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NO. 92293-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

KEVIN RAY CASE,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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 ORIGINAL

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STATEMENT OF THE CASE

By information filed December 23, 2014, the Thurston County Prosecutor charged the defendant Kevin R. Case with one count of felony violation of a no contact order. CP 3-4. The information alleged the following:

COUNT I - FELONY VIOLATION OF POST CONVICTION NO CONTACT ORDER/DOMESTIC VIOLENCE - THIRD OR SUBSEQUENT VIOLATION OF ANY SIMILAR ORDER, RCW 26.50.110(5), RCW 10.99.020 AND RCW 10.99.050 - CLASS C FELONY:

In that the defendant, KEVIN RAY CASE, in the State of Washington, on or about December 18, 2013, with knowledge that the Olympia Municipal Court had previously issued a no contact order, pursuant to Chapter 10.99 in Olympia Municipal Court on July 15, 2013, Cause No. 3Z0193715, did violate the order while the order was in effect by knowingly violating the restraint provisions therein pertaining to Lindsay R. Prior, a family or household member, pursuant to RCW 10.99.020; and furthermore, the defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34 RCW, or a valid foreign protection order as defined in RCW 16.50.020.

CP 3 (capitalization, bold and underlining in original).

This matter later came on for trial before a jury during which the state called three witnesses: John Sedivec, Jose Sanchez (a transit security guard) and Officer Jeff Herbig. RP 9, 22, 29. These witnesses testified that the defendant had violated the provisions of a valid protection order. *Id.* At the end of the trial the court read a stipulation by the parties concerning the defendant's prior convictions for violating "the provisions of a protection

order, restraining order, or no-contact order issued under Washington State Law.” CP 66; *see also* Exhibit No. 5, Stipulation. It was the only evidence presented on this issue. RP 1-103. It stated:

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 Washington State Law.

CP 66; *see also* Exhibit No. 5, Stipulation.

After reading this stipulation the court instructed the jury with neither party voicing any objections or exceptions. RP 65, 68-79; CP 45-55. Following argument the jury retired for deliberation and eventually returned a verdict of guilty. CP 57; RP 99-100. The court later sentenced the defendant to 55½ months in prison. CP 60-69. The defendant thereafter filed timely notice of appeal. CP 76-86, 87-88.

The defendant made the following four arguments on appeal:

1. Substantial evidence does not support the defendant’s conviction for felony violation of a no contact order because the evidence presented at trial fails to prove that the defendant had two prior convictions for violations of no contact orders issued under one or more of the statutes listed in RCW 26.50.110(5).
2. The court violated the defendant and the public’s right to a public trial when it held six evidentiary hearings outside the presence of the defendant and the public.
3. Trial counsel’s failure to object to the trial court’s routine policy of restraining in-custody defendant’s during trial and trial

counsel's failure to object when a police officer told the jury that the state's witnesses were truthful and the defendant was not denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

4. The trial court erred when the defendant contested the existence of any of his prior convictions and the court then failed to require the state to present any competent evidence that the defendant had prior convictions.

See Brief of Appellant.

The Court of Appeals agreed with the defendant's first argument and reversed, holding as follows:

Although the State proved to the jury all the elements of the charge of felony violation of an NCO, it failed to present evidence to satisfy the threshold determination that Case's prior convictions were for violating court orders issued under one of the specific RCW chapters listed in former RCW 26.50.110(5). Accordingly, we hold that there was insufficient evidence to support a conviction for felony violation of an NCO and dismissal of the charge is the appropriate remedy.

State v. Case, No. 46140-4-II, 2015 WL 4744008, at 4 (Wn. Ct. App. Aug. 11, 2015).

Based upon this decision, the court did not address the defendant's other claims. *State v. Case*, No. 46140-4-II, 2015 WL 4744008, at 2 ("Because we reverse and dismiss Case's conviction, we do not address Case's [other] claims . . ."). The state subsequently filed a Petition for Review, which this court has granted.

ARGUMENT

1. The Court of Appeals' decision is internally consistent and it follows the current decisions of this court and the courts of appeals.

