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STATE OF WASHINGTON

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

JOHNATHON ROSWELL,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 34334-7-II
Kitsap County Superior Court No. 05-1-01048-5

RESPONDENT'S ANSWER TO AMICUS BRIEF

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DATED September 9, 2008, Port Orchard, WA

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether this Court should decline to follow the procedure proposed by the amicus when: (1) State and Federal Precedent hold that identification of a prior crime is not unfairly prejudicial if the legislature made the name or nature of the prior crime an element of the offense; and, (2) the amicus' proposal violates this principle by sanitizing the actual element from the offense?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jonathan Roswell was charged by amended information filed in Kitsap County Superior Court with child molestation in the second degree, child molestation in the third degree, and three counts of felony communication with a minor for immoral purposes (based on the fact that Roswell had a prior sex offense conviction). CP 12. After a jury trial, Roswell was convicted of the child molestation and communication counts involving DMW, as well as the communication count involving CMP.¹ The Court of Appeals affirmed in an unpublished decision. *State v. Roswell*, 2007 WL 2183113 (Wn. App. Div. 2, July 31, 2007). This Court then granted Roswell's petition for review. In August of 2008, after the parties had filed

¹ Roswell was acquitted of the child molestation in the third degree of CMP and of a third count of communicating with a minor for immoral purposes involving a third child, "LB." CP 106.

their supplemental briefs, the Washington Association of Prosecuting Attorneys filed an amicus brief.

B. FACTS

The relevant facts were set out in the State's Supplemental Brief.

III. ARGUMENT

A. THIS COURT SHOULD DECLINE TO FOLLOW THE PROCEDURE PROPOSED BY THE AMICUS BECAUSE: (1) STATE AND FEDERAL PRECEDENT HOLD THAT IDENTIFICATION OF A PRIOR CRIME IS NOT UNFAIRLY PREJUDICIAL IF THE LEGISLATURE MADE THE NAME OR NATURE OF THE PRIOR CRIME AN ELEMENT OF THE OFFENSE; AND, (2) THE AMICUS' PROPOSAL VIOLATES THIS PRINCIPLE BY SANITIZING THE ACTUAL ELEMENT FROM THE OFFENSE.

In the amicus brief filed by the Washington Association of Prosecuting Attorneys, the amicus urges this court to follow a procedure outlined by the Hawaii Supreme Court in *State v. Murray*, 169 P.3d 955, 967-70 (2007). Amicus Br. at 6-9. The Amicus suggests that under this procedure a trial court could change the language of statutory elements regarding the existence of prior convictions by using "statutory citations instead of the name of the crime." Amicus Br. at 7. This Court should reject this procedure because: (1) it is inconsistent with prior holdings of this Court that it is the function of the legislature to define the elements of a criminal

offense; and, (2) it is inconsistent with *Old Chief*² which held that the controlling factor is the actual language chosen by the legislature.

In *Murray*, the Defendant was convicted of the felony offense of abuse of a family or household member. *Murray*, 169 P.3d at 957. Under the relevant statute, the prosecution had to prove that the defendant physically abused a family or household member and that the violation was the “third or any subsequent offense that occurred within two years of a second or subsequent conviction in violation [of that statute].” *Murray*, 169 P.3d at 959. The defendant argued that since he had agreed to stipulate to the existence of the prior convictions, the jury should not have been informed of the existence of the prior convictions because his stipulation rendered the prior convictions irrelevant and prejudicial. *Murray*, 169 P.3d at 967.

The Hawaii Court cited *Old Chief* and adopted a procedure regarding the use of prior convictions to prove an element of a charged offense. *Murray*, 169 P.3d at 971. Under that approach, a defendant is allowed to stipulate to the fact of a prior conviction. *Murray*, 169 P.3d at 972. The jury is then instructed that the defendant has stipulated to this particular element of the offense to make it clear that this element is considered proven beyond a reasonable doubt. *Murray*, 169 P.3d at 973. The Hawaii court, however,

² *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1996).

went further and held that the instruction regarding the stipulation must be crafted to omit any reference to the “name or nature” of the previous conviction, and that the court must also preclude any mention of the nature of the prior conviction during the trial. *Murray*, 169 P.3d at 973. The court thus held that if a defendant chose to stipulate to his prior offenses, then the trial court must instruct the jury of the following:

(1) conviction under HRS § 709-906(7) requires the prosecution to prove beyond a reasonable doubt the element that defendant has had at least two prior misdemeanor convictions, the last of which occurred within two years of the charged offense; (without indicating that the two prior convictions must be for abuse of a household or family member); (2) defendant has stipulated to at least two prior misdemeanor convictions, the last of which occurred within two years of the charged offense; (3) the stipulation is evidence only of the prior conviction element; (4) the prior conviction element of the charged offense must be taken as conclusively proven; (5) the jury is not to speculate as to the nature of the prior convictions; and (6) the jury must not consider defendant's stipulation for any other purpose.

