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NO. 63947-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

FILED
2010 MAY 27 PM 4:44

STATE OF WASHINGTON,

Respondent,

v.

DAVID LEE SMITH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARY I. YU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether there is sufficient evidence to support the defendant's conviction for Felony Violation of a Court Order where a certified copy of the court order was admitted at trial that contained the defendant's signature, the defendant received a copy of the order and the order fully advised the defendant of the provisions of the order.

2. Whether the defendant's sentence should be reversed as argued by the defendant where the error was harmless since the defendant's standard sentencing range would have been the same regardless of the comparability of the out of state conviction.

3. Whether the trial court properly denied the defendant's motion to discharge his attorney after conducting a sufficient inquiry.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On November 19, 2008, the defendant, David L. Smith, was charged with one count of Felony Violation of a Court Order. CP 1. On March 5, 2008, the defendant moved to discharge his attorney and this motion was denied by the Honorable Judge Sharon

Armstrong. CP 5. On the first day of trial, May 11, 2009, the State moved to amend the information, adding three additional counts of Felony Violation of a Court Order. CP 26-28. The jury convicted the defendant as charged on all four counts of Felony Violation of a Court Order. CP 61-64.

2. SUBSTANTIVE FACTS

On September 16, 2008, at approximately 7:00 a.m., Christina Smith sent her friend, Ashley Calyxto, a text message. 5/12/09 RP 76. After receiving this message, Ms. Calyxto called the police to report the information that Ms. Smith relayed to her. 5/12/09 RP 76. The Kirkland Police Department arrived shortly thereafter and arrested the defendant as he stood outside of Ms. Smith's residence in violation of a court order. 5/12/09 RP 83-84; Supp. CP ___, Sub #71 (State's Exhibit 3). When the defendant was informed he was being arrested for violation of a court order, he responded that there was "no order with Christina." 5/12/09 RP 86. The defendant was subsequently booked in to the Kirkland City Jail and later transported to the King County Jail where some of his outgoing calls to Ms. Smith were recorded. 5/12/09 RP 75, 94-95; 5/13/09 RP 122. From jail, the defendant

repeatedly continued to contact Ms. Smith in violation of the no contact order over the span of the few weeks that followed this incident, and these outgoing calls from the King County Jail were recorded. 5/13/09 RP 138. The defendant had twice previously been convicted of violation of a court order. 5/13/09 RP 140.

C. ARGUMENT

1. THE JURY'S VERDICTS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD NOT BE DISTURBED ON APPEAL

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, 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); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). By claiming insufficiency of the evidence, a defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d at 201; State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). 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 at 201. The court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Green, 94 Wn.2d at 221. Furthermore, the State is entitled to rely upon circumstantial evidence to prove its case. See State v. Thompson, 73 Wn. App. 654, 870 P.2d 1022, review denied, 125 Wn.2d 1014, 889 P.2d 499 (1994) ("The State need not show a causal connection between the defendant and the crime and can rely entirely on circumstantial evidence to establish the elements of the *corpus delicti.*"); State v. Bernson, 40 Wn. App. 729, 733, 700 P.2d 758, review denied, 104 Wn.2d 1016 (1985) (defendant's murder conviction should be upheld although based entirely upon non-physical circumstantial evidence, citing State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975)); State v. Fasick, 149 Wn. 92, 95, 270 P. 123, 274 P. 712 (1928); State v. Erving, 19 Wn. 435, 440, 53 P. 717 (1898).

One of the elements the State must prove in a prosecution for violation of a court order is that the defendant knew of the existence of the order. State v. Clowes, 104 Wn. App. 934, 935,

18 P.3d 569 (2001). At trial, a certified copy of the no contact order was properly admitted, and the no contact order was signed by the defendant and the defendant was provided with a copy of the no contact order. Supp. CP ___, Sub #71 (State's Exhibit 3). The order protects Christina Smith. Supp. CP ___, Sub #71 (State's Exhibit 3). Ashley Calyxto, a good friend of Ms. Smith's, testified at trial that the defendant is the former husband of Ms. Smith. 5/12/09 RP at 72. Ms. Calyxto also testified that Ms. Smith was forced to change her cellular phone number approximately three months prior because she did not want the defendant contacting her anymore. 5/12/09 RP at 75. With all reasonable inferences drawn in favor of the State and interpreted most strongly against the defendant, this testimony was sufficient to establish with circumstantial evidence that the defendant was the same David Smith listed on the no contact order admitted at trial.

