

No. 39858-7-III
IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JERRY WAYNE CLARK, JR.,

Appellant.

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

The Honorable Judge Charnelle Bjelkengren

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

Issue: The evidence is insufficient to prove the Mr. Clark on trial is the same defendant listed in the no contact order protecting Larry McFarland, or in the previous convictions for violating a no contact order in Spokane Municipal Court.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Issue: Whether the evidence is sufficient to prove the Mr. Clark on trial is the same defendant listed in the no contact order protecting Larry McFarland, or in the previous convictions for violating a no contact order in Spokane Municipal Court.

C. STATEMENT OF THE CASE

On February 24, 2023, at about 9:50 a.m., Spokane Police Officer Caleb Howard responded to 1413 West Kiernan Avenue in Spokane, Washington, for a possible protection order violation. (RP 82-83). Upon arrival, Officer Howard contacted a man on the front porch of the residence. (RP 84). He identified the man as “Jerry Clark” from a recent jail booking photograph. (RP 83).

The State charged “Jerry Wayne Clark” with violation of a no contact order as follows:

That the defendant, JERRY CLARK, in the State of Washington, on or about February 24, 2023, with knowledge that the Superior Court had previously issued a No-Contact Order under 7.105, 9A.40, 9A.44, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.26A, or 26.26B RCW, or any order previously enforceable under Former RCW 26. 50.110, for the protection of LARRY MCFARLAND, did knowingly violate said order by knowingly violating a provision of the order prohibiting the defendant from knowingly coming or remaining within a specified distance of a location described in the order, contrary to RCW 7.105.450; and furthermore, the defendant has at least two prior convictions for violating the provisions of a domestic violence protection order, a sexual assault protection order, a stalking protection order, or a vulnerable adult protection order, an order issued under chapter 9A.40, 9A.44, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.26A, 26.26B RCW, or a valid foreign protection order as defined in RCW 26.52.020, or a Canadian domestic violence protection order as defined in RCW 26.55.010. and furthermore, the defendant did commit the above crime against a family or household member. as defined by RCW 10.99.020(7).

(CP 5).

The State called two witnesses at trial: Deputy Howard and John Ballantyne, a resident at the Kiernan address. (RP 81,

96). Deputy Howard testified about his response to the Kiernan address on February 24, 2023. (RP 82-83).

Deputy Howard testified that he contacted “the defendant” upon arrival at 1413 West Kiernan. (RP 83). The prosecutor inquired:

[State]: And how did you -- and who is that defendant?

[Deputy Howard]: The defendant's right here.

[State]: And is that Jerry Clark?

[Deputy Howard]: It is.

[State]: How did you identify Mr. Clark?

[Deputy Howard]: From a recent jail booking photograph.

[State]: And I know you already stated this, but do you see Mr. Clark in the courtroom today?

[Deputy Howard]: I do.

[State]: And please state where he's sitting and what he is wearing.

[Deputy Howard]: He is sitting right over here. He's wearing a white shirt and green tie.

[State]: Let the record reflect Officer Howard identified Jerry Clark.

(RP 83-84).

The trial court then admitted, and Deputy Howard testified about, the provisions of a Domestic Violence No Contact Order issued by Spokane Superior Court on October 1,

2020. (RP 84-87, State's Ex. 1). The order listed the defendant as "Jerry W. Clark DOB 5/13/72." (RP 86 -87, State's Ex. 1). The order prohibited the defendant from coming within 1,000 feet of "any known location" of "Larry Michael McFarland." (RP 86, State's Ex. 1).

The State then requested Deputy Howard read from two Spokane Municipal Court docket printouts. (RP 87-90, State's Ex. 3, 5).¹ Exhibit Three lists the defendant as "Clark, Jerry Wayne Jr" with other name listings as, "AKA Clark, Jerry W Jr," "AKA Clark , Jerry Wayne Jr," "AKA Clark Jerry Wayne," and "AKA Clark, Jerry W." (RP 88-89, State's Ex. 3). Deputy Howard testified the docket printout showed a finding of "guilty" for "violation of no-contact order" on May 22, 2001. (RP 88-89, State's Ex. 3).

¹ At RP 87-90, the State refers to these Exhibit numbers as Exhibits 2 and 4, however those exhibits are unredacted copies of the docket printouts. Exhibits 3 and 5 were sent back with the jury. (RP 105).

Similarly, Exhibit Five listed the defendant as “Clark, Jerry Wayne Jr.” with other name listings as, “AKA Clark, Jerry W Jr,” “AKA Clark , Jerry Wayne Jr,” “AKA Clark Jerry Wayne,” and “AKA Clark, Jerry W.” (RP 89, State’s Ex. 5). Deputy Howard testified that docket recorded a finding of “guilty” for “no-contact order violation” on June 27, 2012. (RP 89-90, State’s Ex. 5).

