

68269-5

68269-5

No. 68269-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID SIONA SOLOMONA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Cheryl Carey

BRIEF OF APPELLANT

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence of Mr. Solomona's prior second degree assault conviction in the face of his offer to stipulate to the existence of the prior conviction.

2. The trial court denied Mr. Solomona his right to a unanimous jury when it failed to instruct the jury it had to be unanimous regarding which act constituted tampering with a witness.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court must accept a defendant's stipulation to a prior felony conviction which is an element of a charged offense in order to keep the details of the conviction from the jury so that the defendant is not unduly prejudiced. Mr. Solomona had a prior conviction for second degree assault which was a necessary element of the charge of unlawful possession of a firearm. Mr. Solomona offered to stipulate to having suffered a "serious offense" conviction, an offer rejected by the prosecutor and the court. Is Mr. Solomona entitled to reversal of his convictions for the failure to accept his stipulation?

2. A defendant has a constitutionally protected right to a unanimous jury. In order to insure jury unanimity where the State alleges several acts each of which may constitute the charged offense, the prosecutor must either elect the act or the court must instruct on jury unanimity. Here, the State proved several acts which could constitute tampering with a witness, but the prosecutor did not elect which act constituted the act upon which he relied, nor did the court instruct on jury unanimity. Was Mr. Solomona's right to jury unanimity violated requiring reversal of his conviction for tampering with a witness?

C. STATEMENT OF THE CASE

David Solomona was charged with first degree burglary, witness tampering, delivery of methamphetamine, and two counts of unlawful possession of a firearm involving two different firearms. CP 63-67.

Mr. Solomona had suffered a previous conviction for second degree assault, which the State alleged was the serious offense element for the unlawful possession of a firearm counts, and which the State intended to offer in its case-in-chief. CP 64-

65; RP 22-23. Prior to trial, Mr. Solomona offered to stipulate that he had suffered a conviction for a serious offense, an offer which the prosecutor refused:

The State is going to be introducing that certified copy [of the prior assault conviction] to establish the element of unlawful possession of a firearm in the first degree. It is a necessary element. And I've provided notice to the defense that we intend to do that.

Defense has asked whether or not I'll agree to a stipulation on that. *I know the State does not have to.* I'm still considering whether or not I'm going to do that. I don't know if they'll try to put a request in to the court, but I have not made a decision whether I'm willing to do the stipulation to that or not at this time, but I do plan on introducing that conviction one way or another to establish the element of unlawful possession of a firearm.

RP 30-31 (emphasis added). The prosecutor subsequently admitted at trial the certified copy of Mr. Solomona's prior conviction for second degree assault. RP 462.

The prosecutor emphasized this prior conviction for second degree assault during closing argument:

Now for this offense, all you have to do is you show that it was within that time period, and then the defendant knowingly had a firearm in his possession or control. And again, in this particular count, it's the shotgun. The defendant had

previously been convicted of a serious offense, and that this occurred in the state of Washington.

So you'll receive with the rest of the exhibits, there's State's Exhibit 50. And what State's Exhibit 50 shows you is that the defendant was convicted of *assault in the second degree*. *And this is an actual copy of the judgment and sentence, at least the front page and the back page of the judgment and sentence showing this defendant was convicted of that offense.*

There's also another instruction that talks to about what a serious offense is, and it specifically says *assault in the second degree is a serious offense*. So that's how those instructions kind of play together. When you read that and you say oh, *assault in the second degree, is that a serious offense? Oh, the next instruction tells me assault in the second degree is a serious offense*. So that satisfies that particular element. We obviously know it occurred in the state of Washington. And then the only question is did he possess the firearm.

...
So then we have the unlawful possession of a firearm. Same elements. Handgun. And so I've gone through that already, especially with regard to the robbery. I'm not going to go through all that again. Same elements in the sense of the date. Occurred in Washington. *Previously been convicted. Assault two. Serious offense*. And then in this case, it was just the handgun.

RP 553-54, 557.

The State also alleged that Mr. Solomona tampered with a witness but did not allege a specific witness. CP 66. The

Third Amended Information charged Mr. Solomona as follows in

Count VIII:

That the defendant DAVID S. SOLOMONA in King County, Washington, during a period of time intervening between January 8, 2011 through January 30, 2011, did attempt to induce *a witness* he has reason to believe may have information relevant to a criminal investigation, to absent *himself, herself* from such proceedings, or withhold from a law enforcement agency information which he or she has relevant to a criminal investigation.

