the 17th – from 8/23 to 9/17.

PROSECUTOR: He made the phone calls?

MS. HILLS: Yeah. **And then he came by also on 9/13.**

DEFENSE: She's reading from that; that's hearsay, Your Honor.

THE COURT: Overruled. Refresh her recollection.

PROSECUTOR: Thank you. **It helps you remember September 13th is the date he came by?**

MS. HILLS: Yes.

RP 56-57 (emphasis added). Thus, while Ms. Hills testified defendant came by her home on September 17th, upon re-direct she clarified that he also came by on the 13th. The State made clear to the jury that it was defendant's contact with Ms. Hill on September 13th that constituted the violation alleged in count I. In closing, the prosecutor said:

Count I, there's a date range between the 23rd of August and September 16th, and that pertains specifically to the allegation that the defendant went to Ms. Hills's house, knocked on the door, she wasn't there. She [*sic*] went to the neighbor's house, and asked the neighbor to tell Ms. Hills a message.... And [Ms. Hills] remembers – she testified September 13th that she remembers him knocking on her door, her not answering. She looked out the peephole and she saw him.

RP 129-130. Furthermore, defense counsel also discussed the fact that count I referred to the incident on September 13th in his closing when he stated:

The other piece of evidence that was presented was Deshauna Hills' testimony; that she remembers him coming on September 13th to knock on the door and that she looked through the peephole, saw him, left. That goes to her credibility, which I'll get to in a minute. But

understand, that is the only piece of evidence that puts Ricky Ames at her apartment between those two days. It's her testimony. Period.

RP 137-138.

Thus, while there may have been testimony about an incident on September 17th, Ms. Hills testified that defendant also contacted her on September 13th and it was that contact which formed the basis for the conviction in count I. Given that September 13, 2013, falls within the specified date range (between August 23, 2013, and September 16, 2013) alleged in the amended information and Ms. Hills testified defendant came to her house on that date, sufficient evidence existed to convict defendant of violation of a court order in Count I.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONSIDERED IMPOSING AN EXCEPTIONAL SENTENCE DOWNWARD AND CHOSE NOT TO IMPOSE IT.

Generally, a court must impose a sentence within the standard sentence range, but it may impose a sentence outside the standard range if it finds that there are substantial and compelling reasons justifying such a departure. RCW 9.94A.535. The court may impose a sentence below the standard range if it finds mitigating circumstances established by a preponderance of the evidence. RCW 9.94A.535(1). In RCW 9.94A.535(1), the legislature provides an non exclusive illustrative list of mitigating factors which may support a sentence below the standard range.

The list includes circumstances where “[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.” RCW 9.94A.535(1)(a).

A sentence within the standard sentence range is generally not reviewable. RCW 9.94A.585(1). Appellate review of the trial court’s decision to impose a sentence within the standard range is limited to “circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002)(citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). If a trial court has considered the facts and concluded there is no basis for an exceptional sentence, it has exercised discretion and the defendant may not appeal that ruling. *Garcia-Martinez*, 88 Wn. App. at 330.

In the present case, defendant asked the trial court to consider imposing an exceptional sentence downward arguing that mitigating circumstances existed because the consensual contact by Ms. Hills made her a willing participant as in RCW 9.94A.535(1)(a). Defendant argues on appeal that the trial court abused its discretion because it mistakenly believed it did not have the authority to consider this mitigating factor put forth by the defendant. Defendant references the comment made by the court during sentencing that such a mitigating factor is “not an exception I can look at” as support for his argument. *See* Opening Brief of Appellant,

8. However, a review of that entire conversation with defense counsel shows that while the trial court may not have initially believed such a mitigating factor was something it could consider, the defense attorney explained the court had such authority and even directed the court to supporting case law:

THE COURT: And the problem is is that it seems to me that that is not an exception I can look at. It would be one thing if it was something so out of the ordinary to say well, that's outside the ordinary, but I think in this case I really don't have --

DEFENSE: Well, the case I cited as part of the brief does indicate that that is something -- that it is a basis that the court can use to impose an exceptional downward. Now, whether or not under the particular facts that would be appropriate --

THE COURT: That was the *Nelson* case, wasn't it?

DEFENSE: The one before that.

THE COURT: I read *Nelson* again, too. All right.

DEFENSE: The case I cited really stood for the proposition that it would not be an abuse of discretion for the court to impose an exceptional downward under the willing participant exception for violation of domestic violence no contact order.

THE COURT: Very good. Well, the court is not going to do that.

RP 168-169. Thus, while the court initially may have been confused about its ability to consider such mitigating circumstances, defense counsel clarified to the court that such a decision was well within the authority of the court. Defense counsel not only explained this to the court, he referenced the *Bunker* case he cited in his memorandum which explicitly allows a trial court “to depart downward from [a] standard sentence range on the basis of the mitigating factor that an individual who is the protected party of a domestic violence no contact order was a willingly (*sic*) participant in violating the no contact order.” CP 61 (*citing State v. Bunker*, 144 Wn. App. 407, 183 P.3d 1086(2008); RCW 9.94A.535(1)).

Defense counsel made the argument that the consensual contact with Ms. Hill was a mitigating factor warranting an exceptional sentence downward and described how it would not be an abuse of discretion for the trial court to impose such a sentence. The court knew it had the authority to impose an exceptional sentence downward, just chose not to impose one saying “very good. Well, the court is not going to do that.” The fact that the trial court declined to impose an exceptional sentence does not mean it mistakenly believed it could not consider it. To the contrary, the conversation between defense counsel and the court makes it clear that the trial court knew it could consider the argument that Ms. Hill was a willing participant as a mitigating factor and impose an exceptional

sentence on that basis. At the end of the conversation, the court declined to impose the exceptional sentence, not on the basis that it still believed it did not have the authority to consider the mitigating factors argued by defense counsel, but on the basis that it did not believe defendant's situation warranted an exceptional sentence downward. The trial court did not abuse its discretion because it did not act under a mistaken belief of the law.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: March 13, 2015.

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


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