

No. 68879-1-I

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEVEN KRUMM,

Appellant.

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

The Honorable Thomas Wynne

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in refusing to accept Mr. Krumm's stipulation to his prior convictions for purposes of proving the "prior convictions" element of felony violation of a no-contact order.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

In Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), the Supreme Court held that where a prior conviction is an element of a criminal charge, a court abuses its discretion when it refuses an accused person's request to stipulate to the prior conviction to avoid the unfair prejudice of the jury hearing of prior similar criminal history. In Mr. Krumm's prosecution for felony violation of a no-contact order, did the trial court abuse its discretion when it refused his offer to stipulate to his prior convictions? Where the court's ruling resulted in the jury hearing of prior convictions for violating a no-contact order in a trial for that offense, and seeing prejudicial jail booking photographs, must Mr. Krumm's conviction be reversed?

C. STATEMENT OF THE CASE

Appellant Steven Krumm was married to Lynne Krumm.¹ 1RP 47. On March 5, 2012, Everett police officers were dispatched to a reported assault at #5, 3111 Lombard Street, in Everett, a clean and sober house. 1RP 99. They spoke with Lynne, who appeared upset, and had bruising around her face. 1RP 54, 74, 96. Lynne later testified that Mr. Krumm had hit her. 1RP 53, 56. Lynne refused medical aid, and was ultimately arrested on an outstanding warrant for manufacturing methamphetamine. 1RP 60, 104.

Using a key that they had been provided, police officers attempted to enter apartment #5, but it felt like someone was holding the door handle and not letting it twist or open. 1RP 72, 85-86. Eventually they announced they were forcing entry, and kicked the door down. 1RP 75, 86. Mr. Krumm was inside, and was arrested without incident. 1RP 78, 88. A no-contact order prohibited Mr. Krumm from having contact with Lynne or coming within 150 feet of her

¹ Lynne Krumm is referred to by her first name to minimize confusion given that she shares a common name with appellant Steven Krumm. No disrespect is intended.

residence, however the order did not specify a particular residence. 1RP 59, 80-81.

Mr. Krumm was charged in Snohomish County Superior Court with felony violation of a no-contact order, under the alternative means of assaulting someone with whom he was prohibited from having contact or having two prior convictions for violating a no-contact order. CP 136-37.

At his jury trial on the charged offense, the State announced its intention to prove his identity with regard to the prior offenses by introducing jail booking photographs of Mr. Krumm. 1RP 38. Mr. Krumm objected strenuously to this procedure. Id. He offered to stipulate to his identity to avoid admission of the jail photographs, and then requested to waive jury as to the prior convictions element of the offense, noting the extreme prejudice associated with the admission of jail photographs and the jury hearing of his prior convictions for two similar offenses. 1RP 41-43.

The court stated, "I never heard of waiving a jury as to only one element of the crime and not the whole thing." 1RP

43. Mr. Krumm responded that the situation was similar to an unlawful possession of a firearm charge, where an accused is permitted to stipulate to his or her prior qualifying conviction, and argued,

It's incredibly prejudicial to my client to hear that [sic] not only is he here on trial for Violation of a No-Contact order but guess what? He has got two priors. The whole point of us stipulating to the fact is so the jury won't hear that he has these priors.

Id.

The judge was perplexed by this argument, and ruled,

[I]f the jury doesn't hear he has two priors, they can't properly render a verdict ... Suppose the jury doesn't unanimously find there is an assault and find the defendant not guilty, there is nothing the Court can do about that later if, in fact, there is evidence and there is a stipulation that there were two priors. It has to go to the jury.

Id.

Mr. Krumm withdrew his offer to stipulate, and the court ruled the probative value of the photographs outweighed their prejudicial effect, and thus that they were admissible. 1RP 44. Mr. Krumm was convicted as charged, and now appeals. CP 2-16, 105-06.

D. ARGUMENT

Under *Old Chief v. United States* and *State v. Roswell*, Krumm was entitled to stipulate to his prior convictions to minimize the risk of a conviction based upon unfair prejudice.

