

No. 66556-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARIO HUMPHRIES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Regina Cahan

REPLY BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
THE HONORABLE REGINA CAHAN

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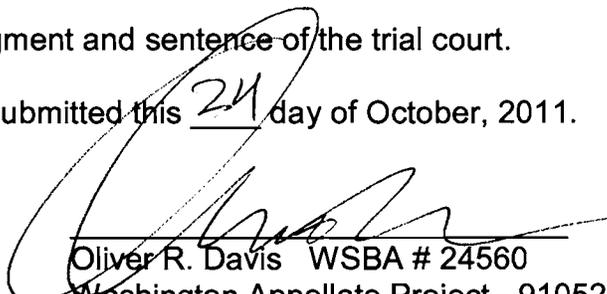
admission of uncautioned prior crime evidence was certainly material to the outcome.

Mr. Humphries believes that this is the direct appeal in which this Court should find that the failure to request a cautionary instruction, which would be given at the same time the stipulation was presented to the jury, and which the trial court repeatedly indicated it would have given had it been requested, was deficient performance, non-tactical, and reversible error. Mr. Humphries' burden to show ineffective assistance of counsel, and resulting prejudice, has been satisfied. A fair trial was not had, and only a new trial will remedy that mistake.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, the appellant Mario Humphries respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 24 day of October, 2011.



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A. REPLY ARGUMENT

(1). MR. HUMPHRIES' AFTER-THE-FACT SIGNATURE ON A DOCUMENT THAT MERELY MEMORIALIZED THE PRIOR ORAL STIPULATION TO ELEMENTS OF THE CRIME, WHICH STIPULATION WAS ORALLY GIVEN TO THE JURY OVER HIS OBJECTION, AND WHICH DOCUMENT WAS NO PART OF THE RECORD EVIDENCE, WAS NEITHER AN ABANDONMENT OF THE ISSUE NOR A WAIVER OF HIS RIGHT TO APPEAL

Neither waiver nor any theory of “abandonment” is applicable to bar litigation of the significant constitutional issue presented on appeal, where Mr. Humphries objected to his counsel’s stipulation to the “prior offense” and other elements of the VUFA charge. The trial court agreed with counsel that Mr. Humphries could not object, and thus in the State’s case in chief, the jury was orally told that he conceded those elements. Later, counsel told the trial court that he had persuaded Mr. Humphries to sign a paper document memorializing the prior oral stipulation.

The State contends that Mr. Humphries’ signature on that document waived his right to argue on appeal that the prior oral stipulation had been improperly accepted by the trial court and presented to the jury over his voiced objection. But the signature was of no consequence. The document, which contained the wording of the forced oral stipulation announced to the jury during the evidence phase, memorialized that oral evidence but

constituted no part of the evidence at trial.

By that time the oral stipulation had been presented to the jury and the elements of the crime stated in the oral announcement had therefore already been conceded. 10/14/10RP at 88-89; CP 12-13. No stipulation in document form was included in either the exhibit list, or the trial court's jury instructions packet. The trial court's erroneous ruling was therefore implemented in the form of, and at the time of, the oral presentation announced to the jury. The defendant's later signature on a document containing the same text as the oral presentation had no practical effect, much less legal consequence, considering that the document was not introduced as evidence and where the presentation of which occurred as it did after the evidence was closed.

The defendant's signature was therefore an inconsequential act which had no affect on the proofs previously presented, or the defendant's right to appeal the matter. At most, it signaled the defendant's lay legal belief assenting to the opinion of all the expert lawyers around him (and the court's already-issued ruling) that he had no say in the matter. But Mr. Humphries argues on appeal that he cannot be forced against his will to give up his right to demand the State muster proof of every element of the charged offense,

irregardless of how advisable his counsel and the trial court believed such concession to be.