Deputy Howard further testified that he did not see Mr. McFarland at the home. (RP 90). Deputy Howard had not entered the residence. (RP 91).

Next, John Ballantyne testified he had lived at 1413 West Kiernan for three and a half years with Larry McFarland and Gloria Richardson. (RP 96-97). He testified that he knew “Jerry Clark” and saw him in the courtroom. (RP 97). He first testified he was not present when Mr. Clark was arrested on February 24, 2023, but later stated he saw Mr. Clark at the residence that day. (RP 99-100, 102).

The defense did not call any witnesses. (RP 114). The trial court instructed the jury, in pertinent part:

Instruction No. 7. To convict the defendant of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about February 24, 2023, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of the order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
- (5) That the defendant's act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(RP 121-122, CP 28).

The jury convicted Mr. Clark of violation of a no contact order with a special verdict finding that he and Mr. McFarland were members of the same family or household. (RP 138, CP 34, 35). At sentencing, the trial court imposed a sentence of 60

months consecutive to a prior sentence Mr. Clark was serving.

(RP 155-56, CP 51). Mr. Clark timely appeals. (CP 63).

D. ARGUMENT

Issue: The evidence is insufficient to prove the Mr. Clark on trial is the same defendant listed in the no contact order protecting Larry McFarland, or in the previous convictions for violating a no contact order in Spokane Municipal Court.

The State, by merely introducing a certified copy of a protection order through Deputy Howard, failed to present sufficient evidence linking the Jerry Clark on trial to the defendant in the protection order prohibiting contact with Larry McFarland. Similarly, the State failed to present sufficient evidence linking the Jerry Clark on trial to the defendant referenced in the Spokane Municipal Court docket notes when it merely presented certified copies of the docket notes. The State did not use evidence of identifying characteristics linking the defendants like dates of birth, physical descriptors, photographs, or fingerprints. Mr. Clark's conviction for violation of a no

contact order must be reversed and the case remanded with instructions to dismiss with prejudice.

In every criminal prosecution, the State must prove every element of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The standard of review for a sufficiency of evidence claim is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hepton*, 113 Wn. App. 673, 681, 54 P.3d 233 (2002). This standard admits the truth of the State's evidence and all inferences that can reasonably be drawn from this evidence in the State's favor. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Where a prior conviction is an element of a crime, the State must prove its existence beyond a reasonable doubt; an identity of names alone is insufficient to meet this burden. *State v. Soto*,

No. 32214–9–III, 2015 WL 5167393 at *1² (citing *State v. Harkness*, 1 Wn.2d 530, 543, 96 P.2d 460 (1939); *State v. Hunter*, 29 Wn. App. 218, 221, 627 P.2d 1339 (1981); *State v. Brezillac*, 19 Wn. App. 11, 13, 573 P.2d 1343 (1978)). Independent corroborative evidence must show that the person whose former conviction is proven is the defendant in the present action. *Id.* (citing *Hunter*, 29 Wn. App. at 221).³

The best evidence of a prior conviction is a certified copy of the judgment. *State v. Santos*, 163 Wn. App. 780, 784, 260 P.3d 982 (2011)(citing *State v. Chandler*, 158 Wash. App. 1, 5, 240 P.3d 159 (2010)). However,

[W]hen criminal liability depends on the accused's being the person to whom a document pertains ... the State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt ‘that the person named therein is the same person on trial.

State v. Huber, 129 Wash. App. 499, 502, 119 P.3d 388

² Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court, however may be cited as nonbinding authorities.

³ See footnote 2.

(2005)(quoting *State v. Kelly*, 52 Wash.2d 676, 678, 328 P.2d 362 (1958) (a habitual criminal case)). The State cannot do this by showing “identity of names alone,” but rather may connect the person on trial to the person in the document using booking photographs, fingerprints, eyewitness identification, or distinctive personal information. *Huber*, 129 Wn. App. at 502-503.

The State charged the defendant in *Huber* with violating a no contact order and witness tampering. *Id.* at 500. After the defendant failed to appear for court, the State charged him with bail jumping. *Id.* The bail jumping charge was tried separately from the other charges. *Id.*

In *Huber*, the State at trial introduced as exhibits certified copies of the Information charging the defendant, a court order requiring the defendant to appear on a specific date, clerk’s minutes indicating the defendant failed to appear, and a bench warrant for the defendant’s arrest. *Huber*, 129 Wn. App. at 500-501. The State did not call any witnesses or attempt to show those

exhibits related to the same Wayne Huber then before the court. *Id.* The defense did not present any evidence or witnesses. *Id.* The jury convicted the defendant of bail jumping. *Id.*

On appeal, the State argued that defense counsel's introduction of his client before jury selection was sufficient evidence to show that the Wayne Huber named in the documents was the Wayne Huber on trial. 129 Wn. App. at 503-504. The appellate court concluded that the evidence was insufficient to show that the person on trial was the person named in the State's exhibits, and reversed and remanded with instructions to dismiss the bail jumping charge with prejudice. *Id.* at 504.