1. When the name and nature of a prior offense raises the risk of a verdict on improper considerations, and the purpose of the evidence is solely to prove the element of a prior conviction, a court must grant a defendant's request to stipulate to the fact of conviction to avoid taint to the jury.

In *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), the United States considered the question whether an accused person charged with a crime of which a prior conviction is an element may stipulate to the prior conviction, so as to prevent the jury from being prejudiced by evidence of the defendant's prior criminal history. Id. at 174. The Court answered this question in the affirmative, holding that notwithstanding

the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away[,] ... [p]roving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes

across as an officious substitution, to confuse or offend or provoke reproach.

Id. at 190-91.

The Court concluded,

[A]s in any other [case] in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available.

Id. at 191.

In State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008), the Court considered the related question whether a trial court must bifurcate a trial at a defendant's request to avoid the prejudicial effect of the jury hearing of a prior conviction. Although the Court narrowly held that denying a motion to bifurcate is not an abuse of discretion, the Court acknowledged that "if an element of the crime is a prior conviction of the very same type of crime, there is a particular danger that a jury may believe that the defendant

has some propensity to commit that type of crime.” Id. at 198.²

Where a prior conviction is an element of the crime, the Court endorsed the procedure advocated by amici curiae Washington Association of Prosecuting Attorneys:

Under its approach, a defendant would be allowed to stipulate to the prior conviction element but the trial court could inform the jury of the element by utilizing statutory citations rather than the name of the crime. For example, a defendant charged with felony “driving under the influence of intoxicating liquor or any drug” under RCW 46.61.502(6) could simply stipulate that he had previously been convicted of the crime defined in RCW 46.61.502(a). Before the stipulation is entered, the court would be required to engage in an on the record colloquy with the defendant regarding the effect of the stipulation. The jury would then be instructed that the defendant has stipulated to a specific element of the charged offense and that this element is to be considered proved beyond a reasonable doubt. A jury instruction would then be given, which includes the following:

1. Conviction under the charged statute requires the prosecution to prove beyond a reasonable doubt the element that the defendant has a

² It should be emphasized that Roswell is a narrow holding pertaining only to the bifurcation of criminal trials to prevent the prior conviction element from being heard by the jury hearing the substantive charges. To the extent that the opinion may be construed to permit trial courts to refuse offers to stipulate to the fact of prior convictions contrary to Old Chief, it is in conflict with binding precedent of the United States Supreme Court, and this Court is not bound to follow it. See Levine v. Heffernan, 864 F.2d 457, 459 (7th Cir. 1988).

certain number of prior offenses within the requisite time period;
The defendant has stipulated to the existence of at least the requisite number of prior offenses and that the prior offenses occurred within the requisite time period;
The stipulation is evidence only of the prior conviction element;
2. The prior conviction element of the charged offense must be taken as conclusively proven;
The jury is not to speculate as to the nature of the prior convictions; and
The jury must not consider the defendant's stipulation for any other purpose.

Id. at 198; see also State v. Murray, 169 P.3d 955, 973 (HI. 2007) (holding that trial court abused its discretion when it denied defendant's motion to prohibit the State from informing the jury of the nature of defendant's prior crimes to which he had stipulated).

This identical approach was endorsed by the Court of Appeals in State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998). Johnson involved a prosecution for unlawful possession of a firearm where the prior conviction was for rape. Id. at 61. Applying Old Chief, the Court affirmed that where a defendant offers to stipulate to a prior conviction so that the name of the offense is not introduced before the

jury, “the probative value of the conviction, as compared to the stipulation, [is] negligible.” Id. at 63.

2. The trial court abused its discretion when it refused Mr. Krumm’s request to stipulate to the fact of his prior convictions for violation of a no-contact order.

