72001-5

NO. 72001-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ERIC SLANE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN, JUDGE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DEBORAH A. DWYER
Senior 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. ISSUE

1. A defendant in a criminal trial has a constitutional right to the assistance of counsel, as well as to proof to a jury beyond a reasonable doubt of every element of the charged crimes before he may be convicted. Slane's attorneys acknowledged during their remarks to the jury that Slane caused the damage at issue, but argued that he was unable to form the intent required for a finding of malicious mischief due to his mental health issues. Slane objected to the mental defense. Slane's attorneys put on expert testimony in support of diminished capacity, and consistently maintained that Slane should be found "not guilty" of all charges. The State was required to, and did, put on evidence in support of every element of the charged crimes. Were Slane's constitutional rights fully protected?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Eric Slane was charged by information and amended information with two counts of Malicious Mischief in the Second Degree,[1] five counts of Malicious Mischief in the Third

[1] RCW 9A.48.080(1)(a): "A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously . . . [c]auses physical damage to the property of another in an amount exceeding two hundred fifty dollars."

Degree,[2] and one count of Bail Jumping.[3] CP 1-10, 41-45, 109-13, 185-87. The State alleged that, in the early morning hours of August 26, 2011, Slane caused damage to numerous cars parked in the vicinity of the group home where he resided in northwest Seattle. Id. The State further alleged that Slane had subsequently failed to appear for a required court hearing. Id.

A jury found Slane guilty on all eight counts. CP 188-95. The trial court imposed a low-end sentence of four months of confinement on the felonies, and 312 days (with credit for 312 days served) on the gross misdemeanors. CP 196-205. The court suspended the remainder of the sentence and placed Slane on probation for 24 months. CP 203. As a condition of probation, Slane was required to obtain a mental health evaluation and follow all treatment recommendations. CP 204.

2. SUBSTANTIVE FACTS

In the early morning hours of August 26, 2011, multiple cars all up and down Second Avenue Northwest in the Broadview

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[2] RCW 9A.48.090(1)(a): "A person is guilty of malicious mischief in the third degree if he or she . . . [k]nowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree."

[3] RCW 9A.76.170(1): "Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state . . . and who fails to appear . . . as required is guilty of bail jumping."

neighborhood of Seattle sustained damage. 4RP 24; 5RP 39; 8RP 14.[4] Six victims testified at trial that their tires were damaged: Celeste Case-Curry (4RP 12), Max Anderson (4RP 31, 47), Thomas Green (4RP 56, 59), Marcia Meek (5RP 25-27), Sanjay Pitroda (5RP 64-66; CP 131-32, 136), and Bernard Robel (8RP 36-39). A seventh victim, Marc Jenefsky, testified that a rear window on his car had been shattered, and an unbroken bottle with no lid was found inside; the bottle smelled like urine, and the entire inside of the car had been sprayed with the liquid. 4RP 108.

One of the victims, Marcia Meek, caught sight of a person in the act of damaging tires. Meek was awakened by a loud popping noise. 5RP 23. She saw a man crouched down by a truck, plunging a knife into a tire. Id. Meek yelled out, "Hey, what are you doing?" Id. The man jumped up, and looked right at Meek before running away. 5RP 24. He was wearing dark clothing and a white hat. Id.

Seattle Police Officer Cole Nelson responded to the scene at about 1:12 a.m. on August 26th. 8RP 7-9. Nelson coordinated a search for the suspect, but police initially were not successful.

[4] The State will refer to the verbatim report of proceedings as follows: 1RP ("Volume I" -- multiple dates); 2RP ("Volume II" – multiple dates); 3RP ("Volume III" – multiple dates); 4RP (4/22/14); 5RP (4/23/14); 6RP (4/24/14 – a.m.); 7RP (4/24/14 – p.m.); 8RP (5/1/14).

8RP 12-14. At about 2:15 a.m., Nelson was doing paperwork at his patrol car near the scene of the damage when he heard noises in some nearby bushes. 8RP 16. Nelson looked over and saw a person crouched down in the bushes. 8RP 17. Nelson ordered the man to come out; as the man emerged, he dropped a white hat to the ground. 8RP at 17-18. Based on his white hat and dark clothing, the man fit the description of the person seen by Meek damaging tires. 8RP 18. The man had two folding knives in his possession. 8RP 19-21. He told Nelson that he had heard a commotion, and wanted to see what was going on. 8RP 20.

Nelson identified the man by his driver's license as Eric Slane.[5] 8RP 19. There was a Scion parked in front of Slane's address (10753 Second Avenue Northwest) that was not damaged; police learned that this car belonged to Slane. 8RP 22-26.

