

63378-3

63378-3

NO. 63378-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VLADIMIR V. MISHKOV,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

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A. ISSUES

1. Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Indecent Exposure is a felony only if a defendant has previously been convicted of Indecent Exposure or a sex offense as defined in RCW 9.94A.030. When a defendant stipulates to an element of the crime charged it is an express waiver with the effect that no evidence need be presented as to that element. Here, Mishkov's prior conviction for Indecent Exposure was an essential element of the current offense. Mishkov stipulated to the prior Indecent Exposure conviction, though it was incorrectly identified as a sex offense. Is there substantial evidence in the record to support Mishkov's conviction?

2. When a claim of ineffective assistance is based on counsel's failure to request specific language in a stipulation regarding a prior conviction, and the fact of conviction is an element of the offense, the defendant must show that had the particular language proposed been used, there is a reasonable probability that the outcome of the trial would have been different. Legitimate trial strategy, including counsel's decision to stipulate to certain

facts to avoid any speculation by the jury as to a prior conviction, cannot constitute ineffective assistance. Likewise, counsel cannot be ineffective for deciding not to request a legally incorrect stipulation that would not have been accepted by the court. Here, counsel agreed to a stipulation that specifically named the predicate conviction as Indecent Exposure rather than requesting the legally incorrect generic term of "sex offense" to describe his prior conviction. Has Mishkov failed to establish that counsel's strategic decision not to request generic sex offense language was so unreasonable that it prejudiced him?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

Mikele Scheffer went to a Linens N' Things store in Redmond around 1:00 p.m. on November 12, 2008 before going to a job interview. 2RP 35-36; 3RP 52.¹ The remaining merchandise had been consolidated in the front half of the store because Linens N' Things was closing. 2RP 21, 36. During the 10 to 15 minutes

¹ The Verbatim Report of Proceedings consists of four dated volumes. The State has adopted the following reference system: 1RP (3/23/09), 2RP (3/24/09), 3RP (3/25/09), and 4RP (4/17/09). Volumes one, three and four are consecutively paginated.

that Scheffer was in the front of the store, she noticed Vladimir Mishkov walking around her—at one point coming within inches of her person. 2RP 37; 3RP 47. Although Mishkov did not touch or speak to Scheffer, she felt uncomfortable when she looked over her shoulder and saw him so close to her. 2RP 27; 3RP 47. Scheffer paid for her items and left the store. 2RP 37.

Scheffer went through the sliding doors at the front of the store and then walked between two nearby cars to get to her car. 2RP 38-39; 3RP 45-46. As Scheffer walked between the cars, Mishkov rolled down the passenger side window of his brown Jeep Cherokee and whistled at Scheffer to get her attention. 2RP 39; 3RP 47, 53. Scheffer kept walking, but glanced over at Mishkov, who looked directly back at her. She saw that he was reclined in the driver's seat, rubbing his fully-exposed erect penis "pretty fast." 2RP 39-40; 3RP 38, 46, 50, 53. Scheffer immediately recognized Mishkov as the man she had just seen in the store. 2RP 40.

Feeling scared and anxious, Scheffer got in her car and locked all the doors. 2RP 41; 3RP 38. She called 911 as she reversed her car out of the parking stall and pulled in behind Mishkov's Jeep, attempting to block his car from leaving. 2RP 41; 3RP 38-40. Mishkov was able to back out of the parking stall and

drive toward another part of the shopping complex. 3RP 42. Scheffer remained on the phone with the 911 dispatcher as she closely followed Mishkov through the parking lot. 3RP 40-43, 51-52. When Mishkov drove behind the Safeway building, Scheffer lost sight of him because she was afraid to follow him back there, not knowing whether he had a weapon. 3RP 42, 51-52. Scheffer then drove back to the Linens N' Things store where she was later interviewed by Redmond Police Officer Lenworth Knowles. 3RP 43.

