

No. 66556-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 JUL 28 PM 4:54

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

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. In Mario Humphries' trial on charges of shooting a firearm at a Seattle police officer and VUFA (unlawful possession of a firearm), the trial court improperly accepted a defense stipulation, over the defendant's objection, conceding several elements of the VUFA including a prior serious offense, violating due process and the defendant's right to a jury trial on every element of the offense.

2. Defense counsel provided ineffective assistance of counsel in failing to request that limiting or cautionary language be read to the jury with the stipulation.

3. The trial court erred in denying the defendant's motion for a new trial based on ineffective assistance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court's acceptance of defense counsel's VUFA stipulation, that the defendant had previously been convicted of a serious offense disqualifying him from possessing a firearm, which was read to the jury over the defendant's objection and his refusal to sign, violate due process and his right to a jury trial on every element of the offense, requiring reversal?

2. Where defense counsel did not request that the trial court contemporaneously caution the jury to limit the scope of its

consideration of the “serious offense” stipulation, was this prejudicially deficient attorney performance, requiring reversal?

3. Did the trial court err in denying the defendant’s motion for a new trial based on ineffective assistance of counsel, where the objective circumstances of the case rendered counsel’s performance deficient and the error undermined confidence in the outcome?

C. STATEMENT OF THE CASE

Mario Humphries, age 19, was charged with second degree assault with a deadly weapon following a Seattle police officer's allegation that Mario shot a firearm as the officer was driving in his patrol car in the middle of the night, putting him in apprehension of harm. CP 1-5, 9-11. The shooting charge was accompanied by an alternative charge of third degree assault (assault of a police officer, later vacated), and a count of unlawful possession of a firearm (VUFA), with ineligibility based on Mr. Humphries' prior Washington robbery convictions. CP 1-5, 9-11. The State also charged a firearm enhancement and additional special allegations, including an allegation that the assault crime had a foreseeable and destructible impact on others. CP 9-11.

Mr. Humphries' pre-trial motion to discharge his trial counsel,

based on his assertion that his lawyer was not spending adequate time counseling him, and because of disagreements about the proper handling of the case, was denied. 5/18/10RP at 2-5.

Prior to trial, the court agreed with defense counsel that Mr. Humphries' refusal to sign the defense-drafted stipulation, which conceded that he had a prior conviction for a "serious offense," did not preclude the court from accepting the stipulation and allowing it to be read to the jury. 10/12/10RP at 5-6, 10/13/10(am)RP at 4-6.

The stipulation read as follows:

The following statement is a stipulation by both parties. A stipulation means that the following facts are not in dispute and should be considered as fact for the purposes of this trial.

The parties in the above-referenced case agree that on February 7, 2010, the defendant, Mario Humphries, had previously been convicted of a serious offense.

The parties further agree that on February 7, 2010, the defendant, Mario Humphries, had previously received written notice that he was ineligible to possess a firearm.

The parties further agree that on February 7, 2010, the defendant, Mario Humphries, knew that he could not possess a firearm.

CP 12-13. Consistent with the court's ruling, the stipulation was read to the jury just prior to the State resting its case, over Mr. Humphries' refusal to sign the stipulation. 10/13/10(pm)RP at 13. Following closing argument, Mr. Humphries indicated he was willing

to sign the stipulation; however, by that time it had been read to the jury as conceded fact. 10/14/10RP at 88-89; CP 12-13. The stipulation was not included in the exhibit list or the jury instructions packet. Supp. CP ____, Sub # 65; Supp. CP ____, Sub # 66. CP 14-44.

The trial evidence of an assaultive shooting was Officer David Ellithorpe's testimony that he saw a pedestrian raise his arm to shoulder height, and then the officer saw a faint flash and heard a small caliber gunshot. 10/13/10(am)RP at 20-22. The officer viewed the incident from inside his patrol car, as he drove down Rainier Avenue South; the pedestrian was about 40 to 45 yards away. 10/13/10(am)RP at 24. The pedestrian had been walking with another black male. 10/13/10(am)RP at 20. Officer Ellithorpe testified that he felt he "could be shot." 10/13/10(am)RP at 53.

