

68146-0

68146-0

NO. 68146-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROGER HOLMES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Was it appropriate for the trial court to accept Holmes' stipulation to an aggravating circumstance when RCW 9.94A.537(3) expressly allows a defendant to stipulate to the existence of an aggravating circumstance?

2. Did Holmes demonstrate informed acquiescence to his desire to waive a jury trial regarding the bifurcated proceeding for the rapid recidivism aggravating circumstance when he first exercised his right to a jury trial and then, through defense counsel, expressed his intent to stipulate to the aggravating circumstance?

3. Does a trial court have the authority to label an offense a crime of domestic violence when such a label has no potential to increase the defendant's punishment now or in the future?

B. STATEMENT OF THE CASE

On November 16, 2010, Dustin Byers saw two people arguing and fighting inside a car outside his home. 10/27/11 RP 29-37.¹ Mr. Buyers then called 911. Id. After calling police,

¹ The State adopts the citation method of Holmes by citing to the verbatim report of the proceedings as follows: 10/25/11 RP; 10/26/11 RP; 10/27/11 RP; 10/31/11 RP; 11/1/11 RP; 12/5/11 RP.

Mr. Buyers went outside and contacted a female, later identified as Michelle Garza, who was now lying in the street. Id. at 36. By this time the car, along with the other person, had fled. Id. Seattle Fire Department Lieutenant Dees arrived soon thereafter to treat Ms. Garza. Id. at 63. Ms. Garza informed the Lieutenant that she had been injured and thrown from the car by her boyfriend. Id. at 63-64.

Roger Holmes was subsequently charged with one count of Robbery in the First Degree – Domestic Violence and one count of Felony Violation of a Court Order - Domestic Violence. CP 1-2. Ms. Garza was the named victim in both counts. Id. The State further alleged the aggravating circumstance of rapid recidivism in both counts as Holmes was released from custody the day before committing these offenses. Id.; CP 3.

Ms. Garza did not testify at trial. Prior to selecting a jury, the State amended the information to one count of Felony Violation of a Court Order - Domestic Violence with the aggravating circumstance of rapid recidivism. CP 16-17.

Holmes was convicted by jury of one count of Felony Violation of a Court Order. CP 18. The jury was not asked to determine if this was a crime of domestic violence. The aggravating circumstance was bifurcated from the guilt phase of the

trial. 10/25/11 RP 12. After the presentation of the evidence regarding the offense of Felony Violation of a Court Order and closing arguments, Holmes stipulated to the rapid recidivism aggravating circumstance. 11/1/11 RP 7.

With an offender score of 17, Holmes' standard range for the offense was 60 to 60 months. CP 45. The court did not impose an exceptional sentence, but rather imposed a drug offender sentencing alternative with 30 months of incarceration and 30 months of community custody. CP 47. At sentencing, the trial court also made the finding that "Crime of Domestic Violence as defined in RCW 10.99.020 was pled and proved." CP 45.

C. ARGUMENT

1. HOLMES PROPERLY STIPULATED TO THE RAPID RECIDIVISM AGGRAVATING CIRCUMSTANCE.

A defendant can stipulate to the existence of an aggravating circumstance. RCW 9.94A.537(3). The rapid recidivism aggravating circumstance, pursuant to RCW 9.94A.535(3)(t), is an aggravating circumstance that is to be considered by the jury and imposed by the Court. RCW 9.94A.535(3). Additionally, due process requires that a jury find beyond a reasonable doubt any

fact that increases the defendant's potential punishment.² Blakely v. Washington, 542 U.S. 296, 303-04, 124 S. Ct. 2531 (2004).

RCW 9.94A.535(3) further indicates that the finding of facts pertaining to an aggravating circumstance "should be determined by procedures specified in RCW 9.94A.537."

RCW 9.94A.537(3) reads:

The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

RCW 9.94A.537(3) (emphasis added).

Therefore, the oral stipulation by defense counsel that "We would stipulate to the aggravator," 11/1/11 RP 7, provided a sufficient basis for the trial court to indicate on the Judgment and Sentence that the charged aggravating circumstance had been found. RCW 9.94A.537(3).

2. HOLMES EXERCISED HIS RIGHT TO A JURY TRIAL BEFORE PROPERLY WAIVING HIS RIGHT

² Arguably, the existence of the aggravating factor in this specific circumstance has no potential to impact Holmes' possible punishment as his standard range, regardless of the existence of the aggravating factor, is 60-60 months.

