

No. 92293-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

KEVIN R. CASE,

Respondent.

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Received *E*  
Washington State Supreme Court

MAR 28 2016 *bjh*

Ronald R. Carpenter  
Clerk

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SIPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

**TABLE OF CONTENTS**

A. ISSUE RAISED..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 4

    1. When a defendant stipulates to the fact of his prior convictions for violating a no-contact order he necessarily stipulates that the orders which were violated in the previous cases were issued under one or more of the statutes specified in RCW 26.50.110(5)..... 4

    2. The failure to object to the admission of evidence of the prior convictions without proof of the statutory basis of the prior orders waives a challenge to the admissibility on appeal..... 11

D. CONCLUSION..... 18

## TABLE OF AUTHORITIES

### Washington Supreme Court Decisions

<u>Key Design, Inc. v. Moser,</u> 138 Wn.2d 875, 983 P.2d 653 (1999) .....	8
<u>State v. Drum,</u> 168 Wn.2d 23, 225 P.3d 237 (2010) .....	6-7
<u>State v. Humphries,</u> 181 Wn.2d 708, 336 P.3d 1121 (2014) .....	6
<u>State v. Kirkman,</u> 159 Wn.2d 918, 155 P.3d 125 (2007) .....	12
<u>State v. Miller,</u> 156 Wn.2d 23, 123 P.3d 827 (2005) .....	5, 12

### Decisions Of The Court Of Appeals

<u>State v. Carmen,</u> 118 Wn. App. 655, 77 P.3d 368 (2003), <i>review denied</i> , 151 Wn.2d 1039, 95 P.3d 352 (2004) .....	5, 12
<u>State v. Case,</u> 189 Wn. App. 422, 358 P.3d 432 (2015) .....	4
<u>State v. Chambers,</u> 157 Wn. App. 465, 237 P.3d 352 (2010), <i>review denied</i> , 170 Wn.2d 1031, 249 P.3d 623 (2011) .....	13
<u>State v. Cochrane,</u> 160 Wn. App. 18, 253 P.3d 95 (2011) .....	13
<u>State v. Gray,</u> 134 Wn. App. 547, 138 P.3d 1123 (2006), <i>review denied</i> , 160 Wn.2d 1008, 158 P.3d 615 (2007) .....	5, 13

State v. Johnson,  
90 Wn. App. 54, 63, 950 P.2d 981 (1998)..... 6

State v. Ortega,  
134 Wn. App. 617, 142 P.3d 175 (2006), *review denied*, 160 Wn.2d  
1016, 161 P.3d 1027 (2007) ..... 9-10

State v. Stevens,  
137 Wn. App. 460, 153 P.3d 903 (2007), *review denied*, 162 Wn.2d  
1012, 175 P.3d 1094 (2008) ..... 6, 10-11

State v. Wolf,  
134 Wn. App. 196, 139 P.3d 414 (2006), *review denied*, 160 Wn.2d  
1015, 161 P.3d 1028 (2007) ..... 8

**U.S. Supreme Court Decisions**

Old Chief v. United States,  
519 U.S. 172, 117 S. Ct. 644, 136 L. Ed 2d 574 (1997)..... 6

**Federal Court Decisions**

United States v. Mason,  
85 F.3d 471, 472 (10<sup>th</sup> Cir. 1996) ..... 6

**Statutes and Rules**

RAP 2.5(a)(3)..... 12

RCW Chapters 7.90 ..... 1

RCW Chapters 9.94A..... 1

RCW 9A.36.011 ..... 1

RCW 9A.36.021 ..... 1

RCW Chapters 10.99 ..... 1

RCW Chapters 25.52 ..... 1

RCW Chapters 26.09 ..... 1

RCW Chapters 26.10 ..... 1

RCW Chapters 26.26 ..... 1

RCW Chapters 26.50 ..... 1

RCW 26.50.110(5) ..... 1, 4-5

RCW 26.52.020..... 1

RCW Chapters 74.34 ..... 1

**Other Authority**

9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON  
LAW § 2588, at 821  
(James H. Chadbourn rev. ed. 1981)..... 8

A. ISSUE RAISED.

Whether, in a prosecution for felony violation of a no contact order on the basis of two prior qualifying convictions for violating protection orders, the State was required to present evidence of the statutes under which the previously violated protection orders were issued to show that they were qualifying convictions even though the defendant stipulated to the admissibility of the fact of the prior convictions at trial.

B. STATEMENT OF THE CASE.

The facts of the crime itself are irrelevant to the issue before the Court.

