Supreme Court No.: 92817-7
Court of Appeals No.: 72001-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC SLANE,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Other Federal Decisions

Decisions of Other States

Constitutional Provisions

Statutes

Rules

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Eric Slane, petitioner here and appellant below, objected to his attorneys' assertion of mental health-based defenses that caused counsel to concede elements of the charged offenses. He requests this Court grant review pursuant to RAP 13.4(b)(3) and (4) of the decision of the Court of Appeals, Division One, in *State v. Slane*, No. 72001-5-I, filed January 19, 2016 to decide an open constitutional question of substantial public import. A copy of the opinion is attached as an Appendix.

B. ISSUE PRESENTED FOR REVIEW

Whether this Court should grant review under RAP 13.4(b)(3) and (4) to determine the open question whether counsel's assertion of a mental health defense that admits elements of the crime charged over defendant's objection violates a defendant's rights to the effective assistance of counsel and a trial by jury?

C. STATEMENT OF THE CASE

Seattle police responding to 911 calls in August 2011 found that tires on several cars in a north Seattle neighborhood had been slashed.

4/23/14 RP 38-39; 5/1/14 RP 8-9.[1] One neighbor reported seeing a man wearing a white hat and dark pants, but the officers' search for a suspect was unsuccessful. 4/23/14 RP 24-25; 5/1/14 RP 10, 15. Later, an officer noticed Eric Slane crouching in nearby bushes and ordered him to come out. 5/1/14 RP 16-17. Mr. Slane explained that he lived nearby and came outside when he heard a commotion. 4/22/14 RP 45; 5/1/14 RP 20. Mr. Slane was wearing similar clothing to the suspect, and a search revealed he had two folding knives. 5/1/14 RP 17-18, 20. He was placed under arrest, and the knives were seized. 4/24/14(Girgus) RP 74-75.

In December 2011, the King County Prosecutor charged Mr. Slane with three counts of malicious mischief in the second degree. CP 1-2. After a lengthy delay, including over 15 months while Mr. Slane's competency was in question, trial eventually began in April 2014. CP 11-31; 1RP 21, 86-87, 95. Several counts of third degree malicious mischief and a charge of bail jumping for failing to appear for a hearing on July 15, 2013, were added by amended information. CP 12, 109-113.

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[1] Petitioner uses the same citation format as in his briefing before the Court of Appeals. *See* Opening Brief, p.3 n.1.

Mr. Slane's attorneys presented a diminished capacity defense to the malicious mischief charges and an affirmative defense based upon their client's mental illness to the bail jumping count. See CP 70-71, 88-94, 149-50. They called three witnesses to support their defense—Mr. Slane's long-time friend Patrick Brockmeyer, a mental health case manager, and forensic psychologist Paul Spizman. 4/23/14 RP 70, 93-94; 4/24/14(Girgus) RP 5.

Dr. Spizman offered his opinion that Mr. Slane suffered from paranoid schizophrenia. 4/24/14(Girgus) RP 16. He could not state with certainly whether or not Mr. Slane was capable of forming the mental state of malice at the time he slashed his neighbors' tires. Id. at 98-99. Dr. Spizman also opined that Mr. Slane's symptoms may have interfered with his ability to appear in court in July 2013. Id. at 65.

Mr. Slane did not agree with the diminished capacity defense presented by his attorneys, and he attempted to voice his objections to the court. When defense counsel began her opening argument, she described Mr. Slane as a paranoid schizophrenic and claimed that he was in the middle of a psychiatric emergency when he damaged his neighbor's property. 3RP 422-23. Mr. Slane immediately spoke up, stating, "No, you won't. . . . I did not want this defense. They did this –

they wouldn't – let me come to court without this defense. It was the only way I could get in front of a jury. I need witnesses." Id. at 423.

The court responded by telling Mr. Slane to be quiet, and Mr. Slane asked if he would be able to say anything. 3RP 423-24. "I'm supposed to be silent through everything and you can just say anything you want?" he asked the court and counsel. Id. at 424. Counsel continued her opening statement by describing Mr. Slane's thought process to the jury. Id. Mr. Slane pointed out that counsel had not learned that information from him and questioned why his attorney could present a defense he did not want. Id.

The next day defense counsel asked the court to find that Mr. Slane was no longer competent to stand trial because of his comments during opening statement and her assessment that Mr. Slane was no longer capable of working with her. 4/23/14 RP 4-7, 12-13. During the court's colloquy with Mr. Slane, the judge told him that he had to "follow along with" his attorney's strategy whether he agreed with it or not. Id. at 11.