The facts here are virtually identical to those in *Huber*. The State charged Mr. Clark with felony violation of a no-contact order, requiring it prove beyond a reasonable doubt both a valid no contact order against him, and that he had two prior convictions for violating a no contact order. The State used Deputy Howard's testimony in an attempt to prove a valid order against the defendant on trial, but his testimony fell short. Deputy

Howard testified that on the night of the incident, he contacted “Jerry Clark” at the prohibited address. (RP 83-84). He then testified the man he contacted that night was the defendant. (RP 83-84). The State then had Deputy Howard read from a protection order that “Jerry W. Clark DOB 5/13/72” was prohibited from being at the address where he found the defendant. (RP 86 -87, State’s Ex. 1).

The State failed to elicit any additional evidence that the Jerry Clark in the courtroom had the same date of birth, physical descriptors, or any other distinctive personal information that would match him to the “Jerry W. Clark DOB 5/13/72” listed in the protection order. The State matched the defendant in the courtroom to the defendant on the protection order in name alone, which is insufficient as a matter of law to prove identity beyond a reasonable doubt.

The State similarly failed to present sufficient evidence linking the prior protection orders to the defendant in the courtroom. The sole evidence of the existence of prior

convictions came through docket notes from Spokane Municipal Court. In those docket notes, it listed “Clark, Jerry Wayne Jr.” as the defendant. Notably, the Information in this case does not list the defendant as a “junior.” The Municipal Court docket notes also have a list of aka’s for “Clark, Jerry Wayne, Jr.,” which makes the lack of an additional link to the defendant on trial particularly problematic. There may be more than one “Jerry Wayne Clark.” There may be a “junior” and a “senior” or possibly even a “Jerry Wayne Clark III.” The person named in the Municipal Court docket notes presumably has used multiple different names, which makes it even more uncertain that the defendant on trial is the same person convicted of the prior order violations. Facts like these are the precise reason the State has an obligation to present evidence additional besides just a name to prove beyond a reasonable doubt the link between prior court orders or convictions and the defendant on trial.

In *State v. Santos*, the State similarly failed to link the defendant sitting in the courtroom with the defendant in prior

judgments and sentence, resulting in reversal of a felony DUI conviction. 163 Wn. App. 780, 782, 260 P.3d 982 (2011). The officer who had arrested the defendant testified, and then the State introduced and the trial court admitted certified copies of four DUI judgments to show that the defendant had prior offenses within 10 years, thus elevating the current offense to a felony. *Id.* at 783. In reversing the conviction, the court reasoned:

But nothing links the prior DUI judgments in this case to Mr. Santos. Certified copies of the four DUI judgments show ‘Santos, Heraquio’ or ‘Heraquio Santos’ was convicted of DUI in either Benton County or Franklin County in the same seven-year period. The same ‘Heraquio Santos’ committed three of those DUIs because one judgment links to two of the other judgments. The remaining judgment lists for ‘Santos, Heraquio’ an address and a birth date, a date that conflicts with the age listed in guilty plea statements underlying two other judgments.

Even if all four prior DUI judgments could somehow be linked to each other, no evidence links them to Mr. Santos. *None of the information in the State’s exhibits can be compared to Mr. Santos, the defendant in this case, by simple observation to determine whether he is the person named in the judgments. And none of it can be compared to any other independent evidence that can be linked to Mr. Santos. The State produced no evidence of Mr. Santos’s address, birth date, or criminal history. It*

produced no photographs of 'Santos, Heraquio' or 'Heraquio Santos' to compare to Mr. Santos, who appeared in person in trial.

163 Wn. App. at 785 (italics added).

For exactly the same reason, the State failed to present sufficient evidence linking the Jerry Clark in the courtroom to the defendant in the municipal court docket notes. The State presented no evidence of the date of birth of either the Jerry Clark in the courtroom or the “Jerry Clark, Jr.” or the many a.k.a.’s in the Spokane Municipal court docket notes. Even if the address associated with the defendant in the docket notes matches the address where the defendant on trial was contacted, the State presented no evidence as to whether the defendant on trial was a “junior” or “senior,” the father or the son. The Spokane Municipal Court docket notes do not contain any dates of birth or physical descriptors the jury could have used to match with the defendant in the courtroom. The State failed to present any photographs of the defendant subject to the two prior convictions matching the defendant in the courtroom.