In addition, the State's argument of "waiver" is not only inapposite to the procedural facts below, it is also legally fallacious. A central principle of waiver is that the defendant cannot complain of a matter to the appellate court, where the trial court was never presented with the question and given an opportunity to rule, by means of an objection raised below. See State v. Powell, 166 Wn.2d 73, 82, 206 P.3d 321 (2009) (waiver of right to appeal trial court action occurs because a failure to object robs the trial court of the opportunity to correct or avoid the error), citing State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007); see. e.g., State v. McGrew, 156 Wn. App. 546, 234 P.3d 268 (2010) (Under RAP 2.5, failure to object to police officer's testimony was failure to preserve for appellate review his claim of improper opinion).

These principles of waiver have no application to the instant case. The defendant, of course, did object.¹

And in no sense can Mr. Humphries be said to have "foregone" some further available option to ask the trial court to decide the disputed question. The deed was done when the

¹ Because Mr. Humphries objected, the appealability doctrine of "manifest constitutional error" is unnecessary to be raised, though applicable. RAP 2.5(a).

stipulation was orally presented to the jury over the defendant's voiced objection, following the trial court's and the defendant's own attorney's concurrence between themselves that the defendant simply had no right to prevent his counsel from conceding elements of the crime.

The defendant's later placement of his signature on a document his counsel typed up to contain the oral stipulation's wording, which was no part of the jury instructions and was not the oral proof that was improperly submitted to the jury, had no affect on the proofs, and no significance one way or the other. The issue of whether it was proper to present the oral stipulation over Mr. Humphries' objection had already been summarily decided against him by all counsel in the courtroom, over the defendant's objection, and that ruling had already been given effect during the State's case in chief when it was presented orally to the jury.

Similarly, signing the paper was not an "abandonment" of any pending motion or request for a ruling by the trial court. Mr. Humphries' case is certainly unlike the Valladares decision, cited by the Respondent. See State v. Valladares, 99 Wn.2d 663, 666, 672, 664 P.2d 508 (1983) (appellate review precluded where defendant waived or abandoned constitutional rights by affirmatively

withdrawing pretrial motion to suppress evidence). In that case, the defendant raised a suppression matter, but then affirmatively withdrew it from trial court consideration, effectively asking the trial court to now not rule. Valladares, at 672.

The Respondent cannot viably contend that this is akin to what happened below. At the time of Mr. Humphries' signature on the writing, at the end of the case, the issue whether the oral stipulation could be accepted and presented was not set for some form of consideration, or reconsideration, by the trial court, such that his act of signing a document memorializing the oral stipulation can be said to have withdrawn a pending question from a request that the trial court decide it. The issue had already been decided, over Mr. Humphries' objection, and implemented as part of the State's case. It is of no moment that the defendant was later persuaded to sign the paper after both the court and his attorney had already told Mr. Humphries he had no right to protest.

As an academic matter, at most, the defendant could perhaps be said to have issued a signature indicating after-the-fact legal agreement with the pronouncement of law by the trial court and counsel that he had no right to object to any stipulation. But a party is not bound on appeal by a statement below as to what it

thinks the law is. See State v. Knighten, 109 Wn.2d 896, 901–02, 748 P.2d 1118 (1988), and authorities cited therein including 2 Callaghan's Michigan Pleading & Practice (2d Ed), § 21.44, p 43 (noting that appellate court is never bound by erroneous legal concession by trial party).

For example, under this universal rule, a defendant, whose lawyer's hearsay objection was overruled at trial, would not be precluded from appealing the matter simply because the attorney might later remark after the evidence phase that the trial court's prior evidentiary ruling was or might have been legally correct.

And certainly a legal opinion uttered at any time during a case by a lay defendant represented by counsel does not bind that defendant on appeal from making all appropriate arguments. Mr. Humphries' after-the-fact signature on a document, which was merely a written memorialization of the concession orally presented to the jury, is similarly inconsequential in terms of having any bearing on the fact that the trial court issued an earlier, incorrect ruling, and implemented it to the defendant's material prejudice. Neither waiver nor abandonment applies to the case before this Court.