Mr. Slane then listened to the testimony largely without comment until defense counsel rested their case and the court was ready to read the instructions to the jury. 5/1/14 RP 54. At that point

Mr. Slane asserted that the defense did not rest, citing the Sixth Amendment and his right to competent counsel. Id. at 54-55 (emphasis added).

After the jury was excused and Mr. Slane was permitted to speak privately with his attorney, he made it clear to the court that he did not agree with the diminished capacity defense; he wanted competent counsel or to represent himself as co-counsel. 5/1/14 RP 56-57. The court insisted on continuing the trial without addressing Mr. Slane's concerns and told him he would be removed from the courtroom if he disrupted the proceedings again. Id. at 57-58. Mr. Slane opted to leave the courtroom "under protest" rather than sit mutely through closing arguments he did not agree with. Id. at 57-59. Mr. Slane renewed his concerns that his attorneys were not competently representing him at a motion for a mistrial and again at sentencing. 5/1/14 RP 119-21, 127; 2RP 280-81, 287. He wanted to speak and wondered why he was there if no one would listen to him. 5/1/14 RP 119-21, 127. "I don't have counsel," he stated. Id. at 120.

The jury found Mr. Slane guilty of two counts of malicious mischief in the second degree, five counts of malicious mischief in the

third degree, and one count of bail jumping. CP 188-95. The Court of Appeals affirmed. *See* Appendix (opinion).

D. ARGUMENT

The constitutional issue of whether pursuing a mental health defense is personal to the defendant and waives a defendant's right to trial by jury and thus cannot be pursued by counsel over the defendant's objection merits a determination by our State's highest court.

"The language and spirit of the Sixth Amendment contemplate that counsel, like other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant." Faretta v. California, 422 U.S. 806, 820, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (emphasis added); accord Const. art. I, § 22 (providing right to "appear and defend in person, or by counsel."). The structure of the Sixth Amendment gives the defendant—not his lawyer—the rights necessary to defend himself.[2] Faretta, 422 U.S. at 819-20; accord United States v. Cronic, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 S. Ct. 657 (1984). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." Faretta, 422 U.S. at 820. Counsel thus assists the defendant in exercising his constitutional rights, including the right to a

[2] Article I, section 22 is similarly structured, giving the defendant several rights, beginning with "the right to appear and defend in person, or by counsel."

jury determination of every element of the charged offenses beyond a reasonable doubt. Cronic, 446 U.S. at 653-54.

"Implicit in the Sixth Amendment is the criminal defendant's right to control his defense." State v. Lynch, 178 Wn.2d 487, 491, 309 P.3d 482 (2013) (holding court may not instruct the jury on lesser included offenses over the defendant's objection). Certain decisions, such as the decision to plead guilty or plead not guilty by reason of insanity, are personal to the defendant and cannot be made by counsel. Florida v. Nixon, 543 U.S. 175, 187-88, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004); State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983); *see* Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Other decisions are considered to be "strategic" and controlled by defense counsel as long as they are consistent with the defendant's ultimate goals. Nixon, 543 U.S. at 187. The line between the two is not clear, and courts are divided as to whether defense counsel can assert certain defenses or concede guilt to a lesser-included defense when the client does not agree.

The United States Supreme Court avoided directly addressing whether defense counsel's concession of guilt in the guilt phase of a death penalty prosecution was a strategic decision that could be made

by defense counsel in Nixon. In that case the defendant did not respond when defense counsel discussed the strategy of conceding guilt. Nixon, 543 U.S. at 181-82. Because of the two-phase structure of a death penalty trial, the gravity of the potential death sentence, and the client's lack of objection, the Nixon Court held that counsel made a reasonable decision designed to save his client form the death penalty. Id. at 191-92.

The Ninth Circuit also avoided deciding whether counsel's decision to present mental health evidence over his client's objection violates a defendant's rights in United States v. Kaczynski, 239 F. 3d 1108 (9th Cir. 2001). In that death penalty case, the defendant made it clear he did not want his attorneys to argue that he was mentally ill. Id. at 1111-12. The defendant pled guilty in exchange for the government's agreement not to seek the death penalty. Id. at 1113. He later moved to vacate his convictions, and argued his plea was involuntary because it was induced by the threat that his attorneys would raise a mental defense over his objection. Id. at 1113.