Evidence supporting Marcia Meek's description of the tire-slasher was subsequently obtained from surveillance video. Max Anderson had three motion-activated cameras mounted on the front of his house. 4RP 27-28. Footage from the cameras showed a man next to the passenger side of Anderson's car, the side on which the damage occurred. 4RP 38-39. Anderson provided

[5] Nelson also identified Eric Slane in court as the man who had been lurking in the bushes. 8RP 18.

relevant footage to the police. 4RP 39; 5RP 38-39. The video showed a man wearing a white baseball cap and a long, dark-colored shirt. 5RP 41-42. The video was played for the jury. 4RP 38.

Evidence collected from Slane supported the conclusion that he was the man observed by Meek damaging tires, and portrayed in the surveillance video next to Anderson's damaged tires. This evidence included the two knives taken from Slane when he emerged from the bushes, as well as the shirt and the hat. 4RP 74-75. The size of the punctures on Anderson's damaged tires was consistent with the width of the knife blades. 5RP 44-48. The blades actually smelled like rubber. 8RP 21. The white baseball cap had areas of dark discoloration on the top of the brim. 5RP 44.

Janet Llapitan, the courtroom clerk supervisor for the Department of Judicial Administration and a custodian of records for the King County Superior Court, testified in support of the bail jumping charge. 4RP 116-18. Llapitan identified court documents showing that Slane had been charged with a class C felony and released by the court on conditions, and that he had failed to

appear at a scheduled court hearing of which he had notice. 4RP 119-27.

Slane opted not to testify at trial. 6RP 111-12; 8RP 43.

3. DIMINISHED CAPACITY DEFENSE

The first mention of a diminished capacity defense came almost six months before trial commenced. 1RP 11, 15; 2RP 232, 248. The State asked for a continuance of the trial date, based on disclosure of two defense expert witnesses and voluminous discovery, all relating to diminished capacity. 1RP 15. Slane did not express any opposition to the diminished capacity defense.

Months later, and only weeks before the start of trial, Slane's attorneys confirmed that they would be presenting a diminished capacity case.[6] 1RP 65. Again, Slane expressed no opposition.[7]

During voir dire, defense counsel questioned the jury extensively on their attitudes toward a mental health defense. 3RP 347-50, 355-59, 383, 386-90, 393-95, 397-409. Slane expressed no opposition to this discussion.

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[6] Slane was represented by two attorneys, Lauren McClane and Zannie Carlson. 1RP 21.

[7] Slane was not reluctant to express himself to the court when he opposed an action his attorneys were taking. In fact, earlier at this same hearing, Slane had vigorously opposed his attorneys' motion to sever the bail jumping count from the malicious mischief counts. 1RP 28-31.

In her opening statement, defense counsel told the jury that Slane was a paranoid schizophrenic. 3RP 422. Counsel acknowledged that Slane, who she asserted was in the midst of a psychiatric emergency at the time, had caused property damage to his neighbors; counsel contended, however, that he "did not cause that damage with malice."[8] 3RP 423. Slane for the first time objected: "I did not want this defense. They did this – they wouldn't let me come to court without this defense. It was the only way I could get in front of a jury. I need witnesses." 3RP 423. Slane added several obscenities (3RP 423, 424), but finally quieted down and let his attorney finish her opening statement without further interruption. 3RP 424-29.

Counsel elaborated on Slane's defense: "The State will be bringing in witness after witness showing you the damages. But we know that Eric caused that damage. We're not here to debate that." 3RP 426. Counsel pointed out that "[t]he real question in this case is whether Eric had the necessary state of mind to cause malicious mischief, which is what he's charged with. The State

[8] To convict Slane of malicious mischief, the State had to prove that he "knowingly and maliciously" caused physical damage to the property of another. RCW 9A.48.080, 9A.48.090; CP 166-68, 178-82. "Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person." CP 171.

needs to prove that Eric acted with malice, an evil intent or design to vex, annoy, or cause damage or injury to another person." 3RP 426.

Counsel told the jury that Dr. Spizman, a clinical psychologist, had interviewed Slane and reviewed his mental health history and the circumstances of the incident on which the charges were based. 3RP 426-27. Based on this evidence, Spizman would testify that Slane may have lacked the capacity to form a malicious intent due to his mental illness. 3RP 427.

As to the charge of bail jumping, counsel said that Slane's "obsessions and delusions about his case" prevented him from coming to court.[9] 3RP 428.

Despite acknowledging certain acts, counsel told the jury that Slane was "not committing a crime" on the night in question. 3RP 429. Counsel said that the "only just and fair verdict" was "not guilty." Id.

