

66556-1

66556-1

NO. 66556-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARIO HUMPHRIES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

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COURT OF APPEALS
DIVISION I

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. FACTS OF THE CRIME	3
C. <u>ARGUMENT</u>	6
1. THE DECISION WHETHER TO STIPULATE TO THE EXISTENCE OF A PRIOR CONVICTION IS A STRATEGIC DECISION TO BE MADE BY TRIAL COUNSEL, AND COUNSEL'S DECISION TO STIPULATE DID NOT VIOLATE THE DEFENDANT'S RIGHT TO A JURY TRIAL OR RIGHT TO DUE PROCESS.....	6
2. THE TRIAL COURT PROPERLY DENIED HUMPHRIES' MOTION FOR A NEW TRIAL BECAUSE HE FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.....	13
D. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Harrington v. Richter, ___ U.S. ___,
131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)..... 15

Old Chief v. United States, 519 U.S. 172,
117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)9, 10, 17

Spencer v. Texas, 385 U.S. 554,
87 S. Ct. 648, 17 L. Ed. 2d 606 (1967)..... 16

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 13, 14, 15

Washington State:

In re Detention of Moore, 167 Wn.2d 113,
216 P.3d 1015 (2009).....9

In re Personal Restraint of Stenson, 142 Wn.2d 710,
16 P.3d 1 (2001)..... 12

State v. Barragan, 102 Wn. App. 754,
9 P.3d 942 (2000)..... 16

State v. Donald, 68 Wn. App. 543,
844 P.2d 447 (1993)..... 16

State v. Garcia, 57 Wn. App. 927,
791 P.2d 244 (1990)..... 14

State v. Garrett, 124 Wn.2d 504,
881 P.2d 185 (1994)..... 15

State v. Goodin, 67 Wn. App. 623,
838 P.2d 135 (1992)..... 10

<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	12
<u>State v. Holm</u> , 91 Wn. App. 429, 957 P.2d 1278 (1998).....	13
<u>State v. Johnson</u> , 104 Wn.2d 338, 705 P.2d 773 (1985).....	8
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	14
<u>State v. Price</u> , 126 Wn. App. 617, 109 P.3d 27 (2005).....	16
<u>State v. Roswell</u> , 165 Wn.2d 186, 196 P.3d 705 (2008).....	15
<u>State v. Valladares</u> , 99 Wn.2d 663, 664 P.2d 508 (1983).....	8

Rules and Regulations

Washington State:

CrR 4.2.....	9
CrR 4.2.....	iii, 9
ER 403.....	10
RAP 2.5.....	7
RPC 1.2.....	10, 12
RPC 1.4.....	10

Other Authorities

<i>ABA, Standards for Criminal Justice: Prosecution Function and Defense Function std. 4–5.2 (3d ed. 1993)</i>	11, 12
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A. ISSUES PRESENTED.

1. A defendant who waives or abandons a claim below may not later raise the claim on appeal. The defendant waived or abandoned his claim that a stipulation was improperly accepted without his consent when he changed his mind and consented to the stipulation prior to jury deliberations. Should his claim of error be rejected as waived or abandoned?

2. In a criminal trial, decisions as to the presentation of evidence, including whether to stipulate to a particular fact, are a matter of trial strategy and are the exclusive province of the defense attorney. An attorney may make strategic decisions without the defendant's consent and over the defendant's objection. Did the trial court properly accept defense counsel's stipulation that the defendant had previously been convicted of an unnamed serious offense regardless of whether Humphries consented to the stipulation?

3. A defendant must establish both deficient performance and prejudice in order to prevail on a claim of ineffective assistance of counsel. The defendant in this case failed to establish that counsel failed to make a tactical decision not to request a limiting instruction, and failed to establish that but for the

lack of a limiting instruction there is a reasonable probability that the result of the trial would have been different. Did the trial court properly conclude that the defendant failed to establish deficient performance?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Mario Humphries was charged by amended information with the crimes of assault in the second degree, assault in the third degree (in the alternative) and unlawful possession of a firearm in the first degree. CP 9-11. The State also alleged that Humphries was armed with a firearm at the time he committed assault. CP 10. The case was tried before a jury, and counsel for Humphries stipulated that Humphries had previously been convicted of a "serious offense." RP 10/12/10 5-6; 10/13/10 (p.m.) 13. The jury found Humphries guilty as charged of all three counts and the firearm enhancement. CP 45-48. Humphries was sentenced to 106 months of total confinement. CP 93. Humphries filed a motion for new trial based on juror misconduct and ineffective assistance of counsel. CP 50-51. The trial court denied the motion. RP 1/6/11 9.

