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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARIO HUMPHRIES,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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 ORIGINAL

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A. ISSUES PRESENTED

1. In a criminal trial, decisions as to the presentation of evidence, including whether to stipulate to a particular fact, are a matter of trial strategy and are the exclusive province of the defense attorney; an attorney may make strategic decisions without the defendant's consent and over the defendant's objection. Did the trial court properly accept defense counsel's stipulation that the defendant had previously been convicted of an unnamed serious offense regardless of whether Humphries consented to the stipulation, and where it was clearly a wise strategy to keep the jury from knowing that Humphries had committed at least three separate robberies in the past?

2. Did Humphries abandon any appellate challenge to the stipulation as to prior offenses when he agreed that the stipulation was proper, signed the stipulation before the case was submitted to the jury, and has offered no plausible basis to believe that, rather than stipulating to the existence of a *single* prior serious offense, he would now insist on the jury learning that he had committed multiple prior robberies?

3. A defendant must establish both deficient performance and prejudice in order to prevail on a claim of

ineffective assistance of counsel. Humphries has not established that counsel overlooked a limiting instruction rather than made a tactical decision to forego the instruction, and Humphries has likewise failed to establish that but for the lack of a limiting instruction there is a reasonable probability that the result of the trial would have been different. Did the trial court properly conclude that the defendant failed to establish ineffective assistance of counsel?

B. STATEMENT OF THE CASE

Mario Humphries was charged by amended information with the crimes of assault in the second degree, assault in the third degree (in the alternative) and unlawful possession of a firearm in the first degree, for firing a single gunshot at a Seattle Police Department officer on routine patrol late at night. CP 9-11.¹ The State also alleged that Humphries was armed with a firearm at the time he committed the assault. CP 10.

On the first day of testimony, defense counsel told the trial court that the parties had agreed to stipulate to the fact that Humphries had previously been convicted of a "serious offense," which is an element of the crime of unlawful possession of a

¹ The State incorporates by reference the detailed statement of facts provided below. Br. of Resp. at 3-5.

firearm. RP 10/12/10 5. He told the court that he had discussed this decision at length with Humphries, but that Humphries disagreed with the strategy. RP 10/12/10 5-6. Counsel explained his reasons for entering the stipulation:

I do not want the jury to hear the fact that he's been convicted of a rob in the first degree, a rob in the second degree and attempted robbery in the second degree.

RP 10/12/10 5.

Humphries' criminal history includes multiple prior convictions for robbery, all of which are "serious offenses." CP 96. In 2005, he was convicted under a single cause number of robbery in the second degree and attempted robbery in the second degree. Id. (Cause No. 05-8-03952-5). The record does not reveal if the two robberies stemmed from one or two incidents. In 2006, he was convicted of robbery in the first degree. Id. (Cause No. 06-8-01614-1). Also in 2006, he was convicted of robbery in the second degree. Id. (Cause No. 06-8-03941-8). These later two convictions clearly stemmed from separate incidents because they were charged under distinct cause numbers. All four convictions would normally have been proved by admitting a certified copy of the judgment and sentence from each case.

Counsel stated that he believed he did not need Humphries' consent to enter into a stipulation for strategic reasons, and the trial court agreed. RP 10/12/10 6. Counsel was also careful to ensure that the court, when reading the information to the jury, would simply refer to "serious offense, as opposed to what the Information says right now, which includes the rob one, rob two and attempted rob two language[.]" Id. The stipulation was read to the jury before the State rested its case. RP 10/13/10 (p.m.) 13. The stipulation read, "the defendant Mario Humphries had previously been convicted of a serious offense," instead of saying that Humphries had been convicted of serious offenses multiple times over the course of several years. Id.

At the end of trial, and before the jury began deliberations, the parties and the court discussed the stipulation again, and counsel stated, "In talking to Mr. Humphries, I think he's prepared to sign it now." RP 10/14/10 89. A copy of the stipulation, signed by Humphries, was filed with the court. CP 12-13. The jury found Humphries guilty as charged. CP 45.