Officer Daryl D'Ambrosio was in the precise area and heard Officer Ellithorpe's subsequent radio call, then detained the defendant and another man nearby within two minutes; Ellithorpe identified Mr. Humphries as the claimed shooter. 10/12/10RP at 39-43. Mr. Humphries was described by an arresting officer as a black male who smelled like he and his friend were smoking marijuana. 10/13/10(am)RP at 20, 27, 76.

Despite what Officer Ellithorpe described as an "exhaustive search" of the area by multiple officers, no firearm, bullet(s), or bullet damage was ever located anywhere, including in a search of the arrestees. 10/13/10(am)RP at 47-59. Officer Nathan Janes, who investigated the incident, testified that neither the defendant or his clothes were tested for gunshot residue, but stated his opinion why this is generally not useful. 10/13/10(am)RP at 87-88. Officer Janes also told the jury that it "happens a lot [that] you don't find the firearm." 10/13/10(pm)RP at 9-10.

Over objections to irrelevance and speculation, Officers D'Ambrosio and Ellithorpe were asked repeatedly by the prosecutor about recent deadly police shootings, including the shooting of Officer Timothy Brenton and the shootings of the four police officers in Lakewood, and the effect of those shootings on fellow officers and their families. 10/12/10RP at 38-50; 10/13/10(am)RP at 73. At one point another officer, Janes, was allowed to recount the fact of police regret over the fact that Officer Brenton's car had not been equipped with a camera to allow documentation of a similar shooting. 10/13/10(am)RP at 84-85.

Dr. Geoffrey Loftus testified extensively regarding the factors influencing a person's ability to accurately perceive an event such

as the claimed firing of a gun, and to identify the shooter, considering the distance, time of night, and weather conditions at the time of the incident. 10/13/10(pm)RP at 39-47, 10/14/10RP at 16-18.

All of the special allegations except for the firearm enhancement were dismissed mid-trial upon defense motion or abandoned thereafter by the State. 10/13/10RP at 14-21, 48-50, 10/14/10RP at 3-5, 10/15/10RP at 8. The court concluded, *inter alia*, that there had been inadequate evidence to permit the jury to decide that the crime would have had a foreseeable destructible impact on others. 10/14/10RP at 3-4.

Before issuing verdicts, the jurors deliberated on the afternoon of October 14, and continued on the morning of October 15. Supp. CP ____, Sub # 77 (minutes of trial).

The jury convicted Mr. Humphries of second degree assault with a deadly weapon, an attached firearm enhancement, and unlawful possession of a firearm in the first degree. CP 45-47, 48-49. The jury conviction on the alternative third degree assault charge was later vacated. CP 90-98.

Defense counsel filed an affidavit and motion for new trial under CrR 7.5 based on jury misconduct, reporting that he had

been contacted by Juror No. 6. This person indicated that jurors had concluded that the defendant's prior conviction for a serious offense was evidence that could be used to decide whether Mr. Humphries committed the crimes charged, including the second degree assault charge. CP 50-52; 1/6/10RP at 2-9.

Counsel also argued that a new trial was warranted based on his own ineffective assistance of counsel, for having failed to seek limiting language regarding the jury's proper use of the serious offense and the defendant's resulting firearm ineligibility at the time the stipulation was read to the jury. 1/6/10RP at 3-9.

I should have asked the Court to enter into a limiting instruction when that stipulation came in, and I didn't do it. I don't think that means trial from the case, but I do think that that's a basis for a new trial that I do think that limiting instruction should have been entered into. At least I should have asked the Court to enter into that instruction, and that instruction should have been read according to the WPICs at the time of [sic] the stipulation was entered.

1/6/10RP at 3-4.

The trial court noted that it had wondered about the matter and stated twice that it would certainly have given such a limiting instruction had one been requested at any time. 1/6/10RP at 4, 9. When the court asked if the deputy prosecutor thought that counsel was ineffective, the prosecutor appeared to assume the issue was

one of a separate limiting instruction regarding the previous offense in the packet of jury instructions at the end of the case. The prosecutor stated that any failure by defense counsel at that time was a tactical decision because doing so would re-emphasize a previously mentioned issue. 1/6/10RP at 5-6 ("I do not. Just because that is something that's very -- it's tactical. It draws more attention to it, and draws more attention to the issue that the defendant was convicted of a serious offense previously").