2. FACTS OF THE CRIME.

At 1 a.m., on February 7, 2010, Officer David Ellithorpe of the Seattle Police Department was working as a patrol officer in a marked police car in the Rainier Valley neighborhood of Seattle. RP 10/13/10 (a.m.) 12-17. It was a Sunday night. The location that Officer Ellithorpe was patrolling, the junction of Rainier Avenue South and South Juneau Street, was very quiet as no nearby businesses were open. RP 10/13/10 (a.m.) 19-20. Officer Ellithorpe had not seen a pedestrian for approximately 15 minutes. RP 10/13/10 (a.m.) 19.

Officer Ellithorpe noticed two males emerge from an alley approximately 40 to 50 yards away. RP 10/13/10 (a.m.) 19. They were walking, and their appearance did not raise any initial concerns for Officer Ellithorpe. RP 10/13/10 (a.m.) 21. However, one of the two males, later identified as Mario Humphries, raised his right arm to shoulder height and pointed it at Officer Ellithorpe's patrol car. RP 10/13/10 (a.m.) 21. Officer Ellithorpe heard a gunshot and saw a muzzle flash from the object in Humphries' hand. RP 10/13/10 (a.m.) 22-25. Officer Ellithorpe accelerated his

patrol car in order to be out of the line of fire, and broadcast over his radio that someone had shot at him. RP 10/13/10 (a.m.) 23, 26; Ex. 2. He reported that the shooter was wearing a gray hooded sweatshirt. Ex. 2. He turned around and headed back to the scene of the shooting, without his lights on. RP 10/13/10 (a.m.) 26.

Officer Daryl D'Ambrosia was close by, at Rainier Avenue and South Ferdinand Street, when he heard the radio dispatch that Officer Ellithorpe had requested help. RP 10/12/10 36-38. He immediately drove to the location of Rainier Avenue South and South Juneau Street, which took him one minute or less. RP 10/12/10 38-41. As he approached that location, he saw two males walking north on Rainier Avenue South between South Juneau Street and South Mead Street. RP 10/12/10 40-41. He contacted Officer Ellithorpe who had returned to the location of Rainier Avenue South and South Juneau Street. RP 10/12/10 41-42.

Officer Ellithorpe recognized the two males that Officer D'Ambrosia had spotted as the two males that had emerged from

the alley and shot at him. RP 10/13/10 (a.m.) 27. Less than two minutes had elapsed. RP 10/13/10 (a.m.) 27; Ex. 2.¹ Officer Ellithorpe identified Humphries as the person who shot at him. RP 10/13/10 (a.m.) 32, 52. Based on the sound of the gunshot and the size of the muzzle flash, Officer Ellithorpe believed that Humphries had used a small caliber handgun, such as .22. RP 10/13/10 (a.m.) 22, 44-45. Humphries was placed under arrest, but no weapons or ammunition were found on him or his companion. RP 10/13/10 (a.m.) 59. Humphries appeared to be under the influence, and smelled of marijuana. RP 10/13/10 (a.m.) 62. He was wearing a blue and gray hooded jacket. RP 10/13/10 (p.m.) 5.

Officers conducted a prolonged search of the area, but were unable to find a gun. RP 10/13/10 (a.m.) 47, 65-66, 70. The area includes a large, old hedgerow, which Officer Ellithorpe testified could not be completely searched because it was so thick. RP 10/12/10 46-47; 10/13/10 (a.m.) 50-51.

¹ A review of the radio dispatch, admitted as Exhibit 2, shows that the suspects were detained one minute and 45 seconds after Officer Ellithorpe reported that someone had shot at him.

C. ARGUMENT.

1. THE DECISION WHETHER TO STIPULATE TO THE EXISTENCE OF A PRIOR CONVICTION IS A STRATEGIC DECISION TO BE MADE BY TRIAL COUNSEL, AND COUNSEL'S DECISION TO STIPULATE DID NOT VIOLATE THE DEFENDANT'S RIGHT TO A JURY TRIAL OR RIGHT TO DUE PROCESS.

Humphries argues that his right to a jury trial and his right to due process were violated when counsel made the reasonable strategic decision to stipulate to the fact that Humphries had previously been convicted of a "serious offense." The record reflects that Humphries initially disagreed with that strategic decision, but changed his mind and agreed to sign the stipulation before jury deliberations began. Thus, Humphries waived or abandoned his claim of error. Moreover, because the decision to stipulate to a prior offense is a strategic decision to be made by counsel, not the defendant, Humphries' initial disagreement with the strategy does not mean that Humphries was denied his right to a jury trial or his right to due process, as he claims.

