

FILED
NOV 07, 2013
Court of Appeals
Division III
State of Washington

No. 31504-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

GARY D. DUGGER,

APPELLANT.

BRIEF OF RESPONDENT

D. ANGUS LEE
PROSECUTING ATTORNEY

By: Paul M. Gaffney, WSBA #38109
Deputy Prosecuting Attorney
Attorney for Respondent

PO BOX 37
EPHRATA WA 98823
(509)754-2011

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
A. IDENTITY OF RESPONDENT	1
B. RELIEF SOUGHT	1
C. STATEMENT OF FACTS.....	1-4
D. RESPONSE TO APPELLANT’S ISSUES PRESENTED	4-8
E. CONCLUSION	9

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>STATE AUTHORITIES</u>	
<i>State v. DeRyke</i> , 149 Wn.2d 906, 73 P.3d 100 (2003).....	5
<i>State v. Elmore</i> , 139 Wn.2d 250, 985 P.2d 289 (1999), <i>cert. denied</i> , 531 U.S. 837 (2000).....	7
<i>State v. Humphries</i> , 170 Wn. App. 777, 285 P.3d 917 (2012) (Review granted on different issue, <i>State v. Humphries</i> , 177 Wn.2d 1007, 300 P.3d 416 (2013)).....	6, 7
<i>State v. Jennings</i> , 111 Wn. App. 54, 44 P.3d 1 (2002).....	5
<i>State v. Lewis</i> , 15 Wn. App. 172, 548 P.2d 587 (1976).....	7
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	5
<i>State v. Stevens</i> , 137 Wn. App. 460, 153 P.3d 903 (2007).....	6
<i>State v. Wolf</i> , 134 Wn. App. 196, 139 P.3d 414 (2006).....	6
 <u>FEDERAL AND OTHER JURISDICTION AUTHORITIES</u>	
<i>Neder v. United States</i> , 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed. 2d 35 (1999).....	5-6
 <u>STATUTES AND OTHER AUTHORITIES</u>	
WPIC 35.35.....	1
WPIC 35.37.....	1

A. IDENTITY OF RESPONDENT

The State of Washington was the Plaintiff in the Superior Court, and is Respondent herein. The State is represented by the Grant County Prosecutor's Office.

B. RELIEF SOUGHT

The State is asking this Court to affirm the decisions of the Superior Court and uphold the conviction of the Appellant.

C. STATEMENT OF FACTS

Gary Don Dugger was charged with Assault of a Child in the Second Degree by information. He was convicted by a jury of the lesser included offense, Assault of a Child in the Third Degree.

The second element is the same for both offenses; that the defendant was eighteen years of age or older and (the alleged victim) _____ was under the age of thirteen. WPIC 35.35 and WPIC 35.37.

Mr. Dugger relieved the State of its burden of proving this element by presenting the following written and signed stipulation to the court:

“I, Gary Don Dugger, understand that I have the right to have a jury determine, beyond a reasonable doubt, whether the State has established that I am over the age of 18 and whether Patrick Dugger is under the age of 13, before I may be convicted of the crime of assault of a child in the second degree. After consulting with counsel, I wish to waive the right and agree to the stipulation below. I hereby stipulate that, on or about, February 27, 2012, I was over the age of 18 and that Patrick Dugger was under the age of 13, and I hereby waive the requirement of proof of those elements by the state.” CP 95.

The Court conducted the following colloquy with the Appellant;

THE COURT: Mr. Dugger, would you state your name for the record?

THE DEFENDANT: Gary Don Dugger.

THE COURT: You can remain seated. Is your mind clear?

THE DEFENDANT: Yes, sir.

THE COURT: Are you under the influence of any substance?

THE DEFENDANT: No, sir.

THE COURT: And do you feel okay physically?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Dugger, you understand that you have the right to require the state to prove every element of the charges against you, including the fact that your son is under 13 and that you are over 18.

THE DEFENDANT: Yes, sir.

THE COURT: By this stipulation, you're relieving the state of the obligation to prove those two facts. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And have you had a full opportunity to consult with your attorney about this waiver?

THE DEFENDANT: Yes sir.

THE COURT: And do you, indeed, wish to waive that right and stipulate to those two facts?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Thank you. The waiver is acceptable and it is received. And in regard to your stipulation, I'll just take out the words, "the parties hereby stipulate that" so that when I read it to the jury, it will say as follows: "The parties have agreed that certain facts are true. You must accept as true

the following facts. On or about January 27, 2012, the defendant, Gary Don Dugger, was over the age of 18, and Patrick Dugger was under the age of 13.” That will be read to the jury. RP 195-196.

On February 8, 2013, prior to the State resting its case, the Court read the stipulation to the jury;

THE COURT: Good afternoon, everyone. All please be seated.

Ladies and gentlemen, the parties have agreed that certain facts are true. You must accept as true the following facts: on or about January 27, 2012, the defendant, Gary Don Dugger, was over the age of 18, and that Patrick Dugger was under the age of 13. RP 307.

D. RESPONSE TO APPELLANT’S ISSUE PRESENTED

Mr. Dugger’s due process and constitutional rights were not violated. In the “to convict” instruction for the lesser included charge of Assault of a Child in the Third Degree, the element regarding the age of the defendant and the age of the victim, was omitted. However, Mr. Dugger had previously stipulated to that element and thereby relieved the State of its burden to prove each and every element of the crime beyond a reasonable doubt. Omitting an

element of the crime, even one that the defendant had stipulated to is not the best practice perhaps, but at worst, it is a harmless error that does not call for an automatic reversal.

