

88234-7

NO. 66556-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARIO HUMPHRIES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

SUPPLEMENTAL BRIEF OF RESPONDENT

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STATE OF WASHINGTON  
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A. SUPPLEMENTAL ISSUES PRESENTED.

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

2. Even if the issue of the lack of his consent to the stipulation could be raised for the first time on appeal in light of the defendant's subsequent agreement to the stipulation prior to jury deliberations, was any error harmless where this Court can conclude beyond a reasonable doubt that verdict would have been the same without the error claimed?

B. ARGUMENT.

THE DEFENDANT'S DECISION TO SIGN THE STIPULATION FORM WAS A MANIFESTATION OF HIS CONSENT TO THE STIPULATION, AND THUS THE ERROR CLAIMED IS NOT A MANIFEST ERROR OF CONSTITUTIONAL MAGNITUDE.

Humphries argues that his right to a jury trial and his right to due process were violated when counsel made the reasonable

strategic decision to stipulate to the fact that Humphries had previously been convicted of a “serious offense” for one reason: because the record reflects that Humphries *initially* disagreed with that decision. Humphries has conceded that counsel’s decision was not ineffective assistance of counsel. Humphries instead asserts that the court’s acceptance of the stipulation over his objection violated his right to a jury trial on every element of the crime. However, because the record reflects that Humphries changed his mind and consented to the stipulation prior to jury deliberations, as manifested by his voluntary signature on the stipulation form, the claim of error was not preserved below. It is not a manifest error of constitutional magnitude that may be raised for the first time on appeal. Moreover, any error must be considered harmless under these facts.

RAP 2.5(a) provides that the appellate court may refuse to review any claim of error that was not preserved in the trial court. A claim of error, even a constitutional one, can be waived or abandoned at trial. Where a constitutional claim was not preserved below, it may not be raised on appeal unless the error is “manifest.” RAP 2.5(a). The state supreme court has rejected the argument that all trial errors that implicate a constitutional right are reviewable

under RAP 2.5(a)(3), noting that the exception must be construed narrowly. State v. Kirkman, 159 Wn.2d 918, 934-35, 155 P.3d 125 (2007). “Manifest” in RAP 2.5(a)(3) requires a showing of actual prejudice. Id. The defendant must make a “plausible showing” the asserted error had practical and identifiable consequences in the trial of the case. Id.

The error raised in this case is not manifest because the record reflects that the defendant agreed to the stipulation, and demonstrated his agreement by signing the stipulation, before the case was submitted to the jury. Thus, the defendant’s lack of consent to the stipulation cannot be considered “manifest” after the defendant changed his mind. The initial lack of consent had no practical or identifiable consequences in the trial once the defendant changed his mind.

Finally, even if the trial court erred in accepting the stipulation over the defendant’s initial objection, the error was harmless. Humphries argues that the error removed an element of the crime from the jury’s consideration. Even if this were a fair characterization of the error, such an error is subject to harmless error analysis. In State v. Berube, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003), the trial court erroneously admitted an element from

the court's instructions. The court applied a harmless error analysis. Id. As the United States Supreme Court has held, "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

To determine that a constitutional error is harmless, it must appear beyond a reasonable doubt that the error did not contribute to the ultimate verdict. Berube, 150 Wn.2d at 505. In other words, if the record supports that the jury verdict would have been the same absent the error, the error is harmless. Id.

In the present case, this Court can easily conclude that any error was harmless. There is no question that the State was able to prove that Humphries had previously been convicted of serious offenses, including robbery in the first degree and robbery in the second degree. The State provided certified copies of these convictions at sentencing, and the record reflects that defense counsel was confident that the State could prove them at trial as well. CP 56-88; RP 10/12/10 5-6. Thus, if the trial court had refused to accept defense counsel's stipulation over the

defendant's initial objection, the result would have been that the State would have presented evidence of the prior robbery in the first and second degree convictions by certified court documents. Had such evidence been presented, instead of a stipulation, this Court can conclude beyond a reasonable doubt that the verdict rendered by the jury would have been the same. This Court should conclude that any error was harmless.

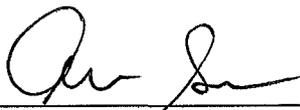
C. CONCLUSION.

Humphries' convictions should be affirmed.

DATED this 7th day of June, 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 Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. HUMPHRIES, Cause No. 66556-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



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Name  
Done in Seattle, Washington

06/08/12  
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Date