Murray, 169 P.3d at 973.

In the present case, the amicus urges this Court to adopt the procedure outlined in *Murray*, and argues that under that approach a defendant should be allowed to stipulate to the existence of his or her prior convictions and that the stipulation itself should alter the actual language of the statutory element by using statutory citations instead of the name of any specific crime.

Amicus Br. at 7.

The fundamental defect with the amicus' proposal is that it fails to recognize the fundamental principle that it is a function of the Legislature, not the courts, to define the elements of a criminal offense. Thus, if the name or nature of the requisite prior conviction is used in the actual statutory language, then the statute demonstrates an actual legislative concern with the specific name or nature of the prior offense, and a court should not remove this language from the element of the offense.

This Court has consistently held that it is the function of the Legislature to define the elements of a specific crime. *See State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000); *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885 (2005); *Hendrix v. City of Seattle*, 76 Wn.2d 142, 155, 456 P.2d 696 (1969).³ When a statute is unambiguous, it is not subject to judicial construction and its meaning must be derived from the plain language of the statute alone. *State v. Sullivan*, 143 Wn.2d 162, 175-75, 19 P.3d 1012 (2001), *citing State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995) (*quoting State v. Hansen*, 122 Wn.2d 712, 717, 862 P.2d 117 (1993)). In addition, the courts do not add to nor subtract from the clear language of a statute unless it is imperatively required to make the statute rational.

³ Similarly, in *Hughes* this Court held that it was the "function of the legislature and not of the judiciary to alter the sentencing process" and that this Court, therefore, would not create a procedure to empanel juries on remand to find aggravating factors because, "[t]o create such a procedure out of whole cloth would be to usurp the power of the legislature." *State v. Hughes*, 154 Wash.2d 118, 149-51, 110 P.3d 192 (2005).

Sullivan, 143 Wn.2d at 175 (citing *State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982)). Furthermore, this Court has held that legislative definitions provided by the statute are controlling. *Sullivan*, 143 Wn.2d at 175 (citing *Am. Legion Post 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991) (citing *City of Seattle v. Shepherd*, 93 Wn.2d 861, 866, 613 P.2d 1158 (1980))).

When the United States Supreme Court in *Old Chief* addressed the admissibility of a prior conviction needed to prove a “status element” of a charged offense, that court, like this one, centered its focus on the actual language of the statute in question. *Old Chief*, 519 U.S. at 186. Although the Court did hold that the “name or nature” of the defendant’s prior conviction was not relevant in that case, it did so because the actual statutory language in that case did not include the name of the qualifying prior offenses. *Old Chief*, 519 U.S. at 186, 117 S. Ct. at 653.

In *Old Chief*, the defendant was charged with violating 18 U.S.C. § 922(g)(1), which made it unlawful for a person to possess a firearm if he or she had previously been convicted “of a crime punishable by imprisonment for a term exceeding one year.” *Old Chief*, 519 U.S. at 174. The defendant in *Old Chief* had a prior conviction for assault causing serious bodily injury. *Old Chief*, 519 U.S. at 175. Prior to trial, the defendant moved for an order preventing the government from mentioning the prior conviction except to

state that he had been convicted “of a crime punishable by imprisonment exceeding one year.” *Old Chief*, 519 U.S. at 175. This language, of course, exactly matched the language of the actual statutory element. The Government, however, refused the stipulation and the trial court allowed the government to introduce the order of judgment and commitment that listed the prior conviction and described it as an assault resulting in serious bodily injury. *Old Chief*, 519 U.S. at 177.

The Supreme Court held that the defendant’s offer to admit the prior conviction element (that is, that he had a prior conviction punishable by imprisonment for a term exceeding one year) would have produced conclusive evidence of the element. *Old Chief*, 519 U.S. at 186. In addition, the Court specifically focused on the actual language of the statute and pointed out that the statutory element itself did not list the name of the offense:

The statutory language in which the prior-conviction requirement is couched shows no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies, and *Old Chief* clearly meant to admit that his felony did qualify, by stipulating “that the Government has proven one of the essential elements of the offense.” As a consequence, although the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission.

Old Chief, 519 U.S. at 186. Later the Court again addressed the issue of whether the name of the prior offense should be disclosed to the jury and focused on the actual language of the statute crafted by the legislative branch:

The issue is not whether concrete details of the prior crime should come to the jurors' attention but whether the name or general character of that crime is to be disclosed. Congress, however, has made it plain that distinctions among generic felonies do not count for this purpose; the fact of the qualifying conviction is alone what matters under the statute. "A defendant falls within the category simply by virtue of past conviction for any [qualifying] crime ranging from possession of short lobsters, see 16 U.S.C. § 3372, to the most aggravated murder." *Tavares*, 21 F.3d, at 4. The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the court's jury instructions.

