No. 92293-4
COA No. 46140-4-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KEVIN R. CASE,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER.

The State of Washington petitions the Court for review of a decision of the Court of Appeals in State v. Case, COA No. 46140-4-II.

II. COURT OF APPEALS OPINION.

The State seeks review of the Court of Appeals opinion filed on August 11, 2015, reversing Kevin Case's conviction for violation of a no-contact order (NCO), domestic violence. A copy of the opinion is attached as Appendix A.

On September 3, 2015, the Court of Appeals denied a timely motion for reconsideration filed by the State. A copy of the order denying reconsideration is attached to this petition as Appendix B.

III. ISSUES

1. Whether, when a defendant charged with violation of a no-contact order stipulates at trial that he has at least two prior convictions for "violating the provisions of a protection order, restraining order, or no-contact order issued under Washington State Law," he waives his right to require the State to prove that the orders which he was convicted of violating were issued under Chapters 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.50.020.

2. Whether, where the State does not produce evidence that the no-contact orders underlying the prior convictions were valid, a sufficiency of the

evidence analysis applies, or whether it is a question of admissibility of evidence to which the harmless error standard applies.

3. If it was error to admit the evidence of Case's prior convictions, whether he invited the error by stipulating to those prior convictions.

4. Whether, even if the Court of Appeals was correct that the evidence was insufficient to establish the element of two or more prior convictions for violation of a no-contact order, the remedy is dismissal rather than entry of a judgment for the gross misdemeanor violation of a no-contact order.

IV. STATEMENT OF THE CASE.

In December of 2013, the defendant was observed leaning over and yelling at a woman who, it was later determined, was the protected party of a no-contact order in which Case was the person restrained.

Case was charged by information with one count of felony violation of a post-conviction no contact order, domestic violence, third or subsequent violation of any similar order, under RCW 26.50.110(5), RCW 10.99.020, and RCW 10.99.050. CP 3. RCW 26.50.110(5) provides:

> A violation of a court order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this

> chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

A violation of a no-contact order is a gross misdemeanor if the defendant does not have at least two prior convictions. RCW 26.50.110(1)(a).

At trial, the parties entered a stipulation, admitted as Exhibit 5, that said:

> The defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Washington State Law.

CP 36; RP 66.[1] Case was found guilty by a jury. CP 57-58.

On appeal, Case argued that the State had failed to prove that the orders underlying the prior convictions were issued pursuant to the statutes specified in RCW 26.50.110(5). The Court of Appeals reversed, holding that while the State produced sufficient evidence to the jury to support the conviction, it failed to prove the validity of the previous orders to the trial court, and therefore the evidence was insufficient to support the conviction. It reversed and dismissed. Case, *slip op.* at 6, 8.

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1 All references to the Verbatim Report of Proceedings are to the single volume of trial transcript dated March 17-18, 2013.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

A. The Court of Appeals ruled that a defendant's stipulation to the fact that he has two prior convictions for violating a similar order is sufficient to allow the jury to convict him for felony violation of a no-contact order, but is insufficient to make the evidence of the prior convictions admissible and therefore the conviction must be dismissed for insufficiency of the evidence. This ruling is internally inconsistent and conflicts with the reasoning of decisions of the Supreme Court and another division of the Court of Appeals.

This Court will accept review when the decision of the Court of Appeals conflicts with a decision of the Supreme Court, RAP 13.4(b)(1), conflicts with another decision of the Court of Appeals, RAP 13.4(b)(2), or raises a significant question of law under the Washington or the United States Constitutions. RAP 13.4(b)(3). The decision at issue does conflict with decisions of the Supreme Court and other decisions of the Court of Appeals, as detailed below.

B. Case waived any claim that the evidence of his prior convictions was either inadmissible or insufficient.

> 1. A stipulation to evidence which constitutes an element of an offense relieves the State of the duty to produce that evidence. It waives any objection to the admission of the evidence.