CP 66 (emphasis added).

Similarly, in the to-convict instruction for tampering with a witness, Instruction 27, the court told the jury:

(1) That between on or about [sic] January 8, 2011 to January 30, 2011, the defendant attempted to induce *a person* to withhold any testimony or absent *himself or herself* from any official proceeding or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation; and

(2) That the other *person* was a witness or a *person* the defendant had reason to believe was about to be called as a witness in any official proceedings or a *person* whom the defendant had reason to believe might have information relevant to a criminal investigation . . .

CP 128 (emphasis added).

Although the State presented evidence of possible tampering with two witnesses, the court did not instruct the jury that it had to be unanimous as to which act had been proven.¹

Following the jury trial, Mr. Solomona was convicted as charged. CP 91-96.

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO ADMIT EVIDENCE OF MR. SOLOMONA'S PRIOR ASSAULT CONVICTION IN LIGHT OF HIS OFFER TO STIPULATE

a. The trial court must accept a defendant's offer to stipulate to the prior conviction without naming the offense where the offense is unlawful possession of a firearm. To prove the charge of unlawful possession of a firearm, the State had to establish that Mr. Solomona previously had been convicted of a serious offense. RCW 9.41.040(1). "Serious offense" includes any crime of violence. RCW 9.41.010(12)(a). Mr. Solomona offered

¹ The court did give a multiple acts instruction, Instruction 22, but the prosecutor argued in his closing argument that that instruction only applied to the delivery of a controlled substance and unlawful possession of a firearm counts. CP 123; RP 561-62. The instruction itself was generic and did not specify to which counts it applied. CP 123.

to stipulate to a prior conviction for a serious offense, without naming the offense.

The rules of evidence prohibit admission of relevant evidence when its “probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. When the State must prove the defendant has a prior felony conviction and when the defendant stipulates to an unnamed felony conviction of the required type, refusing the defendant's stipulation is error. *Old Chief v. United States*, 519 U.S. 172, 183 n. 7, 185-86, 190-92, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997); accord *State v. Johnson*, 90 Wn.App. 54, 62-63, 950 P.2d 981 (1998). If the defendant adequately stipulates, the name of the felony and the court records proving the conviction become primarily propensity evidence and admitting them violates ER 404(b) and 403. *Old Chief*, 519 U.S. at 180-83, 185; accord *State v. Young*, 129 Wn.App. 468, 473-75, 119 P.3d 870 (2005), review denied, 157 Wn.2d 1011 (2006).

In *Old Chief*, the defendant was charged with several crimes, including possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). This offense required the

Government to prove the defendant had been convicted of a felony. *Id.* at 174. The prosecutor rejected the defendant's offer to stipulate to a previous felony conviction, thus keeping the nature of the prior felony conviction from the jury. In reversing, the United States Supreme Court acknowledged that the standard rule that "a defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense." *Old Chief*, 519 U.S. at 183. However, the *Old Chief* Court concluded that a trial court abuses its discretion when the trial judge "spurns such an offer and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction." *Id.* at 174.

Similarly, *Johnson, supra*, involved a prosecution for two assaults and for unlawful possession of a firearm by a convicted felon. Relying on *Old Chief*, the *Johnson* Court held that the trial court erred in admitting a prior rape conviction to prove the element of a past conviction for a "serious offense" when

Johnson proffered a stipulation to “a prior felony conviction,” without disclosing the nature of the felony. *Johnson*, 90 Wn.App. at 62-63. This Court held that the probative value of the conviction was negligible in light of the stipulation, while the unfair prejudice was significant: “[T]here was a significant risk that the jury would declare guilt on the two assault charges based upon an emotional response to the rape conviction rather than make a rational decision based on the evidence.” *Id.* at 63.

Here, like *Johnson* and *Old Chief*, the nature of Mr. Solomona’s prior conviction had no relevance to the current charged offenses.

b. There was evidence of multiple acts alleged to have been committed by Mr. Solomona which required jury unanimity. Here, as in both *Johnson* and *Old Chief*, Mr. Solomona was prosecuted for, among other crimes, unlawful possession of a firearm. An element of the State's case on this charge was to prove that Mr. Solomona had previously been convicted of a “serious offense.” Mr. Solomona offered to stipulate to having suffered a “serious offense,” knowing that proof of the nature of the prior conviction would be inherently

prejudicial. Like in *Johnson* and *Old Chief*, the nature of Mr. Solomona's earlier crime had no relevance to the current charged offenses.

