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May 25, 2016
Court of Appeals
Division I
State of Washington

NO. 73762-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MARKNSEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN S. LUM

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. CROSS-ASSIGNMENT OF ERROR¹

The trial court erred in finding that the defendant “lacks sufficient funds to prosecute an appeal and applicable law grants defendant a right to review at public expense” in the absence of any evidence regarding the defendant’s then-current financial circumstances.

B. ISSUES PRESENTED

1. Where the defendant agrees that the evidence submitted to the jury was sufficient to support the jury’s findings on the essential elements of the charges, and where the defendant stipulated to his prior convictions without raising any objection to their admissibility, is the evidence sufficient to support the convictions despite the lack of evidence in the record establishing the admissibility of the prior convictions?

2. Where the trial court’s post-sentencing finding of indigence was unsupported by any evidence in the record, and where there is also no evidence in the record indicating that the

¹ The State did not cross-appeal the trial court’s finding of indigence because the State was not seeking affirmative relief. See State v. Kindsvogel, 149 Wn.2d 477, 481, 69 P.3d 870 (2003). However, the State assigns error to that finding in opposing the defendant’s request for a finding that it would be improper to order him to pay appellate costs. Cf. id. (party not seeking affirmative relief may assign error to factual findings it seeks to have the Court of Appeals review in order to establish different grounds to affirm trial court’s decision); State v. Sims, 171 Wn.2d 436, 442-43, 256 P.3d 285 (2011).

defendant lacks the future ability to pay financial obligations, should this Court reject the defendant's request to preemptively prohibit the award of appellate costs to the State?

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Michael Marknsen, by amended Information with two counts of Domestic Violence Felony Violation of a Court Order, with special allegations that the crimes were committed against a family or household member. CP 8-9. A jury found Marknsen guilty as charged on both counts, and found the special allegations proven. CP 73-76. The trial court imposed concurrent standard range sentences of 60 months in prison on each count. CP 84-86. Marknsen timely appealed. CP 91.

2. SUBSTANTIVE FACTS.

Marknsen was charged with willfully violating, on two occasions, court orders that prohibited him from contacting Maria Martinez-Gomez, at a time when he had "at least two previous convictions for violating the provisions of an order issued under RCW chapter 10.99, 26.50, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020." CP 8-9. Count One involved an incident on May 10, 2013, where a

Department of Corrections officer visited Marknsen at his hotel room and found Martinez-Gomez in the same room. CP 5, 8. Count Two involved an incident on July 8, 2013, where Marknsen was stopped while driving in a car with Martinez-Gomez. CP 9-10.

At trial, the jury was instructed that in order to convict the defendant, the following elements must be proved beyond a reasonable doubt:

- (1) That on or about [the relevant date for the applicable count], there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (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 for violating the provisions of a court order;** and
- (5) That the defendant's act occurred in the State of Washington.

CP 64 (emphasis added). Rather than have the State prove his prior convictions, Marknsen chose to sign a stipulation as to that element, which stated, "The parties stipulate that the defendant had twice been previously convicted for violating the provisions of a court order prior to May 10, 2013." CP 52.

The stipulation was signed by Marknsen, defense counsel, and the prosecutor, and was read to the jury during the State's

case in chief. CP 52; RP² 762. When the jury retired to deliberate, the stipulation was sent back into the jury room along with the exhibits at the joint request of the parties. Supp. CP __ (sub 105A at 16). At no point did Marknsen raise an objection regarding the admissibility of the prior convictions in the absence of a stipulation, nor regarding the propriety of allowing the jury to hear the stipulation regarding his prior convictions. In closing, Marknsen told the jury that the only issue in the case was whether the woman found in his presence in each incident was actually Martinez-Gomez, and referred to the stipulations³ as addressing issues that were "not in dispute." RP 960, 966-67.

D. ARGUMENT

1. MARKNSEN'S CONVICTIONS ARE SUPPORTED BY SUFFICIENT EVIDENCE.

Marknsen concedes that the evidence submitted to the jury was sufficient to support the jury's finding that all elements of the charged crimes had been proved beyond a reasonable doubt. However, he contends that the evidence contained in the record was nevertheless insufficient to support his convictions because the

² The 19 volumes of the verbatim report of proceedings are consecutively paginated, and will be collectively referred to as "RP."