The trial court denied the motion for a new trial, ruling (1) as for misconduct, that the jury's thought processes could not be used to attack the verdict, and (2) as for ineffective assistance, that there was no prejudice because the outcome of the case centered on whether the jury believed or disbelieved Officer Ellithorpe's trial testimony. 1/6/10RP at 9.

I do think the bottom line is all the jurors believe the officer. I mean, it was a credibility call. And they must have believed the officer to have found him guilty. So I -- I am going to deny the motion for a new trial at this time.

1/6/10RP at 9.

Mr. Humphries was then sentenced to concurrent terms on the two counts of conviction for an initial term of incarceration of 70 months, followed by a 36-month enhancement. CP 90-98;

1/6/10RP at 17.

He appeals. CP 99-100.

D. ARGUMENT

- 1. THE DEFENDANT'S RIGHT TO A JURY TRIAL AND TO DUE PROCESS WAS VIOLATED WHERE THE COURT PERMITTED A STIPULATION OF GUILT TO SEVERAL ELEMENTS OF THE VUFA COUNT TO BE READ TO THE JURY, KNOWING THAT IT WAS AFFIRMATIVELY OBJECTED TO BY MR. HUMPHRIES.**

A stipulation waives the defendant's right to require the State to prove its case on the element or elements in question. State v. Stevens, 137 Wn. App. 460, 466, 153 P.3d 903 (2007), review denied, 162 Wn.2d 1012, 175 P.3d 1094 (2008). In general, constitutional rights may only be waived by knowing, intelligent, and voluntary acts. See, e.g., Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). It is the responsibility of the trial judge when accepting a defense stipulation in a criminal trial to assure, in some manner, that it is made with the consent of the defendant. United States v. Miller, 588 F.2d 1256 (9th Cir. 1978), cert. denied, 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979). Certainly, a stipulation to an element or elements of a crime cannot be entered over the known or expressed objections by the accused.

In the present case, the trial court accepted defense

counsel's stipulation to most of the elements of the VUFA offense over the defendant's expressed objection. Counsel noted to the court that Mr. Humphries was refusing to sign the stipulation, which agreed that he had a prior conviction for a "serious offense" rendering him ineligible to possess a firearm, along with notice, as charged by the State. 10/12/10RP at 5-6, 10/13/10(am)RP at 4-5. The trial court agreed that submitting the stipulation was counsel's decision – made in order to avoid mention of the defendant's prior robbery convictions -- as a matter of defense strategy. The court further stated that the defendant's consent or signature was not required. 10/12/10RP at 5-6.

This ruling was incorrect, see State v. Ford, 125 Wn.2d 919, 922, 891 P.2d 712 (1975), and cases cited infra, but may have stemmed from conflict in case law concerning the question whether a full oral colloquy is required before accepting a stipulation. See, e.g., United States v. Ferreboeuf, 632 F.2d 832, 836 (9th Cir.1980). In the federal case, a written stipulation to an element of the crime charged was signed by defense counsel, but the trial court made no specific attempt to ascertain by oral colloquy whether it was voluntarily agreed to by the defendant. Ferreboeuf, 632 F.2d at 835. The Ninth Circuit declined to hold that a stipulation must be

preceded by personally questioning the defendant about its voluntariness; but importantly, the Court held that the trial court is required to reject the stipulation where it becomes clear it is not voluntary on the part of the accused:

Instead, we hold that when a stipulation to a crucial fact is entered into the record in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or her attorney. Unless a criminal defendant indicates objection at the time the stipulation is made, he or she is ordinarily bound by such stipulation.

Ferreboeuf, 632 F.2d at 836; see also In re Detention of Scott, 150 Wn. App. 414, 433, 208 P.3d 1211 (2009) (when a criminal defendant attempts to make a plea, which "by its very wording couples a protestation of innocence with an assertion of guilt," a trial court should refuse to accept the plea until the equivocation has been eliminated).