As a review of RCW 26.50.110(5) clarifies, in order to elevate a violation of a protection order under RCW 26.50.110(1) to a felony under RCW 26.50.110(5), the state has the burden of proving that the defendant has two prior qualifying convictions for violating an order issued under one of the listed statutes. Whether or not the state has the burden of proving this to the jury as a matter of fact or to the court as a matter of law has previously been in dispute between Division I and Division II of the Court of Appeals. In *State v. Carmen*, 118 Wn.App. 655, 77 P.3d 368 (2003), Division I of the Court of Appeals unequivocally stated that the issue of what type of orders were previously violated is one the court decides, not the jury. In *State v. Arthur*, 126 Wn.App. 243, 108 P.3d 169 (2005), this court rejected the analysis in *Carmen* and held that the character of the prior convictions as violations of one or more of the listed statutes was an element of the offense that the state had the burden to prove to the jury beyond a reasonable doubt.

In *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005), this court addressed a related issue. In that case the defendant appealed a conviction for felony violation of a no contact order under RCW 26.50.110(1)&(5), arguing that the state had the burden of proving that the underlying order and the prior

orders violated were “valid.” After discussing both *Carmen* and *Arthur*, this court held that the underlying validity of the order alleged to have been violated or the orders underlying the prior convictions was a legal issue for the trial court to determine, not a factual element that the state had the burden of proving to the jury. In *State v. Gray*, 134 Wn.App. 547, 138 P.3d 1123 (2006), a case decided after *Miller*, Division I took the position that the *Miller* decision was a complete vindication of Division I’s position in *Carmen*. The court in *Gray* held:

In sum, prior convictions for violating NCOs are only relevant to prove felony violation of an NCO under RCW 26.50.110(5) if the previously-violated NCOs were issued under the listed statutes. *Carmen* and *Miller* establish that the statutory authority for those NCOs is not an essential element of the crime to be decided by the jury but rather a threshold determination the court makes as part of its “gate-keeping function” before admitting the prior convictions into evidence for the jury’s consideration. *Miller* resolved the *Carmen–Arthur* dispute in *Carmen*’s favor, and we agree with the reasoning in both cases. We therefore decline to apply *Arthur* here.

State v. Gray, 134 Wn.App. at 556 (footnote omitted).

In the case at bar Division II of the Court of Appeals specifically accepted Division I’s analysis of *Miller*. The Court of Appeals held as follows:

We agree with *Gray* that our holding in *Arthur* is inconsistent with our Supreme Court’s analysis in *Miller*. Therefore, we decline to follow *Arthur* and hold that the authority under which the court orders the defendant was convicted of violating was issued is not an element of the crime of felony violation of an NCO.

State v. Case, No. 46140-4-II, 2015 WL 4744008, at 4 (Wn.Ct.App. Aug. 11, 2015).

The decisions in *Carmen*, *Miller*, *Gray* and now the case at bar are all in accord on the point that the authority under which the prior no-contact orders were issued is not an element of the crime that the jury must decide. Rather, the only issue for the jury to decide as an element of the offense is the existence of two prior violations. However, the decisions in *Carmen*, *Miller*, and *Gray* are also in accord with the point that Division II makes in the case at bar: that the state must prove to the trial court that the two prior convictions arose from violations of a protection order issued under one of the enumerated statutes. In *Miller*, this court put the proposition as follows:

We hold that the “existence” of a no-contact order is an element of the crime of violating such an order. However, the “validity” of the no-contact order is a question of law appropriately within the province of the trial court to decide as part of the court’s gate-keeping function. The trial judge should not permit an invalid, vague, or otherwise inapplicable no-contact order to be admitted into evidence.

State v. Miller, 156 Wn.2d at 23.

Thus, the decision in this case is neither at odds with the decision in *Miller* nor the decisions in *Carmen* and *Gray*.

2. A stipulation that a 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” is no waiver of the state’s burden to prove that the two prior convictions arose from violations of orders issued under RCW chapters 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34.

The state argues that the defendant waived any argument that his two prior convictions did not arise from violation of orders issued under RCW Chapters 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34. A proper analysis of this argument requires a careful review of the actual stipulation and the statute under which the defendant was charged. The stipulation reads:

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 Washington State Law.

CP 66; *see also* Exhibit No. 5, Stipulation.

