

NO. 49359-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL JASON BURKS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00509-6

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Burks's offender score points were properly enhanced because of his domestic violence conviction?
2. Whether the jury was properly instructed on the elements of felony violation of a court order?
3. Whether appellate costs should be taxed to Burks if the state substantially prevails?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Paul Jason Burks was charged by information filed in Kitsap County Superior Court with felony violation of a court order and residential burglary, both with domestic violence allegations. CP 1-3. Later, a first amended information was filed charging first degree burglary, felony violation of a court order, and interfering reporting domestic violence, each count with a domestic violence special allegation. CP 11-14.

Burks and the state entered into two stipulations. First Burks stipulated that his statements to police are admissible as a *Miranda* waiver. CP 23. Second, Burks stipulated to the existence of and admissibility of two prior court order violation convictions. CP 25. In so stipulating, Burks relinquished the right to dispute the veracity of his two prior

convictions or the use of those convictions as predicate offenses that elevate the present case to a felony. CP 26. The stipulation document recites that the each of the two prior order violations were predicated on orders issued pursuant to RCW 26.50. CP 25.

The trial court held colloquy with Burks regarding his stipulation. RP, 8/8/16, 16.¹ Burks affirmed that the stipulation was entered into freely and voluntarily. RP, 8/8/16, 17. The trial court found that the stipulation was knowing, voluntary, and intelligent. RP, 8/8/16, 18. The trial court read the stipulation to the jury. RP 32. It was admitted as state's exhibit 26. RP 33.

In the "to convict" instruction on the violation of court order count, the jury was instructed that it must find proved beyond a reasonable doubt that Burks "had twice been previously convicted for violating the provisions of a court order." CP 48 (Instruction #18). Regarding the stipulated facts, the jury was instructed that they could consider the information about violation of two prior orders "under RCW 26.50" on the court order violation count only and for no other purpose. CP 52 (instruction #22). Further, the jury venire was read the charges before voir dire. RP 9-11. Specific to the court order count, that recitation included

¹ The VRP volume from August 8, 2016 is entitled "Motions" and is referred to herein by date. All other "RP" citations are from the VRP volume entitled "Trial," which includes August 9, 10, and 11, 2016.

that the orders underlying the prior convictions had been issued under of the various statutes that authorize such orders. RP 10.

Burks was acquitted of first degree burglary and interfering with reporting domestic violence. CP 57. He was convicted of the court order violation and the jury answered “yes” to the domestic violence special interrogatory. CP 58.

Burks was given a standard range sentence, CP 77, and only mandatory legal financial obligations were imposed. CP 82. The present appeal was timely filed. CP 88. Burks was found indigent for appellate purposes. CP 89.

B. FACTS

Burks’s acquittal on the first degree burglary and interfering with reporting domestic violence counts rather compresses the substantive facts. Tanya Bierlein, the victim of the court order violation count, testified that she and Burks had been in a “boyfriend/girlfriend” relationship. RP 42. This lasted about three years. Id.

Burks was alleged to have appeared without invitation at Ms. Bierlein’s house. RP 50. There had been phone calls to her phone from him earlier that she had not answered. RP 46. Screen shots of her phone showing his phone number trying to call her were admitted as state’s

exhibits 23 and 24. (identified at RP 46-47; admitted at RP 47-48). Similarly, a screen shot of her phone showing a text message from Burks was admitted as state's exhibit 22. RP 49.

Ms. Bierlein alleged that when she saw Burks in her house, she reached for her phone to call 911 and Burks ripped the phone out of her hand. RP 51. She alleged that he blocked her as she tried to leave. RP 52. Attempting to draw the attention of neighbors, Ms. Bierlein tried to open some curtains. RP 52. Burks grabbed her and the two fell, all the while Burks squeezing her throat. Id. After a struggle, Burks stopped strangling her. RP 54. Ms. Bierlein claimed that the tussle resulted in her urinating on herself and vomiting. RP 54. Burks slept on the couch over night. RP 54-55.

In the morning, she went to work without seeing Burks. RP 56. After a couple of hours at work, Ms. Bierlein went to the Poulsbo Police station to report the incident. RP 56. She met with Kitsap County sherriff's deputies on a street near her home. RP 56. The deputies went to her house. RP 57. They did not find Burks there. RP 86.

While Ms. Bierlein was with the deputies, she received a call from Burks. RP 69. She answered and Burks asked her to meet him. RP 69. She said she would meet him at Rite-Aid in Poulsbo. Id. Based on this information, the deputies went to the Rite-Aid. RP 87. They saw Burks in the parking lot, blocked his car with theirs, and placed Burks in custody.

RP 87-88. The deputies used their phone to call the number that had appeared on Ms. Bierlein's phone screen and Burks's phone rang. RP 90.