Humphries argued on appeal that his trial lawyer did not have the authority to enter a stipulation over his objection, and that his lawyer provided ineffective assistance of counsel in failing to

request a limiting instruction. Br. of App. at 9-28. The Court of Appeals held that Humphries could not challenge the stipulation on appeal because the claim was not manifest constitutional error, and had been waived or abandoned in the trial court. State v. Humphries, 170 Wn. App. 777, 786-90, 285 P.3d 917 (2012). The court also held that any error in submitting the stipulation was harmless because presenting evidence that Humphries had been three times convicted of robbery would have almost certainly have resulted in a conviction. Id. at 794. The court also held that Humphries had not shown deficient performance of trial counsel in refraining from seeking a limiting instruction because counsel may well have sought to avoid calling undue attention to the prior conviction evidence. Humphries, 170 Wn. App. at 797.

One judge dissented, arguing that the issue had been adequately preserved for review, and that acceptance of the stipulation over the defendant's objection was manifest constitutional error because it was akin to coercing a guilty plea. Id. at 800-10 (Dwyer, J. dissenting). This Court granted review. State v. Humphries, 177 Wn.2d 1007 (2013).

C. ARGUMENT

Humphries argues that his right to a jury trial and his right to due process were violated when counsel made a reasonable strategic decision: to stipulate to the fact that Humphries had previously been convicted of a “serious offense.” This argument should be rejected. Because the decision to stipulate to a prior offense is a strategic decision to be made by counsel, not the defendant, Humphries’ initial disagreement with the strategy does not mean that Humphries was denied his right to a jury trial or his right to due process, as he claims.²

Moreover, it appears that trial counsel decided not to seek a limiting instruction but changed his mind after speaking post-verdict with a juror. These facts do not establish ineffective assistance of counsel, as the tactical decision not to seek a limiting instruction was reasonable. In any event, Humphries has failed to show prejudice.

² The State argues, as below, that Humphries should not have been heard to complain on appeal about a strategy that he eventually accepted at trial. Br. of Resp. at 7-8. The State’s arguments were premised on concepts of waiver and abandonment rather than the doctrine of constitutional avoidance. However, in light of this Court’s grant of review, the State now focuses its briefing on the substantive claim that a lawyer cannot stipulate to prior convictions without the consent of his client.

1. A LAWYER MAY STIPULATE TO A FACTUAL ELEMENT OVER HIS CLIENT'S OBJECTION.

The issue presented here – whether counsel may enter a formal stipulation as to prior offenses over his client's objection – has not been expressly decided by Washington courts. Foreign courts have clearly authorized counsel to enter such stipulations. And, courts in Washington and elsewhere have routinely authorized counsel to make factual concessions of an even greater scope in argument where necessary to protect the defendant's overall interests. Together, these cases make clear that a lawyer may tactically concede facts – by stipulation or argument – in an effort to protect the defendant's general interests.

RPC 1.2(a) sets forth the allocation of responsibility between a lawyer and his client. The rule states that "a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued." RPC 1.2(a) also sets forth the specific decisions that are in a criminal defendant's control:

In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

The ABA, Standards for Criminal Justice: Prosecution Function and Defense Function std. 4–5.2 (3d ed. 1993), also address the allocation of responsibility between a criminal defendant and counsel.³

In State v. Grier, 171 Wn.2d 17, 31-32, 246 P.3d 1260 (2011), this Court utilized RPC 1.2(a) and the ABA Standards in concluding that the decision whether to request a lesser included offense is a strategic decision that ultimately rests with defense counsel. The court noted that the absence of a particular decision from the list of decisions that are to be made by the accused in RPC 1.2(a) and the ABA Standards suggests that the decision is to be controlled by counsel. Grier, 171 Wn.2d at 31. Significantly, in