Kevin Ray Case was charged with one count of felony violation of a post-conviction no contact order, domestic violence, third or subsequent violation of any similar order, pursuant to RCW 26.50.110(5). CP 3. The charging language specified that the prior orders were issued under RCW Chapters 10.99, 26.09, 26.10, 26.26, 26.50, 25.52, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020. *Id.*

RCW 26.50.110(5) provides:

A violation of a court order issued under this chapter, chapter 7.90, 9.94A, 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, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

At trial, before voir dire, Case's attorney advised the court that there would be a stipulation to the fact that he had two or more prior convictions for violations of protection or no contact orders. RP 6.<sup>1</sup> The court said that it expected the stipulation would be read to the jury and that it would be marked as an exhibit and go to the jury during its deliberations. Id. Immediately before the State rested its case, the court read the following stipulation to the jury:

The parties have agreed that certain facts are true. You must accept as true the following facts: The defendant has at least two prior convictions for violating the provisions of a protection order, restraining order or no-contact order issued under the Washington State law.

RP 66. The stipulation itself was admitted as Exhibit 5.

The jury was instructed that the elements of the crime were as follows:

To convict the defendant of the crime of violation of a no contact order as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 18, 2013, there existed a no contact order applicable to the defendant;

(2) That the defendant knew of the existence of this order;

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<sup>1</sup> All references to the Verbatim Report of Proceedings are to the single volume trial transcript dated March 17-18, 2013. This date is a typographical error. The trial occurred on March 17-18, 2014. E. g., see CP 45, cover page of the jury instructions.

(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 of violating the provisions of a court order; and

(5) That the defendant's act occurred in the State of Washington.

CP51-52; Instruction No. 9.

In closing argument, the prosecutor discussed Instruction No. 9, mentioning the stipulation but not elaborating upon it. RP 87-88. During the defense closing argument, counsel did not address the two prior convictions at all. His primary argument was that the eyewitness had not sufficiently identified Case as the person seen contacting the protected party. RP 90-92. The jury found Case guilty of felony violation of a no-contact order and by special verdict found that Case and the protected party were members of the same family or household. RP 100; CP 57-58.

At no time during the trial did Case object to the jury being told that he had two prior convictions for violating no-contact orders, nor did he object to the admission of the stipulation as an exhibit. He did not make any objection that the State had not proved that the prior convictions were for violating no-contact orders issued pursuant to one of the qualifying statutes listed in RCW 26.50.110(5).

On appeal, the Court of Appeals reversed Case's convictions, holding that although there was sufficient evidence to prove to prove the elements of the crime to the jury, there was insufficient evidence to prove that the prior convictions were for violating orders issued under the qualifying statutes. State v. Case, 189 Wn. App. 422, 429-30, 358 P.3d 432 (2015).

The State incorporates herein by reference all of the arguments and authorities set forth in the Petition for Review as well as the State's response brief and Motion for Reconsideration in the Court of Appeals.

#### C. ARGUMENT.

1. When a defendant stipulates to the fact of his prior convictions for violating a no-contact order he necessarily stipulates that the orders which were violated in the previous cases were issued under one or more of the statutes specified in RCW 26.50.110(5).

a. In a prosecution for felony violation of a no-contact order, evidence of two or more prior convictions is relevant and admissible only if the orders that were previously violated were issued pursuant to specific statutes identified in RCW 26.50.110(5).

No contact orders, the violation of which resulted in the prior convictions for violation of a no-contact order or protection order, must have been issued pursuant to the

statutes identified in RCW 26.50.110(5) before those convictions can elevate a subsequent violation of a restraining or no-contact order from a gross misdemeanor to a class C felony. It is well settled that the validity of those previous orders is not an element of the offense of felony violation of a no-contact order. State v. Carmen, 118 Wn. App. 655, 663-64, 77 P.3d 368 (2003), *review denied*, 151 Wn.2d 1039, 95 P.3d 352 (2004); State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005); State v. Gray, 134 Wn. App. 547, 556, 138 P.3d 1123 (2006), *review denied*, 160 Wn.2d 1008, 158 P.3d 615 (2007). Rather, the statutory basis for the prior orders is a question of admissibility; if the prior orders were not issued pursuant to the requisite statutes, evidence of the convictions for violating them is irrelevant and should not be submitted to the jury. Carmen, 118 Wn. App. at 663-64; Miller, 156 Wn.2d at 31; Gray, 134 Wn. App. at 556. It is a question of law to be decided by the court. Miller, 156 Wn.2d at 31; Carmen, 118 Wn. App. at 665.

b. A defendant may stipulate to the fact of his prior convictions.

If the fact of a prior conviction, rather than specific facts about the crime underlying that conviction, proves an element of the crime charged, the defendant may offer to stipulate to the fact of the conviction and prevent the State from offering documentary or other proof of the conviction, which may contain prejudicial information about the defendant. Old Chief v. United States, 519 U.S. 172, 174, 117 S. Ct. 644, 136 L. Ed 2d 574 (1997); State v. Johnson, 90 Wn. App. 54, 63, 950 P.2d 981 (1998).