Officer Knowles and Officer Joaquin Lipana were dispatched to the complex in response to Scheffer's call to 911. 2RP 14-15; 3RP 57-58. Officer Lipana, who had been in a neighboring shopping complex, drove toward the Safeway and found Mishkov's brown Jeep within three minutes. 3RP 61, 68-69. Mishkov was in the reclined driver's seat and the only occupant of the car. 3RP 62-63. Officer Lipana told Mishkov that he stopped him because Mishkov did not have license tabs on the rear plate of the Jeep. 3RP 63. When Officer Lipana spoke with Mishkov about the missing tabs, he observed that Mishkov appeared very nervous. 3RP 64-65, 72.

Officer Knowles had briefly spoken with a visibly upset Scheffer and then drove her to where Mishkov and Officer Lipana were for a show-up identification of Mishkov. 2RP 17-19; 3RP 43, 50, 54. Scheffer confirmed that Mishkov was the man whom she had seen masturbating earlier. 2RP 18-19, 29, 33; 3RP 43-44. Officer Knowles arrested Mishkov. 2RP 17-18, 28, 31.

2. PROCEDURAL FACTS

Vladimir Mishkov was charged by amended information with felony Indecent Exposure based on a prior misdemeanor conviction for Indecent Exposure.² CP 5. The State also alleged that Mishkov had committed the crime with sexual motivation. CP 5. A jury convicted Mishkov as charged. CP 17-18. Mishkov's standard range was three to nine months' incarceration before the sentencing enhancement based on the sexual motivation finding. CP 44. The court sentenced Mishkov to 15 months in prison (three months' incarceration plus a 12 month enhancement). CP 43-53.

² The amended information corrected the incident date and conformed the charging language to the "to convict" instruction. CP 5; 1RP 6-7.

C. ARGUMENT

1. THERE IS SUFFICIENT EVIDENCE SUPPORTING MISHKOV'S INDECENT EXPOSURE CONVICTION.

Mishkov asserts that since the State charged him “solely” with committing Indecent Exposure after having been convicted of a sex offense, the State assumed the burden of proving that fact beyond a reasonable doubt, and failed to do so. App. Br. at 5-6. Though Mishkov stipulated that he had been convicted of Indecent Exposure and that Indecent Exposure was a sex offense, he argues that the evidence was insufficient to establish that element because, as a matter of law, the crime of Indecent Exposure is not a sex offense. This argument should be rejected because there was no dispute that Mishkov had been previously convicted of Indecent Exposure, as stated in the stipulation, and thus, while the informations, stipulation and jury instructions mischaracterized Indecent Exposure as a sex offense, there was no question that Mishkov has a prior Indecent Exposure conviction, which elevated his crime to a felony.

a. Relevant Facts.

On the first day of trial, the State amended the information, to state in pertinent part:

That the defendant VLADIMIR V. MISHKOV in King County, Washington, on or about November 12, 2008, having previously been convicted of Indecent Exposure, a sex offense as defined in RCW 9.94A.030, and knowing that his conduct was likely to cause reasonable affront and alarm, did make an open and obscene exposure of his person...

CP 5 (emphasis in original). The State also moved in limine to present testimony from two witnesses involved in the previous Indecent Exposure case under ER 404(b). 1RP 19-22; Supp. CP __ (Sub No. 43) (State's Trial Memorandum). Specifically, the prosecutor argued that the testimony was admissible to show a common scheme or plan that tended to show that Mishkov acted intentionally and for the purpose of sexual gratification. 1RP 19-22; Supp. CP __ (Sub No. 43).

The previous incident occurred when Mishkov drove—in the same Jeep—to a Taco Bell drive-thru, caught the attention of a woman inside the restaurant, and then began masturbating. 1RP 20-21; Supp. CP __ (Sub No. 43). Mishkov also attempted to obscure his license plate and flee before police arrived, as in the instant case. 1RP 20; Supp. CP__ (Sub No. 43).

Mishkov's attorney argued that the testimony did not demonstrate a common scheme or plan and that it was highly prejudicial. 1RP 22. To lessen any prejudicial effect of the prior conviction, defense counsel offered to stipulate that Mishkov had been previously convicted of Indecent Exposure:

[T]he defense is willing to stipulate to a certified judgment and sentence, that there was a prior conviction for that element. There was a conviction.