**TO A JURY ON THE RAPID RECIDIVISM
AGGRAVATOR.**

To waive a jury trial regarding an aggravating circumstance a defendant does not need to sign a waiver or partake in a colloquy; all that is needed is a sufficient record demonstrating “informed acquiescence” to the waiver. State v. Cham, 165 Wn. App. 438, 449, 267 P.3d 528, 534 (Wash.App. Div. 1,2011).

The validity of a defendant's waiver of a constitutional right depends on the nature of the right waived and the consequences of the waiver.³ State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). For example, a guilty plea requires a colloquy on the record with the defendant demonstrating that the plea is knowing, voluntary, and intelligent. See id. (discussing guilty plea requirements). In contrast, waiving the right to a jury trial does not require the same colloquy or written waiver because the consequences are much less severe. Id. Regarding waiving a jury trial to an aggravating circumstance proceeding, all that is needed is “informed acquiescence” to the waiver. Cham, 165 Wn. App. at 449.

³ Here waiver of the right to jury and the stipulation to the existence of the aggravating circumstance had no practical consequence to Holmes. With an offender score of 17, his standard sentencing range is 60 to 60 months, the statutory maximum for a class C felony. The trial court simply did not have the authority to impose a sentence above the standard range. As a result, there is no practical “consequence” as a result of the waiver.

Here, Holmes' decision to stipulate to the existence of the aggravating circumstance, rather than leave the decision to the jury who convicted him, is akin to stipulating to an element of a crime. An aggravating factor is the "functional equivalent" of an element of a crime whenever the factor is used to increase a sentence beyond the standard range. State v. Powell, 167 Wn.2d 672, 683, 223 P.3d 493 (2009) (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

Defendants can stipulate to a single element, or every element of the crime charged, without triggering the same procedural protections as entering a guilty plea.⁴ See State v. Johnson, 104 Wn.2d 338, 340-41, 705 P.2d 773 (1985) (holding a defendant does not need to be advised of his constitutional rights in a stipulated facts trial). Stipulating to an element does not require a written waiver of the right to jury trial or a colloquy with the judge. In re Det. of Moore, 167 Wn.2d 113, 120-21, 216 P.3d 1015 (2009) (citing Johnson, 104 Wn.2d at 342).

⁴ Federal courts have taken a similar view and held that when defense counsel stipulates to a crucial fact on the record in the defendant's presence, the trial court "may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it," without inquiring further. United States v. Ferreboeuf, 632 F.2d 832, 836 (9th Cir. 1980), cert. denied, 450 U.S. 934 (1981); see also United States v. Mason, 85 F.3d 471, 472-73 (10th Cir. 1996) (defense counsel's stipulation to a factual element waives the defendant's right to jury trial on that element only).

In State v. Cham it was determined that informed acquiescence is sufficient to show waiver of a jury trial for an aggravating circumstance. Cham, 165 Wn. App. at 448. In Cham, the defendant exercised his right to a jury trial. Id. at 441-45. Then, after being convicted, waived his right to a jury trial regarding the aggravating circumstance in favor of a bench trial. Id. The defendant's waiver of his right to a jury for an aggravating circumstance was found to be sufficient despite the fact that he never signed a written waiver, never participated in a colloquy specifically regarding waiver, and never personally expressed his intent to waive jury. Id. at 448-49. The court found that the record demonstrated "informed acquiescence" by the defendant to waive his right to a jury trial for the aggravating circumstance. Id. at 449. The court's finding was based on defense counsel twice indicating that, after consultation with her client, the defendant wanted to waive his right to a jury trial, the fact that the defendant had "showed his knowledge of the function and role of the jury" during a colloquy regarding the adequacy of the defendant's interpreters, and the fact that the defendant had two jury trials prior to the waiver. Id.

Similarly, the record in the instant case demonstrates Holmes' informed acquiescence to waive his right to a trial by jury for the aggravating circumstance.

The record is clear that Holmes knew he had a right to a jury trial for both the guilt phase of his case regarding the charge of Felony Violation of a Court Order and the subsequent bifurcated proceeding for the aggravated circumstance. On October 25, 2011, the first day of trial and days before voir dire began, the issue of bifurcating the aggravating circumstance from the guilt phase of the trial was discussed in open court, with the defendant present.