By contrast, the statute under which the state charged the defendant reads as follows:

(5) A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.46, 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, 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, 9A.46, 9.94A, 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).

As a careful review of the stipulation reveals, the defendant agreed to the existence of a specific fact: that he “had at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Washington State Law.” The introduction in the stipulation specifically identifies it as an agreement “that certain facts are true.” By contrast, the statute requires that the state prove that “the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9A.46, 9.94A, 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.”

In this case, had the defendant stipulated that his prior convictions arose from “violating the provisions of an order issued under this chapter, chapter 7.90, 9A.46, 9.94A, 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” then he would have been stipulating both to a factual element of the offense that the jury had to determine (did he have two prior convictions) as well as the legal element that the court had to determine (did he have prior convictions under the enumerated statutes). In this case the defendant did not stipulate to the statutes under which the prior convictions arose. Rather, he stipulated that

his prior convictions arose from violations “under Washington State law.” The former is a subset of the latter. As such, a stipulation to the latter does not prove the former. Consequently, the state should not be heard to argue that the defendant’s stipulation to a fact that the jury had to determine in any way constituted a stipulation to a legal question that the state had the burden of proving to the court.

3. The Court of Appeals was correct that the trial record did not include evidence sufficient to support a conviction for felony violation of a no contact order.

The state argued that since objections to otherwise inadmissible evidence can be waived and since evidentiary error are not presumed to be prejudicial or reversible the conviction in the case at bar should be sustained because any error in the admission of the stipulation was harmless beyond a reasonable doubt. In so arguing the state misperceives a critical part of the holdings in *Carmen*, *Gray* and *Miller*. As those cases and the case at bar clarify, in order to sustain a conviction for felony violation of a no contact order, the record before the trial court must contain evidence sufficient to convince the trial court that the defendant’s prior convictions arose from violating one of the enumerated statutes.

As was mentioned previously, the universe of “all violations of no contact orders issued under RCW 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34” is a subset of the universe of “all violations of no contact

order issued under Washington law.” Indeed, both are subsets of the universe of “all violations of Washington law.” Thus, the only thing that a stipulation to “a violation of no contact order issued under Washington law” proves is that it *might be* a violation of “a no contact order issued under RCW 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34.” As such the stipulation is relevant and admissible but no alone sufficient to prove the statutes under which the convictions arose. By the same token, a stipulation to “a violation of any Washington criminal statute” also *might be* a violation of “a no contact order issued under RCW 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34.”

However, as the decisions in *Carmen*, *Gray* and *Miller* as well as the case at bar hold, the state must prove that the prior violations *are* convictions of “no contact order issued under RCW 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34,” not just that they *might be*. Thus, in this case the Court of Appeals’ holding that “there was insufficient evidence to support a conviction for a felony violation of an NCO” is fully supported by the decisions in *Carmen*, *Gray* and *Miller*.

4. This Court should refuse to consider an invited error claim because the state did not make this argument in the Court of Appeals.

Absent a compelling reason, this court will not consider an argument raised for the first time in a Petition for Review or in a supplemental brief.

See Douglas v. Freeman, 117 Wn.2d 242, 814 P.2d 1160 (1991); *see also Cummins v. Lewis County*, 156 Wn. 2d 844, 133 P.3d 458 (2006). For example, in *State v. Halstien*, 122 Wn.2d 109, 857 P.2d 270 (1993), a juvenile convicted of burglary with sexual motivation obtained review by the Supreme Court on the issue whether or not the sexual motivation statute was constitutionally deficient when applied to non-sex cases. In a supplemental brief, the defendant argued that the trial court had also erred when it imposed a registration requirement because that statute only applied to adult convictions. Although the court found potential merit in this argument given the language of the applicable statute, it still refused to address the issue because it had not been raised on appeal. The court held:

Regardless, we do not address this issue because it was not raised on appeal. An issue not raised or briefed in the Court of Appeals will not be considered by this court.

State v. Halstien, 122 Wn. 2d at 130 (citing *State v. Laviollette*, 118 Wn.2d 670, 826 P.2d 684 (1992)).