1RP 23.

The court ruled that the testimony was inadmissible in the State's case-in-chief because it was too prejudicial, but left open the possibility of presenting the evidence in rebuttal if the defendant testified. 1RP 25.

After the State had presented all of its witnesses, the parties provided the court with a written stipulation regarding Mishkov's prior Indecent Exposure conviction. 3RP 80; CP 15-16. The stipulation had been signed by both counsel and was consistent with the charging language from the amended information. 3RP 80; CP 15-16. The court read the pertinent portion of the stipulation to the jury:

The parties stipulate that on November 12, 2008, the defendant, Vladimir Mishkov (date of birth is 04/16/1986), had been previously convicted of the

crime of Indecent Exposure, a sex offense as defined in RCW 9.94A.030.

3RP 80. The written version also stated that the “stipulation is entered into knowingly and voluntarily by both parties.” CP 15. The court took a short recess, during which Mishkov’s counsel announced his intent to testify. 3RP 80-81. The State then renewed its motion to present testimony regarding the prior Indecent Exposure conviction under ER 404(b) in rebuttal. 3RP 82, 84-85. After the court ruled that it would allow the proposed testimony in rebuttal, Mishkov decided not to testify. 3RP 85.

The court also addressed the proposed jury instructions during the recess. 3RP 80-81. The State proposed a full set of jury instructions, including a proposed “to convict” instruction, which stated that in order to convict Mishkov of Indecent Exposure, five elements must have been proven beyond a reasonable doubt. Supp. CP __ (Sub No. 44) (State’s Proposed Instructions); CP 36. The fourth element was “[t]hat the defendant has been previously convicted of a sex offense...” Supp. CP__ (Sub No. 44); CP 36. This instruction was based on WPIC³ 47.02, and had been modified

³ Washington Pattern Jury Instruction—Criminal.

to add the element of the prior conviction. Supp. CP __ (Sub No. 44); CP 36.

The State also proposed two definitional instructions: WPIC 47.01, which defined the crime of Indecent Exposure, and an instruction based on RCW 9.94A.030, which instructed the jury that Indecent Exposure was a sex offense. Supp. CP __ (Sub No. 44); CP 32, 35. The court accepted the State's proposed instructions and incorporated them into the court's instructions to the jury. CP 23-41. Mishkov did not object to the "to convict" instruction, nor to the corresponding definitional instructions. 3RP 91-92.

b. The Stipulation Entered Into By The Parties Is Sufficient Evidence Of Mishkov's Prior Indecent Exposure Conviction.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). However, a defendant may waive this proof requirement by stipulating to an element of the charged crime. State v. Wolf, 134 Wn. App. 196, 199, 139 P.3d 414 (2006), rev. denied, 160 Wn.2d 1015 (2007). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime

beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences that reasonably can be drawn therefrom.” Id. at 201. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on the issue of the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

A person is guilty of Indecent Exposure when he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm. RCW 9A.88.010(1). Indecent Exposure is a class C felony if the person has previously been convicted of Indecent Exposure or a sex offense as defined in RCW 9.94A.030. RCW 9A.88.010(2)(c). Indecent Exposure is not

a sex offense as defined in RCW 9.94A.030(46) (2008).⁴ When a person is charged with felony Indecent Exposure, the predicate crime is an essential element of the offense that the State must prove beyond a reasonable doubt. State v. Bache, 146 Wn. App. 897, 905-06, 193 P.3d 198 (2008).