The Court of Appeals held that stipulating to the fact of Case's two prior convictions was insufficient to make the evidence admissible. Case, *slip op.* at 8. The State can find no other

Washington case which holds that when a defendant stipulates that the jury may be told that certain facts exist, he is not also stipulating to the admissibility of those facts.

Where a defendant is charged with felony violation of a no-contact order, an element of which is that he has two convictions for violating orders issued pursuant to specific statutes, the validity of the orders which were previously violated is not an element of the offense. If those previous orders were not issued pursuant to the requisite statutes, the convictions for violating them are not admissible and cannot be used to prove the element that the defendant had, in fact, been convicted at least twice before of violating qualifying orders. State v. Carmen, 118 Wn. App 655, 663-64, 77 P.3d 368 (2003), *review denied*, 151 Wn.2d 1039, 95 P.3d 352 (2004). That holding was specifically approved in State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005). The Court of Appeals agreed with that distinction in Case, *slip op.* at 5-7.

In Carmen, the State offered into evidence the judgments and sentences for the prior convictions. Neither one included the statutory provisions under which the underlying orders had been issued. Carmen, 118 Wn. App. at 657. In the instant case, however, the defendant specifically stipulated that he had two

previous convictions for violating a similar order "issued under Washington State law." CP 36. The Court of Appeals found that this stipulation was insufficient to "satisfy the threshold determination" that Case's prior convictions were for violating valid orders. *Slip op.* at 8. The Court of Appeals then characterized this as an insufficiency of the evidence, because the State had not presented the evidence to support the validity of those previous orders.

A stipulation, however, relieves the State of its burden of proof.

> The premise of the waiver theory is that upon entering into a stipulation on an element, a defendant waives his right to put the government to its proof of that element. "A stipulation is '[a]n express waiver . . . conceding for the purposes of the trial the truth of some alleged fact,' with the effect that 'one party need offer no evidence to prove it and the other is not allowed to disprove it.'"

State v. Wolf, 134 Wn. App. 196, 199, 139 P.3d 414 (2006) (quoting Key Design, Inc. v. Moser, 138 Wn.2d 875, 893-94, 983 P.2d 653 (1999); *see also* State v. Stevens, 137 Wn. App. 460, 466, 153 P.3d 903 (2007), *review denied*, 162 Wn.2d 1012, 175 P.3d 1094 (2008). Surely this also means that the stipulation relieves the State of the duty to make the threshold showing to the

trial court that the previous convictions were for violating qualifying orders. That is particularly reasonable when, as here, the defendant stipulates to an element of the offense so that the jury will not hear the details of the prior convictions. RP 6. It is simply illogical to conclude that Case stipulated that he had at least two prior convictions but did not stipulate that they were admissible, and then allowed the court to read the stipulation to the jury without objection, comment, or clarification. RP 66. That would be nothing more than sandbagging, where a party knows about but fails to raise a known defect at a time when the trial court could rectify it. *See* State v. Kjorsvik, 117 Wn.2d 93. 103, 812 P.2d 86 (1991).

The State maintains that the Court of Appeals was incorrect as a matter of law in finding that the stipulation to the existence of the prior convictions did not also stipulate to their admissibility.

> 2. Even if Case did not stipulate to the validity of the orders for which he was previously convicted of violating, by failing to object to the lack of a foundation for their admissibility he waived his right to appeal on that basis.

Case did not object to the reading of his stipulation to the jury, nor did he argue at any time that the prior convictions were not admissible. Appellate courts generally refuse to address a claim not raised in the trial court. RAP 2.5(a); State v. O'Hara, 167

Wn.2d 91, 217 P.3d 756 (2009); ER 103(a). "The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter. Id. at 98. An evidentiary objection may only be appealed on the specific grounds raised at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

In Carmen, the court held that the defendant waived an objection to the admission of the prior convictions by failing to object. Carmen, 118 Wn. App. at 668. The court in State v. Gray, 134 Wn. App. 547, 138 P.3d 1123 (2006), reached the same result. Id. at 557-58.