A stipulation to facts which prove an element of the crime charged waives the right to a jury trial as to that element. State v. Humphries, 181 Wn.2d 708, 714, 336 P.3d 1121 (2014); United States v. Mason, 85 F.3d 471, 472 (10<sup>th</sup> Cir. 1996); State v. Stevens, 137 Wn. App. 460, 466, 153 P.3d 903 (2007), *review denied*, 162 Wn.2d 1012, 175 P.3d 1094 (2008).

Case maintains that while he stipulated to the fact of his prior convictions, he did not stipulate to the admissibility of that fact, which, as noted above, is a legal question. A stipulation to a legal conclusion is not binding on the court. State v. Drum, 168 Wn.2d 23, 33, 225 P.3d 237 (2010) (“[C]ourts are not bound by stipulations

to legal conclusions.”) In Drum, a defendant who entered drug court stipulated that if he were removed from the program, which he eventually was, the court could determine his guilt based upon the police reports and other documents and he further stipulated that those documents contained sufficient evidence to find him guilty of the charges. Id. at 28.

Stipulating to prior convictions, however, presents a different issue. Case stipulated to the fact of his prior convictions so that the jury would not learn any details of those offenses by reading the judgments and sentences. RP 6. It is apparent from the record that he did not anticipate that the State would also offer evidence of the admissibility of those convictions. It is also apparent that the trial court and prosecutor believed that Case was stipulating that the orders violated in his prior convictions were issued under the required statutes. Case did not object to the stipulation being read to the jury and admitted as an exhibit. He did not argue during closing that the State had not proved the element of the prior conviction. He did not bring a post-conviction motion for a new trial based upon insufficiency of the evidence. He did nothing but act in a manner that indicated he was agreeing that the fact of his prior convictions was admissible.

When a defendant stipulates to facts that prove an element of the charged crime, he waives his right to require the State to prove that element. State v. Wolf, 134 Wn. App. 196, 199, 139 P.3d 414 (2006), *review denied*, 160 Wn.2d 1015, 161 P.3d 1028 (2007). In Wolf, the defendant was tried for felon in possession of a firearm. He stipulated that he had previously been convicted of a serious offense. Id. at 196. The Court of Appeals held that he waived his right to require the State to prove that element of the crime. Id. at 199. There was no discussion as to whether the State was still required to prove to the trial court that Wolf's prior conviction was in fact for a serious offense.

A stipulation is "an express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact," with the effect that "*one party need offer no evidence to prove it and the other is not allowed to disprove it.*"

Key Design, Inc. v. Moser, 138 Wn.2d 875, 893-94, 983 P.2d 653 (1999), *quoting* 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2588, at 821 (James H. Chadbourn rev. ed. 1981) (emphasis added in Key Design).

There does not appear to be a Washington case which squarely addressed whether or not a stipulation to certain facts also stipulates that the State does not have to prove the admissibility of those facts.

In State v. Ortega, 134 Wn. App. 617, 142 P.3d 175 (2006), *review denied*, 160 Wn.2d 1016, 161 P.3d 1027 (2007), the defendant was convicted of three counts of felony violation of a no-contact order. Before trial, he offered to stipulate that if he were convicted of the current charges, they would be felonies. Id. at 623. The trial court ruled that any stipulation would have to say that he had been convicted twice of violating protection orders. He made that stipulation. Id. On appeal, the Court of Appeals said that because the statute under which Ortega was charged required that the prior convictions be for specific crimes, the trial court did not err in refusing a stipulation that avoided the statutory language. Id. at 624. Ortega also argued that the trial court erred by admitting the fact of his prior convictions without first determining whether the orders violated in the prior convictions were issued under the requisite statutes. The Court of Appeals found that he had waived that challenge because he did not object in a timely manner. Id. at 625-26.

Oretega answers a slightly different question than whether the State still has a burden to prove the admissibility of the prior convictions; all that can be said is that if there is such a burden, the failure to raise it in the trial court waives a challenge on appeal. From that, however, follows a conclusion that if the defendant has a duty to object to the entry of a stipulation where the statutory basis of the prior convictions has not been proved to the court, at a minimum the stipulation relieves the State of any such burden unless the defendant specifically limits his stipulation.

In State v. Stevens, 137 Wn. App. 460, 153 P.3d 903 (2007), *review denied*, 162 Wn.2d 1012, 175 P.3d 1094 (2008), the defendant was charged with four counts of unlawful possession of firearms. Id. at 464. The charge was based upon an Oregon conviction for first degree rape. At trial he stipulated that he had been previously convicted of a serious offense. Id. Stevens argued on appeal that his stipulation was limited, and that the State still had the burden to prove his Oregon conviction was equivalent to a serious offense in Washington. The Court of Appeals adopted the reasoning of Wolf and found that "once a defendant enters into a stipulation, he or she waives the right to require the government to

prove its case on the stipulated element.” Stevens, 137 Wn. App. at 466; Wolf, 134 Wn. App. at 200.