When the sole purpose of the evidence is to prove the element of the prior conviction, revealing the nature of a defendant's prior offense is prejudicial in that it raises the risk that the verdict will be improperly based on considerations of the defendant's propensity to commit the crime charged. *Old Chief*, 519 U.S. at 174; *Johnson*, 90 Wn.App. at 63. This risk is especially great when the prior offense is similar to the current charged offense. *Old Chief*, 519 U.S. at 185.

Washington courts follow the *Old Chief* reasoning. In *Johnson*, this Court recognized the standard rule that "a defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense." *Johnson*, 90 Wn.App. at 62, quoting *Old Chief*, *supra*. But, as the Supreme Court determined in *Old Chief*, that "choice" has virtually no application when the purpose for admitting the evidence is solely to prove the element of a prior

conviction. *Old Chief*, 117 S.Ct. at 654-55. The Supreme Court thus held that a trial court abuses its discretion when it spurns a defendant's offer to stipulate and admits a record of the nature of a defendant's prior crimes thereby raising the risk of a verdict tainted by improper considerations when the purpose of the evidence is solely to prove the element of prior conviction. *Old Chief*, 117 S.Ct. at 647.

Here, as in *Old Chief* and *Johnson*, the most the jury needed to know was that Mr. Solomona's prior convictions fell within the class of crimes that the Legislature specified would prevent a convict from possessing a gun; i.e. a prior "serious offense." This point, however, could have been readily made through Mr. Solomona's stipulation to having suffered a conviction for a "serious offense" and underscored in the court's jury instructions. *Old Chief*, 117 S.Ct. at 655; *Johnson*, 90 Wn.App. at 63. Thus, the probative value in admitting evidence that Mr. Solomona had been previously convicted of assault was

negligible; but the risk that the jury's decision would be made on an improper basis was great. *Johnson*, 90 Wn.App. at 63.²

The holdings in *Old Chief* and *Johnson* do not apply only to exceptional emotion-evoking prior crimes, such as rape. Although the unfair prejudice in *Johnson* was based upon the emotional nature of defendant's prior rape conviction, unfair prejudice occurs whenever the probative value is negligible, but the risk that a decision will be made on an improper basis is great. Here, the likelihood was great that the jury's verdict would be tainted by their emotional response to evidence that Mr. Solomona had previously been convicted of a second degree assault. Consequently, it was error to admit the nature of the prior assault conviction. *Johnson*, 90 Wn.App. at 63. Mr.

² Division Three's subsequent decision in *State v. Gladden*, allowing the State to prove the nature of a prior felony sex offense conviction in a prosecution for communicating with a minor for an immoral purpose does not change the analysis and is inapplicable to the instant scenario:

Old Chief and *Johnson* are distinguishable because Mr. Gladden did not offer to stipulate that he had a prior conviction for a felony sex offense. Instead, Mr. Gladden offered to delete any reference to a statutory element that required proof of a prior conviction for a felony sex offense. Under these circumstances, the trial court did not err by admitting the certified copy of the judgment and sentence related to the prior conviction.

116 Wn.App. 561, 566, 66 P.3d 1095 (2003).

Solomona is entitled to reversal of his convictions and remand for a new trial.

2. THE FAILURE TO REQUIRE THE JURY TO BE UNANIMOUS REGARDING THE ACTS CONSTITUTING TAMPERING WITH A WITNESS VIOLATED MR. SOLOMONA'S RIGHT TO A UNANIMOUS JURY

a. The Washington Constitution requires the jury be unanimous. Defendants have a right to a unanimous jury verdict. Art. I, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Where the State presents evidence of multiple acts that could constitute the crime charged, it “must [either] tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act.” *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Failure to do so is constitutional error because of “the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the

elements necessary for a valid conviction.” *Kitchen*, 110 Wn.2d at 411.³

Thus, the threshold question in determining whether a unanimity instruction was required is whether the prosecution was a “multiple acts case.” A multiple acts prosecution occurs when “several acts are alleged and any one of them could constitute the crime charged.” *Id.* Each of the multiple acts alleged must be “capable of satisfying the material facts required to prove” the charged crime. *State v. Bobenhouse*, 166 Wn.2d 881, 894, 214 P.3d 907 (2009).