In Gray, the defendant was convicted of felony violation of a no-contact order. At trial, the State offered, without objection, a judgment and sentence from Seattle Municipal Court and a Statement of Defendant on Plea of Guilty to prove Gray's two prior convictions. After the State rested, Gray sought to dismiss the felony allegations, arguing that the State failed to prove that the Seattle Municipal Court conviction was for violating an order issued under the requisite statutes. The trial court denied his motion on the grounds that the statutory basis for the orders underlying the

previous convictions was not an element of the crime for the jury to find, but rather a question of law for the court to determine. Gray, 134 Wn. App. at 551.

Gray appealed on the grounds that the statutory authority for the prior orders is an essential element of the crime of felony violation of a no-contact order. Citing to Carmen and Miller, the Court of Appeals disagreed. Id. at 552. Also citing to Carmen, the court found that by failing to object to the admission of evidence of the prior convictions at the time they were offered, instead of waiting until the State had rested its case, Gray had waived any objection. Id. at 558.

The court in Case cited to Gray for its holding that the validity of the orders violated in the previous convictions is a question of law for the court, not an element of the crime, but ignores the conclusion that the defendant waived his objection. Case, *slip op.* at 6. In Miller, also cited here by the Court of Appeals, the Supreme Court approved the reasoning of Carmen, holding that evidence of prior convictions must be excluded if the orders underlying them are invalid or deficient. It also said, "As Miller has not shown that this order was invalid, deficient, or otherwise inapplicable to the crime charged, his conviction is

affirmed . . . " Miller, 156 Wn.2d at 32. Here Case made no effort to establish that the underlying orders were deficient. The Court of Appeals overlooked this portion of the Miller decision.

In State v. Cochrane, 160 Wn. App. 18, 253 P.3d 95 (2011), the defendant was convicted of felony DUI, based in part on two prior convictions for DUI in Seattle Municipal Court. At trial, he objected to evidence of those two prior convictions on hearsay and confrontation grounds, but not on their admissibility. On appeal, he argued that the Seattle convictions did not satisfy the statutory requirement to cause them to elevate his current charge to a felony. Id at. 27. The court found that he had waived his right to object on that basis because he did not make that specific objection in the trial court. Id.

Case failed to object to the admission of his prior convictions. Even by the authorities upon which the Court of Appeals relied, he waived a challenge to the admissibility of the prior convictions. The Court of Appeals ignored that waiver, and thus the Case opinion conflicts with all of the above-cited authorities.

C. Even if it was error to admit the evidence of Case's two prior convictions, the Court of Appeals was incorrect in characterizing

the error as an insufficiency of the evidence. If there was error it was an evidentiary error and is subject to the harmless error rule.

The Court of Appeals in this case found that the evidence which went to the jury was sufficient, but that the evidence supporting the admissibility of the evidence was not. It not only reversed the conviction but dismissed the charge. Case, *slip op.* at 8. The State does not dispute that where the evidence is insufficient to support the conviction, reversal and dismissal is the remedy. State v. Smith, 155 Wn.2d 496, 505, 120 P.3d 559 (2005). But here the Court of Appeals found sufficient evidence to support the jury's finding of guilt. *Slip op.* at 6. Improperly admitted evidence does not make the evidence insufficient. It merely means the court made an evidentiary error in admitting that evidence. The question here is admissibility, not sufficiency of the evidence.

Objections to otherwise inadmissible evidence can be waived, as argued above. Even if it was not waived, evidentiary errors are not presumed to be prejudicial or reversible. State v. Barry, 183 Wn.2d 297, 313, 352 P.3d 161 (2015). If there was no prejudice to the defendant, the error is not reversible. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). If the evidentiary error results from a constitutional violation it is subject to

the constitutional harmless error standard—harmless beyond a reasonable doubt—and if it results from violation of an evidentiary rule, it is subject to the less stringent nonconstitutional standard—prejudice exists only if, within reasonable probability, the outcome of the trial would have been materially affected if the error had not occurred. Id.

