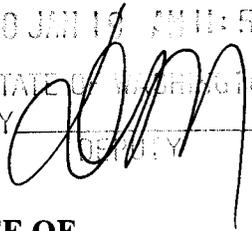


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

NO. 39172-4-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MARK B. VENIS,

Appellant.

BRIEF OF RESPONDENT

**MICHELLE L. SHAFFER
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for Respondent**

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A. ANSWERS TO ASSIGNMENTS OF ERROR

1. Venis received effective assistance of counsel.
2. The firearm enhancement to the charge of assault with a deadly weapon does not place Venis in double jeopardy.
3. The 10-year no-contact order does not exceed the maximum penalty for his convictions.

B. STATEMENT OF THE CASE

The State agrees with appellate counsel's recitation of the facts in this case.

C. ARGUMENT

1. VENIS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

a. Standard of review

Venis argues that his trial counsel was ineffective because he failed enter into a stipulation to Venis's underlying felony convictions. The standard for judging claims of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a

just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). Under *Strickland*, it is the defendant’s burden to show the following: (1) that trial counsel’s performance fell below that required of a reasonably competent defense attorney; and (2) that counsel’s performance caused prejudice. *Id.* at 687. Venis does not satisfy either prong of the *Strickland* test and therefore does not meet his burden of showing ineffective assistance of counsel.

In evaluating whether a defendant meets the first prong of the *Strickland* test, the quality of trial counsel's representation is judged against "an objective standard of reasonableness based on consideration of all of the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Again, the burden is on the defendant to establish that counsel's performance was deficient. To do so, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. As a general rule, in any claim of ineffective assistance of counsel, the "[c]ourts engage in a strong presumption counsel's representation was effective." *State v. Townsend*, 142 Wn.2d

838, 843, 15 P.3d 145 (2001), citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Thomas*, 109 Wn.2d @ 225-26, 743 P.2d 816 .

To establish that the deficient performance prejudiced the defense, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 687. A defendant is denied his right to a fair trial when the result has been rendered unreliable by a breakdown in the adversary process. *State v. King*, 130 Wn.2d 517, 531, 925 P.2d 606 (1996). This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

b. Trial counsel's performance did not fall below that required of a reasonably competent defense attorney.

The due process clause requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). The State has the burden to prove every element of the crime charged. *State v. Bryant*, 73 Wn.2d 168, 171, 437 P.2d 398 (1968). By entering a "not guilty" plea, a defendant preserves both his right to a fair

trial as well as his right to hold the State to its burden of proof. *Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir. 1981), *cert. denied*, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981).

An attorney is “without authority to waive any substantial right of his client unless specifically authorized to do so.” *State v. Ford*, 125 Wn.2d 919, 922, 891 P.2d 712 (1995). Likewise, a defendant “cannot be made to plead guilty against his wishes, however wise such a plea would be.” *Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991). The decision to plead guilty “is reserved solely for the accused based on his intelligent and voluntary choice.” *Wiley*, 647 F.2d at 648-49, citing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

By stipulating to an element of the crime charged, the defendant waives the right to insist that the State prove the element by the usual burden of proof. *State v. Wolf*, 134 Wn.App. 196, 139 P.3d 414 (2006), *review denied*, 160 Wn.2d 1015, 161 P.3d 1028 (2007). In this way, a defendant’s stipulation to an element of the offense is the functional equivalent of a guilty plea to that element. As such, several other constitutional rights are involved when a defendant waives his right to insist that the State prove an element beyond a reasonable doubt. The

first is the privilege against compulsory self-incrimination. *See Boykin*, 395 U.S. at 243 (guilty plea involves right against self-incrimination). The second is the right to a trial by jury. *See Boykin*, 395 U.S. at 243 (guilty plea involves right to jury trial). The third is the right to confront one's accusers. *See Boykin*, 395 U.S. at 243 (guilty plea involves confrontation rights).

Because the stipulation to an element of a charged offense involves all of these important fundamental rights, a defense attorney should never be allowed to enter into such a stipulation without the defendant's consent. This should be distinguished from an attorney stipulating to procedural matters such as the admissibility of evidence:

An attorney is impliedly authorized to stipulate to, and waive, procedural matters in order to facilitate a hearing or trial; but, in his capacity as an attorney, he is without authority to waive any substantial right of his client unless specifically authorized to do so.