Here, contrary to Mishkov's contention, the informations did not allege that he had previously been convicted "solely" of a sex offense. Each alleged that he had been previously convicted of "Indecent Exposure, a sex offense as defined in RCW 9.94A.030..." CP 1, 5 (emphasis added). The mischaracterization of Indecent Exposure as a sex offense continued throughout the jury instructions, which Mishkov did not object to, that instructed the jury

⁴ Sex offense means:

(a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(12);

(ii) A violation of RCW 9A.64.020;

(iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080; or

(iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;

(c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or

(d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

RCW 9.94A.050 was amended effective August 1, 2009. Laws 2009 c.28 § 4. The subsections were re-numbered and the definition of a sex offense is now found in subsection 42. No substantive changes were made to this subsection by the amendment.

that to convict him of Indecent Exposure, one of the elements that the State must have proven beyond a reasonable doubt was that Mishkov had previously been convicted of a sex offense. 3RP 92; CP 36. A separate instruction, also not objected to, defined Indecent Exposure as a sex offense. CP 35. However, this error is of no consequence because although the stipulation erroneously identified Mishkov's Indecent Exposure conviction as a sex offense, Mishkov nonetheless specifically stipulated to the Indecent Exposure conviction, which provided sufficient evidence of the predicate crime to establish that element beyond a reasonable doubt. See Wolf, 134 Wn. App. at 199 (quoting Key Design, Inc. v. Moser, 138 Wn.2d 875, 893-94, 983 P.2d 653 (1999)) (citations omitted) ("A stipulation is an express waiver ... 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.").

The stipulation was the only evidence presented as to the predicate offense. CP 15-16; 3RP 80, 88. No evidence was presented of any other crimes or convictions and no other crime was defined as a sex offense. CP 23-41; 3RP 80, 88. Thus, in order to convict Mishkov of felony Indecent Exposure, the jury

necessarily had to find that Mishkov had been previously convicted of Indecent Exposure because it was the only crime defined in the court's instructions as a sex offense. CP 23-41. Mishkov does not challenge the sufficiency of any other elements of the crime. Indeed, he simply claims that he is entitled to remand and entry of a conviction for misdemeanor indecent exposure.

Therefore, there is substantial evidence in the record such that a rational trier of fact, viewing the evidence and all the reasonable inferences therefrom in a light most favorable to the State, could find that each element of felony Indecent Exposure had been proven beyond a reasonable doubt. Mishkov's conviction should be affirmed.

In the alternative, if this Court finds that there is insufficient evidence in the record to sustain Mishkov's felony conviction for Indecent Exposure, the Court should, as Mishkov requests, remand the case for entry of judgment for lesser offense of misdemeanor Indecent Exposure because the jury found each element of the crime had been proven beyond a reasonable doubt. An appellate court "may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." RAP 12.2; State v. Gilbert, 68 Wn. App.

379, 388, 842 P.2d 1029 (1993) (once the trial court finds all the facts beyond a reasonable doubt constituting guilt for a lesser-included offense, it is within the appellate court's power to remand for entry of judgment and sentence on that offense).

2. MISHKOV HAD COMPETENT COUNSEL AND WAS NOT PREJUDICED BY COUNSEL'S DECISION TO STIPULATE TO HIS PRIOR CONVICTION FOR INDECENT EXPOSURE.

Mishkov argues that his counsel was ineffective for agreeing to a stipulation that identified his prior conviction as Indecent Exposure, rather than characterize it as a prior "sex offense." This argument is without merit for two reasons. First, counsel cannot be ineffective for failing to request a legally incorrect stipulation; that is, Mishkov's counsel cannot be ineffective for failing to insist on characterizing his prior conviction as a sex offense when it was not actually a sex offense. Second, even if that were an available option, the decision to specifically name the predicate offense as Indecent Exposure was a strategic decision that cannot support an ineffective assistance claim.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: 1) that trial counsel's representation was

deficient; and 2) that counsel's deficient representation prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong of the test defeats the claim. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990).

a. Mishkov Cannot Establish That His Counsel's Performance Fell Below An Objective Standard Of Reasonableness.

Competency of counsel is evaluated from the trial counsel's perspective at the time of the alleged error and in light of the entire record below. State v. Riofta, 134 Wn. App. 669, 693, 142 P.3d 193 (2006); McFarland, 127 Wn.2d at 335. Trial counsel does not guarantee a successful verdict, and competency is not measured by the result. State v. Thomas, 109 Wn.2d 222, 228-29, 743 P.2d 816 (1987); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Counsel's performance is deficient only when it falls below an objective standard of reasonableness. Riofta, 134 Wn. App. at 693. A reviewing court engages in a strong presumption that

counsel's performance was effective and within the wide range of reasonable professional assistance. Id.