On appeal Kaczynski argued that asserting a mental defense was a decision, like the decision to plead guilty, that the defendant has the ultimate authority to make. Kaczynski, 239 F.2d at 1118. The

government argued that trial counsel, and not the defendant, controlled "choice of trial tactics and the theory of the defense." Id. The open question—"where along this spectrum control of a mental defense short of insanity lies"—was not decided by the court because the defendant had agreed pre-trial that counsel could control the witnesses to be called and evidence to be elicited at the penalty phase. Id. at 1118-19.

This Court should grant review to decide this important, unresolved question pursuant to RAP 13.4(b)(3) and (4). Eric Slane did not agree with his attorneys' decision to assert a diminished capacity defense to several malicious mischief charges and an uncontrollable circumstances defense based upon his mental illness to the crime of bail jumping.[3] 3RP 423-24l 4/23/14 RP 11; 5/1/14 RP 54-59, 119-21, 127; 2RP 280-81, 287. His lawyers nonetheless pursued both defenses and conceded that he committed all of the acts underlying the malicious mischief and bail jumping charges. The

[3] "Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged." State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997); see State v. Marchi, 158 Wn. App. 823, 835, 243 P.3d 556 (2010), rev. denied, 171 Wn.2d 1020 (2011). Uncontrollable circumstances is an affirmative defense that the defendant must prove by a preponderance of the evidence. RCW 9A.71.170(2); State v. Fredrick, 123 Wn. App. 347, 353-54, 97 P.3d 47 (2004); CP 176 (jury instruction).

decision to raise mental health defenses and concede elements of the charges involved Mr. Slane's personal rights and should have been made by Mr. Slane.

The Court of Appeals opinion holds the attorneys' pursuit of diminished capacity and uncontrollable circumstances defenses, over Mr. Slane's objection, did not relieve the State of its burden of proof. Opinion at 11-12, 15-16. The holding misses the mark and should be reviewed. By asserting the uncontrollable circumstances defense to bail jumping, Mr. Slane's attorneys admitted that he committed the elements of bail jumping. By asserting a diminished capacity defense to the malicious mischief charges, defense counsel contested only the mental element of the crimes. CP 70-71, 88-91, 149; 3RP 422-27; 4/24/14 RP 59-62; 5/1/14 RP 85-97. In so doing, Mr. Slane's attorneys conceded that he committed the acts required for a guilty finding on the various counts of malicious mischief. In opening statement, counsel argued that Mr. Slane slashed the tires of his neighbors' automobiles and that the "real question" for the jury was his state of mind. 3RP 424, 426. Similarly, in closing argument counsel argued that the only element at issue was Mr. Slane's ability to act maliciously. 5/1/14 RP 82-85.

In addition to concessions in closing argument, Mr. Slane's attorneys also admitted evidence that assisted the State in proving the charged offenses. For example, defense counsel elicited testimony from Mr. Slane's friend that Mr. Slane told him why he slashed the tires of his neighbors' cars, and this information was repeated by the defense psychologist. 4/23/14 RP 78-79; 4/24/14(Girgus) RP 49-50, 87, 94-97. The psychologist also testified that Mr. Slane had stored urine in his home in the past, thus linking Mr. Slane to the malicious mischief count where a car's windows were slashed and a broken bottle that apparently contained urine was found inside. Id. at 34; 2RP 252-53; 4/22/14 RP 108, 112. Defense counsel pointed out the connection to the jury in closing argument. 5/1/14 RP 92.

Counsel was not required to concede the actus reus in order to argue the State's inability to prove the mental elements. A defendant may present alternative theories, even if one conflicts with the defendant's testimony. Mathews v. United States, 485 U.S. 58, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988) (defendant may raise entrapment defense even if he denies one or more elements of the crime); State v. Frost, 160 Wn.2d 765, 161 P.3d 361 (2007), cert. denied, 552 U.S. 1145 (2008).

Kansas and North Carolina have both decided similar issues in Mr. Slane's favor. This Court should grant review and do the same. In State v. Carter, 270 Kan. 426, 14 P.3d 1138 (2000), defense counsel presented a theory to the jury that was inconsistent with the client's position that he was innocent of all charges and the court reversed because of the denial of the defendant's right to counsel. Carter was charged with first degree murder under two alternatives, and defense counsel conceded Carter's involvement in the murder, but argued lack of premeditation in hopes of obtaining a felony murder conviction. Id. at 429. Carter expressed his disagreement with the attorney's strategy throughout the trial, but his motion to represent himself was denied. Id. at 429-33.

The Kansas Supreme Court held that defense counsel's guilt-based defense against his client's wishes violated his Sixth Amendment right to counsel and denied him a fair trial. Carter, 270 Kan. at 441. Applying the Cronic exception, that a violation of the right to counsel is structural error, the court found that Carter was entitled to new trial without a separate showing that he was prejudiced by his attorney's representation:

> [Defense counsel] abandoned his client, and the result was a breakdown in our adversarial system of justice. ...