³ The standard reads:

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf; and
- (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

In re Personal Restraint of Stenson, 142 Wn.2d 710, 735-36, 16 P.3d 1 (2001), this Court utilized the ABA Standards in concluding that the decision to admit guilt in the penalty phase of a capital trial falls "within the exclusive province of the lawyer." The court held that trial counsel was free to make that tactical choice over the defendant's objection. Id. Similarly, in State v. Cross, 156 Wn.2d 580, 608, 132 P.3d 80, 92-93 (2006), this Court held that Cross's lawyers could present evidence of insanity in the penalty phase of a capital case over Cross's objections.⁴ An insanity defense includes presenting important factual concessions about the defendant's mental state. Thus, Washington law already recognizes that trial counsel has a wide degree of latitude to defend and to present and withhold facts in a manner that will serve the client's overall objective.

A number of foreign courts have addressed this issue as it applies to formal stipulations to material facts and have held that

⁴ "Counsel clearly believed that given the overwhelming evidence that Cross had killed his family, the best or only defense available was to plead (in the guilt phase) that Cross was not guilty by reason of insanity, or lacked the ability to premeditate, or suffered from diminished capacity. Counsel also clearly believed that the best or only chance to persuade the jury to show mercy was on the basis of Cross's poor mental health. Cross did not want to move forward on this strategy..."

counsel can tactically stipulate to such facts. In Poole v. United States, 832 F.2d 561, 563 (11th Cir.1987), the court held that counsel in a bank robbery case could stipulate without Poole's agreement to the element that the victim banks were "federally insured" because the stipulation was "more a tactical decision than an infringement on an inherently personal right of fundamental importance." See also United States v. Thornton, 327 F.3d 268, 270 (3d Cir.2003) (stipulating to interstate commerce element was reasonable strategy); United States v. Schoenhut, 576 F.2d 1010, 1019 n.9 (3d Cir.1978) (stipulation to insured status of bank was reasonable tactic).

Although no Washington court has specifically addressed whether a formal, written stipulation may be entered against the defendant's wishes, Washington courts have said that defense counsel can, for tactical reasons, concede guilt as to all elements of a charge during argument to the jury, if doing so will increase the chances of an acquittal on a more serious charge. State v. Silva, 106 Wn. App. 586, 595-96, 24 P.3d 477 (2001).

In Silva, police were questioning Silva as he sat in his car at the side of the road. When Silva heard the officers knew he had a warrant, he sped off in his car with an officer hanging out the

window trying to remove Silva's keys from the ignition. Silva was charged with felony assault on the officer, forgery, and attempting to elude a pursuing police vehicle. In closing argument, defense counsel conceded that the evidence established forgery and attempt to elude, but argued that assault had not been proven. The jury agreed, acquitted on the assault charge, but convicted on the other two charges.

On appeal, Silva argued that his lawyer's concession during closing argument was tantamount to a guilty plea and could not be entered without his express permission. The Court of Appeals disagreed, holding that the two concessions were reasonable tactics because Silva had no real defense to the conceded charges, and the concessions bolstered the credibility of defense counsel's other arguments against the more serious charge; an "attorney need not consult with the client before making such a tactical move." Silva, at 597-98.

Silva is wholly consistent with decisions from the Supreme Court and numerous federal and state courts. The leading case in this area is Florida v. Nixon, 543 U.S. 175, 190-91, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), wherein the Supreme Court held that a lawyer may concede his client's guilt as to murder in order to avoid