Here the Court of Appeals did not even address harmless error or identify any particular constitutional violation. Even if the constitutional harmless error standard is applied, this claimed error was harmless beyond a reasonable doubt. Case stipulated to the prior convictions and did not object to the admission of the stipulation or make any argument that the prior convictions were not proven to be for violation of valid orders. RP 6, 66, 89-92.

D. The Court of Appeals erred by failing to consider the invited error doctrine.

Case stipulated that he had been convicted twice before for violating no-contact orders "issued under Washington law." It appears from the record that the parties and the judge believed that this stipulation was sufficient to satisfy admissibility requirements. RP 6.

The invited error doctrine prevents parties from benefiting from an error they caused at trial, regardless of whether or not it was intentional. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). A central purpose of the doctrine is "to prevent parties from misleading trial courts and receiving a windfall by doing so." State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). Here the Court of Appeals did not even consider the invited error doctrine. It is unclear from the record which party actually wrote the stipulation. Defense counsel agreed at the beginning of trial that there would be one. RP 6. The stipulation was designated as Exhibit 5; the State moved to admit it and defense counsel had no objection. RP 66. Even if it were error for the court to admit Exhibit 5, the defense caused it and should not be able to benefit from it.

E. Even if the Court of Appeals were correct that there was insufficient evidence to support a conviction for felony violation of a no-contact order, there was still sufficient evidence to support a conviction for the gross misdemeanor crime and the remedy should have been entry of judgment for the lesser crime, or remand for retrial of the gross misdemeanor, not dismissal of the case.

Violating a no-contact order is a crime, even if it is the first violation of such an order. It is a gross misdemeanor. RCW 26.50.110(1)(a). Even if the evidence of Case's two prior convictions was improperly admitted, the State still proved that he

violated the order in place protecting the victim in this cause. The remedy should have been remand to enter a judgment for the gross misdemeanor of violation of a no-contact order and resentence.

The jury was instructed as to the elements of violation of a no-contact order in Instruction No. 9.

> To convict the defendant of the crime of violation of a no contact order as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about December 18, 2013, there existed a no contact order applicable to the defendant;
>
> (2) That the defendant knew of the existence of this order;
>
> (3) That on or about said date the defendant knowingly violated this order;
>
> (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
>
> (5) That the defendant's act occurred in the State of Washington.

CP 51-52.

A defendant may be convicted of a lesser degree of the crime charged. RCW 10.61.010. The gross misdemeanor violation of a no-contact order includes all of these elements except the fourth. RCW 26.20.110(1)(a). A case may be remanded for resentencing on a lesser included offense where the jury has explicitly been instructed on that offense or where the record

reveals that the jury expressly found each of the elements of the lesser offense. State v. Green, 94 Wn.2d 216, 234-35, 616 P.2d 628 (1980). A jury instruction on the lesser offense is not required before an appellate court may remand for resentencing on a lesser-included offense. In re Pers. Restraint of Heidari, 174 Wn.2d 288, 298, 274 P.3d 366 (2012) (Justice J. Johnson concurring/dissenting). "[W]hen an appellate court finds the evidence insufficient to support a conviction for the charged offense, it will direct a trial court to enter judgment on a lesser degree of the offense charged when the lesser degree was necessarily proved at trial." State v. Garcia, 146 Wn. App. 821, 830, 193 P.3d 181 (2008), *review denied*, 166 Wn.2d 1009, 208 P.3d 1125 (2009).

In the alternative, the Court of Appeals could have remanded for retrial on the gross misdemeanor charge of violation of a no-contact order. It did not find an insufficiency of the evidence of that offense and there is no reason the State could not retry Case.