The defendant's signature on the no contact order and the provision of a copy to the defendant is sufficient to establish that the defendant knew of the no contact order. Regardless of the defendant's implausible denial of the existence of an order with Ms. Smith at the time of his arrest, it is for the jury to make determinations of credibility and weight to give any particular item

of evidence presented at trial. Clearly in this situation, the jury did not find the defendant's denial credible. In light of the applicable standard, viewing the evidence in the light most favorable to the State, the defendant's knowledge of the existence of the order is supported by substantial evidence.

Furthermore, during the course of pretrial motions, the defense contended they would not be challenging the defendant's identity at trial. 5/11/09 RP 56-58. Based on this contention, the court precluded the State from introducing evidence to further establish the defendant's identity. 5/11/09 RP 56-58. By conceding that identity was not at issue, the defense also concedes that the defendant is in fact the same David Smith whose signature appeared on the no contact order and the same David Smith who had an order prohibiting him from having contact with the same Christina Smith.

All of the verdicts of guilt are supported by substantial evidence. Smith has failed to establish that there is not substantial evidence to support the State's case. The verdicts should not be disturbed simply because the defendant does not agree with it.

2. THOUGH THERE WAS NO EVIDENCE PRODUCED AT SENTENCING OF THE DEFENDANT'S OUT OF STATE CONVICTION, THIS ERROR WAS HARMLESS AS SMITH'S STANDARD RANGE WOULD NOT CHANGE EVEN IF THE OUT OF STATE CONVICTION WERE NOT COMPARABLE TO A WASHINGTON STATE FELONY.

At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 126 P.3d 456 (2005). The best evidence of a prior conviction is a certified copy of the judgment. State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (200) (quoting State v. Ford, 137 Wn.2d 477, 480, 973 P.2d 452 (1999). It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination. Ford, 137 Wn.2d at 480. This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing "'some minimal indicium of reliability beyond mere allegation.'" Id. at 481.

Though there was no proof by way of certified copies of judgments or otherwise presented at the time of sentencing or analysis of the comparability of the defendant's out of state conviction, the error in failing to do so was harmless because the

defendant's standard sentencing range is the same whether the out of state conviction is in fact comparable to a Washington felony or not. See State v. Argo, 81 Wn. App. 552, 915 P.2d 1103 (1996) (held where the error in calculation of the defendant's offender score does not change the standard range, such error is harmless and does not require remand).

Here, the defendant was sentenced based on an offender score of nine. Felony Violation of a Court Order is a Class C Felony and therefore carries a maximum penalty of five years in prison and a ten thousand dollar fine. See RCW 26.50.110. Felony Violation of a Court Order carries a seriousness level of a five, and with an offender score of nine or more, the standard sentencing range is 72 to 96 months, completely above the statutory maximum of 60 months. See RCW 9.94A.510. With an offender score of eight, the standard sentencing range for a level five offense is 62-82 months, still completely above the statutory maximum. Consequently, whether or not the defendant's out of state conviction is comparable to a Washington State felony, his sentencing range would not change. Either way, the sentencing court's only option would have been to impose 60 months in prison,

which is what was imposed here. Therefore, any error was harmless and remand is unnecessary.

3. THE TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO DISCHARGE HIS ATTORNEY AFTER CONDUCTING AN ADEQUATE INQUIRY IN LIGHT OF THE STATED BASIS OF THE MOTION.

Smith contends the trial court erred in denying his motion to discharge his attorney. He specifically argues the trial court did not conduct a thorough enough examination of the circumstances surrounding the basis for the defendant's motion. This argument should be rejected. The trial court considered the merits of Smith's motion and allowed Smith and his attorney to fully present their concerns. Smith simply failed to establish good cause to warrant discharge of his attorney.

A trial court's denial of a motion to substitute counsel is reviewed for an abuse of discretion. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). The purpose of providing assistance of counsel is to ensure that criminal defendants receive a fair trial; therefore, the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer. Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d

140 (1988). A defendant does not have an absolute Sixth Amendment right to choose any particular advocate. State v. DeWeese, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991). Generally, a defendant's loss of confidence or trust in his counsel is not a sufficient reason to appoint new counsel. Varga, 151 Wn.2d at 200. A defendant must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. Id.

A reviewing court uses a three-prong test to determine whether the trial court erred in its assessment of whether an irreconcilable conflict exists and in denying a motion to substitute counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001), citing United States v. Moore, 159 F.3d 1154, 1158 n.3 (9th Cir.1998). The factors in the test are (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion. Id.

On March 5, 2009, the court heard the defendant's motion to discharge counsel. After the defendant provided a very vague factual basis for his motion, the court asked the defendant to provide more details. 3/5/09 RP 2. The defendant gave a brief

statement and the court again asked the defendant to state any other bases for his motion. 3/5/09 RP 2. The defendant brought up the notice of potential amendments Ms. Murphy had informed the defendant of, which he perceived as threatening. 3/5/09 RP 2-3. The defendant failed to state an adequate basis to discharge counsel and did not establish good cause to terminate Ms. Murphy. Ms. Murphy then informed the court that the defendant was refusing to speak with her for the past two weeks, but that he had been communicating with her supervisor. 3/5/09 RP 4.

