

No. 42420-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Talyn Benitez,

Appellant.

Grays Harbor County Superior Court Cause No. 11-1-00121-3

The Honorable Judge Gordon Godfrey

Appellant's Reply Brief

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ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION.

- A. The prosecution failed to establish that Mr. Benitez had previously been convicted of a felony sex offense.

To elevate the charged offense to a felony, the prosecution was required to prove that Mr. Benitez had previously been convicted of a sex offense,¹ defined as “[a] felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132.” RCW 9.94A.030(46)(a)(i). Juvenile offenses are not considered felonies.² *State v. Schaaf*, 109 Wash.2d 1, 8, 743 P.2d 240 (1987).

Furthermore, the legislature did not specifically include juvenile adjudications within the definition of “sex offense,” as it has in other contexts. Cf. RCW 9.94A.030(9) (defining “conviction”); RCW 9.94A.030(11) (defining “criminal history”); RCW 9.94A.525 (outlining rules for calculating offender score).

¹ See RCW 9A.88.010(2)(c).

² This is an important distinction, since it allows juveniles to be convicted without benefit of a jury trial. *Schaaf*, at 8.

At trial, the prosecution proved only that Mr. Benitez had a juvenile adjudication under RCW 9A.44; it did not prove that he had an adult conviction. RP 44-46. The evidence was therefore insufficient to elevate the current charge to a felony. RCW 9A.88.010(2)(c).

Respondent erroneously claims that conviction of the aggravated offense “does not require [proof] that the defendant has a prior ‘felony’ conviction, only that he has a prior conviction for a ‘sex offense.’” Brief of Respondent, p. 2. This is incorrect. The statute refers to the definition of “sex offense” contained in RCW 9.94A.030, which does explicitly use the word “felony.” See RCW 9.94A.030(46)(a)(i).

Respondent next argues that juvenile adjudications qualify as felony convictions. Brief of Respondent, pp. 3-6. Respondent relies on three cases to support this argument. Respondent first cites McKinley, which supports Mr. Benitez’s argument: the McKinley court reaffirmed that juvenile adjudications are not “felonies.” Brief of Respondent, p. 3, citing *State v. McKinley*, 84 Wash.App. 677, 680-81, 929 P.2d 1145 (1997).³

³ In McKinley, the question posed was whether a juvenile adjudication qualified as a “conviction” and thus prohibited possession of a firearm. McKinley, at 680-681. The defendant in McKinley conceded that his prior offense qualified as a “serious offense” for purpose of RCW 9.41.040. Mr. Benitez, by contrast, agrees that he has been “convicted” of an offense. He does not agree that his prior conviction qualifies as a “sex offense” within the meaning of the statute.

Respondent's reliance on Cheatham is similarly misplaced. Brief of Respondent, p. 3, citing *State v. Cheatham*, 80 Wash.App. 269, 908 P.2d 381 (1996). As the Cheatham court noted, the statute at issue in that case (former RCW 9.41.040(1)) explicitly incorporated juvenile adjudications, prohibiting unlawful possession of a short firearm or pistol by anyone who had “‘previously been convicted or, as a juvenile, adjudicated in this state or elsewhere of a crime of violence...’” *Id.*, at 272 (emphasis added by Cheatham court).⁴

As noted above, the statutes relevant to this case do not reference juvenile adjudications. See RCW 9A.88.010(2)(c); RCW 9.94A.030(46)(a)(i). Furthermore, the defendant in Cheatham conceded that his juvenile offense qualified as a crime of violence. *Id.*, at 382. Mr. Benitez does not concede that his juvenile offense qualifies as a “sex offense.” Finally, although Cheatham includes some language supporting Respondent's argument, those passages are dicta, and do not control this case. See Brief of Respondent, pp. 4-5, quoting Cheatham, at 276-277.

Like Cheatham, the third case upon which Respondent relies addresses a statute that makes unambiguous reference to juveniles. Brief

⁴ Without explanation, Respondent argues that the statute's specific reference to juveniles in Cheatham is a distinction “that is not germane to the current case.” Brief of Respondent, p. 4. This is incorrect. Mr. Benitez's argument is based in part on the legislature's failure to include similar language in the indecent exposure statute and the definition of “sex offense.” See Appellant's Opening Brief, p. 7.

of Respondent, pp. 5-6, citing *State v. Acheson*, 75 Wash.App. 151, 877 P.2d 217 (1994). The Acheson court addressed whether or not the legislature had imposed registration requirements on juveniles who had been adjudicated on sex and kidnapping charges. *Id.*, at 153. The registration statute, former RCW 9A.44.130, applied to “[a]ny adult or juvenile residing in this state who has been found to have committed or has been convicted of any sex offense...” *Id.* The registration statute’s explicit reference to juveniles distinguishes that statute from RCW 9A.88.010(2)(c).

Mr. Benitez should not have been convicted of felony indecent exposure because the prosecution failed to prove that he had the requisite predicate conviction. Accordingly, the felony conviction must be reversed and dismissed with prejudice, and the case remanded for entry of a misdemeanor conviction. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

- B. The prosecution failed to prove that Mr. Benitez intentionally exposed himself “to another,” as required under the law of the case.

Mr. Benitez stands on the argument set forth in his Opening Brief.

II. MR. BENITEZ'S CONVICTION WAS ENTERED IN VIOLATION OF THE STATE CONSTITUTION'S REQUIREMENT THAT FACTUAL ISSUES IN FELONY CASES BE TRIED BY A JURY.

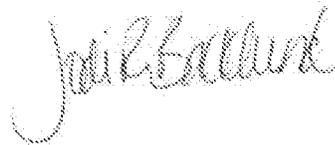
Mr. Benitez stands on the argument set forth in his Opening Brief.

CONCLUSION

Mr. Benitez's conviction must be reversed. The felony charge must either be dismissed or remanded for a new trial.

Respectfully submitted on July 9, 2012,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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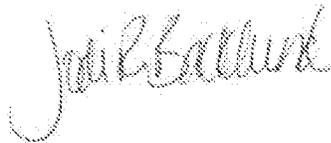
and to:

Grays Harbor County Prosecutor's Office
102 W Broadway Ave Rm. 102
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 9, 2012.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

July 09, 2012 - 9:31 AM

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