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Court of Appeals
Division I
State of Washington

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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 94717.1
(COA No. 74823-8-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW HUTTUNEN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

TRAVIS STEARNS
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A. IDENTITY OF PETITIONER

Matthew Huttunen, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Huttunen seeks review of the Court of Appeals decision dated June 12, 2017, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether a stipulation that Mr. Huttunen had been previously convicted of violating a "court order" is sufficient to establish Mr. Huttunen had been convicted offenses enumerated in RCW 26.50.110.

2. Whether the federal and state constitutions require that evidence of previous convictions required to prove a person guilty of a crime be presented to a jury.

D. STATEMENT OF THE CASE

Matthew Huttunen's felony conviction for violating a no-contact order was based on his having contact with Alicia Morasse on September 12, 2015. CP 130. Mr. Huttunen was charged with a felony

because the government alleged he had two prior convictions enumerated in RCW 26.50.110.

The no-contact orders Mr. Huttunen had previously violated were entered into evidence, but they were not shown to the jury. RP 105 (State's exhibits 3 and 4). A stipulation was instead read to the jury. RP 106. It stated:

> The defendant has twice been previously convicted for violating provisions of a court order.

RP 106.

The jury was instructed on the elements necessary to prove Mr. Huttunen had violated a no-contact order. RP 164. The jury was instructed that to find Mr. Huttunen guilty, they were required to find:

> That the defendant has twice been previously convicted for violating the provisions of a court order.

CP 121.

While the jury was specifically instructed they had to find Mr. Huttunen had twice previously violated a "court order," they were not told the order had to be a qualifying domestic violence no-contact order. CP 121. The definition provided to the jury did not distinguish common court orders or other no-contact order violations from the

violations necessary to prove Mr. Huttunen guilty of the charged offense.

Mr. Huttunen was found guilty of the felony of violating a no-contact order. RP 188. Mr. Huttunen appealed his conviction. Relying on *State v. Case*, 187 Wn.2d 85, 384 P.3d 1140 (2017), the Court of Appeals denied Mr. Huttunen relief. Slip Op. at 8.

E. ARGUMENT

This Court recently held in *State v. Case* that Mr. Case's stipulation that he had previously been convicted of two convictions for violating provisions of a protection order was sufficient to support his conviction for felony violation of a no-contact order. 187 Wn.2d at 92. In *Case*, the defense agreed to the government's stipulation that Mr. Case "had at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Washington State law." *Id.* at 89. Here, the parties only stipulated Mr. Huttunen had twice violated a "court order." CP 121.

1. **Review should be granted to address whether Mr. Huttunen's stipulation that he had convicted of violating a court order was sufficient to establish Mr. Huttunen had qualifying convictions under RCW 26.50.110.**

Unlike *Case*, Mr. Huttunen's jury was never told Mr. Huttunen had a previous conviction for violating a domestic violence no-contact

order. Instead, the jury was only told Mr. Huttunen had violated a "court order." CP 121. This stipulation does not satisfy constitutional requirements of sufficiency. The Court of Appeals analysis that this stipulation is sufficient where the stipulation fails to even reference no-contact order provisions involves a significant question under the federal and state constitutions, satisfying RAP 13.4. RAP 13.4 is also satisfied because this Court's prior ruling in *State v. Oster*, 147 Wn.2d 141, 143, 52 P.3d 26 (2002), is in conflict with *State v. Case*, which the Court of Appeals relied on to deny Mr. Huttunen's appeal. Slip Op. at 6 (citing *Case*, 189 Wn.2d at 90-93).

The federal and state constitutions require the government to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The Supreme Court has held that "no person shall be made to suffer the onus of a criminal conviction" except upon "evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560 (1979); *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310, 314 (2014) (1979). A reviewing court may only affirm a

conviction if a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443, U.S. at 319.

While a stipulation concedes the truth of a fact, it does not waive the sufficiency requirement. *United States v. James*, 987 F.2d 648, 651 (9th Cir. 1993). The government must still prove guilt beyond a reasonable doubt, and the accused may offer evidence or cross-examine witnesses regarding the stipulated evidence. *State v. Johnson*, 104 W.2d 338, 342, 705 P.2d 773 (1985). Further, if the government accepts a stipulation to a particular fact but the stipulation is inadequate, then the government must accept the risk. *Tompkins v. State*, 278 Ga. 857, 857, 607 S.E.2d 891 (2005); *United States v. Hollis*, 506 F.3d 415, 419–20 (5th Cir. 2007); *Gooding v. Stotts*, 856 F.Supp. 1504, 1508 (D. Kan. 1994). What parties stipulate to is generally determined by the four corners of the stipulation. *See Braxton v. United States*, 500 U.S. 344, 350, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991). Courts review stipulations just as they review a determination of meaning and effect of a contract, or consent decree, or proffer for summary judgment. *Id.* Stipulations are construed narrowly. *Stell v. State*, 496 S.W.2d 623, 626 (Tex. Crim. App. 1973).

