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WASHINGTON STATE
SUPREME COURT

FILED
Jan 17 2017
Court of Appeals
Division I
State of Washington

No. *92064.9*
COA No. 73762-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MARKNSEN,

Petitioner.

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

The Honorable Dean Lum

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Michael Marknsen asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Michael Marknsen*, No. 73762-7-I (December 19, 2016). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

Does the decision in Mr. Marknsen's case directly conflict with the decision of the Supreme Court in *State v. Case*, ___ Wn.2d ___, 384 P.3d 1140 (2016), because the stipulation did not prove that Mr. Marknsen had two prior qualifying convictions?

D. STATEMENT OF THE CASE

Michael Marknsen was charged with violating two separate court orders barring him from contacting his wife and with having two prior convictions for violating court orders. CP 8-9. At trial, the parties entered into a stipulation that Mr. Marknsen had two prior convictions for violating court orders:

The parties stipulate that the defendant had been twice previously convicted for violating the provisions of a court order prior to May 10, 2013.

CP 52. No evidence was presented that the prior court orders were issued pursuant to the stated RCW chapters in RCW 26.50.110(5).

At the conclusion of the trial, Mr. Marknsen was found guilty as charged. CP 73-74.

On appeal, relying on this Court's decision in *State v. Case*, ___ Wn.2d ___, 384 P.3d 1140 (2016), the Court of Appeals affirmed Mr. Marknsen's convictions. Decision at 1.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

The State failed to prove the essential prerequisite for the admission of Mr. Marknsen's prior convictions, thus the State provided insufficient evidence for the offenses mandating reversal.

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, the State was required to prove to the trial court that the prior convictions were for violating court orders issued pursuant to the specific RCW chapters listed in RCW 26.50.110(5).

Violation of a no contact order under chapter 10.99 RCW becomes a felony if the offender has at least two previous convictions for violating the provisions of an order issued under chapter 26.50, 7.90, 9.94A, 9A.46, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW. RCW 26.50.110(5). The statutory authority for the issuance of the two prior court orders is not an essential element of the offense, which must be decided by the jury. *State v. Miller*, 156 Wn.2d 23, 24, 123 P.3d 827 (2005). But, the State must still submit to the *trial court* sufficient evidence to determine whether the orders that constituted the two prior convictions were issued pursuant to one of the relevant RCW chapters. *Case*, 384 P.3d at 1143.

In *Case*, the defendant stipulated, as did Mr. Marknsen here, that

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.

Case, 384 P.3d at 1142. In finding the stipulation was sufficient to prove that the prior protection orders were issued pursuant to the relevant statutes, the Supreme Court was persuaded by the charging document, which alleged the prior orders were issued pursuant to the relevant statutes, as well as a sidebar where the trial court noted, and the parties agreed, that the stipulation relieved the State of any necessity of having to go into any detail regarding the prior convictions. *Id.* at 1142-43.

Here, we have only the stipulation and the charging document, but no sidebar indicating that the parties understood that the State was relieved of proving that Mr. Marknsen had two prior *qualifying* convictions because there was no evidence the prior underlying protection orders were issued pursuant to the relevant statutes. Thus, the State failed to prove the element of the offense of a felony violation of a protection order, that Mr. Marknsen had two prior qualifying prior convictions.

The decision in Mr. Marknsen's matter directly conflicts with this Court's decision in *Case*. RAP 13.4(b)(1). This Court should grant review and reverse Mr. Marknsen's convictions.

F. CONCLUSION

For the reasons stated, Mr. Marknsen asks this Court to accept review and reverse his convictions.

DATED this 17th day of January 2017.

Respectfully submitted,

s/Thomas M. Kummerow

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Washington Appellate Project – 91052

Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	DIVISION ONE
Respondent,)	No. 73762-7-I
)	UNPUBLISHED OPINION
v.)	
)	FILED: December 19, 2016
MICHAEL MARKNSEN,)	
)	
Appellant.)	
_____)	

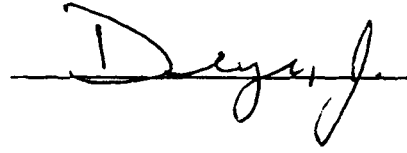
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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 DEC 19 PM 12:46

DWYER, J. — As the parties predicted, the Supreme Court's opinion in State v. Case, No. 92293-4 (Wash. Dec. 8, 2016), <http://www.courts.wa.gov/opinions/pdf/922934.pdf>, is dispositive of the claim of error raised in this appeal. The Case decision mandates affirmance of the trial court's judgment. We so order.

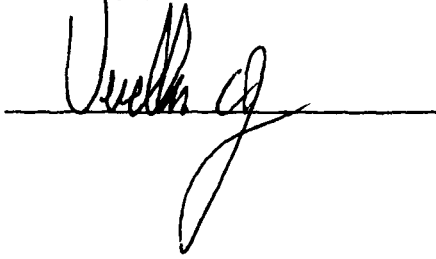
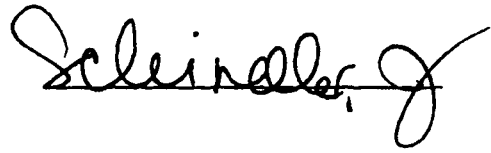
The sole remaining question regards costs on appeal. This question was fully briefed by the parties (it was raised in the brief of appellant, addressed in the brief of respondent, and discussed in appellant's reply brief) and we granted oral argument on the issue. After full consideration of the question, "we now choose to exercise our discretion and direct the clerk of the court not to award appellate costs even though the State has substantially prevailed." In re Pers. Restraint of Flippo, No. 92616-6 (Wash. Dec. 8, 2016), at 8, <http://www.courts.wa.gov/opinions/pdf/926166.pdf>.

No. 73762-7-1/2

Affirmed.

A handwritten signature in cursive script, appearing to read "Deyan J.", written over a horizontal line.

We concur:

A handwritten signature in cursive script, appearing to read "Veeha J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Schleindor J.", written over a horizontal line.

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. 73762-7-1**, 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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petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 17, 2017

WASHINGTON APPELLATE PROJECT

January 17, 2017 - 4:47 PM

Transmittal Letter

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Case Name: STATE V. MICHAEL MARKNSEN

Court of Appeals Case Number: 73762-7

Party Represented: PETITIONER

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