Before presenting the defense case-in-chief, Slane's counsel raised competency concerns, focusing especially on Slane's ability

[9] Slane asserted the affirmative defense of "uncontrollable circumstances" to the charge of bail jumping. CP 176.

to assist in his defense.[10] 5RP 4-7. Counsel referenced Slane's outbursts during voir dire and opening statement.[11] 5RP 5. Counsel did not believe that Slane was angry about the defense that counsel was putting before the jury, but observed that he was somewhat disengaged, and was exhibiting paranoia and delusional guardedness. 5RP 6, 12-13.

The court engaged Slane in a colloquy. Slane confirmed that he understood that his lawyers were questioning his competency. 5RP 9. He demonstrated that he understood the respective roles of the jury, defense counsel, and the prosecutor. 5RP 10-11. He understood that his attorneys were putting forth a mental defense, i.e., that he could not form the intent required to commit the crime charged. 5RP 11-12. When asked whether he could listen to his attorneys' advice, Slane responded, "I can listen to anybody." 5RP 12. He did not express any opposition to the mental defense.

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[10] Months before trial commenced, counsel had requested that Slane undergo a competency evaluation. 1RP 5. Finding reason to doubt competency, the court ordered the evaluation. Id. Slane was ultimately found competent to proceed to trial, based on a report from Western State Hospital and the agreement of counsel. 1RP 11-12.

[11] The record reflects two brief interjections by Slane during voir dire (3RP 345, 373).

The court concluded that Slane understood the proceedings, and that he appeared to be able and willing to assist his attorneys. 5RP 14. The court decided to proceed with the trial, but invited Slane's attorneys to file an affidavit, under seal, with their concerns. 5RP 13, 14-15. The court offered to "continue this conversation," and offered to further inquire once it had a more detailed description of any problems.[12] 5RP 13.

The trial proceeded, and defense counsel supported the diminished capacity defense with testimony from both lay and expert witnesses. Slane's friend Patrick Brockmeyer testified that he had become aware of Slane's paranoid schizophrenia as early as 2005. 5RP 69-72. Slane was at times silent, moody and angry, and he didn't trust anyone. 5RP 72-73. As to the incident in question, Slane had told Brockmeyer that he was trying to gauge how people were thinking about him – their "true intention" toward him. 5RP 77, 88.

Lara Schunneman, Slane's mental health case manager, also testified in support of the diminished capacity defense. Schunneman said that, during the summer of 2011, Slane had become distant, and was disengaged in treatment services.

[12] No such affidavit was ever provided to the court. 8RP 122-23.

5RP 103. When Schunneman saw Slane in a hospital emergency room only days after the tire-slashing incident, he responded to her questions with a blank stare, and any answers he gave were vague and delayed. 5RP 108. Schunneman became concerned enough that she wrote an affidavit to have Slane evaluated for possible involuntary detention. 5RP 113-14.

Finally, the defense called Dr. Paul Spizman, a forensic clinical psychologist, as an expert witness in support of Slane's diminished capacity defense. 6RP 5, 8-10. Spizman evaluated Slane in person, and examined Slane's medical records and his history of involuntary hospitalizations. 6RP 22-26. Spizman also reviewed case manager Lara Schunneman's notes, and he spoke with Slane's friend Patrick Brockmeyer. 6RP 41-51. In addition to the police reports of the incident, Spizman reviewed a video of Slane sitting in the back of the police car; Spizman believed that Slane's behavior, especially the way he was moving his mouth, indicated that he was hearing voices and responding to them.[13] 6RP 51-53.

Dr. Spizman said that Slane exhibited certain symptoms when he decompensated, including selective muteness,

[13] The defense introduced this video at trial, and played it for the jury. 6RP 51-52.

withdrawal, guardedness, suspicion, conspiratorial beliefs, delusions, paranoia, and poor self-care and hygiene. 6RP 30. When persons decompensate, they sometimes urinate in different places or store urine in jars. 6RP 35. Slane, in particular, had in the past stored urine in jars, and sometimes carried it around. Id.

Dr. Spizman believed that Slane was a paranoid schizophrenic. 6RP 16, 23-25. He believed to a reasonable degree of psychological certainty that Slane was experiencing relatively acute symptoms of his illness around the time of this incident. 6RP 17, 59. Spizman believed that the fact that Slane had continued to damage tires even after someone yelled at him indicated that Slane may have lacked an understanding of what he was doing. 6RP 55-56. Spizman opined that there was a "very distinct possibility" that Slane was unable to form the malicious intent necessary for the crime of malicious mischief. 6RP 17, 59.