> such a breakdown compels the application of the Cronic exception. The conduct of [counsel] was inherently prejudicial, and no separate showing of prejudice was required.

Id.

North Carolina also holds that counsel is ineffective per se if she admits the defendant is guilty of the charges for which he is being tried, or a lesser included offense, without the defendant's express permission. State v. Harbison, 315 N.C. 175, 180, 337 S.E.2d 504 (1985); State v. Maready, 205 N.C. App. 1, 13-14, 695 S.E.2d 771 (2010).[4]

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[4] While the State's response brief and the Court of Appeal's opinion refer to In re Personal Restraint of Stenson, 142 Wn.2d 710, 16 P.3d 1 (2001) and State v. Cross, 156 Wn.2d 580, 605-06, 132 P.3d 80 (2006), neither is directly on point. Cross reviewed whether there was an irreconcilable conflict requiring new counsel, not ineffective assistance of counsel or the right to a jury trial. 156 Wn.2d at 605-11. In Stenson this Court considered the issue of "control over trial tactics and theory of defense" during the penalty phase of a death penalty case although it was not raised as a separate claim because it underlay the petition. 142 Wn.2d at 732. The Court noted the open question—"the opinions quoted above do not directly address the issue of whether counsel may employ, over the objection of the defendant, the tactic of admitting guilt during the penalty phase of a death penalty trial"—and relied only on the advisory ABA Standards to hold "this court has no basis upon which to find that a constitutional right of the Petitioner was abridged when his counsel made the decision at issue"—essentially leaving the issue open for another claimant to raise more fully. Id. at 735-36.

Defense counsel conceded that Mr. Slane committed the acts that formed several felony and misdemeanor counts of malicious mischief. Mr. Slane's lawyers also introduced his explanation of why he committed the offenses to a friend through two separate witnesses. And they conceded that he knowingly failed to appear for court by asserting the affirmative defense that his failure was excused. Mr. Slane's lawyers thus violated his right to have the State prove and the jury determine every element of the crime beyond a reasonable doubt.

Mr. Slane's lawyers pursued this strategy over his objection, and they thus were not assisting him in presenting his defense as required by the Sixth Amendment. His constitutional rights to counsel and to a jury determination of every element of the crime beyond a reasonable doubt were violated, and by ignoring Mr. Slane's wishes and conceding elements of the crime, his attorney failed to subject the State's case to adversarial testing.

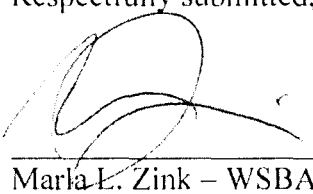
E. CONCLUSION

Mr. Slane argues he was effectively denied counsel when his attorneys raised mental health defenses over his objection. His constitutional right to a jury determination of every element of the charged offense beyond a reasonable doubt was also violated because

the attorneys conceded that Mr. Slane committed bail jumping, conceded that he committed all of the acts constituting malicious mischief, and presented evidence that helped the State prove the malicious mischief counts. These issues have not been conclusively determined by this Court or the United States Supreme Court. This Court should grant review of these important issues under RAP 13.4(b)(3) and (4).

DATED this 17th day of February, 2016.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ERIC SLANE, Appellant.	)	DIVISION ONE No. 72001-5-I UNPUBLISHED OPINION FILED: January 19, 2016

DWYER, J. — Eric Slane appeals multiple felony and misdemeanor convictions of malicious mischief and a conviction of bail jumping. He contends that he was deprived of his constitutional due process right to have a jury determine each element of the crime beyond a reasonable doubt when his attorneys argued, over his objection, that he committed the acts underlying the charges. He further claims that because his attorneys pursued a strategy that he disagreed with, he was deprived of his constitutional right to counsel. But the jury was required to find every element of the charged crimes proved beyond a reasonable doubt in order to convict Slane, and Slane's counsels' strategy did not relieve the State of its burden of proof. Slane entered a plea of not guilty, and his attorneys made sound tactical decisions consistent with the objective of his plea and subjected the State's case to meaningful adversarial testing. Slane

fails to establish a violation of his right to due process or his right to the effective assistance of counsel. We affirm.