Under the Moore factors, the trial court did not abuse its discretion in denying Smith's motion to discharge Murphy. First, Smith did not have an irreconcilable conflict with his attorney. Smith wanted to discharge Murphy essentially because he was unhappy with the news of potential additional counts that would be added for trial. Further, he claimed there was a breakdown in communication, and that Murphy was not paying him enough attention. But this Court has already rejected a similar argument in State v. Staten, 60 Wn. App. 163, 169, 802 P.2d 1384, rev. denied, 117 Wn.2d 1011 (1991). In Staten, this Court rejected the argument that any public defender would lack the time to properly prepare for the defendant's case. The Court further held that

inaccessibility does not require a trial judge to grant a motion to substitute, particularly when a substitution would delay trial for several weeks. Absent counsel's failure to prepare a defense, a conflict of interest, or a complete breakdown in communication that threatens a defendant's right to a fair trial, such a substitution is not justified. Id.

No such conflict or breakdown is present here. Smith had refused to speak with Murphy for the two weeks prior to the hearing, but he had been using Murphy's supervisor to communicate. However, that does not demonstrate the complete collapse of the relationship. Smith fails to show that the trial court abused its discretion in denying the motion to discharge counsel.[1]

Second, Judge Armstrong made appropriate inquiries and allowed both Smith and Murphy to be heard. Those inquiries show that communication between Smith and Murphy was strained however, Smith had no specific complaints. Given the stated basis for Smith's motion, the court made a sufficient inquiry.

Smith cannot show that the trial court abused its discretion in denying his motions. Unlike several cases where an abuse of

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[1] See Stenson, 142 Wn.2d at 724-25 (discussion of federal cases demonstrating irreconcilable conflicts and complete breakdowns of the attorney-client relationship).

discretion has been found, the court in this case conducted an adequate inquiry. For example, in Brown, a dispute arose immediately between Brown and his appointed counsel. He absolutely refused to cooperate or communicate with his attorney in any manner, depriving his attorney of the power to present any adequate defense. Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970). Smith fails to show that he had such a complete breakdown in communication with Murphy and the possible general lack of rapport between them does not rise to the level of an irreconcilable conflict. Although it appears that Smith may have refused to speak with Murphy at one point, they continued communicating through Murphy's supervisor, another attorney with her firm. Given the general nature of Smith's complaints, the trial court's ruling is consistent with Washington cases holding that the motion to substitute counsel was properly denied.[2]

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[2] See, e.g., Varga, 151 Wn.2d at 199-200 (no abuse of discretion in denying motion for new counsel and counsel not ineffective when counsel failed to note bond hearing and defendant and counsel disagreed on trial strategy); Staten, 60 Wn. App. at 170 (unsupported general allegations of deficient representation are inadequate to support a motion to substitute); Stenson, 142 Wn.2d at 729 (no abuse of discretion in denying motion for new counsel when basis is defendant's disagreement with tactics and frustration over limited visits from and communication with attorney).

Smith's argument that the trial court's inquiry was insufficient also fails. Judge Armstrong allowed both Smith and Murphy the opportunity to explain the extent of the conflict, but other than general and conclusory statements, Smith articulated no specific conflicts or deficiencies in Murphy's representation. Further, unlike in Brown, the trial court was not faced with a defendant who categorically refused to communicate with counsel. Given the nature of Smith's complaints, the trial court had no reason to inquire further. Regardless of whether his motions were timely, neither of the first two Moore factors requires reversal here. The trial court should be affirmed.

D. CONCLUSION

The verdicts of the jury are supported by substantial evidence. Moreover, any error by the State to produce certified copies of the defendant's out of state conviction or the sentencing court to conduct a comparability analysis was harmless because the defendant's standard sentencing range remains unchanged. Further, the court below conducted a sufficient inquiry upon the defendant's motion to discharge counsel and did not abuse its

discretion in denying his motion. Neither the sentence imposed nor the verdicts should be disturbed on appeal.

DATED this 27 day of May, 2010.

Respectfully submitted,

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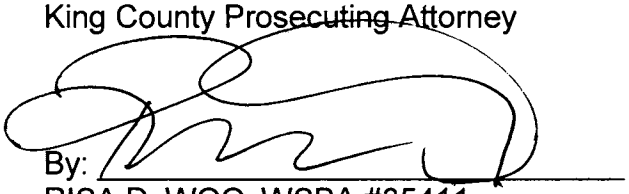

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