As to the charge of bail jumping, Spizman's conversations with Patrick Brockmeyer had convinced him that Slane had decompensated in July of 2013.[14] 6RP 62-64. Spizman believed that Slane's mental illness symptoms could have interfered with his ability to appear in court during that time period. 6RP 65-67.

[14] The hearing at which Slane failed to appear took place in July of 2013. CP 175, 186.

Slane never expressed any contemporaneous opposition to this testimony, or to the diminished capacity defense that it supported. It was not until defense counsel informed the court that the defense would be ready to rest after some motions that Slane objected to the defense resting, citing the Sixth Amendment. 8RP 40. Moments later, when counsel confirmed to the court that Slane was "choosing not to testify," Slane said nothing to contradict his attorney. 8RP 43.

When the defense ultimately rested, Slane again objected, citing the Sixth Amendment and his right to competent counsel. 8RP 54-55. After giving counsel a moment to talk things over with Slane, the court asked Slane if the trial could proceed without further disruption. 8RP 56. This precipitated another round of objections from Slane. He told the court that he wanted to "represent [himself] as co-counsel." 8RP 57. He told the court that it would "just have to remove [him] from the courtroom." Id. He then directed a brief diatribe at the court:

> You are out of your mind. I do believe that. I think half the people in this room are out of their mind, and you think I'm out of my mind. So fucking what. You are not getting away with this. And neither am I.

8RP 57. The court warned Slane that he would be removed from the courtroom if he continued to disrupt the proceedings. 8RP 57-58. Slane responded: ""It's my choice. I'm removing myself under protest. How's that?" 8RP 58. The court found that Slane's absence from the courtroom was voluntary, and that he was in any event "completely disruptive." 8RP 58-59.

In her closing argument on Slane's behalf, defense counsel focused from the outset on Slane's mental illness. 8RP 81-84. Counsel then reminded jurors that they had to find beyond a reasonable doubt that Slane acted maliciously. 8RP 84. Counsel then got to the heart of the defense:

> Now, we heard a lot from the State in their case about the what or the who. And, you know, when this case first started, and Ms. Carlson was up here in opening statement we told you right away the what and who. Tires were punctured, cars were damaged, and Mr. Slane did them. That's not what this case is about. The case is about the why. And as you consider, why, as you consider whether Mr. Slane acted maliciously, you may consider evidence of his mental health disorder. It may be taken into consideration to determine whether or not Mr. Slane had the capacity to form intent.

8RP 85. Counsel put Slane's actions in the context of his mental illness. 8RP 85-88. Counsel replayed the DVD of Slane in the back of the patrol car, referencing Dr. Spizman's opinion that Slane

was responding to internal stimuli. 8RP 88. Counsel referenced Slane's mental decompensation during the summer of 2011. 8RP 90. Counsel pointed out that Dr. Spizman was the only expert to testify in the case, and argued that if the State had an expert to counter Spizman's opinion, the State would have called that expert. Id.

Counsel also used one of the acknowledged acts to specifically support an important aspect of Slane's defense – that he had severely decompensated during the summer of 2011. Referencing the urine spilled in Marc Jenefsky's car, counsel reminded the jury that, when Slane decompensates, he stores urine in jars. 8RP 92.

Summing up, counsel argued that, as to the malicious mischief charges, Dr. Spizman's testimony raised a reasonable doubt as to whether Slane could form malicious intent. 8RP 96. As to the bail jumping charge, counsel argued that the defense had shown that Slane's mental health issues created "uncontrollable circumstances" that prevented him from appearing in court on the appointed date. 8RP 99-103.

Finally, counsel argued that the State had not met its burden of proof, and urged the jury to find Slane not guilty. 8RP 106.

C. ARGUMENT

1. SLANE'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHEN HIS ATTORNEYS PRESENTED A DIMINISHED CAPACITY DEFENSE OVER HIS OBJECTION AND ACKNOWLEDGED THAT HE DAMAGED THE TIRES.

Slane contends that, by raising a diminished capacity defense on his behalf over his objection, and acknowledging in their remarks to the jury that he had committed the damage at issue, his attorneys deprived him of his constitutionally guaranteed counsel and violated his right to a jury finding beyond a reasonable doubt of all of the elements of the charged crimes. In making this argument, Slane ignores important differences between a formal stipulation as to an element, which relieves the State of its burden of proof on that element, and his attorneys' strategic decision in this case. While his attorneys acknowledged in their remarks to the jury that Slane had committed certain acts, they did nothing to relieve the State of its burden of proof – the State was required to, and did, present proof of every element of the crime to the jury, and the jury was instructed that the State must prove these elements beyond a reasonable doubt. Slane's attorneys argued throughout the trial, from opening statement through closing argument, that the jury

should find Slane "not guilty" of the charged crimes. Under these circumstances, Slane's constitutional rights were fully protected.

