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STATE OF WASHINGTON
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NO. 100703-5

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOHN KELLY,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Michael John Kelly has petitioned for review of the Court of Appeals’ unpublished decision affirming his conviction for failure to register as a sex offender on direct appeal. State v. Kelly, Unpublished, No. 81352-8-I, slip op. (January 31, 2022).¹ He concedes that failure to register is not an alternative means crime, but asserts that the importation of a two-part disjunctive definition of his registration requirements into the “to-convict” instruction—which was done at Kelly’s request—created alternative means under the “law of the case” doctrine. Petition for Review at 3, 7. As a result, he asserts, his conviction must be reversed because there was no unanimity instruction and there was not sufficient evidence to support both purported “means.” Petition for Review at 3, 18.

¹ The Court of Appeals originally issued its opinion on November 8, 2021, but issued a substitute opinion on January 31, 2022, upon denial of Kelly’s motion for reconsideration. Appendices A and B to Petition for Review.

The Court of Appeals applied the invited error doctrine to preclude review of Kelly’s alternative means claim and affirmed the conviction after finding sufficient evidence that Kelly failed to comply with one of the two registration requirements on which the jury was instructed. As a result, the Court of Appeals did not address the State’s arguments that the to-convict instruction did not create alternative means and that, even if it did, the conviction should nevertheless be affirmed because the second alleged “means” was also supported by sufficient evidence.

In his petition for review, Kelly repeatedly cites to all four criteria for review listed in RAP 13.4(b), but discusses none of them beyond his assertion that the Court of Appeals’ application of the invited error doctrine conflicts with this Court’s decision in State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998). Petition for Review at 3. The Court of Appeals properly rejected that argument when it denied Kelly’s motion for reconsideration. Hickman does not address the invited error

doctrine and thus is not in conflict with the Court of Appeals' decision in this case. Because the criteria for review are not met, and because Kelly's appeal would fail on other grounds even if this Court were to disagree with the Court of Appeals' analysis, this Court should decline review of this case. If this Court grants review, it should also review the issues briefed below that were not decided by the Court of Appeals.

B. STANDARD FOR ACCEPTANCE OF REVIEW

“A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b).

C. STATEMENT OF THE CASE

The relevant facts, many of which Kelly omits in his petition, are set out in full in section B.2. of the Brief of Respondent below, which the State incorporates herein. A brief summary of some of those facts is provided here for the Court's convenience.

Kelly registered as a sex offender lacking a fixed address in August 2018, but then stopped checking in weekly after mid-September 2018. He was booked into the King County Jail for a violation of community custody conditions on his 2016 conviction for failure to register as a sex offender—itsself a sex offense—in early October 2018 and released in late October 2018. Not only did Kelly fail to register within three business days of his release as required, but he never again registered or checked in with the sheriff's office in the remainder of 2018. Kelly was charged in this case with one count of failure to register as a sex offender between November 2018 and December 2018.

At trial, the State proposed the standard WPIC “to-convict” instruction requiring the jury to find that Kelly “knowingly failed to comply with any requirement of sex offender registration.” The State also proposed, and the trial court gave without objection, a separate instruction defining Kelly’s registration requirements. It listed only two: (1) a requirement that Kelly report to the sheriff weekly if lacking a fixed residence and (2) a requirement that Kelly register within three business days after being released from custody on a sex offense.²

² Because of the way the State defined Kelly’s registration requirements, it was required to prove either that Kelly lacked a fixed residence or that he was released from custody on a sex offense. However, this is not because including the definition of “registration requirements” in the to-convict instruction bound the State to prove additional elements under the “law of the case” doctrine, but because finding one or the other fact was the only way the jury could find that Kelly violated his “registration requirements” as that term was defined in the instructions, regardless of whether the definition was incorporated into the to-convict instruction. Had the term been defined to also include the requirement that an offender who acquires a new fixed address must register it within three business days, regardless of whether that three-part definition