Regardless whether the stipulation in this case, to the several elements of prior conviction, notice, and knowledge of firearm ineligibility, was a full plea of guilty to the VUFA count, the trial court's acceptance of the waiver over the defendant's expressed objections certainly violated Mr. Humphries' Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process, requiring reversal and a new trial. As with an

involuntary plea of guilty, no “harmless error” analysis applies in which the State’s proof is judged by the evidence that could have been submitted in support of the improperly conceded elements.

a. Mr. Humphries had a right to a jury trial on every element of the offense charged against him. Criminal defendants have a right to trial by jury on every element of the offense charged. The Sixth Amendment guarantees this right. Applicable to the States through the Fourteenth Amendment’s Due Process Clause, it provides in part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”. U.S. Const. amend. 6, see U.S. Const. amend. 14; Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The right to trial by jury is also protected under the Washington Constitution, Article 1, section 21.

In addition, Mr. Humphries possesses a right to Due Process of Law under the Fourteenth Amendment. U.S. Const. amend. 14. Due process requires that a stipulation be voluntarily and knowingly agreed to by the accused in a criminal case. United States v. Larson, 302 F.3d 1016, 1020-1021 (9th Cir.2002)

However, when a defendant enters into a stipulation on an element of a crime, the defendant waives his right to put the

government to jury proof of that element. State v. Wolf, 134 Wn. App. 196, 199, 139 P.3d 414 (2006), review denied, 160 Wn.2d 1015, 161 P.3d 1028 (2007); United States v. Mason, 85 F.3d 471, 472 (10th Cir.1996) (by stipulating to elemental facts, defendant waives right to jury trial on that element).

In general, a decision to admit guilt “is reserved solely for the accused based on his intelligent and voluntary choice.” State v. Silva, 106 Wn. App. 586, 596, 24 P.3d 477 (2001) (citing Wiley v. Sowders, 647 F.2d 642, 648-49 (6th Cir.1981), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981) (citing in turn Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969))).

Accordingly, although an attorney is impliedly authorized to stipulate to, and waive, procedural matters in order to facilitate a hearing or trial in his capacity as an attorney, he is without authority to waive any substantial right of his client unless specifically authorized to do so. State v. Ford, supra, 125 Wn.2d 919, 922, 891 P.2d 712 (1975) (quoting In re Adoption of Coggins, 13 Wn. App. 736, 739, 537 P.2d 287 (1995)).

The inquiry into 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. State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994) (waiver of right to 12-person jury constitutionally valid only on showing of either express personal agreement to waiver or indication that judge or counsel discussed issue with defendant).

Where concession to the State's allegations on elements of the crime is not a guilty plea to the entire offense, not all of the protections associated with a full guilty plea may be required. See United States v. Ferreboeuf, 632 F.2d at 836 (apparent agreement by accused, although not full colloquy, required before accepting defense stipulation to crucial fact), cert. denied, 450 U.S. 934 (1981). The Washington Supreme Court recently opined that due process in a criminal trial would not require a trial court to ensure by colloquy that a defendant understands the rights waived by a factual stipulation. In re Detention of Moore, 167 Wn.2d 113, 120-21, 216 P.3d 1015 (2009) (citing State v. Johnson, 104 Wn.2d 338, 705 P.2d 773 (1985) (distinguishing the due process protections afforded defendants entering guilty pleas from those afforded defendants who agree to a stipulated facts trial); Adams v. Peterson, 968 F.2d 835, 842 (9th Cir.1992)).

Nonetheless, a stipulation to a crucial fact such as an element or elements of a crime cannot be accepted by the trial court or entered, over the known or expressed objections by the accused. Ferreboeuf, 632 F.2d at 836; Ford, supra, 125 Wn.2d at 922; Coggins, 13 Wn. App. at 739. The stipulation was improperly accepted and presented to the jury.

b. Mr. Humphries' remedy is vacation of the conviction.

Where a stipulation to an element of the offense is entered during trial without conformity to the requirements of a required colloquy, or certainly in the presence of disagreement of the defendant, the remedy is reversal. For example, in State v. Murray, 116 Hawaii 3, 169 P.3d 955 (2007), the Hawaii Supreme Court held that when a stipulation regarding prior convictions is used to prove an element of a charged offense, "the trial court must engage defendant in a colloquy to confirm that defendant understands his constitutional rights to a trial by jury and that his stipulation is a knowing and voluntary waiver of his right to have the issue of his prior convictions proven beyond a reasonable doubt." Murray, 169 P.3d at 971-72. The Court imposed the higher burden of requiring an oral colloquy before the acceptance of a stipulation to an element of the crime.

