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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 37180-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JACOB M. CLARY,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer II, Trial Court Judge
Cause No. 07-1-00449-1

BRIEF OF RESPONDENT

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 1. CLARY RECEIVED EFFECTIVE ASSISTANCE OF
 COUNSEL BECAUSE:

 (a) HE SIGNED A STIPULATION CONTAINING THE
 STRATEGICALLY CRAFTED LANGUAGE THAT
 HE HAD COMMITTED “A PREDICATE
 OFFENSE”;

 (b) THE TRIAL COURT READ THAT STIPULATION
 TO THE JURY;

 (c) INSTRUCTION NO. 5 PROPERLY LIMITED THE
 SCOPE OF THE STIPULATION;

 (d) THE LANGUAGE OF THE “TO CONVICT”
 INSTRUCTION NO. 9 WAS CONSISTENT WITH
 THAT IN THE STIPULATION; AND

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his right to effective representation when his attorney failed to object to an instruction designed to limit the prejudicial impact of evidence he had a prior conviction, but which actually exacerbated the unfair prejudice.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Clary receive effective assistance of counsel when:
 - (a) he signed a stipulation containing the strategically crafted language that he had committed “a predicate offense”;
 - (b) the trial court read that stipulation to the jury;
 - (c) Instruction No. 5 properly limited the scope of the stipulation;
 - (d) the language of the “to convict” Instruction No. 9 was consistent with that in the stipulation; and
 - (e) juries are presumed to follow the trial court’s instructions?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as “RP.” The Clerk’s Papers shall be referred to as “CP.” The Appellant’s Brief shall be referred to as “AB.”

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Clary’s recitation of the procedural history and facts and adds the following:

Clary entered into the following written stipulation with the State:

The parties herein stipulate that, for purposes of the crime of Felony Driving Under the Influence as charged herein in Count I, the defendant, JACOB M. CLARY, was previously convicted on October 19, 2000 of a predicate offense pursuant to RCW 46.61.522(1)(b) as defined in RCW 46.61.502(6)(b). CP 22; RP 95: 17-23 (emphasis added).

The trial court read that instruction to the jury and indicated, “signed by the attorney for the State and attorney for the defendant and the defendant.

RP 95: 21-23. Through the limitation Instruction No 5., the trial court cautioned the jury that:

Evidence that the defendant has previously been convicted of a crime has been introduced in this case. Such evidence is not evidence of the defendant’s guilt, except insofar as it may apply to an element of the crime charged in Count I. Such evidence may not be considered by you for any other purpose not listed in this instruction. CP 25; RP 100: 14-20 (emphasis added).

After Instruction No. 5 had been read to the jury, the court read the “to convict” Instruction No. 9 which contained the following language:

To convict the defendant of driving while under the influence as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about September 20, 2007, the defendant drove a motor vehicle;
2. That the defendant at the time of driving a motor vehicle was under the influence of or affected by intoxicating liquor;
3. That the acts occurred in Mason County, Washington; and

4. That the defendant was previously convicted of a predicate offense pursuant to RCW 46.61.522(1)(b) as defined in RCW 46.61.502(6)(b). CP 25; RP 101: 11-22 (emphasis added).

Following deliberations, the jury convicted Clary as charged. RP 122: 11-18.

3. Summary of Argument

Clary received effective assistance of counsel because: (a) he signed a stipulation containing the strategically crafted language that he had committed “a predicate offense”; (b) the trial court read that stipulation to the jury; (c) Instruction No. 5 properly limited the scope of the stipulation; (d) the language of the “to convict” Instruction No. 9 was consistent with that in the stipulation; and (e) juries are presumed to follow the trial court’s instructions. Instead of having the State give detailed information regarding Clary’s criminal history, his attorney strategically agreed to stipulate and have it called a “predicate offense.” Requiring the State to prove Clary’s prior conviction through detailed testimony would have been far more damaging than having it mentioned in this fashion.

Although Clary also indirectly argues sufficiency of the evidence in his brief in conjunction with ineffective assistance of counsel, the former issue was not assigned error on appeal and should not be considered by the

Court. The judgement and sentence of the trial court is complete, correct and should be affirmed.

E. ARGUMENT

1. CLARY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE:

- (a) HE SIGNED A STIPULATION CONTAINING THE STRATEGICALLY CRAFTED LANGUAGE THAT HE HAD COMMITTED "A PREDICATE OFFENSE";
- (b) THE TRIAL COURT READ THAT STIPULATION TO THE JURY;
- (c) INSTRUCTION NO. 5 PROPERLY LIMITED THE SCOPE OF THE STIPULATION;
- (d) THE LANGUAGE OF THE "TO CONVICT" INSTRUCTION NO. 9 WAS CONSISTENT WITH THAT IN THE STIPULATION; AND
- (e) JURIES ARE PRESUMED TO FOLLOW THE TRIAL COURT'S INSTRUCTIONS.