³ In addition to the stipulation regarding his prior convictions, Marknsen also stipulated that he and Martinez-Gomez had a child in common. CP 51.

State did not prove to the trial court the admissibility of the prior convictions to which Marknsen stipulated. This claim should be rejected. Not only did Marknsen both invite and waive the alleged error, but by submitting a stipulation to the jury regarding his prior convictions that contained all the information the jury needed to find that element of the crime proven, Marknsen relieved the State of any burden to prove the admissibility of the prior convictions. The submission of the stipulation to the jury was thus proper, and the evidence was sufficient to support the convictions.

- a. Marknsen's Sufficiency Claim Fails In Light Of His Failure To Assign Error To The Trial Court's Acceptance Of His Stipulation And His Implicit Concession That The Evidence Admitted At Trial Was Sufficient To Support The Jury's Verdict On The Essential Elements Of The Charges.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every element of a charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When an appellant claims that there was insufficient evidence to support his conviction, the reviewing court views the evidence and all inferences that can reasonably be drawn from it in the light most favorable to the State. State v. Salinas, 119 Wn.2d

192, 201, 829 P.2d 1068 (1992). Viewing the evidence in that light, if any rational jury “could have found the essential elements of the crime beyond a reasonable doubt,” then the evidence is sufficient to support the conviction. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

RCW 26.50.110, the statute under which Marknsen was convicted in the current case, states that violation of a court order issued under RCW chapter 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34 (or violation of a valid foreign protection order as defined by RCW 26.50.020), which otherwise would be a gross misdemeanor, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under one of the above-listed chapters. RCW 26.50.110(5); State v. Carmen, 118 Wn. App. 655, 656, 77 P.3d 368 (2003). However, the fact that the prior convictions involved a violation of the correct type of court order is not an essential element of the felony crime that the jury must find, but rather a threshold issue of relevance, and thus admissibility, for the court to decide. State v. Gray, 134 Wn. App. 547, 555-56, 138 P.3d 1123 (2006); Carmen, 118 Wn. App. at 663-64 (2003); see State v. Miller, 156 Wn.2d 23, 30, 123 P.3d 827 (2005) (approving of Carmen's reasoning and holding, and

concluding that the validity of the order defendant is charged with violating is an analogous threshold issue of admissibility).

Marknsen concedes that the fact that the prior convictions involved a violation of the type of order listed in RCW 26.50.110(5) is not an essential element of the crimes of which he was convicted, and does not assert that the evidence presented to the jury was insufficient to support the jury's findings on the essential elements. Brief of Appellant at 4. He also does not assign error to the trial court's acceptance of his stipulation regarding his prior convictions or the reading of the stipulation to the jury. Brief of Appellant at 1. For those reasons, his sufficiency claim must fail. See Green, 94 Wn.2d at 221 (sufficiency inquiry asks whether evidence admitted at trial allowed a rational trier of fact to find "the essential elements of the crime" beyond a reasonable doubt).

- b. Even If This Court Were To Interpret Marknsen's Brief As Assigning Error To The Trial Court's Acceptance Of The Stipulation Regarding The Prior Convictions, The Alleged Error Was Invited, And The Claim Of Error Was Waived.

Under the invited error doctrine, the appellate courts will not review a party's assertion of an error to which the party "materially contributed" at trial. In re Dependency of K.R., 128 Wn.2d 129,

147, 904 P.2d 1132 (1995). This doctrine applies even to constitutional errors such as judicial comments on the evidence that, if manifest, would otherwise be reviewable for the first time on appeal under RAP 2.5. State v. Elmore, 139 Wn.2d 250, 280, 985 P.2d 289 (1999). Courts apply the invited error doctrine strictly, sometimes with harsh results. See, e.g., State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (holding doctrine prohibited review of legally erroneous jury instruction because defendant proposed it, even though it was standard WPIC at the time).