III. ARGUMENT

A. **BURKS WAS CONVICTED OF A DOMESTIC VIOLENCE OFFENSE UNDER RCW 10.99.020 AND HIS SENTENCING POINTS WERE THEREFORE PROPERLY CALCULATED UNDER RCW 9.94A.525(21).**

Burks argues that he was improperly sentenced because his conviction for a felony violation of a court order, committed against his former girlfriend, does not meet the definition of domestic violence. This claim is without merit because Burks committed his crime against a person who falls under the definition of family or household member found in RCW 10.99.020 and because he misreads statutory authority defining the term "domestic violence" for sentencing purposes. In particular, Burks does not address case-law authority from each of the three divisions of the Court of Appeals, which cases interpret the relevant statutory provisions in a manner contrary to his argument. This case involves an issue of statutory construction that is a matter of law and is reviewed de novo. *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

First, it should be noted that Burks asserts no argument that the victim in this case does not meet the definition found in RCW 10.99.020(3) as a domestic violence victim:

“Family or household members” means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

Ms. Bierlein had a dating relationship with Burks. RP 42. She is thus a “family or household member” under the statute.

Second, Burks’s argument from RCW 10.99.020 seems to assert that a domestic violence offense cannot be found unless it is one of the offenses listed in subsection (5). Brief at 8. This assertion, however, ignores the plain language of that statute, which provides that ““domestic violence” includes but is not limited to any of the following crimes when committed by one family or household member against another.” RCW 10.99.020(5) (emphasis added). The list of offenses is none-exclusive. *See State v. Walls*, 185 Wn. App. 1045, __P.3d __ (2015) (applying domestic violence finding to identity theft second degree, which is not found in the list in RCW 10.99.020(5)) (UNPUBLISHED, of no

precedential value and cited here as an example of proper reading of the statute only, GR 14.1). The statute, then, clearly includes any crime against a person who meets the definition of family or household member as defined in subsection (3). This plain language completely defeats Burks's claim that his offense cannot be characterized as domestic violence. Ms. Bierlien meets the family or household member test and the crime was committed against her; it was a domestic violence crime.

1. Burks's reading of the statute is contrary to cases that have reviewed this statutory scheme.

Burks correctly notes that RCW 10.99.020(5) does address court order violations. But his reading of that provision is mistaken. First, as argued above, Burks particular crime need not be found in the list in order to be a domestic violence offense. Second, Burks does not consider (nor even cite to) decisions that have directly addressed the statutory scheme under which he was sentenced.

Burks argues that subsection (r) does not address a violation that happens by text or phone call. That provision provides

(r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or

74.34.145);

Burks claims that he had to have engaged in the conduct listed after the third occurrence of “or.” In *State v. Kozey*, 183 Wn. App. 692, 334 P.3d 1170 (2014) rev denied 182 Wn.2d 1007 (2015), this Court disagreed with that reading. There, the state appealed a sentencing in which the trial court had ruled in favor of the type of argument that Burks advances here and refused to enhance Kozey’s offender score as required in a domestic violence case. Kozey argued that RCW 9.94A.030(20) requires that domestic violence be defined by reference to both RCW 10.99.020 *and* RCW 26.50.010 because of the “and” as emphasized here.² In discussing Kozey’s claim, this Court referred to RCW 10.99.020(5)(r), in its relevant part, as containing a complete sentence in its first phrase, saying that the statute says “(r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person.” *Id.* at 694 (footnote 1); and at 697. The third “or” in the provision is thus clearly disjunctive; Burks may not have done the behavior included after the “or” but he clearly violated provisions “restraining or enjoining” him from contacting Ms. Bierlein.

Next, Division I of the Court of Appeals rejected the same argument that was asserted in *Kozey* in *State v. McDonald*, 183 Wn. App.

² The state does note that Burks does not here asserted exactly that argument. However, the *Kozey* decision’s gloss on the statutory language answers his claim.

272, 333P.3d 451 (2014). There, McDonald argued, as Kozey had, that the “and” in RCW 9.94A.030 required that the offender’s behavior meet the definitions of both statutes in order to be a domestic violence offense. Even though Burks in the present case does not make that particular argument, the *McDonald* decision does add to the analysis of his claim. The factual basis for six counts of violation of a court order in that case was that McDonald had had telephone contact with the protected person while he was in jail. *Id.* at 274-75. In deciding that the language of RCW 9.94A.030 results in his offenses being properly characterized as domestic violence, Division I took no pause to consider that RCW 10.99.020(5)(r) required more than the phone calls. The violations by phone call were domestic violence under the statutory scheme.

Next, Division III of the Court of Appeals weighed-in on this issue in *State v. Hodgins*, 190 Wn. App. 437, 360 P.3d 850 (2015). There, the trial court had refused to enhance a domestic violence offender’s points. *Id.* at 438-39. The same “and” issue from RCW 9.94A.030 was raised and rejected by the Court. But Hodgins had a second argument—the one asserted by Burks here. The Court rejected this claim because it “ignores the language of the statute.” *Id.* at 447. The Court held that the language of RCW 10.99.020(5)(r) referred to the provisions of the court order in question and not to a defendant’s particular behavior in violating the order.