I

In the early morning hours of August 26, 2011, police responded to reports that the tires of more than a dozen vehicles parked along the same road in a north Seattle residential neighborhood had been slashed.[1] An owner of one of the vehicles saw a man wearing dark clothing and a white hat crouched by a vehicle plunging a knife into a tire. Approximately an hour after the police first responded to the scene, a police officer noticed a man hiding in the bushes near the vehicles. The man, later identified as Eric Slane, was wearing dark clothing and dropped a white hat as he emerged from the bushes. He was carrying two folding knives.

Slane lived in a group home on the same street where the damage occurred. He told the police officer that he heard a commotion and came outside to investigate. Slane's vehicle, parked along the same street, was unharmed. Video surveillance footage showed a man wearing dark clothing and a white hat next to one of the vehicles that sustained damage.

Based on this August 2011 incident, and on Slane's failure to appear at a July 2013 court hearing, the State charged Slane with two felony counts of malicious mischief in the second degree, five misdemeanor counts of malicious mischief in the third degree, and one count of bail jumping. Although the State

[1] Another vehicle parked on a driveway on the same street sustained a different type of damage during the incident. The rear window of that vehicle was shattered and inside the vehicle was an unbroken bottle of liquid that appeared to contain urine.

initially filed charges in December 2011, trial was delayed for various reasons, including questions regarding Slane's competency.[2]

For several months before the April 2014 trial, it was clear that Slane's attorneys planned to raise defenses to all charges based on Slane's mental health. A few weeks before trial, when Slane's attorneys moved to sever the bail jumping charge from the malicious mischief charges, Slane strenuously opposed the motion. But he did not object when his attorneys confirmed that they would pursue a diminished capacity defense to the malicious mischief charges and the statutory affirmative defense of uncontrollable circumstances to the bail jumping charge.[3] During voir dire, Slane's counsel extensively questioned potential jurors about their attitude toward a mental health defense.

At the outset of opening remarks, one of Slane's attorneys told the jury that Slane was a paranoid schizophrenic who was experiencing a psychiatric crisis in the summer of 2011. Counsel claimed that because of his acute symptoms, Slane could not, and did not, form malicious intent. Slane interjected:

> I did not want this defense. They did this—they wouldn't— . . . let me come to court without this defense. It was the only way I could get in front of a jury. I need witnesses.

After he directed obscenities at counsel and argued with the court, Slane eventually allowed his counsel to continue her argument. Slane's attorney predicted that the State would present abundant evidence showing that Slane

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[2] Following an evaluation by staff at Western State Hospital, the trial court determined that Slane was competent to stand trial.

[3] Under RCW 9A.76.170(2), it is an affirmative defense to bail jumping "that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist."

caused the damage at issue and explained that the defense did not intend to challenge that evidence. Instead, defense counsel argued that the jury should find Slane not guilty of the charges because he did not cause the property damage with malicious intent and because his mental health symptoms prevented him from appearing in court in July 2013.

Slane's attorneys presented evidence to support his defense, including the testimony of Slane's friend of several years, who testified about Slane's longstanding mental health issues and said that Slane told him he damaged the vehicles in order to discover what people were thinking about him. In addition, Slane's mental health case manager testified that Slane was increasingly disengaged in the summer of 2011. She also testified that a few days after the property damage incident, Slane was found non-responsive in the shower with the shower running. He was taken to the emergency room. Approximately two weeks later, based on concerns about Slane's deteriorating mental health, the case manager filed a petition for him to be evaluated for possible involuntary commitment.

Finally, defense counsel presented the only expert testimony in the case, that of forensic psychologist, Dr. Paul Spizman. Dr. Spizman testified that he believed that Slane was experiencing acute symptoms of his mental illness in September 2011 and that there was a "very distinct possibility" that Slane was unable to form the mental state of malice. Among other evidence, Dr. Spizman relied on video evidence showing Slane in the back of a police vehicle on the night of the incident in which he appeared to respond to internal stimuli. Dr.

Spizman also testified that Slane appeared to have decompensated in July 2013, around the time he failed to appear in court, and that his mental health symptoms could have interfered with his ability to appear.

Slane did not testify. When the defense counsel rested its case, Slane objected citing a constitutional "right not to rest" and his right to "competent counsel." The court explained to Slane that he would be removed from the courtroom if he continued to disrupt the proceedings. Slane responded by leaving the courtroom "under protest." In closing arguments, defense counsel urged the jury to find Slane not guilty of all charges.

The jury convicted Slane as charged. The court imposed no further confinement, suspending the remainder of the sentence upon 24 months of probation. As a condition of probation, the court required Slane to undergo a mental health evaluation and follow treatment recommendations. Slane appeals.

