IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALAN ANTHONY NIEMI, Appellant.	No. 40093-6-II UNPUBLISHED OPINION

Penoyar, J. — Alan Anthony Niemi appeals his nine convictions for felony violation of a domestic violence no-contact order.[1] He challenges the sufficiency of the evidence, claims the trial court improperly admitted impermissible opinion testimony and irrelevant, prejudicial evidence, claims the denial of effective assistance of counsel, and claims that the community custody provisions of his judgment and sentence are improper. We affirm the convictions but remand for resentencing.

Facts

On July 6, 2009, a Thurston County District Court Judge signed a domestic violence no-contact order (no contact-order) against Alan A. Niemi, date of birth (dob) 11/22/66, and protecting Dorothy A. Bennett, dob 10/30/59. This order prohibited Niemi from, among other things, "having any contact whatsoever, in person or through others, by phone. . . . " Ex. 1 at 1. The order warned Niemi that any willful violation of the order could result in criminal punishment.

> JUDGE: The other conditions are when you're in or out of custody, no contact with Dorothy Bennett, and the no-contact order specifies that that means no physical harm, no threats or harassment, don't go near her, have any third-party contact with her in any way, and don't go knowingly within one thousand feet to her residence, workplace. This order's in effect regardless of whether she wants

[1] Violations of RCW 26.50.110(5); RCW 10.99.040 and .020.

> contact or (indiscernible) can't have contact with her. You are the person that will be charged for violating the order, and I'll also remind you, Mr. Niemi, that this includes contact or attempts to contact her from the jail as well.

2 Report of Proceedings (RP) at 232.

Between July 21, 2009, and August 6, 2009, Niemi was incarcerated in the Thurston County Jail. The Thurston County Jail records all inmate telephone calls. Computer logs contain the date, the number called, the location in the jail, and the length of the call. When a call commences, the inmate may identify himself and the party he is calling. The Jail recorded nine phone calls each beginning with "Alan Niemi calling Dorothy Bennett." 1 RP at 65. Of these nine phone calls, eight were to number (360) 458-0543 and the other was to (360) 789-1561, a number registered to Charles Bernard with whom Bennett stayed occasionally. In this latter call, the woman answered that she was "[o]ver here at Charlie's." 2 RP 159.

The State charged Niemi with nine counts of violating a no-contact order.[2] During trial, the jury heard each of the nine unredacted phone calls. During these calls, Niemi and Bennett discussed his Department of Corrections (DOC) hold, an outstanding warrant in Mason County, his willingness to assault a corrections officer so he would get prison instead of jail time, and a fight in which the other person was "a bitch" so he had no choice and "cracked on him." 2 RP at 183. He also told Bennett to beat her daughter for calling 911 when they were fighting. During the calls, Niemi used profanity, insisted that they get married so they can have visitation when he is in prison, and demanded to know what was going on in her relationships with other people.

The jury returned guilty verdicts on all counts. The trial court imposed 60-month

[2] The State also charged Niemi with three counts of witness tampering. The trial court dismissed these counts with prejudice after the jury rendered its verdicts.

concurrent sentences and 9-18 months of community custody.

analysis

I. Sufficiency of the Evidence

Niemi claims that the State failed its burden to prove with sufficient evidence two things: (1) that he was the person named in the District Court no-contact order and (2) that this order was still in effect at the time of his alleged violations.

When facing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Because 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), we 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).

A. Person Named

Niemi claims that the State failed to show beyond a reasonable doubt that he was the person the no-contact order restrained. He notes that the order named the restrained party as "Alan A. Niemi," provided a birth date of November 22, 1966, was signed by the judge and prosecutor, but the defendant did not sign it. Relying on *State v. Huber,* 129 Wn. App. 499, 502, 119 P.3d 388 (2005), he argues that the State failed to show more than mere identity of names.

In *Huber*, the State charged Huber with bail jumping. The State:

> introduced certified copies of an information charging Huber with violation of a protection order and tampering with a witness; of a written court order requiring

> Huber to appear in court on July 10, 2003; of clerk's minutes indicating that Huber had failed to appear on July 10; and a bench warrant commanding Huber's arrest. The State did not call any witnesses or otherwise attempt to show that the exhibits related to the same Wayne Huber who was then before the court.

Huber, 129 Wn. App. at 500-01.

The defense did not make an opening statement or present any evidence. *Huber,* 129 Wn. App. at 501. This court reversed Huber's conviction, finding that the State had presented nothing more than identity of names.

In so holding, this court relied on *State v. Hill*, 83 Wn.2d 558, 520 P.2d 618 (1974), for the rule that the State must present evidence independent of the record relied on. The *Hill* Court explained:

> 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.