Mr. Krumm sought to stipulate to his prior convictions to avoid the precise risk of unfair prejudice identified by the Supreme Court in Old Chief. He specifically requested to waive jury as to that element of the offense, noting the “incredib[le] prejudic[e]” that would result from the jury hearing he had twice been convicted of the same crime with which he was charged in the instant case. 1RP 43. The trial court disagreed that such a stipulation was permissible, and instead directed “[i]t has to go to the jury.” Id.

This ruling conflicted with Old Chief and was erroneous. The Court in Old Chief recognized that where a prior conviction is for a similar offense to that with which the defendant is currently charged, the ensuing prejudice from allowing the prosecution to prove this element with explicit evidence is “especially obvious.” 519 U.S. at 185. Here, the

prejudice was amplified by the admission of booking photographs to prove Mr. Krumm's identity.

Washington courts recognize the uniquely prejudicial effect of the admission of jail booking photographs where such photographs are not necessary to prove an essential ingredient of a charged offense. “[M]ug shots from a police department ‘rogues’ gallery’ are generally indicative of past criminal conduct and will likely create in the minds of the jurors an inference of such behavior.” State v. Henderson, 100 Wn. App. 794, 803, 998 P.2d 107 (2000) (quoting United States v. Fosher, 568 F.2d 207, 213 (1st Cir. 1978)); accord State v. Sanford, 128 Wn. App. 280, 286-87, 115 P.3d 368 (2005).

The trial court's ruling forced Mr. Krumm to make a Hobson's choice. On the one hand, the court would not permit him to stipulate to the prior convictions to prevent the jury from hearing that he had twice been convicted of the same crime with which he was charged in the past. Having so ruled, the court then authorized the State to introduce the “incredibly prejudicial” evidence of two jail booking

photographs to prove Mr. Krumm was the person who committed the prior offenses.

Given the trial court's stated concern about the jury reaching a verdict as to each element, the court could have followed the approach utilized in Johnson, and simply termed the convictions "prior qualifying offenses" or something similar. Or the court could have followed the approach endorsed in Roswell, and submitted the prior conviction element to the jury by referencing the relevant statutory subsections without naming the underlying charge. Since juries are prohibited from conducting outside research, they would not have known that the convictions were for prior no-contact order violations. Either approach would have permitted a verdict on each element of the charged offense, but prevented the unfair prejudice of the jury hearing that Mr. Krumm had twice been convicted of prior similar offenses. This Court should conclude that the trial court's refusal to accept Mr. Krumm's offer to stipulate to his prior convictions was an abuse of discretion.

3. The erroneous ruling requires reversal of Mr. Krumm's conviction.

In Johnson, the Court noted that due to the “significant” unfair prejudice from Johnson’s prior conviction being named to the jury, “there was a significant risk that the jury would declare guilt on the two assault charges based upon an emotional response ... rather than make a rational decision based upon the evidence.” Johnson, 90 Wn. App. at 62. Here, this danger was even greater, as the jury was obligated to find that Mr. Krumm had been convicted twice before of the same offense with which he was charged, and was presented with inflammatory jail booking photographs to assist in this determination. This evidence likely tainted the jury’s assessment of whether Mr. Krumm and Lynne had contact at all, or whether, if they had contact in violation of the no-contact order, Mr. Krumm’s violation was willful.

No witnesses saw Lynne and Mr. Krumm together. There was no corroborative evidence presented that Lynne lived at the Lombard Street residence, i.e., no rental

agreements, lease paperwork, or documents of dominion and control. The evidence established that at one point about a month after the charged offense, Lynne successfully petitioned to have the no-contact order temporarily lifted, and that Mr. Krumm knew of this, calling into question whether any violation of the order was willful. 1RP 58-59. The evidence also established that Lynne had a motive to be angry at Mr. Krumm, and thus to fabricate her testimony. See 1RP 154-55 (defense closing argument). This Court should conclude that the trial court's erroneous refusal to accept Mr. Krumm's stipulation to his prior convictions requires reversal of his conviction.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68879-1-I
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STEVEN KRUMM,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF AUGUST, 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 31ST DAY OF AUGUST, 2012.

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