a sentence of death. See Com. v. Cousin, 585 Pa. 287, 301, 888 A.2d 710 (2005) (“...there are multiple scenarios in which a defense attorney may reasonably determine that the most promising means of advancing his client’s interests is to admit what has become plain to all concerned-that his client did in fact engage in at least some of the underlying conduct complained of-but either to argue for conviction of a less severe offense.”); United States v. Gomes, 177 F.3d 76, 83 (1st Cir. 1999) (counsel entitled to take a “calculated gamble” that concession to two crimes might lead to acquittal on another crime); Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991) (“[I]f in closing argument counsel acknowledges what the course of the trial has made undeniable-that on a particular count the evidence of guilt is overwhelming. Such acknowledgment can be a sound tactic when the evidence is indeed overwhelming (and there is no reason to suppose that any juror doubts this) and when the count in question is a lesser count, so that there is an advantage to be gained by winning the confidence of the jury”); Lingar v. Bowersox, 176 F.3d 453, 459 (8th Cir. 1999) (“[conceding guilt on first degree murder in the hopes of a verdict on second degree murder] did not preclude Lingar from maintaining his innocence on the first-degree murder charge, and if successful,

would have permitted Lingar to avoid the death penalty”); Com. v. Arriaga, 781 N.E.2d 1253, 1275 (2003) (“We have found no error in concessions of guilt, including of murder in the second degree, when such a concession is warranted by the circumstances”); Williams v. State, 791 So.2d 895, 899 (Miss. Ct. App. 2001) (“...it could be argued that a viable trial strategy existed to attempt to win some measure of favor with the jury by candidly conceding the overwhelming nature of the evidence of guilt on this count”); United States v. Holman, 314 F.3d 837, 840 (7th Cir.2002) (“...we have held that conceding guilt to one count of a multi-count indictment to bolster the case for innocence on the remaining counts is a valid trial strategy which, by itself, does not rise to the level of deficient performance”); State v. Gordon, 663 N.W.2d 765, 773 (Wis.2003) (counsel’s conceding guilt in the face of overwhelming evidence of less serious charges was “a reasonable tactical approach under the circumstances, plainly calculated to maintain credibility with the jury and enhance the prospects of acquittal on the two more serious charges”).

If defense counsel may concede facts supporting an entire charge without his client’s permission, to further his client’s cause, then it stands to reason that he may enter a stipulation as to prior

convictions to avoid manifest prejudice to his client, even if his client does not see the wisdom of the concession.

These holdings are consistent with the general principle that defense counsel has wide latitude to try a case. *See generally* United States v. Joshi, 896 F.2d 1303, 1307 (11th Cir. 1990) (counsel may agree to bifurcated trial with client's permission because a "myriad tactical decisions made by defense attorneys throughout the course of their defense implicitly involve the waiver of constitutional rights but do not necessitate the personal consent of the defendant"). These modern cases are also consistent with the view taken nearly 50 years ago by this Court:

To assure the defendant of counsel's best efforts then, the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics. If counsel is to be stultified at trial by a post trial scrutiny of the myriad choices he must make in the course of a trial: whether to examine on a fact, whether and how much to cross-examine, whether to put some witnesses on the stand and leave others off—indeed, in some instances, whether to interview some witnesses before trial or leave them alone—he will lose the very freedom of action so essential to a skillful representation of the accused.

Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point, however frivolous, damaging or inconsequential it may appear at the time, or to argue every point to the court and jury which in retrospect may seem important to the defendant; nor is he obliged to obtain

a written waiver or instructions from the defendant as to each and every turn or direction the accused wants his counsel to take.

State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). The rule Humphries seeks would hamstring defense trial counsel and would lead to a whole new category of second-guessing on appeal trial counsel's performance was deficient. The rule should be rejected.

Humphries argues, however, (and the dissenting judge below agreed) that his lawyer could not stipulate over his objection to prior convictions because the stipulation was tantamount to a guilty plea. Nearly every court to consider the comparison between stipulations and guilty pleas has rejected it. This Court should reject it, too.