The Court of Appeals erred by dismissing the case rather than remanding for resentencing on the gross misdemeanor of violation of a no-contact order, or for retrial on the lesser charge.

VI. CONCLUSION

Review of the instant case is appropriate; the decision of the Court of Appeals conflicts with other decisions of the Court of Appeals and the Supreme Court. It contradicts basic and long-standing principles of law. The State respectfully asks this Court to accept review of the Court of Appeals decision reversing the respondent's conviction.

Respectfully submitted this 21st day of September, 2015.

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Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KEVIN R. CASE, Appellant.	No. 46140-4-II PUBLISHED OPINION

MAXA, J. — Kevin Case appeals his conviction for felony violation of a no-contact order (NCO). Under former RCW 26.50.110(5) (2013),[1] violation of an NCO is a felony if the defendant has at least two previous convictions for violating a court order issued under one of several specific RCW chapters. Case argues that there was insufficient evidence to support his conviction because the State presented no evidence that his previous convictions involved violation of court orders issued under one of those RCW chapters.

Whether a defendant's previous NCO convictions involved the violation of court orders issued under one of the specific RCW chapters listed in former RCW 26.50.110(5) is not an element of the crime of felony violation of an NCO. Instead, whether the previous convictions involved violation of such orders is a threshold question of law for the trial court to determine. Therefore, the State was not required to submit evidence *to the jury* that Case's previous

[1] RCW 26.50.110 was amended in 2015. *See* LAWS OF 2015, ch. 248, §§ (1)(a), (2). However, these amendments have no effect on the issues in this case.

convictions were for violations of orders issued under one of the RCW chapters listed in former RCW 26.50.110(5) in order to produce sufficient evidence to establish all elements necessary to convict Case. However, the State still was required to submit sufficient evidence to allow the trial court to determine as a matter of law whether Case's prior convictions involved violation of orders issued under one of those RCW chapters.

Here, the State presented no evidence to the trial court that Case's prior convictions were for violating court orders issued under one of the specific RCW chapters listed in former RCW 26.50.110(5). As a result, there was insufficient evidence to support a conviction for felony violation of an NCO. Accordingly, we reverse and dismiss Case's conviction with prejudice.[2]

FACTS

In December 2013, a person called the police after observing Case yelling at a woman crouched in a doorway near a bus terminal. The investigating officer determined that an NCO was in place that prohibited Case from contacting the woman. The State charged Case with felony violation of an NCO under former RCW 26.50.110(1) and (5).

At trial, the parties entered the following stipulation: "The defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Washington State Law." Clerk's Papers (CP) at 36. However, the

[2] Because we reverse and dismiss Case's conviction, we do not address Case's claims that the trial court violated his public trial right and right to be present at critical trial proceedings, that he received ineffective assistance of counsel based on his defense counsel's failure to object to Case's restraint in a leg brace during trial and a police officer's testimony that allegedly commented on Case's guilt, and that the trial court erred at sentencing.

State provided no evidence regarding whether Case's prior convictions involved violation of court orders issued under one of the specific RCW chapters listed in former RCW 26.50.110(5).

After trial, the jury found Case guilty as charged. Case appeals.

ANALYSIS

Under former RCW 26.50.110(5), violation of an NCO is a felony if the defendant has at least two previous convictions for violating a court order issued under one of several specific RCW chapters listed in the statute. However, former RCW 26.50.110(5) does not apply to convictions for the violation of orders issued under RCW chapters not listed in the statute.[3]

The stipulation entered at trial stated only that Case at least twice had been convicted of violating a "protection order, restraining order, or no-contact order" without reference to whether the convictions had been issued under the RCW chapters specified in former RCW 26.50.110(5). CP at 36. Case argues that there was insufficient evidence to support his conviction for felony violation of an NCO because the State did not produce any evidence that his previous convictions had been for violating a court order issued under one of the specified RCW chapters. We agree.