Id.

Thus, all three divisions of the Court of Appeals have passed on the statutory scheme underlying Burks's claim. Division I did not see Burks's reading of RCW 10.99.020(5)(r) and held that phone calls in violation of an order sufficed for a domestic violence finding. The *Hodgins* Court (Division III), directly addressed Burks's argument, found that the statute does not mean what Burks think it does, and rejected the argument. This Court, in *Kozey*, rejects Burks's argument by correctly reading the first phrase of the provision.

Burks was "restrained and enjoined" from contacting Ms. Bierlien. She was a "family or household member" as defined. Burks knew of the order and contacted Ms. Bierlien anyway. Ms. Bierlien's status was pled and proven. This is a felony domestic violence offense and Burks was properly sentenced.

Further, the foregoing analysis forecloses Burks's subsidiary claim that his counsel was ineffective for not arguing that his offender score should not include the enhanced domestic violence points. Contrary to Burks's argument, it appears that trial counsel did in fact research domestic violence sentencing law. This is manifest because if she had she would have been aware of the above authority or in fact may have correctly read the statutes on her own. Since the sentence was lawful,

defici

ent performance cannot be found. This second way to make the same argument also fails.

B. THE “TO CONVICT” JURY INSTRUCTION WAS NOT DEFECTIVE BECAUSE IT DID NOT INCLUDE A REFERENCE TO A QUALIFYING COURT ORDER.

Burks next claims that the trial court erred in giving a to convict instruction on the court order violation charge as the instruction is written in Washington Pattern Jury Instruction, Criminal . This claim is without merit because Burks provides no argument as to why the statutory citations found in RCW 26.50.110(5) should be considered to be an element of the offense. Moreover, this issue has recently been conclusively resolved by the Washington Supreme Court in *State v. Case*, ___ Wn.2d ___, 384 P.3d 1140 (December 8, 2016) (En Banc).³

Burks’s two prior convictions was stipulated to by Burks. CP 25. Burks allowed the jury to receive the stipulated facts instead of the state proving his priors by admission of the two prior judgments in those cases. Further, each case referred to in the stipulation is noted to be “pursuant to

³ Interestingly, Burks did not even cite to the Court of Appeals decision in *Case*, which would have supported his case.

RCW 26.50.” CP 25.

On these facts, the *Case* decision controls. There, Case was charged with felony violation of a court order. As Burks did, Case stipulated to the existence of the two prior violations that elevated the present violation to a felony. He then argued on appeal that the state had presented insufficient evidence because “it failed to show the prior convictions he stipulated to were based on violations of a *qualifying* order.” *Case*, 384 P.3d at 1142 (emphasis by the court). First, the Supreme Court noted that “elements of a crime are those facts the state must prove to sustain a conviction.” *Id.* And the parties there agreed that “the validity of the underlying orders is a question of law.” *Id.* The question became whether the stipulation was itself sufficient to establish the two *qualifying* prior convictions. *Id.* at 1142-43. The Court gave two answers to the question; both answers are contrary to Burks’s argument.

First, the Court said “[w]hen 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.” *Id.* at 1143 (internal quotation and citation omitted). Further, “[t]he defendant also waives the right to require the State to prove that element beyond a reasonable doubt.” *Id.* (internal quotation and citation omitted). On this point, it was held that

“[a]bsent a timely and specific objection or exception from Case's attorney, the stipulation appeared to establish that Case agreed he had two prior *qualifying* convictions under RCW 26.50.110(5) as alleged in the charging information and was therefore sufficient.” *Id.* (emphasis by the court) (internal quotation and citation omitted). Burks’s stipulation, which actually cites to RCW 26.50, has the same affect. Burk effectively waived his right to jury trial on that issue and his complaint her therefore fails.

Second, and even more straightforward, the *Case* Court held that “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.” *Id.* Moreover, “[i]f the prior convictions do not qualify, they are almost certainly inadmissible on this point under ER 404(b).” *Id.* It’s a question of law for the trial court to decide not a factual issue that the jury decides. For either of the reasons supporting the disposition in *Case*, Burks’s claim fails.

C. THE STATE WILL NOT SEEK APPELLATE COSTS IN THIS MATTER.

Burks next claims that that he should not be taxed with app[elate] costs should the state substantially prevail. As a matter of policy, this office will not seek appellate costs in this matter should it substantially

prevail.

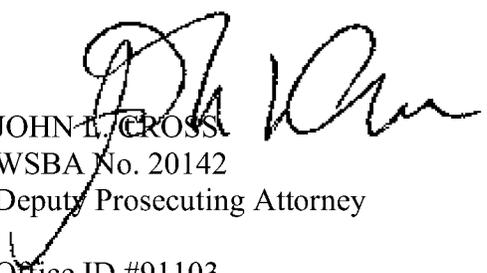
IV. CONCLUSION

For the foregoing reasons, Burks's conviction and sentence should be affirmed.

DATED February 7, 2017.

Respectfully submitted,

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