In *State v. Oster*, where Mr. Oster was charged with a felony violation of a domestic violence no-contact order, this Court held that "to convict" instructions must contain all of the elements of a crime. 147 Wn.2d at 143. This Court only held the instructions in Mr. Oster's case were sufficient because the special verdict form specifically instructed the jury regarding prior convictions and the jury was specifically instructed that each element of the crime must be proved beyond a reasonable doubt, including the prior convictions. *Id.*

This analysis was affirmed in *State v. Roswell*. 165 Wn.2d 186, 190, 196 P.3d 705 (2008). In *Roswell*, this Court held that the prior convictions prerequisite to a current conviction of a felony constituted an element, explicitly stating, "Despite the similarities between an aggravating factor and a prior conviction element, under RCW 9.68A.090(2), a prior sexual offense conviction [was] an essential element that must be proved beyond a reasonable doubt." *Id.* at 192.

The analysis here is no different. To prove a person guilty of felony violation of a no-contact order, the government must prove the person has two prior convictions for violating the provisions of an order issued under RCWs 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.50, 26.26, 74.34, or a valid foreign protection order as defined in RCW

26.52.020. Finding Mr. Huttunen was convicted of violating a "court order" does not satisfy this burden.

There are in fact many orders which do not provide a sufficient basis for conviction, including no-contact orders which may be issued by courts. *See, e.g.,* RCW 10.14.080. Courts may issue orders compelling persons to abide by many conditions. Violations of those orders can result in prosecution and conviction for criminal contempt. RCW 7.21.040 specially provides for punitive sanctions for a person who has been held to be in contempt of court. And there are other, unlisted, statutes under which protective orders might have been issued. *E.g.*, RCW 10.14.080 (temporary anti-harassment protection order); RCW 26.44.150(1) (temporary restraining order against person accused of abusing a child).

Unlike *Case*, the stipulation agreed to by the parties does not come close to establishing Mr. Huttunen had two previous qualifying domestic violence convictions. Nothing about the stipulation proves Mr. Huttunen had twice been convicted of violating a no-contact order enumerated in RCW 26.50.110. Instead, the stipulation only establishes Mr. Huttunen was previously convicted of a "court order." This stipulation is insufficient to prove Mr. Huttunen has two previous

convictions for violating an enumerated no-contact order. Because the question of whether this stipulation is sufficient involves a significant question under the federal and state constitutions, RAP 13.4 is satisfied and review should be granted. Review should also be granted because the Court of Appeals analysis is in conflict with prior holdings issued by this Court. RAP 13.4.

2. Review should be granted because the Court of Appeals reliance on *State v. Case* conflicts with Supreme Court precedent that all elements of a charged crime must be proved to a jury beyond a reasonable doubt.

The United States Supreme Court has held that all elements of a charged crime, whether they are characterized as legal or factual, must be proven to the jury beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 511-15, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). In *Case*, this Court held that the determination of whether Mr. Case had been previously convicted of a qualifying conviction was a threshold legal question for the court. 187 Wn.2d at 92. The Court of Appeals relied on this holding to deny Mr. Huttunen relief. Slip Op. at 7. The Court of Appeal's holding is in conflict with *Gaudin* and warrants review under RAP 13.4.

Both the holding in *Case* and here conflict with Supreme Court precedence. The Fifth and Sixth Amendments require criminal

convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged. *Sullivan v. Louisiana*, 508 U.S. 275, 277–278, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). In *Gaudin*, the Supreme Court held "all elements" of an offense, whether characterized by the government as legal or factual, are for the jury. *Gaudin*, 515 U.S. at 519; *see also TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976).

A court's determination that the government's proof satisfied the elements of an offense should never be substituted for the requirement that each element of an offense be proved beyond a reasonable doubt. The majority's holding in *Case* that whether the government has been able to prove a person accused of violating a domestic violence court order is a threshold question to be decided by the judge is in conflict with Supreme Court precedence. As such, RAP 13.4 is satisfied and review should be granted.

F. CONCLUSION

Based on the foregoing, petitioner Mr. Huttunen respectfully requests this that review be granted pursuant to RAP 13.4 (b).