In any event, any error was harmless beyond a reasonable doubt. Based on the strong evidence of guilt presented by the State at trial, any reasonable jury would undoubtedly have reached the same result in the absence of the alleged error.

a. This Strategic Decision Was Properly Left To Counsel.

The right of a criminal defendant to the assistance of counsel is protected by the Sixth and the Fourteenth Amendments to the United States Constitution. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963). Under the due process clauses of the Fifth and Fourteenth Amendments, a criminal defendant has a right to require the State to prove every element of the charged crime. State v. Humphries, 181 Wn.2d 708, 714, 336 P.3d 1121 (2014) (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970)).

""[A] lawyer shall *abide* by a client's decisions concerning the *objectives* of representation and . . . shall *consult* with the client as to the *means* by which they are to be pursued." Rules of Professional Conduct ("RPC") 1.2(a) (italics added). Certain

decisions rest with the accused personally. These include: what plea to enter, whether to waive the right to counsel, whether to waive the right to a jury trial, whether to testify at trial, and whether to appeal. ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION std. 4-5.2(b) (4th ed. 2015); *see also* RPC 1.2(a).

Strategic and tactical decisions, on the other hand, are to be made by counsel "after consultation with the client where feasible and appropriate." Id. at std. 4-5.2(d). These decisions include: "how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions and objections should be made, what stipulations if any to agree to, and what and how evidence should be introduced." Id.

The decision that Slane's attorneys made in this case – to acknowledge Slane's *actions* but to argue that, as a result of his diminished capacity, he could not form the malicious intent necessary to commit the crime of malicious mischief – did not contravene Slane's decision as to the *objective* to be achieved. Slane's objective was to be found not guilty by the jury; his

attorneys' chosen strategy was nothing more than the *means* by which they pursued that objective. *See* RPC 1.2(a).

Nor did the attorneys' decision to put forth a defense of diminished capacity violate Slane's right to control what plea to enter. Slane's plea of "not guilty" never changed.[15]

The courts give defense counsel "wide latitude to control strategy and tactics." In re Personal Restraint of Stenson, 142 Wn.2d 710, 733, 16 P.3d 1 (2001). "[A]ppointed counsel, and not his client, is in charge of the choice of trial tactics and the theory of defense." Id. at 734 (quoting United States v. Wadsworth, 830 F.2d 1500, 1509 (9th Cir. 1987)). "To assure the defendant of counsel's best efforts then, the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics. . . . For many reasons, therefore, the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." In re Stenson, 142 Wn.2d at 735 (quoting State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)).

This case presents a good example of why counsel has such broad latitude. The evidence that Slane was the person who had

[15] The defense of diminished capacity differs from the defense of insanity in this important respect. Raising insanity actually changes the plea. *See* CrR 4.2(a) ("A defendant may plead not guilty, not guilty by reason of insanity, or guilty.").

damaged the tires was strong. However, there was also strong evidence that Slane had serious mental health issues, and that these issues may have deprived him of the ability to form the requisite malicious intent. Under these circumstances, raising a diminished capacity defense represented sound trial strategy. Such a decision is properly left to counsel. *See* In re PRP of Stenson, 142 Wn.2d at 732-36 (decision to admit guilt during penalty phase of capital trial fell within the exclusive province of defense counsel); State v. Cross, 156 Wn.2d 580, 605-06, 132 P.3d 80 (2006) (decision to present expert testimony concerning defendant's poor mental health during penalty phase of capital case was a strategic decision properly left in the hands of defense counsel).[16]

Nor does the Washington Supreme Court's recent decision in Humphries, 181 Wn.2d 708, aid Slane. In Humphries, the court was faced with a formal, written stipulation, signed by counsel, admitting to an element of the crime of first degree unlawful possession of a firearm:

> The following statement is a stipulation by both parties. A stipulation means that the following facts

[16] In both Stenson and Cross, counsel pursued the strategy at issue over the explicit objection of the defendant. Stenson, 142 Wn.2d at 735; Cross, 156 Wn.2d at 606.

> are not in dispute and should be considered as fact for the purposes of trial.
>
> The parties in the above-referenced case agree that on February 7, 2010, the defendant, Mario Humphries, had previously been convicted of a serious offense.
>
> The parties further agree that on February 7, 2010, the defendant, Mario Humphries, had previously received written notice that he was ineligible to possess a firearm.
>
> The parties further agree that on February 7, 2010, the defendant, Mario Humphries, knew that he could not possess a firearm.