83 Wn.2d at 560 (citations omitted). "Because 'in many instances men bear identical names,' the State cannot do this by showing 'identity of names alone.' Rather, it must show, 'by evidence independent of the record,' that the person named therein is the defendant in the present action." *Huber*, 129 Wn. App. at 502 (citations omitted).

The State responds that the evidence at trial overwhelmingly established that the defendant here was the Alan A. Niemi named in the no-contact order. It introduced a certified copy of the no-contact order, which included the defendant's full name and birth date. The judge signed the order in open court in Niemi's presence and the protected party was Dorothy A. Bennett with a birth date of October 30, 1959. The State also introduced a certified copy of a recording of the

proceeding in which the jury heard the judge identify Niemi and explicitly inform him that he could not contact Dorothy Bennett. Further, the State introduced testimony from Deputy Camm Clark, who went to Bennett's residence in response to a domestic violence report on July 2, 2009. The State introduced a certified copy of Bennett's Department of Licensing photo and driver's license, which showed her birth date as October 30, 1959. Deputy Clark also learned from Bennett that Niemi was her boyfriend. RP 42. Deputy Brian Goheen visually identified Niemi in court as the defendant and testified that he verified that Niemi had the same birth date as the Niemi named in the no-contact order. Niemi disputed none of this evidence. Captain Deborah Thompson testified about Niemi's time in the Thurston County Jail. She verified his presence, location, and his out-going phone calls.

Finally, the jury listened to the phone calls between Niemi and Bennett. The phone calls originated from the jail, were to Dorothy Bennett, and discussed matters regarding the no-contact order that prevented him from contacting her. Further, they discussed how he does not want her to testify, attempts to get the no-contact order lifted, and his plan to deny he knew her.

From all of this evidence, a jury could, beyond a reasonable doubt, conclude that Niemi was the same person as named in the no-contact order.

B. Validity of Order

Niemi also challenges the State's proof that the no-contact order was still in effect. He likens the order to orders entered before arraignment that expire at arraignment, RCW 10.99.040(5), and orders entered after charges are filed that terminate if the defendant is acquitted or the charges dismissed. RCW 10.99.040(3). He claims that the State's failure to prove that the no-contact order was in effect on the days charged violated his due process rights and his

convictions must be dismissed with prejudice.

The State responds that the validity of a no-contact order is not a question for the jury but rather is a preliminary question of law for the court to decide. *State v. Miller*, 156 Wn.2d 23, 32, 123 P.3d 827 (2005). In fact, it argues, there is no requirement that it prove the validity of the no-contact order beyond a reasonable doubt; rather the State need only prove the existence of a facially valid no-contact order. *State v. Snapp*, 119 Wn. App. 614, 624, 82 P.3d 252(2004). And it met its burden of proof, it argues, in presenting a certified copy of the no-contact order. *State v. Abrams,* 163 Wn.2d 277, 297, 178 P.3d 1021 (2008) (Chambers, J. concurring).

We agree with these observations. We also note that the no-contact order specifically states that it is in effect from July 6, 2009, to July 6, 2013. While RCW 10.99.040(5) provides that a no-contact order entered before charging "shall expire at arraignment or within seventy-two hours if charges are not filed." Here, the State filed charges within 72 hours and so this no-contact order did not expire under this statute. Finally, Niemi conceded during preliminary proceedings that the order was valid stating, "we're in agreement that [validity] is not an issue for us to bring up during this trial." 1 RP at 12-13.

Niemi's sufficiency challenges fail.

II. Constitutional Right to a Jury Trial

Niemi claims that the trial court violated his right to a jury trial as guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 21 of the Washington Constitution in that Detective Adams gave impermissible opinion testimony on his guilt.

We review claims of constitutional error de novo. *In re Det. of Martin*, 163 Wn.2d 501,

506, 182 P.3d 951 (2008). If the defendant asserts the error, as here, for the first time on appeal, he must show constitutional error and how the error affected his right; this latter showing of prejudice must be manifest. *State v. McFarland,* 127 Wn.2d 322, 334, 899 P.2d 1251 (1995).

Generally, no witness, lay or expert, may give an opinion, directly or inferentially, on the defendant's innocence or guilt. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such opinions are unfairly prejudicial because they invade the fact finder's exclusive province. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *Black*, 109 Wn.2d at 348. But if the testimony does not directly comment on the defendant's guilt or veracity, helps the jury, and is based on inferences from the evidence, it is not improper opinion testimony. *See City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993) (officer could give his opinion that defendant was intoxicated because it was based on the defendant's physical characteristics); *State v. Farr-Lenzini*, 93 Wn. App. 453, 465, 970 P.2d 313 (1999) (improper opinion on defendant's guilt invades jury's province). In order to show manifest error, the witness' statement must be an explicit or almost explicit statement on an ultimate issue of fact. *Kirkman,* 159 Wn.2d at 936.