Marknsen implicitly complains that the jury should not have been allowed to hear his stipulation until the State had submitted evidence to the trial court regarding the admissibility of the prior convictions. However, the record shows that Marknsen wanted the stipulation to be submitted to the jury, and explicitly requested that the written stipulation be provided to the jury during deliberations. RP 687-88, 772; supp. CP __ (sub 105A at 16). He thus invited the error of which he now complains.

Even if Marknsen had not invited the alleged error, he waived it by failing to raise a timely objection. A defendant may not challenge a trial court's ruling admitting evidence unless a timely objection or motion to strike is made. ER 103(a)(1); RAP 2.5(a);

State v. Finch, 137 Wn.2d 792, 819, 975 P.2d 967 (1999).

Accordingly, this Court has already determined that any challenge to the admissibility of a prior conviction in a prosecution for felony violation of a court order on the grounds that the prior conviction did not involve a violation of the correct type of order is waived if an objection is not made at the time the conviction is admitted. State v. Gray, 134 Wn. App. 547, 557-58, 138 P.3d 1123 (2006).

Marknsen failed to challenge the admissibility of his prior convictions or object to the submission of his stipulation to the jury at any point during the trial court proceedings. RP 687-88 (no objection when trial court announces that it will read stipulation to the jury), 762-65 (no objection when trial court reads stipulation to jury), 772 (defendant agrees that jury should be instructed that it may consider the convictions addressed in stipulation for purposes of determining whether elements of crime have been proved). He may not now challenge it for the first time on appeal. RAP 2.5(a); See State v. Perez-Cervantes, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000) (admissibility of evidence may not be challenged for first time on appeal).

c. Marknsen's Stipulation Regarding His Prior Convictions Relieved The State Of The Obligation To Prove The Admissibility Of The Prior Convictions.

Even if Marknsen had not invited or waived any alleged error regarding the acceptance or reading of the stipulation by the trial court without first requiring the State to prove the admissibility of the prior convictions, such a claim of error would fail. This is because Marknsen's stipulation relieved the State of any burden to prove the admissibility of the convictions.

If the fact of a prior conviction proves an essential element of the crime charged, the defendant has the right to stipulate to the fact of the conviction and thereby prevent the State from offering 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, 62-63, 950 P.2d 981 (1998). 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) (emphasis in original; internal quotations marks omitted). Put another way, a stipulation to facts which prove an element of the crime charged waives the right to a jury trial as to that element as well as the right to require the State to prove that element beyond a reasonable doubt. State v. Humphries, 181 Wn.2d 708, 714-15, 336 P.3d 1121 (2014).

By stipulating to the fact that he had “twice previously been convicted for violating the provisions of a court order,” which was the only fact the jury needed to find in order to satisfy the relevant element of the charged crimes, Marknsen relieved the State of its obligation to offer evidence to prove that fact. CP 52; Key Design, 138 Wn.2d at 893-94. Because the State had no obligation—and in fact, no right—to offer extrinsic evidence of Marknsen’s prior convictions, the State had no obligation to establish the admissibility of such extrinsic evidence. The trial court therefore did not err in accepting the stipulation and reading it to the jury without first requiring the State to prove the admissibility of the prior convictions. The lack of information in the record regarding the admissibility of those convictions thus has no effect on the propriety or sufficiency of the evidence before the jury. Because the jury was properly given evidence, including stipulations, that was sufficient to

support its findings on the essential elements of the charges, Marknsen's convictions should be affirmed.

d. State v. Case Was Incorrectly Decided And Should Not Be Followed By This Court.

Marknsen's claim that the evidence was insufficient to support his convictions rests entirely on Division Two's decision in State v. Case, 189 Wn. App. 422, 358 P.3d 432 (2015), review granted, 185 Wn.2d 1001 (2016).⁴ Marknsen is correct that Case appears to be factually identical to this case (and countless others). However, Case conflicts with this Court's decision in Gray and ignores binding precedent from our Supreme Court regarding stipulations and waivers of objections to the admissibility of evidence. This Court should therefore decline to follow it.

