

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KELLY J. McAFERTY,

Appellant.

No. 39083-3-II

UNPUBLISHED OPINION

Armstrong, J. — Kelly J. McAferty appeals his conviction for violating a no contact order (NCO), third or greater offense. We affirm.

On November 11, 2008, Christopher Reeves, a security guard at Ralph’s Thriftway, called the Olympia City Police Department after he saw McAferty in the store’s pharmacy. Reeves believed McAferty was violating a no trespass order. Upon arrival, officers questioned McAferty and learned he was the respondent in a domestic violence NCO. Officers asked the woman standing next to McAferty to identify herself. They learned she was Pricilla Collins, the protected party in the NCO. McAferty was taken into custody and charged with felony violation of an NCO, third or greater offense.

During trial, defense counsel moved to restrict Exhibits 3-8 for illustrative use only. These exhibits include the charging documents, guilty pleas, and judgment and sentencing forms from two predicate NCO convictions. Without objection, the court entered these exhibits to support a stipulation of the parties expressly acknowledging McAferty’s two predicate NCO convictions. The deputy prosecuting attorney, defense counsel, and McAferty signed the stipulation. Following a jury trial, McAferty was convicted and sentenced to 60 months’ confinement.

On appeal, McAferty argues the evidence is insufficient to support the special verdict. McAferty contends the trial court could not have determined whether his predicate convictions were “valid” and “applicable” to the instant case. McAferty’s argument is meritless.

In order to support a third or greater NCO conviction under RCW 26.50.110(5), a defendant must be found guilty of violating an NCO issued under chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW. The defendant must also have two predicate convictions for violating an NCO issued under these same chapters.

The existence of “valid” and “applicable” NCOs underlying predicate convictions is not an element of the third or greater NCO statute to which the State bears the burden of proof; it is a threshold determination a judge makes as part of the court’s gate-keeping function. *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005). “An order is not *applicable* to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order.” *Miller*, 156 Wn.2d at 31 (emphasis added).

McAferly contends *Miller* imposes a requirement on the trial judge to enter a finding in the record stating that predicate NCO convictions are *valid* and applicable. The law imposes no such requirement. *Miller* merely requires that “[o]rders that are not applicable to the crime should not be admitted” and “[i]f no order is admissible, the charge should be dismissed.” *Miller*, 156 Wn.2d at 31. Orders themselves cannot be collaterally attacked after alleged violations, and such challenges must go to the issuing court itself. *Miller*, 156 Wn.2d at 301 n.4.

It is undisputed that McAferly was twice previously convicted of violating an NCO. In his

brief, McAferty suggests the NCOs supporting his predicate convictions were not *valid*. A valid NCO contains a warning that a violator is subject to arrest and prosecution, the protected party's consent is not a defense, and the NCO is issued under an appropriate statute. *State v. Marking*, 100 Wn. App. 506, 997 P.2d 461 (2000), *overruled on other grounds by State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005). Reviewing the validity of the previous two NCOs under the *Marking* standard would require the court to reopen two previous convictions. We will not reopen or further scrutinize appellant's two previous convictions from separate cases.

McAferty also contends the trial court judge could not have determined whether the predicate NCO convictions are *applicable* to the instant case, specifically, whether the two previous NCOs were issued pursuant to the statutes listed in RCW 26.50.110(5). However, even a cursory review of the record supports the applicability of these convictions to the instant case.

A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State; circumstantial evidence is accorded equal weight with direct evidence. *State v. Holt*, 119 Wn. App. 712, 720, 82 P.3d 688 (2004), *overruled on other grounds by State v. Eckenrode*, 159 Wn.2d 488, 150 P.3d 1116 (2007). Exhibits 3-8 and the stipulation signed by the parties reflect that McAferty was convicted of violating NCOs issued under chapters 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW. In a light most favorable to the State, the evidence was sufficient to enable the trial judge to make a threshold determination of predicate NCO validity and applicability.

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Affirmed.

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.

Armstrong, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.