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Court of Appeals
Division II
State of Washington
8/14/2019 4:39 PM

No. 53068-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL TIMOTHY GOUVEIA,

Appellant.

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

BRIEF OF APPELLANT

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STATUTES

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A. SUMMARY OF ARGUMENT

Russell Gouveia was arrested while in the presence of a woman whom he was barred from contacting. He was charged with a felony violation of a no contact order based upon having two prior convictions for violating no contact orders. The evidence of his 1998 prior conviction failed to establish he was convicted of violating a no contact order or, assuming he was convicted of such, that the no contact order was issued pursuant to the statutes listed in RCW 26.50.110(5).

Pursuant to its gate-keeping function, and over Mr. Gouveia's repeated objections, the trial court admitted the evidence of the 1998 prior conviction and, following a jury trial, Mr. Gouveia was convicted as charged.

Mr. Gouveia's conviction must be reversed and a misdemeanor conviction entered where one of the prior convictions did not qualify as a prior conviction under RCW 26.50.110(5) and the trial court erred in admitting it a trial.

B. ASSIGNMENT OF ERROR

The trial court erred in admitting the evidence of Mr. Gouveia's 1998 prior conviction.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A violation of a no contact order is a felony where the defendant has two prior convictions that qualify under RCW 26.50.110(5).

Whether a prior conviction qualifies and is admissible is determined by the trial court as a matter of law.

The evidence purporting to establish Mr. Gouveia's 1998 conviction qualified failed to establish that it was a prior conviction for violation of a no contact order and failed to establish it was issued pursuant to the statutes listed in RCW 26.50.110(5). Did the trial court err in admitting evidence of the 1998 prior conviction in the absence of sufficient evidence thus requiring reversal of Mr. Gouveia's felony conviction where the 1998 prior conviction was one of the necessary elements necessary to prove a felony violation?

D. STATEMENT OF THE CASE

Russell Gouveia was observed by a police officer working on a car in which Candi Martel-Gomez was seated. RP 191-93. Police confirmed that there was a no contact order in place barring Mr. Gouveia from being within 500 feet of Ms. Martel-Gomez. RP 193-94. As a result, Mr. Gouveia was charged with a felony violation of a no

contact order based upon having two prior convictions for violating a no contact order. CP 1.

Prior to trial, Mr. Gouveia objected to the State admitting evidence of his 1998 district court conviction as irrelevant. CP __ (Exhibit 4); RP 35-43, 46-49. Mr. Gouveia noted the exhibit purporting to be proof of a prior conviction for violation of a no contact order failed on its face to prove either that it was a conviction for a violation of a no contact order or that any no contact order was issued pursuant to RCW 26.50.110(5). CP __ (Exhibit 4); RP 35-43, 46-49. The exhibit only showed Mr. Gouveia was guilty of “charge 1” without further elaboration of what “charge 1” was. *Id.*

The trial court misunderstood its obligation regarding this exhibit and found it admissible:

The question isn't one of hearsay. The defense acknowledges this is a certified record; rather, it is the substantive evidentiary concerns under ER 401 and 403. Much of the argument about this document focuses on what it does or does not show. *However, in ruling on questions of admissibility, I am not in a position where it is appropriate for me to act as the fact finder and find facts from this document* but, rather, to determine what a reasonable juror could conclude from this document through the lens of course of concerns about prejudice substantially outweighing probative value.

Based on my review of this record and the argument of counsel, I am overruling the defense's objections as to

401 and 403. *That is not to say that I am acting as a fact finder saying that this is evidence of a prior no-contact order violation; rather, this document is sufficient, given the issues in this case, to be presented to the jury for determination about that issue along with any other evidence that is competent that is put forward concerning those issues.* And as I said before, I think we can all acknowledge that this could be a lot cleaner where there would be no objection, but the evidence is what the evidence is.

But based on what is contained within this record, I am overruling objections raised by Mr. Shackleton under ER 401 and ER 403. The jury will be able to make a determination as to whether this evidence is sufficient to satisfy the element of the crime charged concerning prior convictions for no-contact order violations. Of course, if requested, I would give a limiting instruction to ensure that the jury is directed to not consider any such evidence for any purpose other than establishing that element of prior convictions.

RP 49-50 (emphasis added).