Old Chief, 519 U.S. at 190-91.

The holding in *Old Chief*, therefore, was clearly based on an analysis of the actual language of the statutory element. There, the statute only required a showing of a prior conviction punishable by "imprisonment for a term exceeding one year." The actual name of the conviction, therefore, was not admissible, given the defendant's stipulation, because the statute showed "no congressional concern with the specific name or nature of the prior offense," the name or nature was not relevant. *Old Chief*, 519 U.S. at 186.

In *State v. Johnson*, 90 Wn.App. 54, 63, 950 P.2d 981 (1998), the Washington Court of Appeals followed *Old Chief* and held that when a statute only required the state to prove the existence of a prior “violent offense,” it was error for the trial court to allow the State to produce evidence that the defendant had a prior rape conviction when the defendant had offered to stipulate that he had a prior violent offense without naming the offense.

The Washington Court of Appeals has also rejected a procedure similar to the one proposed by the amicus in the present case. In *State v. Ortega*, 134 Wn. App. 617, 142 P.3d 175 (2006), the defendant was charged with three counts of felony violation of a protection order. For each count, the State had to prove the existence of two prior convictions for violating protection orders. *Ortega*, 134 Wn. App. at 620-21. The defendant offered to stipulate that if the jury found him guilty of committing the three present violations then those convictions would be felonies. *Ortega*, 134 Wn. App. at 623. The trial court rejected the proposed stipulation because the defendant declined to specify that he had twice been convicted of *violating protection orders*. *Ortega*, 134 Wn. App. at 623 (emphasis in original).

On appeal, the Court of Appeals discussed affirmed. The court found that the defendant’s case differed from *Old Chief* because the defendant in *Old Chief* “offered to stipulate to the language of the element in question.” *Ortega*, 134 Wn. App. at 624. *Ortega*’s offense, on the other hand, required

prior convictions for certain types of crimes: violations of protection orders.

Ortega, 134 Wn. App. at 624-25. The court also specifically held that *Old*

Chief did not allow a defendant to sanitize the elements of the offense:

Neither *Johnson* nor *Old Chief* requires acceptance of a stipulation that would avoid the statutory language on the ground that the statutory language itself was unfairly prejudicial.

Ortega, 134 Wn. App. at 625.

Several conclusions are readily apparent. First, under Washington law, it is unquestionably a function of the Legislature to determine the elements of a criminal offense. Further, under *Old Chief* and *Ortega*, the primary analysis in determining the appropriateness of a defendant's offer to stipulate to the existence of a prior offense must focus on the actual language of the statutory element. If the element requires only a showing of a prior "violent offense," or a conviction "punishable by imprisonment for a term exceeding one year" then the actual name of the offense is not admissible if a defendant offers a stipulation that matches the statutory language. The issue of paramount importance, however, is the actual language of the statutory element. Thus, if the element reflects a legislative or congressional concern with the specific name or nature of the prior offense, then the stipulation must follow the language of the statutory element naming the prior offense.

The procedure proposed by the amicus in the present case, however, distorts the actual language of *Old Chief*. Instead of focusing on the language of the actual statutory element and analyzing whether the element itself demonstrates a legislative concern with the specific name of the prior offense, the amicus' procedure skips the analysis altogether and concludes that the "name or nature" of the prior offense is not admissible. The Hawaii court in *Murray* also distorted the holding in *Old Chief* and focused only on what it perceived to be "unfair prejudice" to a defendant if the jury were informed of the "name and nature" of the prior offense. *Murray*, 169 P.3d at 972. This approach, however, puts the cart before the horse.

To properly analyze whether evidence is unfairly prejudicial, a court must first determine the actual elements of the offense. As this Court stated in *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994), ER 403 is the same as Federal Rule of Evidence 403, so this Court may look to both state and federal case law for guidance. The Ninth Circuit, for example, has explained that evidence regarding a prior conviction was not inadmissible based on claim of prejudice when the prior conviction was an actual element of the offense:

Barker misunderstands the fundamental nature of "prejudicial evidence." Evidence is prejudicial only when it has an additional adverse effect on a defendant beyond tending to prove the fact or issue that justifies its admission. A prior conviction is not prejudicial when it is an element of the

charged crime. Proof of the felony conviction is essential to the proof of the offense - be it proof through stipulation or contested evidence. The underlying facts of the prior conviction are completely irrelevant under § 922(g)(1); the existence of the conviction itself is not.