II

The Fourteenth Amendment right to due process and the Sixth Amendment right to a trial by jury, taken together, entitle a criminal defendant to a jury determination of guilt beyond a reasonable doubt as to every element of the charged crime. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, §§ 3, 22. In this case, for the jury to convict Slane of malicious mischief in the second degree, the State was required to prove beyond a reasonable doubt that Slane (1) knowingly and maliciously (2) caused physical damage to the property

of another in an amount exceeding seven hundred and fifty dollars. RCW 9A.48.080(1)(a). To find Slane guilty of malicious mischief in the third degree, the jury had to find beyond a reasonable doubt that Slane (1) knowingly and maliciously (2) caused physical damage to the property of another, "under circumstances not amounting to malicious mischief in the first or second degree." RCW 9A.48.090(1)(a). "Malice" means "an evil intent, wish, or design to vex, annoy, or injure another person" and may be inferred from an act done in willful disregard of another's rights or an act wrongfully done without just cause or excuse. RCW 9A.04.110(12). Finally, to convict Slane of bail jumping, the State was required to establish beyond a reasonable doubt that Slane (1) was "released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state" and (2) he failed to appear as required. RCW 9A.76.170(1).

Slane claims that defense counsel "conceded that he committed all of the acts underlying the malicious mischief and bail jumping charges" and thereby violated his constitutional right to require the jury to find each element of the charged crimes beyond a reasonable doubt. In support of this argument, Slane cites State v. Humphries, 181 Wn.2d 708, 336 P.3d 1121 (2014).

The State charged Humphries, among other crimes, with unlawful possession of a firearm based on prior robbery convictions that rendered him ineligible to possess a firearm. Humphries, 181 Wn.2d at 712. Defense counsel wanted to stipulate that Humphries had a previous conviction for a "serious offense" so the jury would not learn of the specific nature of the prior convictions.

Humphries, 181 Wn.2d at 712. Although counsel informed the trial court that Humphries did not agree with the proposed stipulation, the court determined that the decision was tactical and the defendant's consent was not required. The court allowed counsel to stipulate to the prior offense element of the crime on his client's behalf, over his objection. Humphries, 181 Wn.2d at 712.

Reversing Humphries' firearm conviction and this court's decision, our Supreme Court held that counsel's stipulation to an element of the crime over the defendant's personal objection amounted to an involuntary waiver of his constitutional right to due process. Humphries, 181 Wn.2d at 718. This was so because "[w]hen the parties stipulate to the facts that establish an element of the charged crime, the jury need not find the existence of that element, and the stipulation therefore constitutes a waiver of the 'right to a jury trial on that element,' as well as the right to require the State prove that element beyond a reasonable doubt." Humphries, 181 Wn.2d at 714 (citation omitted).

Slane contends that by allowing counsel to proceed with a mental health defense after he voiced objections, the court impermissibly permitted counsel to stipulate to an element of the offense over his explicit objection, as in Humphries. However, Slane's reliance on Humphries is misplaced. As the State correctly points out, there are legally significant differences between Slane's attorneys' arguments to the jury in this case and entry of a formal stipulation to an element of the crime. The primary distinction being that a stipulation relieves the State of its burden of proof as to the element to which the parties stipulate. Here, on the other hand, the defense argument had no effect on the State's burden to present

evidence or its burden of proof. The instructions informed the jury that Slane's plea of not guilty put "in issue every element of each crime charged" and that the State bore the "burden of proving each element of each crime beyond a reasonable doubt."

While Slane's attorneys focused only on challenging the State's claim that Slane acted "knowingly and maliciously" and demonstrating that his mental health condition prevented him from appearing in court, the jury was nevertheless specifically instructed that Slane could only be convicted upon proof beyond a reasonable doubt that he "caused physical damage to the property" of the victims and that he "failed to appear before a court" on July 15, 2013. The jury was also instructed that the lawyers' arguments could not be considered as "evidence" and were merely intended to assist the jury to "understand the evidence and apply the law." As the court specifically noted in Humphries, unlike a formal stipulation, "an attorney's concession during closing argument does not waive any of the defendant's relevant constitutional rights. The State is still required to bear its burden, present admissible evidence, and convince a jury of every element of the crime beyond a reasonable doubt." Humphries, 181 Wn.2d at 717 n.4.

III

Slane also contends that his attorneys abandoned him by asserting a mental health defense over his objection and thereby violated his constitutional right to counsel. Slane claims that counsel presented evidence that was beneficial to the State's case, and that by conceding his actions, counsel failed to

subject the State's case to meaningful adversarial testing. Therefore, he argues that this is a case where we must presume ineffective assistance.