Niemi claims that Detective Adams's testimony that the callers in the recorded telephone conversations were Niemi and Bennett was improper opinion testimony because the State had to prove that he contacted the protected party. Niemi explains that by telling the jury that these conversations were between Niemi and Bennett, Adams was stating as a matter of fact that Niemi was guilty.

The following colloquy took place at trial:

> PROSECUTOR: Were you able to identify in some or all of those calls who were the parties engaged in the conversation?
>
> WITNESS: Yes

> PROSECUTOR: And how were you able to do that?
>
> WITNESS: By the content of the phone calls, by the caller using his—using his name and identifying the call receiver by their name. Mainly by content.
>
> PROSECUTOR: And so who were the parties involved in most of those telephone calls?
>
> WITNESS: Alan Niemi calling Dorothy Bennett.

1 RP at 64-65. Later, the State asked Detective Adams to explain what facts led her to conclude that the phone calls were between Niemi and Bennett. She replied:

> WITNESS. Yes, I did. During the phone calls the caller and the call receiver talk about case facts that were consistent with the case facts involving Mr. Niemi's arrest. They also mention -- the caller provides a Social Security number for the call receiver to obtain a phone, and that Social Security number was only one digit off from Alan Niemi's Social Security number. They discuss the date of an upcoming court trial, and according to police records, that was consistent with an upcoming court date for Mr. Niemi. They discuss Dorothy Bennett's daughter, and she's mentioned as a daughter, and police reports indicate that Corin May is the daughter of Dorothy Bennett.
>
> DEFENSE COUNSEL: Your Honor, I'm going to object to this as hearsay.
>
> THE COURT: Sustained to this last remark.
>
> WITNESS: A phone number is provided during their conversation for Corin May, and that phone number is consistent with our police records for the phone number for Corin May.

2 RP at 156-57. The trial court then explained to the jury that it could consider this testimony to show the detective's state of mind but not for whether it was true.

We find no manifest error here. The detective properly explained to the jury the evidence she relied on to conclude that Niemi made all nine phone calls to Bennett. The detective did not state her belief that Niemi was guilty of violating the no-contact order. Most importantly, the jury

listened to all nine phone calls and could independently evaluate Adams's testimony based on its own observations. Further, Adams's observation about who participated in these phone calls was not a critical piece of the State's evidence. The State introduced evidence that Niemi was incarcerated, made these phone calls from the Thurston County Jail, identified himself on the recordings, eight of the nine calls were to the same phone number and answered by a woman who identified herself as Dorothy. Further, as Adams explained, many of the details they discussed corresponded with Niemi's circumstances. Adams's opinion, even if questionably admissible, had no real effect on the jury's verdict. *See State v. Hayward*, 152 Wn. App. 632, 651, 217 P.2d 354 (2009) (error in admitting testimony "is harmless 'if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.'"(quoting *State v. Yates*, 161 Wn.2d 714, 764, 168 P.3d 359 (2007)).

Niemi's claim that the admission of opinion testimony violated his constitutional jury trial right fails.

III. Admission of Evidence of Outstanding Warrant

Niemi next claims that the trial court erred in allowing testimony about his outstanding arrest warrant in Mason County. He argues that this evidence was irrelevant to the charge under ER 403, improper character evidence under ER 404(b), and the trial court did not identify any purpose for admitting the testimony.

We review a trial court's decision admitting or refusing to admit evidence for an abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). A court abuses its discretion when it takes a position no reasonable person would adopt. *State v. Demery,* 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Where reasonable persons

could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. *Demery*, 144 Wn.2d at 758 (citing *State v. Sutherland*, 3 Wn. App. 20, 22, 472 P.2d 584 (1970)).

Contrary to Niemi's assertion, the trial court discussed at length with counsel the admissibility of the discussion between Niemi and Bennett about an outstanding Mason County felony warrant. The trial court discussed redacting the tapes but the State said that was not possible. The trial court discussed turning down the volume in these brief moments but found that both impractical and that it would encourage the jury to speculate. Finally, the trial court agreed to provide a limiting instruction, which Niemi's counsel apparently drafted.[3] The trial court summarized its reasons for admitting the testimony:

> THE COURT: All right. That sounds appropriate to me. I'd simply say that the state needs the tapes to prove the elements of their crimes. So they're

[3] Instruction 6 provided:

> Certain evidence has been admitted in this case for only a limited purpose. First, this evidence consists of a joint stipulation relating to two prior convictions for violation of a no-contact order and may be considered by you only for the purpose of establishing that the defendant has at least two prior convictions for violation of a no-contact order. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.
>
> Second, in the recordings of telephone conversations made from the jail, other cases and other matters not related to this case were mentioned either by the caller, or, the recipient of the call. You may consider this evidence only for the limited purpose of establishing the identity of the participants in the telephone conversations, whether the defendant may have violated the no-contact order at issue in this case, or whether these calls prove any tampering with a witness which the state has alleged. The character or lifestyle of persons heard speaking in these recordings is not relevant to any matter before you. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Clerk's Papers (CP) at 34.