Finally, the waiver doctrine is permissive, and in this case

this Court should not decline to review the question presented. RAP 2.5 indicates that this Court “may refuse” to review a claim of error not properly preserved in the trial court. RAP 2.5; see also In re Marriage of Wendy M., 92 Wn. App. 430, 434, 962 P.2d 130 (1998) (“RAP 2.5(a) is permissive in nature and does not automatically preclude this court from reviewing an issue not raised below”).

The central aspect of this case is the erroneous nature of the trial court’s action below, and the future constitutional implications which would result if criminal defendants’ attorneys are permitted to unilaterally waive the accused’s right to contest multiple elements of the crime, over the accused’s voiced objection.

No workable rule can be crafted which would permit such stipulations to be entered over the accused’s opposition only as to matters counsel or the court deems to be in the defendant’s best interest to concede. Appellant believes through undersigned counsel that the effects of the actions of the trial court and defense counsel de facto combined against him to waive his right to defend against the charges.

Mr. Humphries’ only recourse, in a case where the number of attorneys aligned against his claim of violation of his due process

rights has now climbed to four (including counsel for the Respondent) is this Court of Appeals. Even if the defendant somehow had waived his right to appeal the forced stipulation (which he does not concede), no purpose is served in this case by applying a waiver theory against a 19 year-old lay defendant ignorant in the complex law of preservation of trial court error. This Court should reach the issue.

(2). NEITHER THE ETHICAL RULES NOR THE CASES CITED BY THE RESPONDENT ESTABLISH THAT THE COURT'S ACCEPTANCE OF A STIPULATION OVER THE ACCUSED'S AFFIRMATIVE OBJECTION WAS CONSTITUTIONALLY PROPER.

The Respondent State of Washington proposes a doctrine that the Rules of Professional Conduct ("RPC's") allow a criminal defense attorney to waive the accused's right to contest any element of the charged offense, and further that the trial court may accept that stipulation over the defendant's voiced objection. This proposition should be rejected for its lack of any merit.

Notably, the Respondent makes no effort whatsoever to distinguish the rule exemplified by the federal case of United States v. Ferreboeuf, 632 F.2d 832, 836 (9th Cir.1980), one of the many on-point cases cited by Mr. Humphries and ignored by the State. The importance of the Ferreboeuf case is fully discussed in the

Appellant's Opening Brief, but it is worth repeating that the Ninth Circuit there held that the trial court cannot accept a stipulation entered by counsel where the accused "indicates objection at the time the stipulation is made". Ferreboeuf, 632 F.2d at 836.

On the substantive question of error, the Respondent is incorrect to assert that this case's question of a violation of Mr. Humphries's trial and due process rights is governed and decided by what the RPC's allow or do not allow in terms of what strategic trial decisions are ethical for an attorney to unilaterally decide him or herself. This case is not about whether it was ethical to stipulate over the client's objection. Although Mr. Humphries believes it was not, he certainly could not successfully claim that a violation of the RPC's establishes anything favorably material to his appellate arguments. For example, in a case regarding whether trial counsel provided ineffective assistance, it has been held that the RPC's do "not embody the constitutional standard for effective assistance of counsel on appeal." State v. White, 80 Wn. App. 406, 412, 907 P.2d 310 (1995), review denied, 129 Wn.2d 1012 (1996).

The Respondent has certainly cited no case which provides, as the State appears to contend, that the State can rely on certain RPC's (defining whether certain trial strategy decisions may be

ethically made by counsel unilaterally), to establish that the defendant's Sixth Amendment or due process rights as a criminal defendant were not violated in this case by the trial court's acceptance of the stipulation over the defendant's voiced objection.