To safeguard the fundamental right to a fair trial, a criminal defendant is entitled to the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We presume that counsel is effective, and the appellant bears the burden of proving otherwise. Strickland, 466 U.S. at 689. Under Strickland, the benchmark for evaluating a claim of ineffectiveness is whether the attorney's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. Strickland set forth a two-part, performance-and-prejudice test whereby the appellant must show that counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 688, 694. Both deficient performance and prejudice are required before the court may conclude that a conviction "resulted from a breakdown in the adversary process that render[ed] the result [of the proceeding] unreliable" and in violation of the Sixth Amendment. Strickland, 466 U.S. at 687.

Although Strickland's test generally governs, ineffective assistance may be presumed in limited circumstances under United States v. Cronic, 466 U.S. 648, 650, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). In Cronic, the companion case to Strickland, the Court identified three distinct situations in which such a presumption is appropriate: (1) when the defendant is completely denied

counsel "at a critical stage of his trial," (2) when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," and (3) when, although counsel is available to assist, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Cronic, 466 U.S. at 659-60.

As an initial matter, Slane characterizes his objection to the strategy his lawyers pursued as clear and consistent throughout the proceedings. But in fact, the record is somewhat ambiguous as to the nature of Slane's objection and whether he abandoned it. Slane claimed for the first time during opening remarks that he did "not want this defense" as his attorney discussed his mental health status in connection with the malicious mischief charges. But he did not raise the issue again after opening statements or at any other point. He did not seek the appointment of new counsel, nor raise any issue with the court about a conflict with his attorneys. When one of Slane's attorneys expressed concerns about competency the day after opening statements, she said her concerns were based on Slane's inability to engage with counsel, but said she did not believe that his disengagement stemmed from a disagreement or conflict. The court's colloquy with Slane at this point included some discussion about the defense strategy. Slane's answers reflected that he understood the defense, but he did not reiterate any objection or opposition. Slane did not object to the testimony of any of the defense witnesses nor to the jury instruction on the affirmative defense of uncontrollable circumstances. And while Slane strenuously voiced his

dissatisfaction with trial counsel at the conclusion of the case, this appeared to be based on his view that the defense prematurely rested its case.

Nevertheless, even if we assume that Slane opposed the assertion of a mental health defense with respect to both the malicious mischief and bail jumping charges and that his objection was not fleeting, his argument hinges on the notion that the client must agree, not only with the objective, but also with the means to pursue that objective. This is incorrect.

It is a cardinal rule of attorney-client relations that "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued." Rules of Professional Conduct (RPC) 1.2(a). In the criminal context, certain decisions must ultimately rest with the defendant after consultation with the lawyer, including what plea to enter, whether to waive a jury trial, whether to testify, and whether to appeal. ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION std. 4–5.2 (4th ed. 2015); RPC 1.2(a). "An attorney undoubtedly has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy. That obligation, however, does not require counsel to obtain the defendant's consent to every tactical decision." Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004) (internal quotation marks and citation omitted). In general, counsel, not the client, "'is in charge of the choice of trial tactics and the theory of defense.'" In re Personal Restraint of Stenson, 142 Wn.2d 710, 734, 16 P.3d 1 (2001) (quoting United States v. Wadsworth, 830 F.2d 1500, 1509 (9th Cir. 1987)). "The adversary

process could not function effectively if every tactical decision required client approval." Taylor v. Illinois, 484 U.S. 400, 418, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

While the constitutional right to effective assistance of counsel places an outer limit on the attorney's decision-making power, Strickland does not define the Sixth Amendment right to counsel in terms of the defendant's right to control the defense. Stenson, 142 Wn.2d at 733 (decision to admit guilt in penalty phase of capital trial over the objection of the accused fell within the province of counsel to determine matters of strategy); see also State v. Cross, 156 Wn.2d 580, 605-06, 132 P.3d 80 (2006) (decision to present evidence about the accused's mental health at sentencing, over his objection, properly rested with defense counsel). And again, only a tactical decision not "to subject the prosecution's case to meaningful adversarial testing" constitutes "a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Cronic, 466 U.S. at 659.

