

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 63892-1-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
TOMMY JEAN KIRK,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: November 29, 2010
)	
_____)	

Becker, J. — Tommy Kirk was convicted of two counts of violation of a no contact order. We accept the State’s concession that count 1 should be dismissed for lack of sufficient evidence. Kirk argues count 2 should also be dismissed because the State attempted to prove it through a witness whose trial testimony did not establish an unlawful contact. Count 2, however, is supported by a police officer’s testimony about prior inconsistent statements by the witness. Kirk did not object to the police officer’s testimony, and he did not move to limit the purpose for which it could be used. On appeal, he fails to show that these statements could not be considered to prove guilt. We therefore affirm the conviction on count 2.

In March 2004, as a condition of sentence for a domestic violence

conviction, Kirk was ordered to have “no contact, directly or indirectly, in person, in writing or by telephone, personally or through any other person” with Machele Mitchell until March 26, 2009. Kirk and Mitchell have three children who were living with Mitchell. The order permitted Kirk to have contact with Mitchell through a third party only for the purpose of arranging to visit the children. Due to what was probably a scrivener’s error, the order prohibited Kirk from entering Mitchell’s residence only through March 26, 2004—the date the order was entered. The parties agree that under the literal terms of the order, it was permissible for Kirk to be at Mitchell’s residence after March 26, 2004, as long as Mitchell herself was somewhere else.

On November 26, 2008, police found Kirk at Mitchell’s residence and arrested him for violating the no contact order. In December, Kirk’s sister told the police she had called Kirk at Mitchell’s house around Thanksgiving and she knew Mitchell was there at the same time because Mitchell answered and then handed Kirk the phone. Based on this evidence, the State charged Kirk with two counts of violating the March 2004 no contact order. After a two day trial, a jury convicted Kirk on both counts. Kirk appeals, alleging insufficiency of the evidence.

“Evidence is sufficient to support a conviction if, when taken in the light most favorable to the state, the evidence would allow any rational trier of fact to find the elements of the crime beyond a reasonable doubt. State v. Clinkenbeard, 130 Wn. App. 552, 571, 123 P.3d 872 (2005). A claim of

insufficiency admits the truth of all of the State's evidence and all of the inferences that can reasonably be drawn from it. However, there must be at least substantial evidence that supports the elements of the crime charged.

Clinkenbeard, 130 Wn. App. at 571-72.

The evidence introduced by the State to prove count 1 consisted of testimony by police officers. The officers established that Kirk had listed his parents' residence as his address for purposes of community custody supervision for his previous conviction. They were unable to locate him there after six in person visits. Having received information on November 26, 2008, that Kirk might be residing at Mitchell's house, several officers went there to check on the safety and welfare of the occupants. Kirk was there with only the children. Concluding that Kirk would not be at the residence watching the children without having contacted Mitchell, the officers arrested him. One of the officers testified that after his arrest, Kirk confessed that he was living with Mitchell.

On appeal, the State concedes that police lacked probable cause to arrest Mitchell because it was not a violation of the order for him to be there in Mitchell's absence. The State also concedes that Kirk's postarrest confession that he was living at Mitchell's house was the sole evidence that Kirk had personal contact with Mitchell on that date. Because the police lacked probable cause to arrest, Kirk's postarrest confession should have been suppressed. We accept the State's concession that Kirk's conviction on count 1 was not

supported by sufficient evidence.

To prove that Kirk and Mitchell were both in the house at the same time as alleged in count 2, the State called Emma Vaughn, Kirk's sister, as the key witness. Vaughn acknowledged that she had spoken with Kirk on Mitchell's home phone "sometime around Thanksgiving." She said she asked him to call his parole officer so the officer would stop checking for him at their mother's house. After a "heated conversation" with Kirk, Vaughn called the officer who had been looking for Kirk. Vaughn acknowledged she was interviewed by Detective Heather Castro in early December 2008 about the incident.

The State tried to elicit Vaughn's testimony that when she called Mitchell's home phone, Mitchell answered and then handed the phone to Kirk. The State repeatedly attempted to refresh Vaughn's memory about this by reading to her from a transcript of Detective Castro's notes of her interview. Other than stating that some of the interview seemed inaccurate, Vaughn said she could not remember making most of the statements attributed to her in Detective Castro's notes.

The State concluded with testimony by Detective Castro. Detective Castro described and quoted from her December 2008 interview with Vaughn. According to Detective Castro, Vaughn said she contacted Kirk at Mitchell's house by calling Kirk on Mitchell's residential line and when Mitchell answered the telephone, she said Kirk was with her and gave Kirk the phone.

Kirk did not present witnesses. In closing, the State encouraged the jury

to believe the statements Vaughn made to Detective Castro instead of her testimony at trial. Because the statements established that Kirk and Mitchell were together at the house to talk on the same phone, the State argued, Kirk had violated the no contact order. Defense counsel urged the jury to believe Vaughn's trial testimony and to find Kirk not guilty of count 2.

On appeal, Kirk argues that Vaughn's testimony did not establish a violation of the no-contact order because she did not testify to any facts that would establish that Kirk and Mitchell were in the home at the same time. He notes, citing Clinkenbeard, that the State's attempts to use the interview transcript to impeach Vaughn were not substantive evidence. "Impeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed by the evidence." Clinkenbeard, 130 Wn. App. at 569.

Kirk is correct that Vaughn's testimony, standing alone, does not establish a violation of the court order. However, Detective Castro's testimony does. Detective Castro testified as to Vaughn's prior inconsistent statements during the interview in December 2008. According to these statements, Mitchell answered Vaughn's phone call placed to Mitchell's residential phone line and then handed the phone to Kirk, who proceeded to have a heated conversation with Vaughn. Kirk did not object to Castro's testimony below or try to limit the use that could be made of it, and he does not argue on appeal any grounds for holding that it was unavailable to the jury for consideration as substantive evidence of his personal contact with Mitchell. Accordingly, we conclude count 2

No. 63892-1-1/6

was supported by sufficient evidence.

The conviction on count 1 is reversed. The conviction on count 2 is affirmed.

Becker, J.

WE CONCUR:

Dwyer, C. J.

Cox, J.