Neither State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011), nor In re Personal Restraint of Stenson, 142 Wn.2d 710, 16 P.3d 1 (2001), have anything to do with the situation presented here. The Respondent's skewed and misleading representations of the holdings in these cases must be addressed.

Grier was a case in which the defendant argued ineffective assistance in her lawyer's failure to request a lesser included offense instruction. The State argued that Ms. Grier had made her own decision to forego such an instruction (as shown by her answer to the trial court's inquiry as to whether she agreed with her lawyer's statement that they would not be seeking one), and therefore that she had waived the right to complain on appeal that her lawyer was ineffective. State v. Grier, 171 Wn.2d at 31-32.

The Grier Court reviewed the RPC's and applicable American Bar Association ("ABA") standards, and concluded that although the ethical rules require the defendant to have input on the question whether to request a lesser-included offense, such

decision “ultimately rests with defense counsel.” Grier, at 32.

Therefore, the Grier Court held, the State was incorrect in its contention that Grier’s agreement, regarding not requesting a lesser included offense instruction, had waived her right to claim ineffective assistance of counsel on appeal based on counsel not requesting such instruction. Grier, at 32.

The Respondent in Mr. Humphries’ instant case argues that the Grier decision stands for the proposition that “the decision [whether to request a lesser included offense instruction] is to be controlled by counsel.” BOR at 12.²

Then, from this, the Respondent contends that Mr. Humphries’ lawyer had the unilateral ability to waive the defendant’s right to contest the State’s charge on multiple elements of the crime and to submit a stipulation to the jury agreeing that he is guilty on those elements, and that the trial court may accept such a stipulation, notwithstanding that counsel and the court are fully aware that the accused does not in fact wish to waive that right.

The two situations are of course dramatically different. The present situation involves counsel forcing the accused to essentially agree that he is guilty as to most of the elements of the offense

²What the Supreme Court actually said was that “the decision to [request or not request] lesser included offenses does not rest squarely with the defendant”. Grier, at 31.

charged. But the defendant has a Sixth Amendment right to demand that the State muster evidence sufficient to prove him guilty on each and every element of the crime. There is no corresponding constitutional right to a lesser included offense instruction.

Notably, in addition, the RPC's do not even purport to address the question of stipulations to elements of the charge, even assuming that mention of that matter in the RPC's as ethically being within the attorney's province would have any bearing on the court's ability, within constitutional constraints, to accept such an involuntary stipulation to elements of the crime. Rather, it is the constitutional case law which addresses that question, and the existing authority on the matter indicates plainly that the court may not do so. See United States v. Ferreboeuf, supra, and the multiple additional cases cited in the Appellant's Opening Brief. The Grier case, and the ethical rules, for so many reasons, fail to give defense counsel or the trial court the authority to effectively relieve the State of its burden to muster proof on every element, as the State would obviously wish this Court to hold.

Similarly, Stenson does not contain any holding that supports the State's position here. The Respondent asks this Court

to view Stenson as authorizing transfer of the right to demand proof of every element of the crime, from the defendant's constitutional protections, and instead placing the decision to admit factual guilt on elements of the crime "within the exclusive province of the lawyer." (Emphasis added.) BOR at 12. The Stenson case of course does no such thing.

Stenson had been found guilty of murder based on overwhelming physical evidence; subsequently, in the penalty phase of his capital trial, Stenson's jury ultimately found no mitigating circumstances. Stenson argued ineffective assistance based on his lawyer's refusal to accede to his demand that counsel argue his innocence during that phase (including by making arguments regarding "other suspects" that one of the deceased, his wife, was the perpetrator, which counsel had concluded would alienate the jury and ensure a death sentence). Stenson, 142 Wn.2d at 717, 734.

The Supreme Court held that counsel's refusal to do so was within the attorney's province to decide upon the best strategy for the penalty phase following a finding of guilt. Stenson, at 134-35. The Stenson case plainly does not authorize a defense attorney to force the accused, over his objection, to stipulate to material

elements of the substantive crime and therefore waive the defendant's right to demand that the State prove every element.