Later, during trial, the court, upon further objection by Mr. Gouveia, briefly revisited its role in the process and its prior ruling, but ultimately reaffirmed its ruling admitting Exhibit 4:

And so I will stop -- you will both have an opportunity to respond. I did some research about this issue last night. There appears to be -- it is apparently an unduly complex area of law regarding the validity of no-contact orders and for this situation whether or not a prior violation falls within the rubric of the statute such that the determination of whether or not a prior violation of a no-contact order falls within these chapters, which is listed in the statute as a requirement for this crime, is a question of law for the Court to determine, whereas the

question of whether or not these prior violations existed is one for the jury to determine at trial. So this question of whether or not it fell within this statute, based on my best reading of the appellate case law, is one for me to determine as a question of law, which my anticipation upon processing this is that Mr. Shackleton's new proposed instruction was going to include these references to the statutes in the instruction to the jury to allow them to make that determination; is that correct?

RP 229.

At trial and prior to its admission, Mr. Gouveia again objected to admission of the 1998 prior conviction. RP 226-29. The court again rejected Mr. Gouveia's objection and admitted the exhibit. RP 225-26, 243.

The State also proffered an additional exhibit which it claimed established Mr. Gouveia's 1998 conviction was for a violation of a no contact order. CP __ (Exhibit 8); RP 238-39. Mr. Gouveia again objected to this exhibit's admission. RP 236-37. The court admitted this exhibit as well. RP 243-44.

At the conclusion of the trial, the jury found Mr. Gouveia was guilty as charged. CP 52; RP 296.

E. ARGUMENT

The 1998 prior conviction was not admissible as it did not qualify as a predicate conviction under RCW 26.50.110.

Violation of a no contact order issued under certain statutes is a felony if the offender has at least two prior convictions for violating court orders issued under specified statutes.

A violation of a court order issued under this chapter, chapter 7.90, 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, 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.

RCW 26.50.110(5).

Whether prior convictions qualify as predicate convictions under RCW 26.50.110(5) is a threshold question of law for the trial court. *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005); *State v. Gray*, 134 Wn.App. 547, 549-50, 138 P.3d 1123 (2006), *review denied*, 160 Wn.2d 1008 (2007); *State v. Carmen*, 118 Wn.App. 655, 663-64, 667, 77 P.3d 368 (2003), *review denied*, 151 Wn.2d 1039 (2004). As part of its gate-keeping function, a court must determine the relevance

or “applicability” of the prior convictions before allowing the jury to consider them. *Gray*, 134 Wn.App. at 549-50. The relevance of the prior convictions to the crime charged depends on whether they qualify as predicate convictions under the statute. *Carmen*, 118 Wn.App. at 664. Only qualified prior convictions are admissible. *Id.*

The validity of a court order and whether it is applicable to the crime charged is an issue of law that is reviewed *de novo*. *State v. Robinson*, 8 Wn.App.2d 629, 634, 439 P.3d 710 (2019); *Gray*, 134 Wn.App. at 558.

Thus, the question to be determined by the trial court regarding the admission of Exhibit 4 was whether the evidence of the 1998 prior conviction was based on violation of a protection order issued under one of the statutes listed in RCW 26.50.110(5). *Carmen*, 118 Wn.App. at 663. There is nothing in Exhibit 4 that proves either that it was a violation of a no contact order or that the no contact order was issued pursuant to one of the statutes listed in RCW 26.50.110(5). The exhibit refers only to “Charge 1” without any elucidation.

Exhibit 8 does nothing to change this fact. This exhibit refers to a charge of violation of a no contact order but it once again fails to

correlate it to “Charge 1.” There is nothing in these two exhibits which states that “Charge 1” was for a violation of a court order.

Further, assuming the documents establish a violation of a no contact order, neither Exhibit 4 nor Exhibit 8 establishes that the no contact order was issued pursuant to the named statutes in RCW 26.50.110(5), also a necessary requirement for the admission of the exhibits.

Since Mr. Gouveia’s 1998 prior conviction did not qualify as a prior conviction under RCW 26.50.110(5), there was insufficient evidence to support the conviction. The trial court erred in admitting Exhibits 4 and 8 and erred in entering a felony conviction. Mr. Gouveia is entitled to reversal of his conviction and remand for entry of misdemeanor violation of a no contact order.

F. CONCLUSION

For the reasons stated, Mr. Gouveia asks this Court to reverse his felony conviction for a violation of a no contact order and remand for entry of a misdemeanor conviction.

DATED this 12th day of August 2019.

Respectfully submitted,

s/Thomas M. Kummerow

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SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF AUGUST, 2019.

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August 14, 2019 - 4:39 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v. Russell Gouveia, Appellant
Superior Court Case Number: 18-1-01497-6

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