DATED this 28 day of June 2017.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. MATTHEW DAVID HUTTUNEN, Appellant.	)	No. 74823-8-I FILED: June 12, 2017

VERELLEN, C.J. — A jury convicted Matthew Huttunen of felony violation of a domestic violence no-contact order. For the first time on appeal, Huttunen argues the State failed to prove its case because his stipulation that he had two prior convictions for violating a no-contact order was inadequate. Specifically, he asserts his stipulation did not explicitly state that the previously violated no-contact orders had been issued under qualifying provisions listed in RCW 26.50.110(5). Because our Supreme Court's recent opinion in State v. Case is dispositive of Huttunen's claim, we affirm.[1]

FACTS

On September 12, 2015, Snohomish County Sheriff's Deputy Troy Koster drove into Lake Stickney Park and noticed a blue Chevy Cavalier that belonged to Alicia Morasse. Deputy Koster knew Morasse and saw her in the passenger seat. He did not recognize the man in the driver's seat, but later identified him as Matthew Huttunen.

[1] 187 Wn.2d 85, 384 P.3d 1140 (2017).

When Huttunen saw Deputy Koster, he looked panicked, started the car, and sped away. Deputy Koster searched his computer and found a no-contact order restraining Huttunen from contacting Morasse. He obtained Huttunen's photo and recognized him as the driver.

Debbie Randall was walking her dog near the park when she saw Huttunen speed by in the driver's seat of the blue Cavalier with a police car in pursuit. Randall observed Huttunen turn into a driveway. A few seconds later, she saw Huttunen run through the woods.

Deputy Arthur Wallin, a dog handler, was also nearby and heard Deputy Koster's radio broadcast about Morasse's blue Cavalier. Deputy Wallin located the blue Cavalier and pulled Morasse over. Based on information from Randall, Deputy Wallin conducted a dog track through the woods near the park and found Huttunen.

The State charged Huttunen with one count of felony violation of a domestic violence no-contact order under RCW 26.50.110(5). The charging document alleged that on September 12, 2015, Huttunen

> with knowledge that [he] was the subject of a protection order, restraining order, or no contact order pursuant to RCW 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 . . . issued by Everett Municipal Court . . . protecting Alicia Morasse, and said order being valid and in effect, did violate the restraint provisions of the order issued pursuant to RCW 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.74 and the defendant had contact with the protected party and had at least two prior convictions of a no contact order issued under RCW 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 or a valid foreign protection order as defined in RCW 26.52.020.[2]

Before trial, the State produced certified copies of Huttunen's two prior convictions for violating a domestic violence no-contact order, one a misdemeanor and

[2] Clerk's Papers (CP) at 128.

one a felony. Defense counsel conceded that the convictions established an element of the crime charged and asked only that they be redacted before shown to the jury. Defense counsel also suggested Huttunen might stipulate to the two prior convictions, "assuming at that point [the State] would not need to have any evidence of that put in front of the jury."[3]

Morasse, Randall, and Deputies Koster and Wallin testified at trial. Morasse testified that she and Huttunen had dated for years and would be together had the courts not gotten involved. She stated that the person who had driven her car and fled on September 12, 2015 was someone named Bryson. Morasse testified it was a "major" coincidence that Huttunen was found in the same area.[4]

The State moved, without objection from defense counsel, to admit a copy of the five-year domestic violence no-contact order requiring Huttunen to stay away from Morasse issued by Everett Municipal Court in 2014. The trial court admitted the no-contact order as exhibit 4. The State also moved to admit copies of Huttunen's two prior convictions for violating a domestic violence no-contact order. The trial court provisionally admitted copies of the convictions as exhibits 5 and 6, anticipating a stipulation to the convictions. Defense counsel agreed with the State's proposed language in the stipulation, stating, "I think it is the statutory language."[5] Defense counsel stated she would not object to exhibits 5 and 6 being admitted as long as they were not provided to the jury.

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[3] Report of Proceedings (RP) (Jan. 11, 2016) at 11.

[4] RP (Jan. 12, 2016) at 145.

[5] RP (Jan. 11, 2016) at 97.

The next morning, defense counsel informed the trial court that Huttunen agreed to stipulate to the two prior convictions. The following discussion occurred:

> DEFENSE: And, Your Honor, this is something that I discussed with my client yesterday and I've shown him the proposed WPIC instruction this morning and confirmed with him that this would be in order to prevent the jury from seeing the actual sentencing documents, and I believe he is in agreement that he would prefer to proceed this way.
>
> COURT: Okay.
>
> DEFENSE: We have no objection to Counsel's proposed language.
>
> COURT: All right. With the modification, I was going to substitute the word "a" for the word "the," because I didn't want them thinking that he had been twice previously convicted for violating the provisions of the court order that we're talking about here.
>
> DEFENSE: And no objection to that, Your Honor.
>
> COURT: All right. And my recollection is that Exhibits 3 and 4 were admitted yesterday. Five and 6 were provisionally admitted, assuming the stipulation goes forward, which I'll discuss with the defendant now.
>
> So, Mr. Huttunen, you understand that the proposal is that I read the stipulation that you've looked at to the jury in lieu of admitting and having go back to the jury the previous convictions --
>
> HUTTUNEN: Yes.
>
> COURT: -- and requiring the State to prove that as an element of the -- well, having those go back in support of the State's element about the two previous convictions. And is it true that you've discussed that with [defense counsel]?
>
> HUTTUNEN: Yes, Your Honor.
>
> COURT: And so are you in agreement with proceeding this way?