A. SUFFICIENT EVIDENCE TO CONVICT

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the

[3] Trial courts can issue protection and restraining orders under RCW chapters not listed in RCW 26.50.110(5). *See, e.g.*, RCW 10.14.080 (antiharassment protection order); RCW 26.44.150(2) (restraining order against person accused of abusing a child).

fact at issue beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In evaluating a sufficiency of the evidence claim, we assume the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.* at 106. We defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence. *Id.*

The State charged Case with felony violation of an NCO under former RCW 26.50.110(5), which states:

> A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order *issued under this chapter, chapter 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW*, or a valid foreign protection order as defined in RCW 26.52.020.

(Emphasis added.) The first issue here is whether an essential element of the crime of felony violation of an NCO is the statutory authority under which the predicate convictions were entered. We hold that the statutory authority of the predicate convictions is not an element of the crime that must be presented to the jury.

Division One of this court addressed this issue in *State v. Carmen*, 118 Wn. App. 655, 77 P.3d 368 (2003). The court held that whether the defendant's convictions actually were based on violations of statutes listed in former RCW 26.50.110(5) was not a question of fact for the jury, but a question of law for the trial court. *Id.* at 663. Accordingly, the court rejected the defendant's argument that proof of the statutory authority of the predicate convictions was an element of the offense. *Id.* at 660-63. In *State v. Arthur*, we expressly disagreed with the court in *Carmen* and held that the statutory authority for felony-qualifying convictions was an

essential element of the offense. 126 Wn. App. 243, 244, 108 P.3d 169 (2005), *overruled by State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005).

Our Supreme Court addressed *Carmen* and *Arthur* in *Miller*, 156 Wn.2d at 30-31. In that case, the issue was slightly different than here. The court addressed whether the validity of the underlying court orders was an element of the crime of violating such orders. *Id.* at 24. The court held that the *existence* of a domestic violence no-contact order is an element of the crime of violating such an order, but that the *validity* of such an order is not an element. *Id.* Instead, the validity of underlying orders is a question of law for the trial court to decide as part of its "gate-keeping function." *Id.*

In its analysis, the court discussed *Carmen* with approval. *Miller*, 156 Wn.2d at 30. The court noted that in *Carmen*, Division One "determined that evaluation of the underlying no-contact order was properly a question of law for the judge, not of fact for the jury." *Id.* at 30. After citing to *Arthur* as well as to *Carmen*, the court further stated:

> *Carmen* rested in part on the comparative expertise of a judge to make reasoned judgments about the legal authority by which predicate no-contact orders were issued. *Carmen* also noted, properly, that "[t]he very relevancy of the prior convictions depended upon whether they qualified as predicate convictions under the statute. If they had not so qualified, the jury never should have been permitted to consider them." *Carmen*, 118 Wn. App. at 664.

Miller, 156 Wn.2d at 30. The court reemphasized its holding that the "validity of the no-contact order is not an element of the crime," and stated that "[t]o the extent the cited cases are inconsistent, they are overruled." *Id.* at 31.

In *State v. Gray*, Division One subsequently interpreted *Miller* as "explicitly approv[ing] *Carmen*'s holding that whether the prior convictions qualified as predicate

convictions under the statute was a threshold determination of relevance, or applicability, properly left to the court." 134 Wn. App. 547, 555, 138 P.3d 1123 (2006). The court stated that *Miller*'s reasoning regarding the validity of predicate convictions applied equally to issues of law about previously-violated NCOs. *Id.* The court summarized the dispute between *Carmen* and *Arthur* as follows:

> In sum, prior convictions for violating NCOs are only relevant to prove felony violation of an NCO under RCW 26.50.110(5) if the previously-violated NCOs were issued under the listed statutes. *Carmen* and *Miller* establish that the statutory authority for those NCOs is not an essential element of the crime to be decided by the jury but rather a threshold determination the court makes as part of its "gate-keeping function" before admitting the prior convictions into evidence for the jury's consideration. *Miller* resolved the *Carmen-Arthur* dispute in *Carmen*'s favor, and we agree with the reasoning in both cases. We therefore decline to apply *Arthur* here.