State v. Dault, 19 Wn.App. 709, 578 P.2d 43 (1978), citing *In re Coggins*, 14 Wn.App. 736, 739, 537 P.2d 287, 290 (1975); *see also Gallup v. State of Wyoming*, 559 P.2d 1024 (1977) (in defense of accused, attorney is governed by client's wishes and commands only in regard to whether he should plead guilty, waive jury and take the stand to testify). The

constitutional right not to plead guilty cannot be waived by a defendant's counsel. The decision to plead guilty is the defendant's. Likewise, the decision to relieve the State of its burden of proof as to a single element of a crime charged belongs solely to the defendant.

The American Bar Association Standards for Criminal Justice, although not binding authority, are of interest here and provide that:

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf; and
- (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

THE AMERICAN BAR ASSOCIATION'S STANDARDS FOR CRIMINAL JUSTICE,
Standard 4-5.2 (3d ed.1993).¹

At his trial, Venis wanted to hold the State to its burden to prove beyond a reasonable doubt that he had a prior serious offense and other felony convictions. This was in spite of the fact that the State had offered to stipulate to the existence of the prior convictions. 2B RP 262. Defense counsel was clear that he had attempted to convince Venis to stipulate: "I was hoping my client would sign a stipulation, which he didn't agree to do." 2B RP 257-58. While the State agrees that it would have been wise for Venis to have stipulated to having these priors, the choice was Venis's and Venis's alone. Neither the State, the trial court, nor his counsel had the authority to force him to waive this fundamental right, even though it would likely have been in his best interest. As such,

¹ See also *Brookhart v. Janis*, 384 U.S. 1, 7-8, 86 S.Ct. 1245, 1248 - 1249 (U.S. Ohio 1966): "Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances."

counsel's representation was not deficient, and Venis cannot meet his burden to show there was ineffective assistance of counsel.

c. *Silva* is distinguishable.

Venis attempts to analogize his case to *State v. Silva*, 106 Wn.App. 586, 24 P.3d 477 (2001). However, the two cases are distinguishable. *Silva* was charged with assault in the second degree, felony hit and run, attempting to elude a pursuing police vehicle, and forgery. *Silva*, 106 Wn.App. at 589-90, 24 P.3d 477. Defense counsel made the decision to concede guilt during closing argument to charges of forgery and attempting to elude. *Id.* at 588. The jury acquitted him of the assault charge, but convicted him of the remaining crimes. *Id.* at 590. *Silva* argued on appeal that his attorney's decision to concede guilt during closing argument to the charges of elude and forgery constituted an unauthorized guilty plea that effectively waived his right to a fair trial and his right to hold the State to its burden of proof. *Id.* at 595.

The *Silva* court affirmed his conviction, holding that defense counsel's acknowledgement during closing argument of the defendant's obvious guilt as to two of the lesser charges is not the equivalent of an

unauthorized guilty plea. *Id.* at 596. Rather, the *Silva* court held, “[s]uch acknowledgement can be a sound tactic when the evidence is indeed overwhelming (and there is no reason to suppose that any juror doubts this) and when the count in question is a lesser counts, so that there is an advantage to be gained by winning the confidence of the jury.” *Id.* at 596, citing *Underwood*, 939 F.2d at 474 (citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312-13, 77 L.Ed.2d 987 (1983)). The *Silva* court held that an attorney need not consult with the client before making such a tactical move. *Silva*, 106 Wn.App. at 596, 24 P.3d 477.

In *Underwood*, a jury convicted the defendant of criminal confinement with a deadly weapon and of attempted rape. *Underwood*, 939 F.2d at 474. During closing argument, defense counsel conceded to the jury that his client was guilty of criminal confinement with a deadly weapon. *Id.* On appeal, the defendant argued “that it is ineffective assistance of counsel per se for a lawyer to concede his client's guilt without the client's consent.” *Id.* The Court disagreed, concluding that “[t]he lawyer did not plead *Underwood* guilty; he merely acknowledged the weight of the evidence” on the lesser of two charges, in order to

contrast it with the lack of direct evidence on the more serious charge of attempted rape. *Id.*

Venis's case is distinguishable from both *Silva* and *Underwood*. In those cases, defense counsel conceded guilt on some charges during closing argument. The jurors are generally instructed by the court just prior to closing argument that the lawyer's statements are not evidence and that they must disregard any remark, statement, or argument that is not supported by the evidence or the law. CP 14. The jurors are not required to accept that concession. As argued in the previous section, a stipulation to an element of the offense lessens the State's burden of proving that element to the jury beyond a reasonable doubt. As such, these cases are distinguishable from Venis's case.

d. Trial counsel's performance did not cause prejudice.