In Murray, defense counsel stipulated to defendant's prior abuse convictions, an element of the charged offense. Murray, 169 P.3d at 957. The trial court did not conduct a colloquy and there was no indication that the defendant signed a written stipulation or signed a written waiver of rights regarding the stipulation. The Supreme Court concluded that the stipulation to the prior convictions was invalid because "[the defendant's] fundamental rights could not be waived or stipulated to by his counsel; only [the defendant] personally could have waived such rights." Murray, 169 P.3d at 965. The improper stipulation waived the defendant's "right to a trial by jury under the sixth amendment to the United States Constitution" and the state constitution. Id. The Court vacated the judgment in favor of a new trial at which the defendant could choose voluntarily whether to stipulate. Murray, 169 P.3d at 966; see also Brookhart v. Janis, 384 U.S. 1, 8, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (partial concession in the form of a stipulated trial on prima facie evidence required reversal of conviction in the absence of a colloquy as to the stipulation).

No matter how advisable he or she deems it, defense counsel cannot force his client to stipulate to facts conceding guilt on an element of a charged crime, and the trial court cannot accept

such a stipulation where, as here, it is aware of the defendant's refusal to sign the stipulation in protest. Mr. Humphries' right to demand jury proof on every element of the crime charged was violated, and reversal is required.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST THAT THE COURT CAUTION THE JURY, AT THE TIME OF ADMISSION, REGARDING THE LIMITED PURPOSE OF THE PRIOR "SERIOUS OFFENSE" STIPULATION.

When prior act or prior conviction evidence is admitted in a criminal prosecution for a limited purpose under ER 105, the trial court is required upon the request of defense counsel to caution the jury regarding the narrow scope for which the evidence is being presented. See, e.g., State v. Russell, 171 Wn.2d 118, 121, 249 P.3d 604 (2011); ER 105 (when "evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted," the court if requested shall restrict the evidence to its proper scope and instruct the jury accordingly) (Emphasis added.).

Given the circumstances of Mr. Humphries' charging and trial, counsel was objectively obligated to request that the trial court give the jury standard cautionary language, contemporaneous with

reading the stipulation to a prior “serious offense.” Considering the similarity including between the seriousness of the firearm assault charge and the defendant’s apparent past crime, and the thin nature of the State’s case, along with the specter of other notorious recent shootings of police officers raised by the State’s evidence, it was critical to guard against the danger that an uncautioned jury might convict Mr. Humphries for shooting at Officer Ellithorpe based on a perception that he was already a prior violent gun criminal.

a. Counsel’s failure to request that the court give the jury a limiting or cautionary instruction, restricting the scope of the evidence at the time it was admitted, was deficient attorney performance under the objective circumstances of the case. Mr. Humphries was entitled to receive effective assistance of his trial counsel in the form of conduct of the defense case that was not objectively unreasonable, at a minimum. U.S. Const. amend. 6; State v. Reichenbach, 153 Wn.2d 126, 128-32, 101 P.2d 80 (2004) (citing Strickland v. Washington, 466 U.S. 668, 686-8, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); see also Roe v. Flores–Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), and cases cited infra.

Mr. Humphries’ counsel was aware at the time of

arraignment that the defendant's case was a prosecution for a serious firearm assault, joined with a charge of unlawful possession of that firearm (VUFA). 10/12/10RP at 2-4. This prosecutorial stratagem results (barring severance, generally refused) in the admissibility of some form of evidence revealing that the defendant has previously been convicted of an earlier serious offense, as required proof under VUFA. See. e.g., State v. Suthersby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009) (discussing severance in multiple-count VUFA prosecutions). This situation puts the defendant at risk of the evidence of the prior crime being used as propensity evidence on the primary assault charge.

During trial, however, Mr. Humphries' counsel failed to request that limiting or cautionary language be given to the jury at the time the stipulation was read, a request that would have been granted. The trial court, at the January, 2011 new trial motion, twice indicated it would have given any such instruction to the jury if it had been requested by counsel during the case, as indeed the court would have been required to do upon proper motion.