State v. Humphries, 170 Wn. App. 777, 784, 285 P.3d 917 (2012), *affirmed in part, reversed in part by* State v. Humphries, 181 Wn.2d 708, 336 P.3d 1121 (2014). Humphries did not personally sign the stipulation, and it was read to the jury over his explicit objection. Humphries, 170 Wn. App. at 783-84; Humphries, 181 Wn.2d at 711-18. The supreme court held that entering a stipulation as to an element of the crime over Humphries' known objection violated his due process right to hold the State to its burden of proof. Humphries, 181 Wn.2d at 718.

There are important differences between the stipulation entered in Humphries and trial counsel's actions in Slane's case. The difference is apparent from the definition of "stipulation."

A stipulation is a "[v]oluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues." BLACK'S LAW DICTIONARY 1415 (6th ed. 1990). Stipulations are "evidentiary devices used to simplify and expedite trials by dispensing with the need to prove formally uncontested factual issues." Id. "A stipulation is '[a]n 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) (Madsen, J., concurring/dissenting) (alteration and emphasis in original) (quoting 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2588, at 821 (James H. Chadbourn rev. ed. 1981)).

From these definitions, it is apparent that a stipulation is a formal agreement that relieves the State of its burden of proof on the fact or facts covered by the stipulation. The parties entered into no such formal agreement in Slane's case, and the State was not relieved of its burden of proof on any element of the crime. While counsel acknowledged orally that Slane had caused the damage,

the jury was never told that this issue had been removed from their consideration, or that the State need not prove what Slane had done. To the contrary, the jury was told that counsel's statements were *not* evidence:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 158.

Thus, based on their instructions, the jurors did not accept defense counsel's acknowledgment of Slane's actions as evidence; rather, they held the State to its burden of proof as to the acts of vandalism. *See* State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) (jury is presumed to follow the instructions of the court).

Indeed, the Washington Supreme Court recognized the distinction between a formal, written stipulation and an attorney's comments in Humphries, supra. The court held that entering the stipulation in that case relieved the State of its burden of proof on an element of the crime, and that doing so over Humphries's known

objection constituted an involuntary waiver of his due process right to hold the State to its burden of proof. 181 Wn.2d at 716, 718. The court was careful to distinguish a situation like the one now before this Court, however: "[A]n attorney's concession during closing argument does not waive any of the defendant's relevant constitutional rights. The State is still required to bear its burden, present admissible evidence, and convince a jury of every element of the crime beyond a reasonable doubt."[17] Humphries, 181 Wn.2d at 717 n.4.

The State did in fact shoulder its burden in Slane's case. The State, through the testimony of numerous witnesses, presented evidence of the damage to the cars, as well as evidence that Slane was the one who caused that damage. Had the parties

[17] The fact that defense counsel acknowledged Slane's actions in her opening statement as well does not alter the analysis. *See* Florida v. Nixon, 543 U.S. 175, 182, 188, 125 S. Ct. 551, 160 L. Ed.2d 565 (2004) (holding that acknowledgment of guilt in opening statement during guilt phase of capital case was not the "functional equivalent" of a guilty plea because the defendant "retained the rights accorded a defendant in a criminal trial"). Moreover, the jury was instructed that the attorneys' remarks (whether in opening statement or closing argument) were not evidence. *See* Grisby, 97 Wn.2d at 499 ("[T]he trial court instructed the jurors that an opening statement is not evidence and cannot be considered as evidence by them. The jury is presumed to follow the instructions of the court."). Notably, after acknowledging Slane's actions but telling the jury that Slane's mental illness prevented him from forming the necessary malicious intent, counsel urged the jury to find Slane *not guilty*. 3RP 429.

entered into a stipulation, as in Humphries, this would not have been necessary.[18]

Moreover, it was good trial strategy to acknowledge Slane's actions. The evidence that Slane was the person who had caused the damage to the cars was very strong. Building credibility with the jury by acknowledging Slane's actions undoubtedly strengthened the argument that Slane was nevertheless unable to form malicious intent due to his mental illness. *See* State v. Silva, 106 Wn. App. 586, 599, 24 P.3d 477, *review denied*, 145 Wn.2d 1012 (2001) (conceding guilt as to the two least serious offenses in the light of overwhelming evidence "was a legitimate tactical decision, one designed to gain credibility with the jury and to secure [the defendant's] acquittal on the two more serious charges"); Florida v. Nixon, 543 U.S. 175, 181, 192, 125 S. Ct. 551, 160 L. Ed.2d 565 (2004) (defense counsel's acknowledgment of defendant's guilt during guilt phase of capital case preserved counsel's credibility in arguing for leniency in penalty phase).