We review the adequacy of a challenged “to convict” jury instruction *de novo*. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 100 (2003).

Until recently, Washington law was clear that an instruction that relieves the State of its burden to prove an element of a crime is automatic reversible error. *State v. Jennings*, 111 Wn. App. 54, 62, 44 P.3d 1 (2002). See, eg., *State v. Smith*, 131 Wn. 2d 258, 265, 930 P.2d 917 (1997) (“failure to instruct on an element of an offense is automatic reversible error”). *Id.* But the United States Supreme Court has unsettled this previously settled issue. *Id.*

The United States Supreme Court held that a jury instruction that relieves the prosecution of its burden to prove an element of a crime is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed. 2d 35 (1999). *Jennings* at 63. In *Neder*, the court held that when an error is structural, affecting the whole “framework within which the trial proceeds”, it taints the entire process, making it fundamentally

unfair. *Id.* Such errors can never be harmless. *Id.* But an instruction that omits an element of the offense may or may not necessarily taint the entire trial or otherwise make it unreliable to determine guilt or innocence. *Id.* It is thus subject to a harmless error analysis. *Id.*

Here, the omitted element was one that Mr. Dugger had previously stipulated to in colloquy with the court. By entering into that stipulation with the court, Mr. Dugger relieved the State of its burden of proving that element.

As this court has previously explained, where a defendant stipulates in writing to the fact of a previous conviction, the defendant waives “the right to put the State to its burden of proof on [that] element.” *State v. Wolf*, 134 Wn. App. 196, 199, 139 P.3d 414 (2006). See also *State v. Stevens*, 137 Wn. App. 460, 466, 153 P.3d 903 (2007). As a result of such a waiver, the government is relieved of its obligation to introduce any evidence on that element—including the stipulation itself. *Wolf*, 134 Wn. App. at 203. *State v. Humphries*, 170 Wn. App. 777, 801, 285 P.3d 917 (2012). (Review granted on different issue, *State v. Humphries*, 177 Wn.2d 1007, 300 P.3d 416 (2013)).

The Washington Supreme Court Committee on Jury Instructions has explained that, where a defendant stipulates to

an element of a charged offense, such a stipulation also amounts to a partial waiver of the right to a trial by jury. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS; CRIMINAL 4.77, at 165 (3d ed. 2008). (noting that, because stipulation is partial waiver of defendant's right to jury trial, the best practice is to have the defendant sign a written stipulation and have it reviewed and acknowledged in open court.)

Humphries at 802, fn. 11. (Internal quotations omitted).

Where a defendant stipulates to facts to be presented to a jury, proposes such presentation, assisted in its drafting, and agreed to its content, he cannot later be heard to complain on appeal that the trial court did as he requested. *State v. Elmore*, 139 Wn.2d 250, 280, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837 (2000).

In *State v. Lewis*, 15 Wn. App. 172, 177, 548 P.2d 587 (1976), the court stated:

[W]hen a defendant in the procedural setting of a criminal trial makes a tactical choice in pursuit of some real or hoped for advantage, he may not later urge his own action as a ground for reversing his conviction even though he may have acted to deprive himself of some constitutional right. A criminal defendant is entitled to a fair trial *from the state*, including due process. He is not denied due process *by the state* when such denial results from his own act, nor may the state be required to protect him from himself.

Here there is no question that Mr. Dugger agreed to the stipulation of an element of the offense; his signed waiver was presented to the Court. The Court, following the best practices recommended by the Washington Supreme Court Committee on Jury Instructions, conducted an open Court colloquy with Mr. Dugger.

Mr. Dugger stipulated to the element that he was over the age of 18 and that his alleged victim was under the age of 13. The jury was informed that the parties had agreed to the existence of that fact.

Omitting this element from the jury instruction was not the best practice, but at worst, it was harmless error. Moreover, the omission of that element did not relieve the State of its burden, Mr. Dugger's stipulation had already done that.


Mr. Dugger cannot stipulate to an element and then argue that the State did not prove that element beyond a reasonable doubt.

E. CONCLUSION

The Appellant has not raised any supportable claims of error. The defendant's stipulation to an element of the charged offense relieved the State of its obligation to prove that element.

Accordingly, this Court should uphold the decisions of the trial court and the conviction of the Appellant.

Respectfully submitted this 7th day of November, 2013.



PAUL MICHAEL GAFFNEY
WSBA#B8109
Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 31504-5-III
)	
vs.)	
)	
GARY D. DUGGER,)	DECLARATION OF SERVICE
)	
Appellant.)	
<hr/>		

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

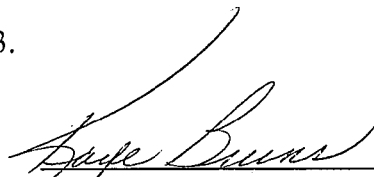
That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

David N. Gasch
Gasch Law Office
gaschlaw@msn.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Gary D. Dugger
PO Box 1152
Soap Lake WA 98851

Dated: November 7, 2013.



Kaye Burns