In Case, Division Two agreed with this Court's decision in Gray that, under Miller, the statutory authority for the orders the defendant was previously convicted of violating is not an element of the crime of felony violation of a court order. Case, 189 Wn. App. at 427-28. The Case court held that in light of Case's stipulation regarding his prior convictions (which was functionally identical to the stipulation in this case), the State had presented sufficient evidence to the jury to support the conviction. Id. at 425, 428. The

⁴ The supreme court will hear oral argument in Case on June 21, 2016.

Case court also properly noted that, under Miller, whether the prior convictions are qualifying predicate offenses is a question of law for the trial court to decide as part of its “gate-keeping function.” Id. at 429.

However, from that, the court concluded that the State must in all cases submit sufficient evidence to the trial court that the prior convictions involved violations of the correct type of order before the trial court can “allow the State to submit evidence to the jury of a defendant’s prior convictions for violating court orders.” Id. As in this case, the prosecutor in Case had offered no evidence regarding the prior convictions beyond the stipulation. Id. Division Two concluded that “[a]lthough 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),” and that therefore there was insufficient evidence to support the conviction. Id. at 429-30.

The Case court’s reasoning is flawed, and should not be followed by this Court, because it fails to take into account several important facts and principles. First, the Case court failed to

grapple with the fact that Miller, in discussing the trial court's role in assessing the admissibility of a prior conviction, never addressed how a stipulation might change the need for the trial court to exercise its "gate-keeping function." Id. at 429-30; Miller, 156 Wn.2d at 31. The Case court similarly did not consider the fact that a defendant's stipulation to prior convictions relieves the State of the burden to produce admissible evidence of those convictions. Case, 189 Wn. App. at 429-30; Humphries, 181 Wn.2d at 714-15; Key Design, 138 Wn.2d at 893-94. Finally, the Case court failed to consider the fact that challenges to the admission of evidence are waived if not raised promptly at the time the evidence is admitted.⁵ Case, 189 Wn. App. at 429-30; ER 103(a)(1); Finch, 137 Wn.2d 792, 819; Gray, 134 Wn. App. at 557-58.

Because Case fails to take these principles into account, this Court should not follow it. This Court should instead follow binding precedent regarding the effect of stipulations and the waiver of objections to the admissibility of evidence, and affirm Marknsen's convictions.

⁵ It appears that, in Case, the issue of waiver was not briefed by either party in the Court of Appeals.

2. THE IMPOSITION OF APPELLATE COSTS IS APPROPRIATE IF THE STATE PREVAILS IN THIS APPEAL.

Marknsen asks this Court to rule that, should the State prevail on appeal, Marknsen cannot not be required to repay appellate costs, on the grounds that he is currently indigent. This claim should be rejected. Not only is there no evidence in the record to support a finding that Marknsen is currently indigent, but it is a defendant's future ability to pay costs, rather than his present ability, that is most relevant in determining whether it would be unconstitutional to require him to pay appellate costs. Because the record contains no information from which this Court could reasonably conclude that Marknsen has no likely future ability to pay, and because the trial court's finding that Marknsen is indigent is unsupported by any evidence in the record, this Court should not forbid the imposition of appellate costs.

The State respectfully disagrees with this Court's approach to costs on appeal set forth in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). A decision on the State's petition for review of Sinclair is expected on May 31, 2016.

As in most cases, Marknsen's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial.

As such, the record does not contain information about Marknsen's financial status and the State did not have the right to obtain information about Marknsen's financial situation.

Several weeks after sentencing, Marknsen obtained an ex-parte Order of Indigency by presenting, off the record, a proposed order containing a finding that "the defendant lacks sufficient funds to prosecute an appeal." CP 92. It appears that Marknsen did not provide the trial court with any supporting declaration or documentation regarding his then-current financial circumstances.⁶ Nevertheless, without acknowledging the lack of evidence supporting the order's findings, an otherwise-uninvolved judge signed the proposed order on the trial judge's behalf. CP 92-93.

A trial court's factual findings are erroneous if they are not supported by "substantial evidence" in the record. In re Pers. Restraint of Davis, 152 Wn.2d 647, 679, 101 P.3d 1 (2004).