Slane relies on United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed.2d 657 (1984) for his argument that prejudice must be presumed here and reversal must result. This argument

[18] In Humphries, the State presented no independent evidence on the element covered by the stipulation. Humphries, 181 Wn.2d at 719.

should be rejected. The Court in Cronic limited the presumption of prejudice based on the Sixth Amendment right to counsel to two situations: 1) complete denial of counsel at a critical stage, or 2) the situation where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." Id. at 659. The record in Slane's case demonstrates neither deficiency. Slane was represented by counsel throughout the proceedings. And his attorneys clearly subjected the State's case to "meaningful adversarial testing" -- the record demonstrates that Slane's attorneys fought vigorously throughout the trial, from opening statement through the presentation of evidence and closing argument, to convince the jury that Slane did not have the capacity to form the intent necessary to convict him of malicious mischief.

Other courts have similarly rejected the Cronic assumption of prejudice. In Commonwealth v. Cousin, 585 Pa. 287, 290, 888 A.2d 710 (2005), the defendant's attorney acknowledged in closing argument that the defendant had caused the victim's death, but argued that malice was absent and thus the defendant was guilty of manslaughter, not murder. The Pennsylvania Supreme Court declined to apply Cronic under these circumstances:

> [T]here are multiple scenarios in which a defense attorney may reasonably determine that the most promising means of advancing his client's interests is to admit what has become plain to all concerned – that his client did in fact engage in at least some of the underlying conduct complained of – but either to argue for conviction of a less severe offense, or to plead for mercy in sentencing based upon the facts viewed in a light favorable to the defendant.

Cousin, 585 Pa. at 301. *See* Anderson v. Calderon, 232 F.3d 1053, 1087-90 (9th Cir. 2000) (rejecting application of Cronic where defense counsel acknowledged that defendant killed the victim, but argued that due to diminished capacity defendant lacked the ability to form specific intent to commit burglary, a prerequisite for the death penalty). *See also* Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991) (rejecting claim of per se ineffective assistance where defense counsel conceded defendant's guilt on lesser charge in order to build credibility with jury in opposing conviction on greater charge – "a lawyer is not required to consult with his client on tactical moves").

Nor do the other cases Slane cites support his argument. In Cooke v. State, 977 A.2d 803 (Del. 2009), the defendant's attorneys pursued a defense of "guilty but mentally ill" over the defendant's explicit objection. The Delaware Supreme Court held that counsel violated the defendant's right to decide what plea to

enter, since the pleas available in Delaware are "not guilty, guilty, nolo contendere, or guilty but mentally ill." Id. at 842. Slane, on the other hand, chose to plead "not guilty," and his attorneys consistently supported that plea from opening statement through closing argument. 3RP 429 ("[Slane] was not committing a crime. . . . Once the evidence is in, we ask you to render the only just and fair verdict in this case, not guilty."); 8RP 106 ("You may believe beyond a reasonable doubt that Mr. Slane is very sick, that he needs help, that he needs treatment, but that's a different courtroom. The courtroom you are in is about criminal law. It's about whether Mr. Slane committed a crime. And that he didn't do beyond a reasonable doubt. [The] State has not met its burden, and Mr. Slane is not guilty.").

Similarly, in Edwards v. State, 88 So.3d 368, 370 (Fla. Dist. Ct. App. 2012), the defendant informed the trial court that he did not wish to pursue the insanity defense that his attorneys intended to put forward. Counsel nevertheless asserted the defense at trial. Id. at 373-75. The Florida appellate court held that raising the insanity defense was "akin to a plea decision," and that such a decision "rests with the defendant alone." Id. at 374-75. Again,

Slane's right to decide what plea to enter was fully protected in this case.

Slane's right to determine his plea was fully protected here, as were his rights to the assistance of counsel and to have the State prove all of the elements of the charged crimes to the jury beyond a reasonable doubt. Slane's attorneys' acknowledgment during their remarks to the jury of his actions, strategically made to strengthen the likelihood that he would be found not guilty based on a diminished capacity defense, did not violate Slane's constitutional rights. *See* Humphries, 181 Wn.2d at 717 n.4 (attorney's concession during closing argument does not waive any of the defendant's relevant constitutional rights).

b. Any Error Was Harmless.

"A constitutional error is harmless when there is no reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." Humphries, 181 Wn.2d at 718. The reviewing court should "focus on evidence that was actually admitted at trial." Id. at 719.