> relevant evidence under Rule 401. They would be admissible under Evidence Rule 402. To the extent they're comments on his character under Evidence Rule 404, and doing the balancing, I think the relevance here outweighs any prejudicial effect. There is some prejudice. There always is, but I don't think it's unduly prejudicial in light of what the state needs to prove their case under Evidence Rule 403. So I would allow these to be admitted with the limiting instruction.
>
> Let's not forget what we're after is the truth here. Now, we have a defendant who has two pages of prior incidences, but he should be tried for what he's alleged to have done in this case, not on his criminal history. That's how I see it, and I think that's a correct understanding of the law. But this case he's charged with involves the government proving he has two prior convictions for the same kind of thing, so I don't know where the government can prove that or not, but that's part of the elements that have to be proved here. So we come here with -- in that context.

1 RP at 35-36.

We find no abuse of discretion here. The trial court discussed the matter, considered alternatives, and found that giving a limiting instruction would best reduce any prejudice that Niemi may have suffered from the admission. Further, the trial court's instruction explicitly instructed the jury that it could only consider the telephone conversations for identifying the callers. We presume the jury followed this instruction. *Kirkman*, 159 Wn.2d at 928.

IV. Effective Assistance of Counsel

Niemi next argues that he was denied his constitutional right to effective assistance of counsel because (1) defense counsel did not object to Adams's opinion testimony identifying the participants in the telephone recordings and (2) defense counsel did not object to the prejudicial conversations contained in the telephone recordings.

The test for ineffective assistance of counsel has two parts. One, the defendant must show that defense counsel's conduct was deficient, *i.e.*, that it fell below an objective standard of reasonableness. Two, the defendant must show that such conduct caused actual prejudice, *i.e.*,

that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We begin with the presumption that counsel's assistance was effective. *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122 (1986). This presumption continues until the defendant shows in the record the absence of legitimate or tactical reasons supporting his counsel's conduct. *McFarland*, 127 Wn.2d at 334-38.

We have already discussed Adams's opinion testimony and found that it was properly admitted. Any objection would have been unproductive and cannot support a claim of ineffective assistance of counsel.

Niemi claims that defense counsel should have objected to (1) coarse language; (2) the DOC hold and outstanding warrant; (3) references to drug use and distribution; (4) discussion about the friend who had been arrested and jailed for assault; (5) discussion about theft of property by friends and acquaintances; (6) the caller's claim that he'd be willing to assault a corrections officer to ensure he would be sent to prison; (7) references to the caller's involvement in a fight; and (8) information about the accident/hit-and-run involving the caller's truck. He argues that had counsel objected, the trial court would have had to balance the probative value of this evidence against its prejudicial effect. He argues that allowing this substantive evidence without limitation could serve no legitimate tactical purpose.

Even assuming that defense counsel should have objected to this evidence, Niemi fails to show that it would have affected the trial outcome. First, and as noted above, the trial court gave a very specific limiting instruction regarding the telephone recordings, admonishing the

jurors to only consider the evidence for identification purposes. In light of this instruction, we must presume that the jury did just that. Second, the evidence identifying Niemi and Bennett at trial was overwhelming. Excluding evidence of Niemi's coarse language, friends and acquaintances involved in theft and drugs, and Niemi's own propensity to violence would not have changed the trial outcome. Niemi's claim of ineffective assistance of counsel fails. *See Strickland,* 466 U.S. 687 (A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.).

V. Community Custody Provisions

Last, Niemi argues that the trial court erred in imposing concurrent 60-month sentences with 9 to 18 months of community custody. He argues that 2009 legislative changes to RCW 9.94A.701 require that his community custody ranges be reduced to 0 months for all but Count I, which he concedes was properly imposed.[4] This statute now provides:

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Laws of 2009, ch. 375, § 5.

The State concedes this error and asks us to remand for resentencing.

We affirm Niemi's convictions but remand for resentencing.

[4] Count I occurred before the effective date of the new legislation and complies with *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009) (amended sentence properly specified that time served and community custody cannot exceed statutory maximum).

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Worswick, J.