Even if this court finds that trial counsel's performance fell below that required of a reasonably competent attorney, Venis cannot meet his burden of showing that the performance caused prejudice.

First, in Venis's case, the court instructed the jury regarding the purpose for which each prior conviction could be considered. CP 33-40.

Depending on the conviction's status as a serious offense, other felony or impeachable offense, the jurors were instructed with specificity regarding each offense. *Id.* For example, the jurors were instructed as follows:

Residential burglary is a serious offense. You may consider evidence that the defendant has been convicted of the crime of residential burglary only for the purpose of determining whether the defendant had previously been adjudicated guilty as a juvenile or convicted of a serious offense as alleged in count III, and for no other purpose.

CP 33. In contrast, as to the prior conviction for forgery, the jury was instructed as follows:

Forgery is a felony. You may consider evidence that the defendant has been convicted of the crime of forgery only in deciding what weight or credibility to give the defendant's testimony, and for the purpose of determining whether the defendant had previously been adjudicated guilty as a juvenile or convicted of a serious offense as alleged in count IV, and for no other purpose.

CP 37. The jury is presumed to follow the instructions given. *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991). Therefore, in this case, the jury is presumed to consider each prior conviction only for its lawful purpose and for no other reason. As such, Venis cannot show prejudice, and his claim of ineffective assistance of counsel fails.

Second, the State in this case did not in any way over-emphasize the prior convictions. The record of the State's closing argument and

rebuttal is 30 pages long. 4RP 592-606, 617-31. The prior convictions are mentioned only once, only briefly, and only in the context of serving as proof of the prior conviction element in the unlawful possession of a firearm charges. 4RP 604-05. The evidence of the prior convictions was used as sparingly as possible and cannot be said to have prejudiced the jury. As such, Venis cannot show prejudice, and his claim of ineffective assistance of counsel fails.

Finally, even if this court does find prejudice as to the second-degree assault and unlawful possession of a firearm charges, there is no prejudice as to the charges of harassment, assault in the fourth degree or the two counts of violation of a no-contact order. There is overwhelming evidence of each of these crimes, including Venis's confession on the stand to each. 3BRP 542, 544-57, 553-54. As such, Venis cannot show prejudice as to these counts, and his claim of ineffective assistance of counsel fails.

2. THE FIREARM ENHANCEMENT TO THE CHARGE OF ASSAULT WITH A DEADLY WEAPON DOES NOT PLACE VENIS IN DOUBLE JEOPARDY.

Venis argues that his conviction for assault in the second degree (by assaulting another person with a deadly weapon) under RCW 9A.36.021(1)(c)² and the imposition of a firearm enhancement pursuant to RCW 9.94A.533(3)³ place him in double jeopardy. The State agrees with

² RCW 9A.36.021(1) reads in pertinent part as follows:

- (1) A person is guilty of assault in the second degree if he or she....
 - (c) Assaults another with a deadly weapon
- (2) (a) ... assault in the second degree is a class B felony.

³ RCW 9.94A.533(3) reads in pertinent part as follows:

- (3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined by RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime...
 - (b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection....
 - (f) The firearm enhancement in these sections shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony....

appellate counsel's recitation of the basic case law regarding double jeopardy.

However, as noted in a footnote in Venis's opening brief, two divisions of the Court of Appeals have upheld -- post-*Blakely*⁴ -- the imposition of firearm enhancements in cases in which the base offense included an element of being armed with a deadly weapon. See *State v. Nguyen*, 134 Wn.App. 863, 142 P.3d 1117 (2006) (Division I), *review denied*, 163 Wn.2d 1053 (2008), and *State v. Kelley*, 146 Wn.App. 370, 189 P.3d 853 (2008) (Division II), *review granted*, 165 Wn.2d 1027, 203 P.3d 379 (2009).

Nguyen was convicted of three counts of burglary in the first degree and two counts of assault of a child in the second degree. *Nguyen*, 134 Wn.App. at 866, 142 P.3d 1117. On each count, the jury found Nguyen or an accomplice was armed with a firearm. *Id.* On appeal, Nguyen argued that under *Blakely*, imposition of multiple firearm enhancements violated double jeopardy. *Nguyen*, 134 Wn.App. at 865, 142 P.3d 1117.