In assessing performance, “the court must make every effort to eliminate the distorting effects of hindsight.” State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (quoting In re Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)). Trial conduct that can be characterized as legitimate trial strategy or tactics cannot constitute ineffective assistance. State v. Soonalole, 99 Wn. App. 207, 215-16, 992 P.2d 541, rev. denied, 141 Wn.2d 1028 (2000).

In the instant case, Mishkov’s counsel agreed to a stipulation that informed the jury of Mishkov’s prior conviction for Indecent Exposure but incorrectly defined the crime as a sex offense under RCW 9.94A.030. Mishkov relies on Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) and State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998) in support of his argument that defense counsel’s performance was deficient because she agreed to the stipulation that informed the jury of Mishkov’s prior conviction for the same offense, and failed to request that the stipulation state only that Mishkov had been convicted of a generic sex offense. However, as illustrated in State v. Ortega, 134 Wn. App. 617, 142 P.3d 175 (2006), Old Chief

and Johnson are distinguishable because both involved charged offenses where the nature of the predicate crime had no relation to the current offense; hence, any prior conviction that was a felony would suffice. In contrast, for the crime of Indecent Exposure, only particular crimes qualify as predicate offenses that elevate the offense to a felony.

In Old Chief, the defendant was charged with assault and being a felon in possession of a firearm. 519 U.S. at 174. Because Old Chief's prior felony conviction was for assault, he offered to stipulate to being a felon, which the trial court rejected. Id. at 175-77. The Supreme Court ruled that the refusal of the stipulation was an abuse of discretion because the statute under which Old Chief had been charged merely criminalized the possession of a firearm by a convicted felon, showing "no congressional concern with the specific name or nature of the prior offense" so long as the predicate crime was within the broad category of felonies. Id. at 186.

Likewise, in Johnson, in order for the jury to convict Johnson of being a felon in possession of a firearm, the State had to prove that the defendant had been previously convicted of a serious offense. 90 Wn. App. at 60-62. In addition to the unlawful

possession charge, Johnson was charged with two counts of assault. Id. at 59. To minimize the prejudicial effect of the predicate rape conviction, Johnson offered to stipulate to a prior conviction for a “violent felony offense” without naming the specific crime. Id. at 60-62. The trial court rejected Johnson’s offer and allowed the State to present evidence of his previous conviction. Id. at 60-61. The Johnson court, relying on Old Chief, held that the trial court erred when it refused to accept the stipulation because the evidence of the prior rape conviction was unfairly prejudicial and the stipulation was a less prejudicial means to establish Johnson’s conviction. Id. at 62-63.

In the more recent case of Ortega, the defendant was charged with three counts of felony violation of a protection order based on two prior convictions for the same offense. 134 Wn. App. at 621. The trial court refused Ortega’s offer to stipulate that if convicted, the convictions would be felonies. Id. at 623. Ortega relied on Old Chief⁵ and Johnson⁶ in support of his argument that the trial court erred by refusing to accept his stipulation. Id. at

⁵ 519 U.S. 172.

⁶ 90 Wn. App. 54.

623-24. The Ortega court concluded that Old Chief and Johnson were distinguishable because those defendants offered to stipulate to the language of an element in question, whereas Ortega's stipulation would have eliminated the statutory language that his convictions were for violating protection orders—an essential element of the offense. Id. at 624. The court also noted a second distinction between Old Chief and Ortega's case. The statute at issue in Old Chief made it a crime for a felon to possess a firearm, but did not require a conviction for a specific kind of felony, whereas the statute under which Ortega was charged required prior convictions for certain kinds of crimes: violations of protection orders. Id. at 624-25.