The Respondent appears to think Mr. Humphries is making an ineffective assistance of counsel argument as to this assignment of error, arguing in the Brief of Respondent that entering into a forced stipulation as to a prior offense element is something that cannot be complained of because it is a tactical choice by counsel. But this part of the case is not about ineffective assistance.

Neither of the Respondent's cited cases, of Johnson and In re Detention of Moore, have anything to do with what happened below. See State v. Johnson, 104 Wn.2d 338, 705 P.2d 773 (1985), and In re Detention of Moore, 167 Wn.2d 113, 216 P.3d 1015 (2009). Those cases held that a full guilty-plea-type colloquy as required by CrR 4.2 where a defendant is entering a plea of guilty, need not be engaged in where the defendant is agreeing to a stipulated facts trial or a factual stipulation to an element or essential fact. Neither case addresses the issue whether such agreement or stipulation, when sought to be entered by defense counsel, may be accepted by the trial court where the defendant voices his affirmative objection and this is made known to the trial court. As amply argued in the Opening Brief, these are two very

different questions.

The answer to the question presented in this case is also not advanced by the Respondent's reliance on Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), along with State v. Goodin, 67 Wn. App. 623, 838 P.2d 135 (1992), to argue, in essence, that it was a wise "tactical" or "strategic" choice for Mr. Humphries' counsel to have the defendant stipulate to the serious offense element, motivated by the goal of reducing prejudice to the defendant.

First, as with the other cases cited by the State, these above cited cases do not involve a stipulation to an element of the crime accepted by the trial court over the defendant's voiced objection. And Mr. Humphries is not specifically arguing one way or the other that his counsel's actions were ineffective assistance. The *wisdom* of a concession to various elements of the VUFA charge is not up for decision in this appeal.

The applicable assignments of error in this portion of Mr. Humphries' appellate case are not about ER 403 (prejudice v. probity, Old Chief), and are not about a claim of ineffective assistance of counsel such that the resolution of the instant matter is furthered by claims that the stipulation was "tactical" or wise.

This case is not about whether it is ethical, or a good tactical idea, to stipulate to prior qualifying offenses when they are elements of the crime charged. Rather, this case is about a forced stipulation by defense counsel to multiple elements of the crime, which was accepted by the trial court, improperly so because it was done over the defendant's known, own, objection, and the resulting deficiency in the valid proofs, requiring reversal for the violation of his right to trial and due process.

(3). MR. HUMPHRIES HAS SQUARELY MET HIS BURDEN TO DEMONSTRATE THAT HIS COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LIMITING INSTRUCTION AT THE TIME THE PRIOR OFFENSE WAS INTRODUCED INTO EVIDENCE.

The Respondent contends in its Brief that the failure to request a limiting instruction should be deemed a "tactical" choice, rather than ineffective assistance of counsel. BOR at 9.

The State utterly ignores Mr. Humphries' argument that no prejudice would or could have been caused by requesting a limiting caution to the jury at the time of admission of the stipulated evidence, because doing so at that moment would not in any way have "re-reminded" the jury of the prejudice of the prior offense.

For that reason, as explained, there could be no viable, reasonable tactical choice to not request a caution to the jury at the

moment of admission. The Appellant's Opening Brief carefully, more than adequately, and with full support in case law, presents this argument, and Mr. Humphries relies on those arguments here in his Reply Brief. Appellant's Opening Brief, at pp. 20-22.

Additionally, the Respondent stretches the bounds of credulity when it contends that defense counsel did not admit to the trial court at the motion for new trial that he had rendered deficient performance. By engaging in Clintonian parsing of trial counsel's statements to the trial court, the State contends that counsel's arguments did not include a representation that the failure to do so was non-tactical. In fact, this was the entire point of counsel's representations to the court at the post-trial motion, and such motion could only be so premised. Trial counsel was aware that tactically reasonable decisions cannot establish ineffective assistance, and he conceded that in this case, he was ineffective.