United States v. Barker, 1 F.3d 957, 959 (9th Cir.1993), *amended*, 20 F.3d 365, 365-66 n.3; *see also United States v. Amante*, 418 F.3d 220, 224 (2d Cir. 2005)("Where the prior conviction is essential to proving the crime, it is by definition not prejudicial."); *United States v. Gilliam*, 994 F.2d 97, 100 (2d Cir.1993); *United States v. Belk*, 346 F.3d 305, 310 (2d Cir.2003)("A prior conviction is not prejudicial where the prior conviction is an element of the crime because it proves the fact or issue that justified its admission into evidence.").

In addition, as outlined in the State's Supplemental Brief at pages 7-8, the United States Supreme Court addressed so-called recidivist or habitual criminal statutes that required a state to prove the existence of a prior conviction in *Spencer v. Texas*, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967). In *Spencer*, the Supreme Court stated that the possibility of prejudice from the evidence of the prior conviction was outweighed by the validity of the State's purpose in introducing the evidence and that the defendants' interests could be protected by limiting instructions. *Spencer*, 385 U.S. at 561. The Court thus rejected the defendants' due process claims:

It is fair to say that neither the *Jackson* case nor any other due process decision of this Court even remotely supports the proposition that the States are not free to enact habitual-offender statutes of the type Texas has chosen and to admit evidence during trial tending to prove allegations required under the statutory scheme.

Spencer, 385 U.S. at 565-66. Moreover, the Court specifically found that a contrary holding would be unworkable and unwarranted:

To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence. For example, all joint trials, whether of several codefendants or of one defendant charged with multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge. This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest.

Spencer, 385 U.S. at 562 (citations omitted).

Similarly, over fifty years ago, this Court rejected a defendant's claim that the inclusion of statutory element of a prior conviction placed his character in evidence and deprived him of a fair trial. *Pettus v. Cranor*, 41 Wn.2d 567, 568, 250 P.2d 542 (1953)(unlawful possession of a firearm); *See*

also *State v. Tully*, 198 Wash. 605, 89 P.2d 517 (1939). In *Pettus*, this Court held that because the charge followed the language of the statute, and because the existence of the prior conviction was a fact “which was necessary for the state to allege and prove to obtain a conviction for its violation,” there was no error. *Pettus*, 41 Wn.2d at 568-69.

All of the authorities cited above demonstrate several basic principles that in turn show the flaws in the amicus’ proposed procedures. First, it is the function of the legislature to define the elements of a criminal offense. Second, in determining whether the actual name of a specific prior conviction is admissible, a court must look to the actual language of the statutory element to determine if the statute demonstrates legislative concern with the specific name or nature of the prior offense. Third, the name nature of the prior is not prejudicial when the name or nature of the prior conviction is an element of the charged crime. Finally, any argument that an actual element may be removed or changed because the element itself is prejudicial was squarely rejected by the United States Supreme Court in *Spencer*.

In sum, the Legislature unquestionably has the power to create criminal offenses including status offenses that require the State to prove, as an element, that the defendant has certain prior offenses. When the statutory element includes the name or nature of certain offenses, that information is relevant and admissible. The Legislature, of course, could choose to sanitize

the prior conviction by creating categories or subsets of offenses with generic titles or names (such as: “a prior conviction punishable by imprisonment for a term exceeding one year;” “violent offenses;” or “sex offenses.”). In such a case, the defendant can choose to stipulate to the existence of a prior offense as long as the stipulation matches the language of the statutory element, such as “felony,” “violent offense,” or sex offense,” respectively. If, however, the Legislature has chosen instead to specifically name the crime or crimes required to prove the element of a prior conviction, then the defendant’s stipulation must match the statutory element. A contrary ruling would violate the core principle that it is a function of the Legislature to determine and establish the elements a criminal offense. The United States Supreme Court in *Old Chief* recognized the importance of this concept by repeatedly returning to the language the legislative branch chose to use, the distinctions between prior offenses congress felt “counted,” and whether the statute showed “congressional concern” with the specific name or nature of the prior offense. For these reasons, this Court should reject the proposed procedure outlined in the amicus’ brief and require, as the courts did in *Old Chief* and *Ortega*, that any stipulation must match the actual language of the statutory elements.

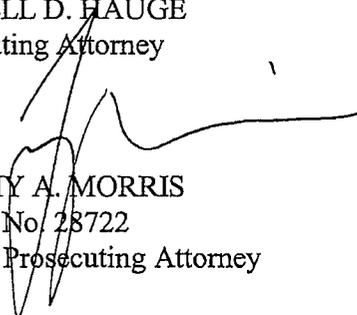
IV. CONCLUSION

For the foregoing reasons, this Court should decline the amicus' invitation to follow the holding of the Supreme Court of Hawaii in *Murray*.

DATED September 9, 2008.

Respectfully submitted,

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