Kelly persuaded the trial court to give a modified to-convict instruction that incorporated the State’s definition of “registration requirements” by telling the jury that it had to find either that Kelly lacked a fixed residence and failed to report weekly or that Kelly failed to register within three business days of being released from custody on a sex offense, rather than simply that he failed to comply with a registration requirement. The State repeatedly objected to this departure from the standard to-convict instruction, but eventually acquiesced after the trial court’s assurance—which Kelly did not contradict—that Kelly’s proposed instruction did not create

was incorporated into the to-convict instruction, the State could have proved a violation of Kelly’s registration requirements merely by showing that Kelly neither checked in weekly nor registered a new fixed address, without proving any particular residential status. See State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (“[I]t is possible to prove that a registrant failed to register within any applicable deadline without having to specify the registrant’s particular residential status. . . . Peterson registered outside of *any deadline* contained in the statute. It was therefore unnecessary to show his particular residential status in order to prove a violation of the statute.”).

alternative means. No unanimity instruction was requested by either party or given by the court.

The State presented evidence to support both prongs of the definition of “registration requirements” given to the jury. Kelly’s asserted defense was his claim that he had reported a fixed address to the sheriff in August 2018 and been told he no longer needed to check in weekly and his claim that he had registered as required the day after his release from custody in October 2018.

The parties agreed on a stipulation and limiting instruction regarding three prior convictions—the original sex offense that triggered Kelly’s registration requirement and two subsequent convictions for failure to register as a sex offender, one of which was itself a sex offense. The limiting instruction was, in retrospect, contradictory, as it both permitted the jurors to use Kelly’s “prior sex offense conviction”—of which he had two—“for the purpose of determining the elements of the [charged] crime,” and also prohibited the jurors from using

Kelly's prior "failure to register as a sex offender convictions" for any purpose beyond proving knowledge and a special allegation that Kelly had two prior felony convictions for failure to register. Neither the parties nor the trial court gave any indication that they believed that the limiting instruction prevented the jury from using the uncontested evidence that Kelly had been incarcerated for a community custody violation related to his prior sex offense conviction for failure to register for the purpose of determining that Kelly had been "released from custody on a sex offense" shortly before the charging period. Kelly admitted on cross-examination that his incarceration stemmed from a prior sex offense and never suggested in closing argument that the State had failed to prove he had been released from custody "on a sex offense."

The jury returned a general verdict finding Kelly guilty as charged.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

Kelly seeks review of the Court of Appeals' invited error holding and its holding that the State presented sufficient evidence that Kelly failed to register within three business days of being released from custody on a sex offense. However, Kelly makes no argument that the Court of Appeals' holding regarding the sufficiency of the evidence meets any of the criteria for review.³ The only criterion for review he addresses in his petition is his assertion that the Court of Appeals' invited error holding conflicts with this Court's holding in State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998). Petition for Review at 3-4.

Kelly is incorrect on that point. It is true that this Court in Hickman reversed a conviction for insufficient evidence

³ Kelly merely identifies one of the issues for review as "Insufficient evidence supports Mr. Kelly's conviction" and cites "RAP 13.4(b)(1)-(4)" without any discussion of the criteria for review or why Kelly believes they apply to the sufficiency issue. Petition for Review at 2, 13-17.

under the “law of the case” doctrine after the trial court gave the defendant’s proposed to-convict instruction, which required the State to prove the county in which the crime occurred. Id. at 105-06. However, the Court of Appeals’ decision in this case does not conflict with Hickman for two reasons.

First, this Court’s decision in Hickman makes no mention of the invited error doctrine; the State never raised the issue. Id. at 99-112; see State v. Arlene’s Flowers, Inc., 193 Wn.2d 469, 494, 441 P.3d 1203 (2019) (noting court in prior opinion “had no reason to discuss” an argument that had not been raised). Because this Court did not address the applicability of the invited error doctrine, Hickman does not stand for the proposition that the invited error doctrine does not apply to “law of the case” claims, and thus it in no way conflicts with the Court of Appeals’ decision in this case. In re Pers. Restraint of Swagerty, 186 Wn.2d 801, 810, 383 P.3d 454 (2016) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be

considered as having been so decided as to constitute precedents.” (quoting Webster v. Fall, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925)).