These statements in the post-trial motion were the exact sort of expert legal opinion of non-tactical deficiency, as would accompany a challenge to a judgment based on ineffective assistance in a properly-supported Personal Restraint Petition. The Respondent's characterization of counsel's representations to the court as "ambiguous" is wrong, and wholly untenable.

However, it is absolutely critical to note, or rather to repeat, that the appellant is not relying for relief on trial counsel's admissions of deficient performance made to the court at the new trial motion. This Court, correctly, will not grant new trials simply because defense counsel is willing to fall on his sword post-verdict.

Rather, more properly, and in line with the case law requirements, Mr. Humphries has asked this Court to look instead at the entire circumstances of the case to find deficient performance and prejudice, including, but not limited to, (1) the absence of any risk of prejudice that might be caused in the form of "bringing up again" a prejudicial matter later in the case, by cautioning the jury how to use or not use the matter (no such prejudice is risked by a limiting instruction at the time of admission of the evidence); and (2) the nature and weakness of the State's proof and the grave concern in this particular trial that the defendant's prior conviction would play a large part in the jury's decision, searching as the jury was for some convincing reason to discount the weakness of the evidence and conclude the defendant fired a gun at the officer, given the absence of a firearm or other evidence of a firearm assault. The defendant's prior gun-related crime – uncautioned as the jury was that this prior act must not be

used to find substantive guilt – provided that persuasion.

The present case, in all of its circumstances, does not allow a determination that counsel's failure was a tactical choice, nor that such choice had no affect on the outcome. In sum, the Respondent's arguments contesting deficient performance and prejudice are inadequate and unavailing and should be rejected; Mr. Humphries has met his heavy appellate burden to show both.

These matters have already been fully elucidated in the Appellant's Opening Brief, but have been met with no response whatsoever from the State of Washington, except to contend that this was not a close or weak State's case given the state of the evidence. This last contention by the Respondent is virtually frivolous – the State's evidence was remarkably weak, as fully argued in the Opening Brief, and as is apparent by simply looking to the nature and quantum of evidence presented by the prosecutor below. The officer merely saw a flash and heard a gunshot, and so weak was this evidence that the trial court, apparently over no objection by the State, permitted the defense to introduce expert opinion testimony regarding the likelihood of erroneous perception – evidence that trial courts usually refuse, and which refusal the appellate courts normally affirm. In such circumstances the

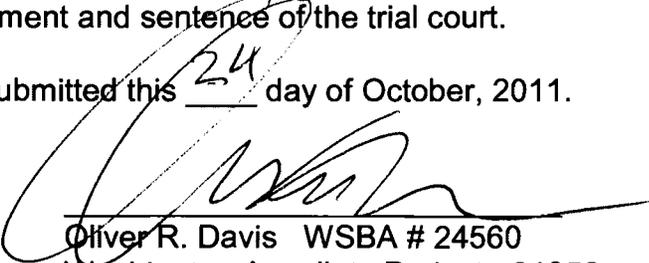
admission of uncautioned prior crime evidence was certainly material to the outcome.

Mr. Humphries believes that this is the direct appeal in which this Court should find that the failure to request a cautionary instruction, which would be given at the same time the stipulation was presented to the jury, and which the trial court repeatedly indicated it would have given had it been requested, was deficient performance, non-tactical, and reversible error. Mr. Humphries' burden to show ineffective assistance of counsel, and resulting prejudice, has been satisfied. A fair trial was not had, and only a new trial will remedy that mistake.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, the appellant Mario Humphries respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 24 day of October, 2011.



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Washington Appellate Project - 91052
Attorneys for Appellant

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MARIO HUMPHRIES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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STATE OF WASHINGTON
2011 OCT 24 PM 4:43

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF OCTOBER, 2011.

X _____ 

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