

FILED

JAN 17 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30871-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARRY A. POWELL, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
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I.

APPELLANT'S ASSIGNMENT OF ERROR

- A. Under the law of the case, evidence was insufficient to convict appellant of first degree unlawful firearm possession.

II.

ISSUE PRESENTED

- A. SHOULD THE LIMITING INSTRUCTION REGARDING THE JURY'S USE OF THE STIPULATED CRIMINAL HISTORY PREVENT THE JURY FROM FINDING SUFFICIENT EVIDENCE TO CONVICT?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

- A. THE LIMITING INSTRUCTION IN QUESTION, (SUBMITTED BY ALL PARTIES) DID NOT PREVENT THE JURY FROM FINDING SUFFICIENT EVIDENCE FROM WHICH TO CONVICT THE DEFENDANT.

The decision in *State v. Ortega* 134 Wn. App. 617, 142 P.3d 175 (2006), is on all fours with this case and contrary to the defendant's arguments.

In *Ortega*, the defendant made nearly identical arguments as the defendant in this case. *Ortega* stipulated to the prior convictions required to prove a case of Violation of a No Contact Protection Order. The defendant in *Ortega* argued on appeal that the limiting instruction applied to two earlier convictions and prevented the jury from using the agreed stipulations to convict. *Ortega, supra* at 622. The jury had been instructed that the prior conviction stipulations could only be used for credibility determinations, not as substantive evidence. *Id.* The language of the limiting instruction was somewhat different but the intent was clearly the same as the current case.

It is true that the stipulation in *Ortega* addressed two prior crimes while this case addressed only one prior crime, but this fact does not affect the applicability of the holding. The instruction in this case told the jury: “You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give the defendant’s testimony, and for no other purpose.” CP 92. The defendant submitted essentially the same instruction as did the court. CP 29-67.

Even if the limiting instruction became the law of this case as to the 1997 convictions, it did not deprive the jury of sufficient evidence upon which to find that *Ortega* had been twice convicted in the past. The limiting instruction required the jury to consider “evidence of a prior conviction” for no purpose other than evaluating the weight and credibility of *Ortega's* testimony. To use the prior convictions for the purpose of evaluating *Ortega's* testimony, the jury would first have to find that those prior convictions existed. The jury could properly consider the

stipulation as evidence of the existence of the two prior convictions. This is the finding they made when they filled out the special verdict form. Having found that the 1997 convictions did exist, the jury would then follow the limiting instruction and not consider the 1997 convictions as evidence of *Ortega's* guilt on the three charges for which he was on trial.

Ortega, supra at 622.

The logic of the *Ortega* court is undeniable. The jury would first find that the stipulated conviction did exist. Then, the jury would proceed to convict the defendant of the possession charge without considering the stipulated prior conviction.

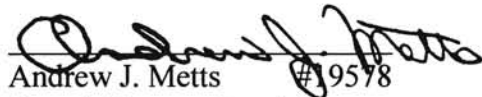
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 17th day of January, 2013.

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