1/6/10RP at 4, 9; see ER 105; see. e.g., Russell, supra; State v. Newbern, 95 Wn. App. 277, 295–96, 975 P.2d 1041, review denied, 138 Wn.2d 1018, 989 P.2d 1142 (1999); State v. Lynch, 58 Wn.

App. 83, 88, 792 P.2d 167 (1990).¹

The question presented to the court at the new trial hearing and on appeal is whether such cautionary instruction should have been requested by counsel to be given to the jury at the time “when that stipulation came in.” 1/16/11RP 3-4. Although the trial court also reviewed the record to determine if a standard WPIC limiting instruction had been included in the jury’s final packet (it had not), the failure to request a contemporaneous instruction was the particular trial deficiency placed in issue at the motion for new trial. 1/16/11RP at 4-5.

The trial court abused its discretion when it denied the motion, failing to note that trial centered not on the officer’s believability as a witness but whether he perceived the situation accurately, and failing to assess attorney deficiency by looking to all the objective circumstances of the case. See State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

In the circumstances of this case, a cautionary instruction, so timed, should have been employed as a routine method of

¹ In the motion new trial hearing, counsel stated as an officer of the court that he could not conceive of any reason for his failure in such a case to request that the court restrict the scope of the prior crime evidence. 1/6/11RP at 3. Absent accompanying limiting language delivered by the court at the time of the stipulation’s reading, the jury at the end of the case was as a result only informed that it could consider the stipulation as evidence without restriction. See CP 15 (jury instruction no. 1, informing jury that the evidence in the case included the testimony of the witnesses, and any exhibits and “stipulations”).

restricting limited-purpose evidence to its proper scope of consideration and make clear to the jury that the evidence was “not [legally] admissible . . . for another purpose”. ER 105. The Rule contemplates, and case law endorses a preference for, the giving of this cautionary language at the time the evidence is admitted. See, e.g., State v. Ramirez, 62 Wn. App. 301, 304, 814 P.2d 227 (1991).²

There was only tactical advantage to be gained for Mr. Humphries’ defense by invoking his entitlement to a brief, but clear, cautionary contemporaneous statement from the court, properly restricting the scope of the evidence being presented by the State, which would be presumed to be followed by the jury. See State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987).

Conversely, there was no countervailing potential disadvantage to the Mr. Humphries in obtaining a cautionary

² In general, “it is usually preferable to give a limiting instruction contemporaneously with the evidence at issue.” Ramirez, 62 Wn. App. at 304-05 (citing 5 K. Tegland, Wn. Prac., Evidence § 24, at 88 (3d ed. 1989) (giving a contemporaneous limiting instruction “is the preferred practice”) and United States v. Longbehn, 898 F.2d 635, 639–40 (8th Cir.), cert. denied, 495 U.S. 952, 110 S.Ct. 2217, 109 L.Ed.2d 542, 498 U.S. 877, 111 S.Ct. 208, 112 L.Ed.2d 168 (1990); United States v. Dabish, 708 F.2d 240, 243 (6th Cir.1983); United States v. Weil, 561 F.2d 1109, 1111 (4th Cir.1977); United States v. Campanale, 518 F.2d 352, 362 (9th Cir.1975), cert. denied, 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 638 (1976); United States v. Annoreno, 460 F.2d 1303, 1307–08 (7th Cir.), cert. denied, 409 U.S. 852, 93 S.Ct. 64, 34 L.Ed.2d 95 (1972); State v. Perez, 64 Haw. 232, 638 P.2d 335, 337 (1981); State v. Hall, 246 Kan. 728, 793 P.2d 737, 748–49 (1990)).

instruction. Where such an instruction is given at the time the evidence is admitted, there is no danger of re-emphasizing a prejudicial but previously mentioned matter, by bringing it up an additional time, later in the case, when the jury is finally instructed. Cf. State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (2005) ("We can presume that counsel did not request a limiting instruction regarding the use of ER 404(b) evidence of prior bad acts because "to do so would reemphasize this damaging evidence" and the choice was therefore tactical) (Emphasis added.) (citing State v. Barragan, 102 Wn. App. 754, 758, 762, 9 P.3d 942 (2000) (failure to request limiter in jury instructions not ineffective because doing so "would reemphasize this damaging evidence"). State v. Ramirez, 62 Wn. App. at 304 (counsel requested cautionary instruction after each accordant piece of evidence was presented to jury but declined final instruction at end of case because "instructing the jury after the fact would cause it to reflect further on the evidence").