On the first day of testimony, defense counsel told the trial court that the parties had agreed to stipulate to the fact that Humphries had previously been convicted of a "serious offense," which is an element of the crime of unlawful possession of a

firearm. RP 10/12/10 5. He told the court that he had discussed this decision at length with Humphries, but that Humphries disagreed with the strategy. RP 10/12/10 5-6. Humphries' criminal history includes prior convictions for robbery in the first degree, robbery in the second degree and attempted robbery in the second degree. CP 96. Counsel explained his reasons for entering the stipulation:

I do not want the jury to hear the fact that he's been convicted of a rob in the first degree, a rob in the second degree and attempted robbery in the second degree.

RP 10/12/10 5. Counsel stated that he believed he did not need the defendant's consent to enter into a stipulation for strategic reasons, and the trial court agreed. RP 10/12/10 6. The stipulation was read to the jury before the State rested its case. RP 10/13/10 (p.m.) 13. At the end of trial, before the jury began deliberations, the parties and the court discussed the stipulation again, and counsel stated, "In talking to Mr. Humphries, I think he's prepared to sign it now." RP 10/14/10 89. A copy of the stipulation, signed by Humphries, was filed with the court. CP 12-13.

RAP 2.5(a) provides that the appellate court may refuse to review any claim of error that was not preserved in the trial court.

A claim of error, even a constitutional one, can be waived or abandoned at trial. For example, in State v. Valladares, 99 Wn.2d 663, 666, 672, 664 P.2d 508 (1983), the defendant affirmatively withdrew a motion to suppress physical evidence, and then claimed on appeal that he could raise the admissibility of the evidence on appeal. The state supreme court refused to consider the issue, concluding that it had been waived or abandoned. Id. at 672.

Likewise, in the present case, the record reflects that Humphries changed his mind and acquiesced to entry of the stipulation before the end of trial. As such, he waived or abandoned any claim that the trial court erred in allowing the stipulation without his consent.

Moreover, even if this claim was not waived or abandoned below, Humphries' attempt to analogize counsel's decision to stipulate to the decision to plead guilty is misplaced. As the state supreme court has held, a stipulation, even a stipulated facts trial, is functionally and qualitatively different from a guilty plea. State v. Johnson, 104 Wn.2d 338, 341, 705 P.2d 773 (1985). As the court in Johnson explained, "a stipulation is only an admission that if the State's witnesses were called, they would testify in accordance with the summary presented by the prosecutor." Id. at 341. The trier of fact is still called upon to make a finding of guilt, and the

defendant's ability to appeal a determination of guilty is preserved. Id. at 341-43. In Johnson, the court concluded that a stipulated facts trial is not tantamount to a guilty plea, and the admonitions set forth in CrR 4.2 to insure that a guilty plea is knowingly, voluntary and intelligent, are not required. Id. at 343. See also In re Detention of Moore, 167 Wn.2d 113, 120, 216 P.3d 1015 (2009) (stating "due process would not require the trial court to ensure that defendant understands his rights waived by a factual stipulation as long as the stipulation is not tantamount to a guilty plea.").

Strategic and tactical decisions, such as the decision to stipulate to the existence of a prior conviction, are controlled by defense counsel, not the defendant. For this reason, a court may accept a stipulation over the defendant's objection. In this case, the court's acceptance of counsel's stipulation did not violate any of Humphries' constitutional rights. In Old Chief v. United States, 519 U.S. 172, 185, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), the United States Supreme Court explained that when a prior conviction is an element of a charged crime, admission of the name or nature of the prior offense carries a risk of unfair prejudice to the defendant. The Court also recognized that the prosecution is generally entitled to prove its case by evidence of its own choice, and cannot be forced

into entering into stipulations that deprive the State of the full evidentiary force of its case. Id. at 186-87. The Court balanced these competing interests and held that when the defense offers to stipulate to the existence of an unnamed prior conviction that is an element of the charged offense, the trial court violates ER 403 by not accepting the stipulation. Id. at 192.

In the present case, it cannot be questioned that defense counsel's decision to enter into an Old Chief stipulation in order to prevent the jury from hearing of Humphries' prior robbery convictions was a reasonable strategic choice. See State v. Goodin, 67 Wn. App. 623, 634, 838 P.2d 135 (1992) (holding that decision to enter stipulation was reasonable tactic). Humphries, however, argues that counsel should not have been allowed to enter into the stipulation without Humphries' consent.

RPC 1.2(a) sets forth the allocation of responsibility between a lawyer and his client. The rule states that "a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued." RPC 1.2(a) also sets forth the specific decisions that are in a criminal defendant's control:

In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

The ABA, *Standards for Criminal Justice: Prosecution Function and Defense Function* std. 4–5.2 (3d ed. 1993), also address the allocation of responsibility between a criminal defendant and counsel. The standard reads:

(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.