10/25/2011 RP 12-14. The prosecutor made it clear that the State had no objection to bifurcating the trial. Id. at 12. Furthermore, it was noted that the same jury, if they returned a guilty verdict, would then hear testimony regarding the aggravating circumstance, be instructed by the court regarding the aggravating circumstance, then deliberate regarding the aggravating circumstance. Id. at 12-13.

On October 26, 2012, counsel for Holmes reiterated the fact that the hearing regarding the aggravating circumstance would be bifurcated in an "additional proceeding." 10/26/12 RP 8.

Holmes was then present for voir dire and the entire jury trial to determine his guilt for the charged offense. See 10/26/12 RP 15; 10/27/11 RP 3-77; 10/31/11 RP 3-75.

On November 1, 2011, after the jury had heard all the evidence and closing arguments, the parties, including Holmes, were in open court awaiting the verdict when they began to discuss the process for the bifurcated jury proceeding regarding the aggravating circumstance. 11/1/11 RP 4-7. The prosecutor, on the record, provided the court with jury instructions for the bifurcated proceeding. Id. at RP 4. The parties agreed to waive opening statements to the jury. Id. at RP 4-5. After the State represented that the presentation of the evidence for the aggravated circumstance would take "all of three minutes" the trial court indicated that after a guilty finding by the jury, the jury would then hear the evidence regarding the aggravating circumstance and be excused for lunch. Id. at RP 6. Closing argument and jury instructions would occur after lunch. Id.

After being present for both his jury trial regarding his guilt for the underlying offense and extensive conversation regarding the procedure and scheduling for the bifurcated jury proceeding addressing the aggravating circumstance, Holmes stipulated to the

existence of the aggravating circumstance. Id. at 7. Specifically, counsel for Holmes stated:

Mr. Holmes and I had conferred previously about this. I have spoken with him again this morning, and I appreciate the Court's indulgence. We would stipulate to the aggravator should the jury come back with a guilty verdict in this case as it doesn't add anything to his score. Mr. Holmes has 14 or 15 points listed on his criminal history. It seems unlikely to me the State would fail to prove, you know, seven of those, which, at that point, it would make a difference for Mr. Holmes. So we stipulate to the aggravator.

Id.

Like the defendant in Cham, the representations by Holmes' counsel, coupled with the fact that Holmes had already been tried by jury for the underlying offense and the, demonstrates informed acquiescence to waive his right to a jury trial regarding the aggravating circumstance.

3. THE TRIAL COURT ACTED WITHIN ITS AUTHORITY WHEN IT LABELED THE CURRENT OFFENSE A CRIME OF DOMESTIC VIOLENCE.

A trial court has the authority to label an offense a crime of domestic violence. State v. Watson 135 Wn. App. 400, 406, 144 P.3d 363 (2006); State v. Felix, 125 Wn. App. 575, 578-81, 105 P.3d 363 (2006), rev. denied, 155 Wn.2d 1003 (2005).

In this case, the trial court acted within its authority when it found the Felony Violation of a Court Order, for which Holmes was convicted, an offense of domestic violence as defined by RCW 10.99.020 on the Judgment and Sentence.⁵ CP 45. Importantly, the trial court's finding that the Felony Violation of a Court Order was a crime of domestic violence had no impact on Holmes other than labeling the offense a crime of domestic violence and therefore allowing for the entry of an RCW 10.99 domestic violence no-contact order.

- a. The Trial Court's Finding That The Current Offense Is A Crime Of Domestic Violence Has No Potential To Increase Holmes' Punishment In Possible Future Domestic Violence Offenses.

Due process requires that a jury find beyond a reasonable doubt any fact that increases the defendant's potential punishment.

Blakely v. Washington, 542 U.S. 296, 303-04, 124 S. Ct. 2531

⁵ Appellant's assertion that the trial court noted on the Judgment and Sentence "that the jury made a finding that the conviction was a crime of domestic violence" is simply incorrect. Opening Brief of Appellant at 3-4. No place on the Judgment and Sentence does it say that the jury made this finding. CP 4449. The "Special Verdict or Findings" section of the Judgment and Sentence, CP 45, lists findings that can be made by a court and/or a jury. For example, Special Verdict or Finding (i) is for same criminal conduct, which per RCW 9.94A.589(1)(a) is to be found by the court. In this case, the finding of domestic violence was made by the court.