Whether the trial court was required to instruct the jury on unanimity is reviewed by this Court *de novo*. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

³ While Mr. Solomona did not raise this issue at trial, he may raise it for the first time on appeal. The failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error, which may be raised for the first time on appeal. RAP 2.5(a)(3); *Bobenhouse*, 166 Wn.2d at 892 n. 4.

b. The trial court erred in not instructing the jury it had to be unanimous on the act constituting the charged offense of tampering with a witness. Here, there was proof that Mr. Solomona instructed both Cassandra Nuezca and Gregory Potter not to cooperate and not to speak to the police. RP 369-71; 396-97. As a consequence, there were multiple acts each of which alone would constitute the offense of tampering with a witness.

Further, the prosecutor in his closing argument failed to elect upon which of the acts he was proceeding:

To convict the defendant of tampering. There's no real different elements on there. You can again look at your instructions and you'll have the elements listed by the number. The date. I only played the telephone calls from the 10th through the 18th. A few of them. So those fall within that charging period, the 8th through the 30th. *So anything that occurred during that time period.* Again state of Washington.

And here, the important thing that I want you to remember is what is highlighted. It says, "The defendant attempted to induce." It does not require that he was successful. So if the defendant attempts to get somebody to either not testify or to not give information to police, then he's guilty of the offense. It doesn't matter if the person came in and testified or didn't come in to testify, the commission of the offense is his effort in attempting

to do that. You don't have to be successful. The State doesn't have to lose its case because all the witnesses didn't show up in order to prosecute him for this one offense. He just has to attempt to do it.

One of the other important things is we're told from the law enforcement agency information which *he or she* had relevant to a criminal investigation. Now obviously he's in jail. He's pending charges and pending trial. There's no issue of whether or not there's a criminal investigation going on. But the best thing is in this particular offense, it's just the defendant who speaks for himself.

RP 558-59 (emphasis added). The prosecutor then played a jail recording of a telephone call from Mr. Solomona to Ms. Nuezca, following which he completed his argument on tampering:

"I want you to shut the fuck up and not say anything to anybody." I want you to not to go to court." "Promise that you won't say anything else." So guilty of tampering with a witness. The defendant said it all.

While the prosecutor played the recording of Ms. Nuezca and repeated what Mr. Solomona had said to her, the prosecutor never told the jury he was relying solely on Mr. Solomona's statements to Ms. Nuezca or that Ms. Nuezca was the person with whom Mr. Solomona was attempting to tamper. The prosecutor repeatedly referred to *he* and *she*, and also *a person* in his argument and stated that *anything* that occurred during

the charging period applied. Thus, Mr. Solomona's statements to either Ms. Nuezca *or* Mr. Potter could apply. As a consequence, the prosecutor failed to elect. Mr. Solomona's right to a unanimous jury was violated.

c. The error in failing to instruct the jury on unanimity regarding the tampering count was not harmless.

The failure of the trial court to instruct on unanimity in a multiple acts case is presumed to be prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411.

Here there was a disparate amount of evidence supporting the allegations of tampering. The State had several recorded conversations between Mr. Solomona and Ms. Nuezca, which detailed his efforts to keep Ms. Nuezca from speaking or cooperating with the authorities. Ms. Nuezca also testified at trial consistent with the recorded conversations.

Contrast this quantum of evidence concerning Ms. Nuezca with the evidence concerning Mr. Potter. Mr. Potter described

himself as a friend of Mr. Solomona, but was bitter about how he had been treated by Mr. Solomona since Mr. Solomona's arrest. RP 390. According to Mr. Potter, Mr. Solomona also told him not to cooperate with the police. RP 396. While this conversation was also recorded and played for the jury, it was merely one incident compared to the untold number involving Mr. Solomona and Ms. Nuezca. Given the bitterness Mr. Potter now felt regarding Mr. Solomona, a juror could find Ms. Nuezca extremely credible, while finding Mr. Potter less credible.

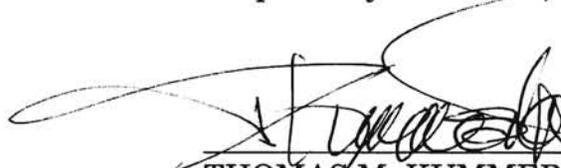
Given this wide disparity, the State cannot prove beyond a reasonable doubt the error in failing to instruct on jury unanimity regarding the tampering count was harmless. Mr. Solomona is entitled to reversal of the tampering conviction.

E. CONCLUSION

For the reasons stated, Mr. Solomona requests this Court reverse his convictions and remand for a new trial.

DATED this 19th day of July 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tom Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
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DAVID SOLOMONA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF JULY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF JULY, 2012.

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