The error of deficient performance in the present case cannot be dismissed under the "tactical choice" rubric. True, there is a strong presumption that defense counsel performed adequately. See State v. Reichenbach, 153 Wn.2d at 130. Indeed,

if trial counsel's conduct can be characterized as legitimate trial strategy or tactics, the representation will be deemed not deficient, assuming such characterization has support in the record. State v. Hendrickson, 129 Wn.2d 61, 77–79, 917 P.2d 563 (1996).

However, this assumption is overcome when there is no conceivable reasonable tactic explaining counsel's challenged actions or non-actions. See Reichenbach, 153 Wn.2d at 130; State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

In this case, the danger of unfair prejudice and the objective need to request a cautionary instruction arose once it became clear this case was one where evidence of a prior, firearm-disqualifying “serious offense” would be admitted, putatively to prove a VUFA charge, in a primary prosecution for assault with a firearm.³

Given the above consideration alone, counsel’s failure to use the mechanism of a contemporaneous cautionary instruction has and had no possible tactical justification, particularly considering the Washington courts’ recognition of the importance of such

³ The propensity risk of “qualifying prior crime” evidence in this situation is recognized by the extensive litigation of severance in this area. See, e.g., State v. Suthersby, supra, see also State v. McDaniel, 155 Wn. App. 829, 860, 230 P.3d 245 (2010). Notably, arguments claiming error in denying severance have been rejected on appeal in part upon the basis that propensity reasoning will be precluded by a trial court’s giving of proper limiting or cautionary instruction. See McDaniel, 155 Wn. App. at 859-62.

admonitions. See also State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (it is critical "to stress to the jury that the testimony was admitted only for a limited purpose and may not be considered as evidence of the defendant's guilt"); State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (such caution to the jury is both "proper and necessary").

Although defense counsel conceded he had no explanation for the absence of a request for the needed cautionary instruction, the inquiry into deficiency is an objective one – the circumstances of the case will determine whether, objectively viewed, the attorney's action or non-action was reasonable. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995); State v. Tarhan, 159 Wn. App. 819, 246 P.3d 580 (2011) ("counsel's representation was deficient [if] it fell below an objective standard of reasonableness based on consideration of all the circumstances") (citing McFarland, 127 Wn.2d at 334); see also State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011) (same); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (same).

In this case additional circumstances made the failure to request an instruction objectively unreasonable beyond just the basic posture of the charged offenses and the prior crime evidence.

The stipulation admitted that Mr. Humphries was already a convicted felon guilty of a prior, apparently gun-related, serious crime. The case on trial was a prosecution of a young black male presented to the jury during the State's case (before the stipulation was read) as someone walking around Rainier Avenue South with an associate, smoking marijuana, and who allegedly fired a gun at a Seattle Police Officer for no reason. CP 9-11. Although the State's special allegation of impact on others was later dismissed, the State, during the testimony phase, repeatedly invoked the understandable fright caused by the then very recent gun slaying of Officer Timothy Brenton, and the four police officers who were slain by firearm violence in Lakewood.

All of this made it even more critical to caution the jury. Uncautioned, however, the stipulation did much more than simply concede the State's ability to prove the "serious offense" element of VUFA. The connection between the prior crime and the current charge of assault with a firearm would leave the stipulation distressingly amenable to being used by the jury as character and propensity evidence of the defendant's possibly violent penchant for committing gun-related crimes – like the shootings of other police officers, and like the firearm assault offense charged in count

1 – unless the jury was warned that it must not do so. Counsel's conduct cannot be characterized as legitimate trial strategy or tactics, and therefore his performance was deficient. See State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011); State v. Aho, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

b. Counsel's deficient performance at this crucial juncture of trial greatly undermines any confidence in the outcome of Mr. Humphries' trial, was prejudicial under Strickland, and requires reversal for a new trial. Prejudice in the context of ineffective assistance of counsel is established where the deficiency in counsel's performance undermines the reviewing court's confidence in the outcome of the trial. State v. Mohamoud, 159 Wn. App. 753, 246 P.3d 849 (2011) (citing Strickland, 466 U.S. at 694).