Clary received effective assistance of counsel because: (a) he signed a stipulation containing the strategically crafted language that he had committed "a predicate offense"; (b) the trial court read that stipulation to the jury; (c) Instruction No. 5 properly limited the scope of the stipulation; (d) the language of the "to convict" Instruction No. 9 was consistent with that in the stipulation; and (e) juries are presumed to follow the trial court's instructions.

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the

deficient performance resulted in prejudice. State v. Walker, 143 Wash.App. 880, 890, 181 P.3d 31 (2008); see Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. State v. Rodriguez, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004). Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wash.2d 322, 334-335, 899 P.2d 1251 (1995). Competency of counsel will be determined upon the entire record. State v. Gilmore, 76 Wn.2d 293, 297, 456 P.2d 344 (1969). Effective assistance of counsel does not mean successful assistance of counsel. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

The jury is presumed to follow the instructions of the court. State v. Grisby, 97 Wash.2d 493, 499, 647 P.2d 6 (1982).

Clary received effective assistance of counsel because his attorney ensured that the stipulation was both phrased properly and consistently throughout the entire record, and that Instruction No. 5 properly limited its scope. Had Clary's attorney agreed to potentially inflammatory phrasing of his prior conviction anywhere in the record, then he might have more persuasive argument. As it was, Clary's prior conviction was strategically

referred to in the stipulation as a “predicate offense.” CP: 25; RP 95: 20. (emphasis added).

Through the limitation Instruction No. 5, the trial court further cautioned the jury that “[s]uch evidence is not evidence of the defendant’s guilt, except insofar as it may apply to an element of the crime charged in Count I.” (emphasis added). CP: 25; RP 100: 17-18. The single element referred to in this limiting instruction is further clarified through the “to convict” Instruction No. 9, as it specifically asked the jurors to find whether “the defendant was previously convicted of a predicate offense...” CP 25: RP 101: 20-22 (emphasis added).

As jurors are presumed to follow the court’s instructions, commonsense would lead them to conclude that the specific element referred to was Clary’s prior conviction, namely his “predicate offense,” and not just any element of the offense charged as Clary argues. (emphasis added). Put another way, the limitation of Instruction No. 5 is quite specific, in that it refers to “an element,” and not just “any” element. CP 25 (emphasis added). Had the stipulation bluntly referenced Clary’s predicate offense candidly as vehicular assault, then the jurors might have concluded as Clary argues that “once a criminal, always a criminal.” AB: 9. This did not occur, and the trial court took care to make the following record before jury selection began:

It has also been discussed by counsel and the Court in chambers regarding the charge in Count I of the Information which alleges the crime of felony driving under the influence-refusal, and the defense position that the reading of the Information as it is currently filed would be prejudicial, unduly prejudicial to the defendant in that it calls out the predicate offense. In this particular case that being driving while under the influence of or affected by intoxicating liquor and/or drugs or another other combined-let's see, felony, to wit: convicted of vehicular assault while under the influence of intoxicating liquor or drug in violation of RCW 46 and so forth.

The parties, having discussed that aspect of the case, have agreed that the way to handle that is to modify for the purposes of reading to the jury the charging portion of the information and simply indicate a- that said defendant having been previously convicted of a predicate felony did drive a vehicle while under the influence or affected by. Is that the stipulation of the parties? RP 1: 18-25; 2: 1-10.

This demonstrates that from the outset all parties were concerned about the best way to phrase and present to the jury the prior offense to which Clary had stipulated.

Additionally, Clary's prior conviction was consistently referred to as his "predicate offense." Had his prior conviction been referenced by a variety of different and potentially confusing names, then his argument might have greater merit. Because Clary's attorney ensured that precise language was used in the stipulation and the jury instructions in conjunction with the limiting instruction in No. 5, neither prong of Strickland is satisfied. Clary received effective if not successful assistance

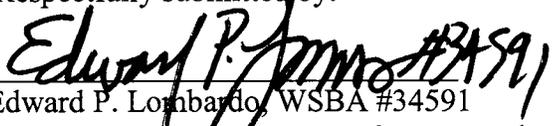
of counsel, and the judgement and sentence of the trial court should be affirmed.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 6TH day of August, 2008

Respectfully submitted by:


Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Bursell, Prosecuting Attorney
Mason County, WA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 JACOB M. CLARY,)
)
 Appellant,)
 _____)

No. 37180-4-II

DECLARATION OF
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PROOF OF SERVICE

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY _____
DEPUTY

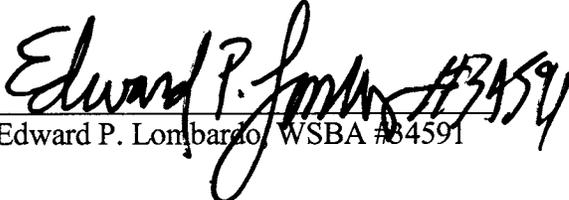
I, EDWARD P. LOMBARDO, declare and state as follows:

On WEDNESDAY, AUGUST 6, 2008, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

David B. Koch, Attorney at Law
Nielsen, Broman & Koch, PLLC
1908 East Madison
Seattle, WA 98122

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 6TH day of AUGUST, 2008, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591