(2004). However, the Sixth Amendment does not prohibit a trial court from labeling a crime an offense of “domestic violence,” so long as the labeling does not increase potential punishment. State v. Watson 135 Wn. App. 400, 406, 144 P.3d 363 (2006); State v. Felix, 125 Wn. App. 575, 578-81, 105 P.3d 363 (2006), rev. denied, 155 Wn.2d 1003 (2005). Id. The domestic violence finding in the instant case has no potential to increase Holmes’ punishment in this case or in future cases.

Recently the Legislature amended the Sentencing Reform Act (SRA) to enhance punishment for domestic violence offenses where the offender has a prior conviction for which domestic violence was “plead and proven” after August 1, 2011. 2010 Laws of Washington Ch. 274 §§ 402, 403 (effective June 10, 2010) (codified at RCW 9.94A.030(20), (41); RCW 9.94A.525(21)).

RCW 9.94A.525(21) reads in pertinent part:

If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense...

Holmes argues that, pursuant to RCW 9.94A.525(21), the trial court's finding that domestic violence as defined in RCW 10.99.020 was pled and proved "will lead to increased punishment should Mr. Holmes be convicted of a new crime involving domestic violence." Opening Brief of Appellant at 9. This argument is simply incorrect. Holmes' current offense does not fall under clear language of RCW 9.94A.525(21)(a) as it was not "plead and proven" after August 1, 2012. Holmes' current offense was committed November 16, 2010. CP 1; CP 18; CP 33. The original Information charging Holmes with the offense was filed, or plead,⁶ January 13, 2011. CP 1. The offense was proven November 1, 2011, when the jury returned a guilty verdict. CP 18. Accordingly, the offense was not "plead" after August 1, 2011, and therefore Holmes' current offense does not fall under RCW 9.94A.525(21). As a result, the trial court's finding that "Domestic Violence as defined in RCW 10.99.020 was pled and proved" has no potential to increase Holmes' punishment if he is convicted of a new domestic violence offense in the future.

⁶ "Plead: To assert or allege in a pleading." Black's Law Dictionary 531 (2nd Pocket ed. 2001).

- b. Holmes Failed To Preserve An Objection To The Trial Court Entering A Finding That "Domestic Violence As Defined In RCW 10.99.020 Was Plead And Proved For Count(s) I."

Holmes failed to object to the sentencing court entering a finding on the Judgment and Sentence that "Domestic Violence as defined in RCW 10.99.020 was plead and proved for count(s) I." CP 45; 12/5/11 RP 1-21. As a result, Holmes has failed to preserve the issue for appeal. An appellate court may refuse to entertain a claim of error not raised before the trial court. RAP 2.5(a). An exception exists for a claim of manifest error affecting a constitutional right. Id. To benefit from this exception, "the appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alternation in original) (quoting State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). "A constitutional error is manifest if the appellant can show actual prejudice, i.e., there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" Id. at 99, 217 P.3d 756 (quoting Kirkman, 159 Wm.2d at 935, 155 P.3d 125).

As demonstrated above, the finding that Holmes' offense was a crime of domestic violence as defined by RCW 10.99.020 is well within the authority of the trial court. The only potential error here was to include the language "plead and proved" in the Judgment and Sentence. However, the determination that domestic violence was "plead and proved" had no potential to increase Holmes' sentence in the instant matter and has no potential to increase his sentence in possible future offenses. RCW 9.94A.525 (21). The language is a harmless Scrivener's error. In the instant case, "plead and proved" is superfluous language without legal consequence. Accordingly, inclusion of the language "plead and proven" is not manifest constitutional error and the inclusion of the language has not actually affected Holmes' rights. As a result, Holmes failed to preserve any objection to the language "plead and proven" when no objection was launched at the time of his sentencing.

D. CONCLUSION

Holmes properly stipulated to the existence of the aggravating circumstance and waived his right to a jury trial regarding the aggravating circumstance. Importantly, an

exceptional sentence was not imposed. In fact, as a result of Holmes' offender score of 17, his standard range was 60 to 60, the statutory maximum punishment for a class C felony. As a result, it was impossible for a court to impose a sentence outside of his standard range.

Additionally, the court properly exercised its authority when it labeled Holmes' offense a crime of domestic violence; a label did not increase his punishment in this case and has no potential to increase Holmes' punishment in possible future cases.

DATED this 24 day of October, 2012.

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 Jan Trasen, 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. ROGER MARCO HOLMES**, Cause No. 68146-0-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.

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