Gray, 134 Wn. App. at 556 (footnote omitted).

We agree with *Gray* that our holding in *Arthur* is inconsistent with our Supreme Court's analysis in *Miller*. Therefore, we decline to follow *Arthur* and hold that the authority under which the court orders the defendant was convicted of violating was issued is not an element of the crime of felony violation of an NCO.

Under this holding, the State was required to prove at trial only the *existence* of two prior convictions for violating a court order. Here, the State presented a stipulation that Case twice previously had violated a protection order, restraining order, or NCO issued under Washington law. Therefore, we hold that the State produced sufficient evidence *to the jury* to support Case's conviction for felony violation of an NCO.

B. TRIAL COURT'S GATE-KEEPING FUNCTION

Our holding that the State produced sufficient evidence to the jury to establish all elements necessary to convict Case of felony violation of an NCO does not end our inquiry. Case argues that even if whether his previous convictions involved orders issued under one of the RCW chapters listed in former RCW 26.50.110(5) is a question of law for the trial court, the State still was required to submit evidence to the trial court that those convictions involved such orders. We agree.

Under *Miller*, the trial court determines as a question of law whether the predicate convictions supporting the charge of felony violation of an NCO involved orders issued under one of the RCW chapters listed in former RCW 26.50.110(5). 156 Wn.2d at 24, 31. This determination involves the trial court's exercise of its "gate-keeping function." *Id.* To enable the trial court to make this determination, the State must submit evidence to the trial court proving that the defendant's prior convictions were in fact for violating court orders issued under one of the specific RCW chapters listed in former RCW 26.50.110(5). *Miller*, 156 Wn.2d at 31. Only once the State produces such evidence can the trial court allow the State to submit evidence to the jury of a defendant's prior convictions for violating court orders. If no prior convictions are admissible, the defendant's charge for felony NCO violation must be dismissed. *Id.*

Here, the State submitted no evidence to the trial court that Case's prior convictions were for violating orders issued under one of the specific RCW chapters listed in former RCW 26.50.110(5). Instead, the State relied on the parties' stipulation that Case had at least two prior convictions for violating the provisions of a protection

order, restraining order, or NCO without stating the statutory authority of such orders. This stipulation was insufficient to support a conviction for felony violation of an NCO under former RCW 26.50.110(5).

Although the State proved to the jury all the elements of the charge of felony violation of an NCO, it failed to present evidence to satisfy the threshold determination that Case's prior convictions were for violating court orders issued under one of the specific RCW chapters listed in former RCW 26.50.110(5). Accordingly, we hold that there was insufficient evidence to support a conviction for felony violation of an NCO and dismissal of the charge is the appropriate remedy.

We reverse and dismiss Case's conviction with prejudice.

MAXA, J.

We concur:

WORSWICK, P.J.

LEE, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KEVIN R. CASE,

Appellant.

No. 46140-4-II

ORDER DENYING MOTION FOR RECONSIDERATION

RESPONDENT, State of Washington, moves for reconsideration of the Court's **August 11, 2015** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Maxa, Lee

DATED this 3rd day of September, 2015.

FOR THE COURT:

Worswick J
PRESIDING JUDGE

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CERTIFICATE OF SERVICE

I certify that I served a copy of State's Petition For Review on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

AND

JOHN A. HAYS
JAHAYSLAW@COMCAST.NET

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 21 day of September, 2015, at Olympia, Washington.

CAROLINE M. JONES

THURSTON COUNTY PROSECUTOR

September 21, 2015 - 2:28 PM

Transmittal Letter

Document Uploaded: 1-461404-Petition for Review.pdf

Case Name:
Court of Appeals Case Number: 46140-4

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Caroline Jones - Email: jonescm@co.thurston.wa.us

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