⁴ *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

A Division I panel found that it is “well settled that sentence enhancements for offenses committed with weapons do not violate double jeopardy even where the use of a weapon is an element of the crime.” *Id.* at 866, citing *State v. Pentland*, 43 Wn.App. 808, 811-12, 719 P.2d 605 (1986); *State v. Caldwell*, 47 Wn.App. 317, 320, 734 P.2d 542 (1987); and *State v. Horton*, 59 Wn.App. 412, 418, 798 P.2d 813 (1990). The *Nguyen* court rejected the argument that the effect of the legislation enacting the forearm enhancement was unintentional as it applies to his case:

... [U]nless the question of involves the consequences of a prior trial, double jeopardy analysis in an inquiry into legislative intent. The intent underlying the mandatory forearm enhancement is unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies Any “redundancy” in mandating enhanced sentences for other offenses involving use of a firearm is intentional.

Nguyen, 134 Wn.App. at 868, 142 P.3d 1117.

The *Nguyen* court likewise rejected the argument that *Blakely* implicates double jeopardy:

... *Blakely* does not implicate double jeopardy, but rather involves the procedure required by the Sixth Amendment for finding the facts authorizing the sentence. A jury found *Nguyen* guilty on each count, and entered a special verdict finding that *Nguyen* or an accomplice was armed with a firearm at the time of the crimes. This procedure fully complies with *Blakely*.

Nguyen, 134 Wn.App. at 868, 142 P.3d 1117.

Likewise, a Division II panel found that the *Nguyen* court was correct when it held that it is “well settled that sentence enhancements for offenses committed with weapons do not violate double jeopardy even where the use of a weapon is an element of the crime.” *Kelley*, 146 Wn.App. at 374, 189 P.3d 853, citing *Nguyen*, 134 Wn.App. at 866, 142 P.3d 1117.

Kelley was convicted of murder in the first degree, unlawful possession of a firearm in the second degree, and assault in the second degree. *Kelley*, 146 Wn.App. at 373, 189 P.3d 853. The jury found that he had committed the murder and the assault with a firearm. *Id.* The *Kelley* court found that *Nguyen*’s argument was identical to *Kelley*’s argument. *Id.* at 375. Following the reasoning and the decision in *Nguyen*, the *Kelley* court affirmed *Kelley*’s sentences. As appellate counsel points out, the Supreme Court accepted review of *Kelley*, and it was purportedly argued October 29, 2009.

The State asks this court to follow the decisions in *Nguyen* and *Kelley* and affirm *Venis*’s sentence.

3. THE 10-YEAR NO-CONTACT ORDER DOES NOT EXCEED THE MAXIMUM PENALTY FOR HIS CONVICTIONS.

Venis alleges the no-contact order issued with the judgment and sentence in this case exceeds the statutory maximum for counts II (felony harassment), V (assault in the fourth degree), VI and VII (each violation of a no-contact order). In the opening brief, appellate counsel states, “The 10 year no contact order specified that it applied to all of Mr. Venis’ charges” (referencing CP 93-94). BRIEF OF APPELLANT 22. However, a review of both the plain language of the no-contact order and the amended judgment and sentence reflects that there is no language that the order is specific to each count. CP 93-104. It is evident that the 10-year prohibition applies because of the assault in the second degree (domestic violence) conviction.

If this court finds that either the no-contact order or the amended judgment and sentence is ambiguous, it is the State’s position that the appropriate remedy would be to remand for entry of an order clarifying which count the no-contact order applies to.

D. CONCLUSION

For the reasons argued above, Venis's convictions and sentence should be affirmed.

Respectfully submitted this 15th day of January, 2010.

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Prosecuting Attorney

By:



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Chief Criminal Deputy Prosecuting Attorney
Representing Respondent

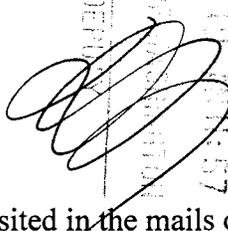
COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 MARK BRANDON VENIS,)
)
 Appellant.)

NO. 39172-4-II
Cowlitz County No.
08-1-01323-2

CERTIFICATE OF
MAILING

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
TACOMA, WA



I, Michelle Sasser, certify and declare:

That on the 15th day of January, 2010, I deposited in the mails of
the United States Postal Service, first class mail, a properly stamped and
address envelope, containing Respondent's Brief addressed to the
following parties:

Lisa E. Tabbut
Attorney at Law
P.O. Box 1396
Longview, WA 98632

Court of Appeals, Clerk
950 Broadway, Suite 300
Tacoma, WA 98402-4454

I certify under penalty of perjury pursuant to the laws of the State
of Washington that the foregoing is true and correct.

Dated this 15th day of January, 2010.


Michelle Sasser