Similar to Ortega, the statute under which Mishkov was charged required a prior conviction for only particular kinds of crimes: Indecent Exposure or a sex offense as defined in RCW 9.94A.030. RCW 9A.88.010(2)(c). Mishkov's only qualifying conviction under RCW 9A.88.010 was the prior misdemeanor conviction for Indecent Exposure. Supp. CP__ (Sub No. 56) (Statement of Prosecuting Attorney, including Mishkov's criminal history). Thus, contrary to Mishkov's argument, his counsel could not have requested that the stipulation list the predicate crime

solely as a generic “sex offense” as that would have been an incorrect statement of Mishkov’s criminal history and the law. Counsel’s performance cannot be deficient for failing to request what would have been a legally and factually incorrect stipulation.

Even assuming, *arguendo*, that Mishkov’s counsel could have requested a generically worded stipulation, the decision not to do so was tactical. Counsel could reasonably conclude that it was preferable to identify the prior offense as Indecent Exposure, rather than have the jury speculate as to what possible sex crime Mishkov had committed. Thus, Mishkov cannot establish that his counsel’s performance fell below an objective standard of reasonableness, and his conviction should be affirmed.

- b. Even If Defense Counsel's Tactical Decision Is Deemed Unreasonable, Mishkov Has Failed To Establish Prejudice Based On The Record Below.

As noted above, the second prong of the Strickland test requires the defendant to prove that he was so prejudiced by defense counsel's deficient performance that there is a reasonable probability that the outcome of the proceedings would have been different. State v. Brett, 126 Wn.2d 136, 199, 892 P.2d 29 (1995).

“A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694.

Here, Mishkov asserts, without citing any authority, that he was entitled to stipulate that he had been convicted of a “sex offense” and that counsel’s failure to request that wording prejudiced him because once the jury heard he had been convicted of the same offense previously, it allowed the jury to improperly convict him based on his propensity to commit that crime. In support of his argument, Mishkov relies on State v. Young, 129 Wn. App. 468, 119 P.3d 870 (2005). Young was convicted of second degree murder, first degree assault and unlawfully possessing a firearm. Id. at 470. At the beginning of trial, the judge inadvertently revealed that the predicate crime for the firearm charge was second degree assault, contrary to the parties’ stipulation not to identify the specific crime. Id. at 472. Young then moved for a mistrial, which was denied. Id. The Young court found that the trial court improperly denied the mistrial because the disclosure likely prejudiced the jury’s verdicts, given the nature of the current offenses for which Young was on trial. Id. at 475-76:

The instant case differs from Young for two reasons. First, the disclosure of Mishkov’s prior conviction was not inadvertent, nor

the basis for a motion for a mistrial; rather, he knowingly stipulated to the fact of conviction as a strategic decision regarding that element of the charged offense. Second, under Johnson and Old Chief, Young was entitled to a stipulation that he had been convicted of an unnamed, violent felony because it was immaterial which particular violent felony he had been convicted of for purposes of that element of the unlawful possession of a firearm. Mishkov, unlike Young, was not entitled to a generically worded stipulation, because as in Ortega, only certain, specific crimes qualify as predicates for a felony Indecent Exposure charge, and Mishkov did not have a prior conviction for a sex offense. Therefore, the only prior conviction Mishkov could have stipulated to was Indecent Exposure. Even if counsel had proposed a stipulation to prior conviction for a generic “sex offense,” the court would not have accepted such a legally incorrect stipulation because a stipulation to an unspecified conviction would not have been conclusive proof of that element of the offense. See Ortega, 134 Wn. App.617 (where the defendant offers a general stipulation to conviction of a prior felony but the current offense requires proof of a specific prior offense, the court is not required to accept such stipulation). Because Mishkov cannot show that he suffered any

prejudice as a result of counsel's representation, his conviction should be affirmed.

D. CONCLUSION

For the foregoing reasons, the State respectfully requests that Mishkov's felony Indecent Exposure conviction be affirmed.

DATED this 7th day of December, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. VLADIMIR MISHKOV, Cause No. 63378-3-1, 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.

W Brame
Name Wynne Brame
Done in Seattle, Washington

12/7/09
Date