Slane pleaded not guilty to the crimes and therefore, the objective of the representation was to have the jury find him not guilty. Slane's attorneys mounted a defense consistent with that objective.[4] Slane does not suggest that counsel failed to consult with him about the means to achieve that objective. Nor

[4] In contrast, in several cases Slane relies on from other jurisdictions, the attorneys' conduct conflicted with the defendant's objective in entering a not guilty plea. For instance, in Cooke v. State 977 A.2d 803 (Del. 2009), the pleas available in Delaware were guilty, not guilty, nolo contendere, or guilty but mentally ill. Cooke, 977 A.2d at 842. Although Cooke chose to plead not guilty, rather than guilty but mentally ill, his attorneys infringed upon his right to enter the plea of his choice by asking the jury to find him guilty but mentally ill. Cooke, 977 A.2d at 842-43; see also State v. Carter, 270 Kan. 426, 440, 14 P.3d 1138 (2000) (by urging jury to convict on felony murder count to avoid conviction of premeditated murder, "defense counsel was betraying the defendant by deliberately overriding his plea of not guilty").

did the strategic decision of counsel not to challenge certain facts fail to subject the State's case to adversarial testing.

The United States Supreme Court's decision in Florida v. Nixon is instructive. Nixon was on trial for capital murder. Nixon, 543 U.S. at 180. Given Nixon's confession and "overwhelming evidence" of his guilt, Nixon's attorney determined that the only way to avoid a death sentence was to concede guilt and focus on the penalty phase. Nixon, 543 U.S. at 180, 181. Trial counsel attempted to explain this strategy to Nixon and secure his consent, but Nixon was uncooperative and eventually removed from the courtroom. Nixon, 543 U.S. at 181-82. The Florida Supreme Court vacated Nixon's conviction and sentence after finding trial counsel ineffective for conceding guilt without the defendant's express consent. Nixon, 543 U.S. at 186-87. The court presumed prejudice under Cronic because it found that the concession "allowed the prosecution's guilt-phase case to proceed essentially without opposition" and left the prosecution's case unexposed to "meaningful adversarial testing." Nixon, 543 U.S. at 185.

The United States Supreme Court disagreed. Acknowledging that criminal defendants must consent to guilty pleas, the Court determined that the concession to murder was not the "functional equivalent" of a guilty plea. Nixon, 543 U.S. at 187-88. "Nixon retained the rights accorded a defendant in a criminal trial. . . . The State was obliged to present during the guilt phase competent, admissible evidence." Nixon, 543 U.S. at 188. Trial counsel did not cede the case; he cross-examined witnesses and attempted to exclude prejudicial

evidence. Nixon, 543 U.S. at 188. Nixon's express consent to the concession strategy was not required. Nixon, 543 U.S. at 189. Furthermore, the Court held that "if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the Strickland standard, that is the end of the matter." Nixon, 543 U.S. at 192.

The defense strategy in this case, while unsuccessful, was sound. Slane argues that the defense evidence, such as the testimony about his nonsensical explanation for why he damaged the vehicles, merely corroborated his guilt and benefitted the State. Slane's argument fails to appreciate that the defense evidence also undermined the State's assertion that he possessed the requisite intent and supported the claim of uncontrollable circumstances. The argument also ignores the strength of the evidence indicating that Slane caused the damage in question and failed to appear in court. He was found hiding in the vicinity of the damaged cars around the time of the incident. He was wearing clothes matching the description provided by an eyewitness and depicted in surveillance video. He had knives in his possession. The knives were consistent with puncture marks on the tires and there were indications they had recently been used to cut rubber. The State also presented the testimony of a records custodian to establish that Slane had been charged with a felony, had been released, and failed to appear at a required court hearing.

While even conceding a client's guilt may be an appropriate trial strategy in some cases, Slane's counsel did not pursue a strategy of conceding guilt that was inconsistent with his plea of not guilty. It is reasonable to assume that

acknowledging Slane's conduct lent credibility to the defense argument that Slane's mental health symptoms rendered him unable to form malicious intent or appear in court as required. See Nixon, 543 U.S. at 192 ("[C]ounsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in a useless charade." (internal quotation marks omitted)); see also United States v. Thomas, 417 F.3d 1053, 1056-59 (9th Cir. 2005) (no prejudice where attorney conceded participation in one robbery where defendant was "in effect, caught red-handed" but contested the remaining charges which carried significantly greater penalties). In the face of significant evidence establishing Slane's conduct, it was reasonable for counsel to focus on the mens rea element and affirmative defense rather than challenging facts that were not readily disputable.

In sum, counsels' decision to acknowledge Slane's actions did not amount to an involuntary waiver of a constitutional right nor violate Slane's constitutional right to due process. And here, where defense counsel pursued a reasoned trial strategy in light of the evidence available and did not override his choice of plea, Slane fails to establish a violation of his constitutional right to the effective assistance of counsel.

Affirmed.

We concur:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72001-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: February 17, 2016