"Substantial evidence" exists "where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of

⁶ It is not just the appellate record that lacks information of the necessary supporting documentation. Undersigned counsel combed through the superior court's electronic court records (ECR) and found no evidence that any documentation regarding Marknsen's finances was provided to the trial court to support the request for a finding of indigency on appeal.

the truth of the finding.” Id. (internal quotation marks omitted).

Here, there is absolutely no evidence in the record indicating that Marknsen was constitutionally or statutorily indigent at the time the Order of Indigency was signed. As such, the trial court’s finding of indigency was made in error, and cannot support a finding on appeal that Marknsen has no current ability to contribute toward the cost of his appeal.

Even if the trial court’s finding of then-current indigency had been supported by sufficient evidence, the trial court made no findings regarding Marknsen’s future ability to pay financial obligations. CP 92-93. It is a defendant’s future ability to pay, rather than simply his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments). The record is devoid of any information that would support a finding that the defendant is unlikely to have any future ability to pay appellate costs.

In contrast, the record contains evidence suggesting that Marknsen is unlikely to be permanently indigent after release from prison. Given that he was 44 years old at sentencing and received a sentence of no more than five years in prison, Marknsen will have a considerable portion of his working years ahead of him upon release. CP 86, 88. While awaiting trial in this case, Marknsen had sufficient resources to post a \$100,000 bond. RP 996; supp. CP ___ (sub 9). Additionally, he indicated at sentencing that he owns a home. RP 994-95, 998. And in March 2016, Marknsen filed documentation in the trial court indicating that he had the resources to post a \$125,000 appeal bond. Supp. CP ___ (sub 146 at 2).

Because the record in this case contains no evidence from which this Court could reasonably conclude that the defendant has no present or future ability to pay appellate costs, and in fact contains evidence to the contrary, any exercise of discretion by this Court to prohibit an award of appellate costs in this case would be unreasonable and arbitrary.

This Court should also reject Marknsen's claim that he has a due process right to a full hearing in the trial court before appellate costs can be awarded. Brief of Appellant at 10. Marknsen relies on State v. Abd-Rahmaan, 154 Wn.2d 280, 111 P.3d 1157 (2005),

which is in turn based on Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 2600-02, 33 L. Ed. 2d 484 (1972), for his claim that he is entitled to a hearing, at which he asserts he must be permitted to cross-examine the State's witnesses.

In Morrissey v. Brewer, the United States Supreme Court held that due process requires that the defendant be given certain procedural protections, such as the ability to cross-examine adverse witnesses, at a parole revocation hearing. 408 U.S. 471, 92 S. Ct. 2593, 2600-02, 33 L. Ed. 2d 484 (1972). Abd-Rahmaan, applied Morrissey to sentence modification hearings. 154 Wn.2d at 291.

However, the holdings of Morrissey and its progeny turn on the fact that the hearings in question involved the potential termination of the defendant's liberty. E.g., Morrissey v. Brewer, 408 U.S. at 482; State v. Dang, 178 Wn.2d 868, 883, 312 P.3d 30 (2013) (finding a limited right to cross-examination because, "[I]ike parole, sentencing modification, and SSOSA revocation, the trial court's revocation of an insanity acquittee's conditional release implicates a conditional liberty dependent on the observance of special terms and conditions."). The imposition of financial obligations, including restitution, does not involve a loss of liberty.

State v. Fambrough, 66 Wn. App. 223, 226-27, 831 P.2d 789 (1992); State v. Smith, 33 Wn. App. 791, 799, 658 P.2d 1250 (1983). The limited due process rights to a hearing and confrontation enumerated in Morrissey therefore do not apply to the imposition of appellate costs, and this Court should allow the imposition of such costs without a further hearing.

E. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Marknsen's convictions and allow the imposition of appellate costs.

DATED this 25th day of May, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
STEPHANIE FINN GUTHRIE, WSBA #43033
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Thomas Kummerow, the attorney for the appellant, at Tom@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in State v. Michael Marknsen, Cause No. 73762-7, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 25 day of May, 2016.


Name:
Done in Seattle, Washington