The dissent in Hickman did note that “Hickman himself presented the ‘to convict’ jury instruction,” but the dissent’s argument was focused on whether Hickman “waived” any challenge to the sufficiency of the evidence as to venue by failing to raise on objection at trial—not on whether the invited error doctrine applied. Id. at 106 (Talmadge, J., dissenting). Hickman therefore cannot reasonably be read as foreclosing the Court of Appeals’ application of the invited error doctrine in this case.

Second, even if Hickman did stand for the proposition that the invited error doctrine does not apply to “law of the case” challenges, it would still not conflict with the Court of Appeals’ holding in this case, because the “law of the case” doctrine does not apply in this situation. As this Court held in State v. Tyler, “Hickman’s law of the case rule is inapplicable”

to a claim that the inclusion of a multi-part definition in a to-convict instruction on a single-means crime. 191 Wn.2d 205, 207, 422 P.3d 436 (2018). Because the law of the case rule is inapplicable in this case, Hickman is inapplicable in this case.

The Court of Appeals properly applied the invited error doctrine in this case. Under the invited error doctrine, appellate courts will not review a party's assertion of an error to which the party "materially contributed" at trial. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). Courts apply the invited error doctrine strictly even where constitutional rights are involved, sometimes with harsh results. See, e.g., State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (holding doctrine prohibited review of legally erroneous jury instruction because defendant proposed it, even though it was standard WPIC at the time); State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) ("[E]ven where constitutional rights are involved, [appellate courts] are precluded from

reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording.”).

Kelly contends that the trial court committed reversible error by instructing the jury on an unsupported alternative means without requiring unanimity as to the means, yet it was Kelly himself who proposed the to-convict instruction. In conceding that failure to register is normally a single means crime, Kelly implicitly concedes that, had the trial court given the standard WPIC to-convict instruction requested by the State, no alternative means would have been created, there would have been no requirement that each part of the definition of “registration requirements” be supported by sufficient evidence, and there would thus have been no instructional error. It was Kelly’s proposal of an unconventional to-convict instruction that created the asserted need for sufficient evidence that Kelly violated both parts of the definition of “registration requirements” and the asserted need for a unanimity-as-to-means instruction where one would otherwise not have been

needed. As such, Kelly created the error he alleges and the Court of Appeals properly declined to review his claim.

Even if the Court of Appeals had not applied the invited error doctrine to preclude review of Kelly's claim, Kelly's appeal would have failed on the merits because, as this Court held in Tyler, the inclusion of a multi-part definition in a to-convict instruction does not convert a single-means crime into an alternative-means crime. Tyler, 191 Wn.2d at 214; Br. of Respondent at 24-32. Moreover, even if this Court were to overrule Tyler—something Kelly does not request—and conclude that the to-convict instruction in this case created alternative means, Kelly's conviction should still be affirmed because both alleged "means" were supported by sufficient evidence, as explained in the State's briefing below. Br. of Respondent at 16-24.

Neither the Court of Appeals' application of the invited error doctrine nor its holding that the State presented sufficient evidence that Kelly failed to register within three business days of release from custody on a sex offense satisfy the criteria for review. The petition for review should therefore be dismissed. If the Court chooses to grant review of those issues, it should also address the issues not reached by the Court of Appeals: whether the to-convict instruction in this case converted the charge against Kelly into an alternative means offense, and, if so, whether the second alleged "means" was also supported by sufficient evidence.

E. CONCLUSION

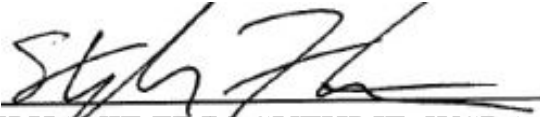
For the foregoing reasons, the petition for review should be denied.

This document contains 2,540 words, excluding the parts
of the document exempted from the word count by RAP 18.17.

DATED this 1st day of April, 2022.

Respectfully submitted,

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