The Washington cases recognize that prior conviction evidence is, as a rule, tremendously prejudicial under the circumstances of the present case, particularly given the nature of the charged crimes. See State v. Savaria, 82 Wn. App. 832, 842, 919 P.2d 1263 (1996); see also State v. Dow, ___ Wn. App. ___, ___, 253 P.3d 476 (Wn. App. Div. 2, June 21, 2011) (also stating,

"The potentially prejudicial nature of prior conviction evidence makes limiting instructions critically important" (citing State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013, 787 P.2d 906 (1989); City of Seattle v. Patu, 108 Wn. App. 364, 376, 30 P.3d 522 (2001), affirmed, 147 Wn.2d 717, 58 P.3d 273 (2002)).

Where the jury was not warned regarding the limited purpose for which the stipulation was admitted, the deficiency of counsel gave the jury *carte blanche* to use the prior offense any way it sought fit, deeply undermining this Court's confidence in the outcome. Evidence of a crime that is similar or identical to the crime charged, if used by the jury beyond the purpose for which the matter is supposed to be admitted, is far more prejudicial than a dissimilar crime or act, because it is more likely to cause a jury to decide that the defendant has now committed the same type of act again, consistent with his proven track record. See Escalona, *supra*; see also State v. Newton, 109 Wn.2d 69, 76-77, 743 P.2d 254 (1987).

Reversal is all the more warranted where the evidence at trial claiming to show that Mario Humphries actually ever discharged a firearm consisted solely of the officer's testimony that he heard a gunshot and saw a muzzle flash from the area of the

defendant's raised hand, along with hearsay testimony recounting the officer's radioed assertions reporting the claimed occurrence.

The State delivered multiple witnesses during trial who recounted for the jury the police department's exhaustive search for any physical evidence such as bullets, casings, or bullet damage in order to prove that the defendant was guilty of firing a gun, all of which showed the comprehensiveness and good faith of that search effort. But the resulting absence of any physical evidence – including the lack of any firearm whatsoever, even though the defendant was “nabbed” as the alleged shooter moments after Officer Ellithorpe's radio call – made the affair and the question of what happened all the more puzzling, and a close, narrow case.

The jury was likely deliberating to the next day because it was seeking something that could help it determine whether the defendant was in fact the violent gun assailant that the State claimed. The effect of a cautionary instruction issued from the bench contemporaneous with admission of the “serious offense” stipulation would have been maximal and would have precluded improper use of the evidence by the jury. See State v. Ramirez, at 304 (citing Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 409, 451 P.2d 669 (1969) (civil case) (stating that jury can readily understand

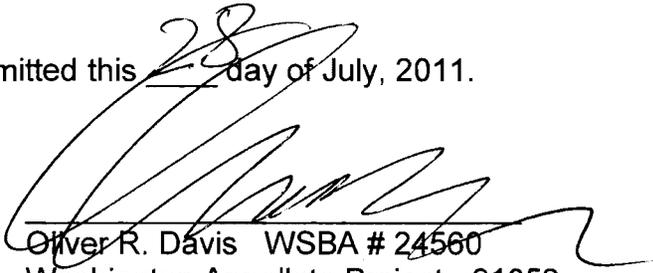
and apply evidentiary limiting instruction if it is given when evidence is introduced)). Under these circumstances, defense counsel's deficient performance at the critical juncture of trial, was materially prejudicial under Strickland.

Absent such caution to the jury, and given the weak evidentiary nature of the prosecution case, this Court should find that the absence of a requested cautionary instruction undermines any existing confidence in the outcome of Mr. Humphries trial.

E. CONCLUSION

Based on the foregoing, the appellant Mario Humphries respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 28 day of July, 2011.



Oliver R. Davis WSBA # 24560
Washington Appellate Project - 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

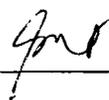
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66556-1-I
v.)	
)	
MARIO HUMPHRIES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JULY, 2011, I CAUSED THE ORIGINAL **OPENING 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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[X] MARIO HUMPHRIES 347050 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JULY, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710