If the State is relieved of its burden of proof regarding an element of the crime, it logically follows that the State is relieved of all aspects of that proof, including the admissibility of the facts constituting the element. This is particularly so in situations such as Case’s where he did not at any time indicate to the court that he did not expect the jury to hear his stipulation. It makes no sense that he would have stood by silently while evidence that he believed was inadmissible was given to the jury. It is true that his belief does not control the question of law, but it does speak to whether or not he waived a challenge for the first time on appeal. He did not claim ineffective assistance of counsel for failing to object, although he did raise an ineffective assistance claim in regard to a failure to object to the restraints he wore during trial and to certain testimony by Officer Herbig. Appellant’s Opening Brief at 26-34.

2. The failure to object to the admission of evidence of the prior convictions without proof of the statutory basis of the prior orders waives a challenge to the admissibility on appeal.

Generally, a reviewing court will not consider an evidentiary issue that is raised for the first time on appeal because failure to

object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A narrow exception, however, exists for "manifest error[s] affecting a constitutional right." RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 936. There is no constitutional issue involved here, nor has Case claimed that there is.

In Carmen, the State at trial offered certified copies of the judgment and sentence in each of the prior convictions. Neither one specified the statutory authority for the orders that were violated. Id. at 657. Carmen did not object. Id. at 663. At sentencing, the trial court verified that both of the previous orders were valid. Id. at 664. The Court of Appeals held that because Carmen did not object to the admission of the judgments and sentences and because the trial court "cured the evidentiary gap," he waived any challenge to the admission of the prior convictions. Id. at 668.

In Miller, the defendant did not contest or concede the validity of the previous orders, and it is not apparent from the opinion what evidence was offered to the jury. Miller, 156 Wn.2d at 25-26. After concluding that the validity of the prior convictions was a question of admissibility rather than an element of the charged

crime, the court said, “As Miller has not shown that this order was invalid, deficient, or otherwise inapplicable to the crime charged, his conviction is affirmed[.]” Id at 32. This holding is consistent with finding waiver where an objection was not raised below.

In Gray, the State offered a judgment and sentence for one prior conviction and a Statement of Defendant on Plea of Guilty for the other. Gray did not object to either. At the conclusion of the State’s case, Gray moved to dismiss the felony allegation on the grounds the State had failed to prove one of them was based upon a no-contact order issued under the requisite statutes. Gray, 134 Wn. App. at 551. The Court of Appeals held that Gray waived his objection. “To assign error to a ruling that admits evidence, a party must raise a timely objection on specific grounds.” Id. at 557-58. See *also* State v. Cochrane, 160 Wn. App. 18, 27, 253 P.3d 95 (2011) (“Cochrane did not object or argue that the two Seattle Municipal Court convictions do not meet the statutory definition. We conclude Cochrane waived his right to object to the admissibility of the dockets establishing those convictions for the first time on appeal.”); State v. Chambers, 157 Wn. App. 465, 480, 237 P.3d 352 (2010), *review denied*, 170 Wn.2d 1031, 249 P.3d 623 (2011) (“[B]ecause it is undisputed that Chambers did not

object to admission of the evidence establishing her three prior DUI convictions in Washington, she waived any claim of error as to those convictions.”)

Even if Case did not effectively stipulate that the orders which he violated in the previous cases were issued under the requisite statutes, by failing to object to the court reading that stipulation and entering Exhibit 5 without the State proving the admissibility of those prior convictions to the court, he waived any claim that the evidence was insufficient to prove that element.

#### D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this Court to hold that where a defendant stipulates to facts which constitute an element of an offense, without qualification, the State is relieved of the burden to prove the admissibility of those facts. In the alternative, the State asks this Court to hold that even if the stipulation to facts does not relieve the

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State of its burden to prove the admissibility of those facts, the defendant's failure to object in the court below waives a challenge to admissibility on appeal.

Respectfully submitted this 25<sup>th</sup> day of March, 2016.



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Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Supplemental Brief of Petitioner on the date below as follows:

VIA US MAIL

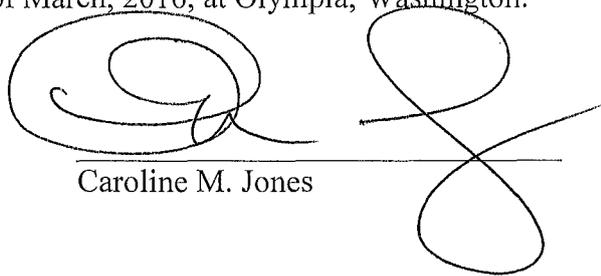
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 25 day of March, 2016, at Olympia, Washington.

  
\_\_\_\_\_  
Caroline M. Jones