HUTTUNEN: Yes, Your Honor.

COURT: Do you have any questions at all about the stipulation or how we're proceeding?

HUTTUNEN: No, Your Honor.

COURT: Okay. So then in that case [exhibits] 5 and 6 will be admitted but not go to the jury.[6]

Near the end of trial, the judge read to the jury Huttunen's stipulation that "the parties have agreed certain facts are true. So you're to accept as true the following facts: The defendant has twice been previously convicted for violating the provisions of a court order.[7] Neither party objected to the stipulation or to the to-convict instruction.

The to-convict instruction mirrored the stipulation and said:

> To convict the defendant of the crime of felony violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 12th day of September, 2015, 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 a provision of 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.[8]

This instruction mirrored the pattern jury instruction.[9] Neither party objected to the

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[6] RP (Jan. 12, 2016) at 102-103.

[7] Id. at 106.

[8] CP at 121.

[9] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 36.51.02, at 674 (4th ed. 2016).

instruction. The jury returned a guilty verdict.

Huttunen appeals.

ANALYSIS

For the first time on appeal, Huttunen argues the State failed to prove its case because his stipulation was inadequate. Specifically, he asserts his stipulation did not explicitly state that the previously violated no-contact orders had been issued under qualifying provisions listed in RCW 26.50.110(5). The Supreme Court's recent opinion in Case is dispositive of Huttunen's claim.

In Case, the State charged the defendant with one count of felony violation of a domestic violence no-contact order under RCW 26.50.110(5), and the defendant stipulated he had "at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Washington State law."[10] For the first time on appeal, the defendant argued that "the State presented insufficient evidence because it failed to show the prior convictions he stipulated to were based on violations of *qualifying* orders."[11] The Court of Appeals agreed with the defendant, holding "the State failed to satisfy the threshold requirement that Case's prior convictions were for violating qualifying court orders."[12] The Supreme Court granted review and reversed.[13]

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[10] Case, 187 Wn.2d at 87-89.

[11] Id. at 89-90 (citing State v. Case, 189 Wn. App. 422, 423, 358 P.3d 432 (2015)).

[12] Id. at 90 (citing Case, 189 Wn. App. at 424).

[13] Id. at 90-93.

The Supreme Court held the defendant's stipulation was sufficient to prove the defendant had been convicted of violating qualifying no-contact orders, even if the stipulation did not mirror the statutory language for qualifying provisions.[14] In the context of a detailed charging document and a sidebar acknowledging the purpose of the stipulation, Case stipulated he had two prior qualifying convictions as alleged in the charging information, and defense counsel did not timely object or take exception that the stipulation was insufficient.[15]

Similarly here, Huttunen's counsel did not object or take exception that the stipulation was insufficient. In the context of the charging document and colloquy in court, we are satisfied that Huttunen stipulated he had two prior convictions for violating a qualifying no-contact order. Absent a timely and specific objection from defense counsel, the stipulation established that Huttunen agreed he had two prior qualifying convictions under RCW 26.50.110(5) as alleged in the charging information and was therefore sufficient.

Further, "whether the prior convictions met the qualifying statutory requirements is a threshold legal determination to be made by the trial judge, not a question for the jury."[16] As the Supreme Court noted in Case, "[w]hether the prior convictions qualify under RCW 26.50.110(5) is a substantially similar question to whether a prior no-contact order was valid—a question of law to be decided by a judge, not a jury."[17] "If the prior convictions do not qualify, they are almost certainly inadmissible on this point

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[14] Id. at 91-92.

[15] Id.

[16] Id. at 92.

[17] Id.

under ER 404(b)."[18] Huttunen has failed to show that his stipulation was based on nonqualifying, and thus inadmissible, prior convictions.

Finally, because the stipulation adequately established the element of the offense, the to-convict instruction was sufficient.[19]

Affirmed.

Verellen, C.J.

WE CONCUR:

Mann, J.

Becker, J.

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[18] Id.

[19] See id. at 91 ("'When the parties stipulate to the facts that establish an element of the charged crime, the jury need not find the existence of that element, and the stipulation therefore constitutes a waiver of the right to a jury trial on that element. The defendant also waives the right to require the State to prove that element beyond a reasonable doubt.'" (internal quotation marks omitted) (quoting State v. Humphries, 181 Wn.2d 708, 714-15, 336 P.3d 1121 (2014))).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74823-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: June 28, 2017

WASHINGTON APPELLATE PROJECT

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