In State v. Grier, 171 Wn.2d 17, 31-32, 246 P.3d 1260 (2011), the state supreme court utilized RPC 1.2(a) and the ABA Standards in concluding that the decision whether to request a lesser included offense is a strategic decision that ultimately rests with defense counsel. The court noted that the absence of a particular decision from the list of decisions that are to be made by the accused in RPC 1.2(a) and the ABA Standards suggests that the decision is to be controlled by counsel. Grier, 171 Wn.2d at 31. Significantly, in In re Personal Restraint of Stenson, 142 Wn.2d 710, 735-36, 16 P.3d 1 (2001), the court utilized the ABA Standards in concluding that the decision to admit guilt in the penalty phase of a capital trial falls "within the exclusive province of the lawyer." The court held that trial counsel was free to make that tactical choice over the defendant's objection. Id.

The decision to enter into a particular factual stipulation, in order to prevent unfairly prejudicial evidence from being presented to the jury, is a strategic decision that is to be made by counsel pursuant to the guidelines set forth in RPC 1.2(a) and the ABA Standards. The defendant's consent is not required.

2. THE TRIAL COURT PROPERLY DENIED HUMPHRIES' MOTION FOR A NEW TRIAL BECAUSE HE FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Humphries argues that his trial counsel rendered ineffective assistance of counsel because he failed to propose a limiting instruction in regard to the jury's consideration of his prior conviction. At sentencing, Humphries moved for a new trial based on this claim of ineffective assistance of counsel. The trial court denied the motion. The trial court's denial was not an abuse of discretion. Humphries failed to establish either deficient performance or prejudice.

The appellate court reviews a trial court's factual findings relating to a claim of ineffective assistance of counsel under the substantial evidence standard. State v. Holm, 91 Wn. App. 429, 957 P.2d 1278 (1998). The trial court's legal conclusions are reviewed de novo. Id. A trial court's denial of relief is reviewed for abuse of discretion. Id.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial

process that the trial cannot be relied on as having produced a just result." Id. at 686.

The defendant has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail on a claim of ineffective assistance of counsel the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Id.; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990). The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688.

In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Id. at 689. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Id. at 689-90.

Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. If the standard were so low, virtually any act or omission would meet the test. Id. Petitioner must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694. The difference between Strickland's prejudice standard and a more-probable-than-not standard is slight. Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011).

In the present case, Humphries failed to establish deficient performance below because he failed to provide evidence that counsel did not make a tactical decision not to request a limiting instruction. Courts have held that a limiting instruction is appropriate when an unnamed prior conviction is admitted to prove an element of the charged crime. State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008); Spencer v. Texas, 385 U.S. 554, 561,

87 S. Ct. 648, 17 L. Ed. 2d 606 (1967) (approving use of limiting instruction where prior conviction admissible to prove element of charged crime). However, Washington courts have long held that a failure to request a limiting instruction can be a tactical decision. See, e.g., State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (2005); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993). The record as it exists does not overcome the strong presumption that defense counsel made a reasonable tactical decision not to request a limiting instruction. Notably, defense counsel did not say that he failed to make a tactical decision. Counsel stated, "I should have asked the Court to enter a limiting instruction." RP 1/6/11 3. This statement is open to interpretation. One interpretation is that counsel simply forgot to request a limiting instruction. But another, equally reasonable interpretation is that counsel made a tactical decision not to request a limiting instruction, which in hindsight he came to believe was a tactical error after speaking to the jury. Counsel's ambiguous statement is insufficient to overcome the strong presumption that counsel's actions were the result of a reasonable trial strategy. Counsel never represented to the trial court that his failure to request a

limiting instruction was not a tactical decision. Humphries has failed to establish deficient performance.²

Moreover, as the trial court found, Humphries failed to establish prejudice. As the trial court noted, the strength of the case rested entirely on the credibility of the officer. This case was not a credibility contest. The defendant did not testify. The defense theory was that the circumstances were such that the officer could not have accurately observed the events. See RP 10/14/10 63-67. The fact that Humphries had been previously convicted of an unnamed serious offense could not have had much bearing on the jury's evaluation of whether the circumstances were such that the officer could accurately observe what happened. The decision in Old Chief is predicated on the recognition that hearing the name and nature of a prior conviction is far more prejudicial than hearing the sanitized fact that the defendant has an unnamed prior conviction. In this case, thanks to counsel's stipulation, the fact of the prior conviction was as sanitized as possible. Under the circumstances, this Court cannot conclude that there is a reasonable probability that but for counsel's failure to request a limiting instruction, the result of the trial would have been different.

² The trial court did not address the performance prong. RP 1/6/11 9.

Humphries failed to establish either deficient performance or prejudice below. Thus, the trial court properly exercised its discretion in denying the motion for a new trial based on ineffective assistance of counsel.

D. CONCLUSION.

Humphries' convictions should be affirmed.

DATED this 23rd day of September, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. HUMPHRIES, Cause No. 66556-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame

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