In the case at bar the state made no invited error argument before the Court of Appeals neither did it brief this issue. *See* Brief of Respondent, pages 1-6. Consequently, as in *Halstien*, this court should refuse to consider this argument the state made for the first time in the Petition for Review. In addition, as the following explains, even were this court to consider this argument, there is no proper claim of invited error in this case.

The invited error doctrine prohibits a party from setting up an error below and then complaining of it on appeal. *Nania v. Pac. NW. Bell Tel. Co.*, 60 Wn.App. 706, 806 P.2d 787 (1991). The doctrine applies when a party takes affirmative and voluntary action that induces the trial court to take an action that the party later challenges on appeal. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 10 P.3d 380 (2000).

For example, a party may not propose a jury instruction during trial, and later complain on appeal that the court erred in granting the party's request to use the instruction. *State v. Aho*, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999). The key point of the invited error doctrine is that a party may not procure an affirmative action at trial and then complain on appeal that the trial court erred in granting or allowing the case to proceed with that affirmative action. This rule is a corollary to the rule that states that a party may not urge an error on appeal if that party did not object to it in the trial court. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995).

In the case at bar the record does not even show who proposed the factual stipulation, although a careful look at the document certainly implies that the state prepared it. Neither does the record show that the defendant somehow procured an affirmative action at trial by signing the stipulation. In making this argument the state appears to forget that this is a criminal case during which the state bore the burden of proving both (1) that the defendant

had at least two prior convictions for violating a protection order, and (2) that those protection orders had been issued under one of the enumerated statutes. The fact that the defendant stipulated to the former in no way excused the state from failing in its burden of proving the latter. Thus, the invited error doctrine has no application in this case even were this court disposed to consider it.

5. This Court should refuse to consider a claim of incorrect remedy because the state did not make this argument in the court of appeals.

In this case the state has also argued for the first time in its Petition for Review that the Court of Appeals erred in its choice of remedies. Thus, the state argues that the Court of Appeals should have either remanded the case for entry of a conviction for misdemeanor violation of a no contact order or it should have remanded for trial on that same misdemeanor charge. However, the state made no such argument before the Court of Appeals. The following gives the last paragraph of the state's first argument in reply to the defendant's claim of insufficient evidence:

Case is incorrect that the statutory basis of the orders he was convicted of violating on previous occasions is an element of the offense for which he was on trial. Even if it were, it is not logical to believe that he was stipulating only to the fact of the convictions and not to the validity of the underlying orders, particularly when he did not object to jury instructions which did not require the State to prove it.

Brief of Respondent, page 5.

As is apparent from this final paragraph, the state did not argue to the Court of Appeals in the alternative that the court should remand for entry of a misdemeanor conviction should the court accept the defendant's argument. Neither did the State make any such argument in the alternative in the conclusion section of its brief. This section stated:

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Case's conviction and his sentence.

Brief of Respondent, page 24.

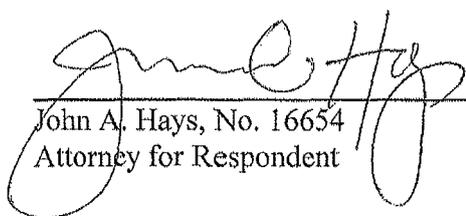
Having failed to present any argument in the alternative that the Court of Appeals should remand this case to the trial court either for entry of a conviction for a misdemeanor or for a new trial on a misdemeanor, this court should not now allow the state to raise this issue.

CONCLUSION

The Court of Appeals was correct that the evidence at trial does not prove the essential element that the defendant's two prior convictions arose from violations of orders issued under RCW Chapters 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34.

DATED this 1st day of April, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Respondent

APPENDIX

RCW 26.50.100(5)

(5) A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.46, 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, 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, 9A.46, 9.94A, 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.

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

KEVIN R. CASE,
Appellant.

NO. 92293-4

AFFIRMATION OF
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-mailed and/or placed in the United States Mail the Supplemental Brief of Respondent with this Affirmation of Service Attached to the indicated parties:

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Dated this 1st day of April, 2016, at Longview, WA.


Diane Hays

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Subject: Supplemental Brief of Respondent - State v. Case - No. 92293-4

To the Clerk of the Court:

Attached please find a pdf copy of Respondent's Supplemental Brief for filing in the case noted below. Please note that the parties have agreed to service by e-mail.

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