The evidence in this case can be contrasted with the facts of *State v. Soto*, where the court rejected a similar sufficiency argument when the State presented evidence of matching dates of birth and similar signatures during a trial for violating a no contact order. 32214-9-III, 2015 WL 5167393 at *1, 2 (Wa. Ct. App. Sept. 3, 2015).⁴ The defendant in *Soto* was the passenger in a car stopped for speeding. *Soto*, 2015 WL 5167393 at *1.⁵ The driver was a Ms. Fabiola Ayala, the respondent in a no contact order protecting her from Daniel Soto. *Soto*, 2015 WL 5167393 at *1.⁶ The officer obtained identification from the passenger, and matched his name, physical description, and birthdate to the Daniel Soto who was subject to the no contact order. *Soto*, 2015 WL 5167393 at *1.⁷

At a bench trial, the municipal court's probation officer

⁴ Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court, however may be cited as nonbinding authorities.

⁵ See fn. 4.

⁶ See fn. 4.

⁷ See fn. 4.

and a clerk of the court identified the no contact order and the defendant in the courtroom as the man who was subject to that order. *Soto*, 2015 WL 5167393 at *1.⁸ The trial judge convicted the defendant, who challenged the sufficiency of the identification of the defendant at trial as the same person who had been subject to the no contact order. *Soto*, 2015 WL 5167393 at *1.⁹

The appellate court affirmed the conviction, stating:

There was more than similarity in names here. The Daniel Soto listed in the protection order has the same birthday – January 14, 1977 – as the Daniel Soto in both judgment and sentence forms. *See* Exs. 2, 3, 5. The signature ‘Daniel Soto’ on each of the three forms looks identical. These facts corroborate the identification of Daniel Soto on the prior convictions with the Daniel Soto currently in the courtroom subject to the Pasco Municipal no contact order.

Soto, 2015 WL 5167393 at *2.¹⁰

The facts here are distinguishable from those in *Soto*. In

⁸ Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court, however may be cited as nonbinding authorities.

⁹ See fn. 8.

¹⁰ See fn. 8.

Soto, the State presented evidence other than the certified copies of the prior convictions to link the defendant sitting in the courtroom to the defendant subject to the prior convictions. Both a probation officer and a clerk of the court identified the defendant on trial as the same person who was subject to the protection order. The dates of birth and signatures on the protection order matched those on the judgments of prior conviction, thus providing the second link between the defendant on trial and the person with the prior convictions.

In Mr. Clark's case, no witness identified the defendant in the courtroom as being the same defendant listed on the protection order prohibiting contact with Mr. McFarland. Deputy Howard stated that the defendant in the courtroom was the same person he arrested that night, but he had no personal knowledge of the defendant in the courtroom as being the same person listed on the protection order with Mr. McFarland.

The State similarly failed to link the defendant in the courtroom and the "Jerry Clark, Jr." listed on the municipal court

docket sheets. The docket sheets do not provide a date of birth or signature, as the judgments did in *Soto*. The State did not call any witness who could identify the “Jerry Clark” on trial as the same person identified in those docket sheets. The docket sheets also provided multiple names, which underscores the reason that more than name alone is required to prove identity beyond a reasonable doubt.

The State failed to introduce any evidence proving that the identity of the defendant in this trial matched that of the defendant in either the protection order or the prior Municipal Court convictions. The State only introduced certified copies of these documents through Deputy Howard, which is insufficient as a matter of law. The evidence is insufficient to prove the defendant in this case, Jerry Clark, is guilty of felony violation of a protection order.

E. CONCLUSION

The State failed to present sufficient evidence establishing the identity of the defendant in the protection order with Mr. McFarland or the identity of the defendant listed in the Spokane Municipal Court docket notes was the same defendant in the courtroom on trial. Mr. Clark's conviction for violation of a no contact order should be reversed and remanded with instructions to dismiss.

I certify this document contains 3,881 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 5th day of February, 2024.

/S/ Brooke D. Hagara

Brooke D. Hagara, WSBA #35566

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON) COA 39858-7-III
) Respondent
vs.)
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JERRY WAYNE CLARK, JR.,)
) Defendant/Appellant.) PROOF OF SERVICE
_____)

I, Brooke D. Hagara, counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 5, 2024, having obtained prior permission, I served the attached Appellant’s Opening Brief on the Respondent at the Spokane County Prosecutor’s Office at scpaappeals@spokanecounty.org, via email through the Washington Appellate Portal.

Dated this 5th day of February, 2024.

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