Here, the State presented overwhelming evidence of Slane's guilt of the malicious mischief charges. He was apprehended close in time and space to the damage to the parked cars, hiding in the

bushes. He was dressed in clothes very like the person captured on video and described by one of the victims, and he tried to discard his white hat when discovered by police. He had two knives on his person that were consistent with the size of the punctures in the damaged tires, and both blades smelled like rubber. His white hat had areas of dark discoloration on the brim. Slane's own car, which was parked in front of his house on the street where so many cars had been vandalized, was undamaged. The necessary witnesses testified to the necessary damage amounts. Absent the evidence of diminished capacity, the jury would undoubtedly have inferred malicious intent. *See* CP 171.

As to the bail jumping charge, a custodian of records for the King County Superior Court identified documents showing unequivocally that Slane had been charged with a felony, that he had been released by court order, and that he failed to appear at a subsequent hearing of which he had notice.

Given this evidence, there is no reasonable doubt that any reasonable jury would have convicted Slane of all of the charges of malicious mischief had his attorneys pursued a defense of general denial, rather than presenting evidence of Slane's mental health issues in support of a defense of diminished capacity to form the

necessary malicious intent. Nor can there be any doubt that, had the defense relied on general denial rather than a defense of "uncontrollable circumstances" as to the bail jumping charge,[19] any reasonable jury would have found Slane guilty of that charge as well.

Slane nevertheless urges this Court not to apply harmless error analysis, arguing that a violation of the right to counsel is structural error. Brief of Appellant at 20. As argued above, Slane's attorneys did not fail to subject the State's case to "meaningful adversarial testing." *See* Cronic, 466 U.S. at 659.

Nor do the cases Slane relies on support automatic reversal in his case. In State v. Carter, 270 Kan. 426, 14 P.3d 1138 (2000), defense counsel's strategy, which he pursued over the defendant's objection, was to obtain a verdict of guilty of felony murder, thus saving the defendant from the much greater penalty that would result from a conviction for premeditated first degree murder. 270 Kan. at 429. Finding that counsel "betray[ed] the defendant by deliberately overriding his plea of not guilty," the court concluded that "defense counsel's imposing a guilt-based defense against

[19] Slane's attorneys proposed the instruction on the affirmative defense of "uncontrollable circumstances." CP 150; WPIC 19.17. Slane never objected to the court's giving that instruction. 7RP 3-12; 8RP 53-54.

Carter's wishes violated his Sixth Amendment right to counsel and denied him a fair trial." Id. at 440-41. Here, counsel never overrode Slane's plea of not guilty, nor did counsel impose a guilt-based defense – rather, counsel consistently maintained that Slane was not guilty of any of the charges, and repeatedly urged the jury to reach a "not guilty" verdict.

Similarly, in State v. Maready, 205 N.C. App. 1, 695 S.E.2d 771 (2010), the defendant's attorney, in spite of defendant's plea of "not guilty" to all charges, argued to the jury that his client was guilty of manslaughter, but not murder. 205 N.C. App. at 4. The appellate court relied on the principle that it is the defendant's prerogative to decide what plea to enter. Id. at 5-8. The court concluded that, because defense counsel had failed to obtain his client's express consent "before admitting Defendant's guilt to three charges before the jury," counsel was *per se* ineffective and the defendant was entitled to a new trial on those counts. Id. at 13-14. Again, Slane's attorneys did not tell the jury that Slane was guilty of *any* crime.

Finally, in State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985), counsel in closing argument admitted that the defendant was guilty of manslaughter, but not first degree murder – this in the

face of the defendant's insistence that he had acted in self-defense. 315 N.C. at 177-78. The Supreme Court of North Carolina held that "[w]hen counsel *admits his client's guilt* without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away." Id. at 180 (italics added). The court found a *per se* violation of the Sixth Amendment right to counsel.

None of these cases governs the outcome in Slane's case. Slane's attorneys never contravened his plea of "not guilty" – rather, they supported it with the only strategy that stood a chance of gaining an acquittal. Slane's constitutional rights were not violated, and any error was harmless beyond a reasonable doubt.

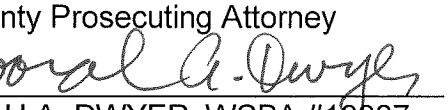
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the judgment and sentence.

DATED this 19th day of August, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, **Elaine L. Winters** at elaine@washapp.org, containing a copy of the **Brief of Respondent**, in **STATE V. ERIC SLANE,** Cause No. **72001-5-I**, 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.

Name

08-19-15

Date

Done in Seattle, Washington