The Supreme Court has clearly held that a concession to even *all* elements of a crime is not the same as a guilty plea, because, unlike a guilty plea, a jury must still reach a decision based on the stipulation and other evidence presented. Florida v. Nixon, *supra*, 543 U.S. at 189 (referring to the "Florida Supreme Court's erroneous equation of [trial counsel's] concession strategy to a guilty plea"). In United States v. Muse, 83 F.3d 672, 678-79 (4th Cir.1996), an unlawful possession of firearms case, trial counsel stipulated to Muse's prior felony conviction and to use of a

weapon in interstate commerce. The defendant claimed that the stipulation was tantamount to a guilty plea. The Fourth Circuit disagreed, holding that a stipulation does not remove the fact or element from the jury's consideration; it simply makes clear that no further evidence need be presented. Muse, 83 F.3d at 679-80. See also Adams v. Peterson, 968 F.2d 835, 839-43 (9th Cir.1992) (plea protections do not apply to entry of stipulation); United States v. Ferreboeuf, 632 F.2d 832, 836 (9th Cir.1980) (plea inquiry not needed for accepting stipulation).

Washington cases are in accord. This Court has held that a stipulation, even a stipulated facts trial, is functionally and qualitatively different from a guilty plea. State v. Johnson, 104 Wn.2d 338, 341, 705 P.2d 773 (1985). As the court in Johnson explained, "a stipulation is only an admission that if the State's witnesses were called, they would testify in accordance with the summary presented by the prosecutor." Id. at 341. The trier of fact is still called upon to make a finding of guilt, and the defendant's ability to appeal a determination of guilt is preserved. Id. at 341-43. In Johnson, this Court concluded that a stipulated facts trial is not tantamount to a guilty plea, and the admonitions set forth in CrR 4.2 to insure that a guilty plea is knowingly, voluntary and intelligent,

are not required. Id. at 343. See also In re Detention of Moore, 167 Wn.2d 113, 120, 216 P.3d 1015 (2009) (stating “due process would not require the trial court to ensure that defendant understands his rights waived by a factual stipulation as long as the stipulation is not tantamount to a guilty plea.”); State v. Silva, supra, 106 Wn. App. at 698-99; State v. Wiley, 26 Wn. App. 422, 425-26, 613 P.2d 559 (1980) (CrR 4.2 does not apply to stipulations). It is simply incorrect to equate stipulations and guilty pleas.

It follows that the decision to stipulate to the existence of a prior conviction – a strategic and tactical decision – is controlled by defense counsel, not the defendant. For this reason, a court may accept a stipulation over the defendant’s objection. It does not follow from that conclusion, however, that all factual concessions – either as to single elements or as to entire charges – will always be acceptable. The question ultimately will depend on whether the concession was a reasonable trial tactic. So, if a trial lawyer concedes all elements, by argument or by stipulation, for no apparent gain, that lawyer may be held on appeal to have provided deficient performance resulting in prejudice. The measure of reasonableness will be whether the tactic furthered the client’s objective. The measure of reasonableness cannot simply be the

scope or magnitude of the fact conceded. See Nixon, *supra*, at 190-91 (stipulation to murder may be necessary to spare client's life).

In this case, the trial court's acceptance of counsel's stipulation did not violate any of Humphries' constitutional rights. In Old Chief v. United States, 519 U.S. 172, 185, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), the United States Supreme Court explained that when a prior conviction is an element of a charged crime, admission of the name or nature of the prior offense carries a substantial risk of unfair prejudice to the defendant. The Court also recognized that the prosecution is generally entitled to prove its case by evidence of its own choice, and cannot be forced into entering into stipulations that deprive the State of the full evidentiary force of its case. *Id.* at 186-87. The Court balanced these competing interests and held that when the defense offers to stipulate to the existence of an unnamed prior conviction that is an element of the charged offense, the trial court violates ER 403 by not accepting the stipulation. *Id.* at 192.⁵ It cannot seriously be

⁵ Should this Court reach the question of harmless error, it should reject the reasoning of the dissenting judge below, who faulted the State for presenting no evidence of a prior conviction. Humphries, at 809-10 (Dwyer, J., dissenting). Once counsel offered to stipulate, Old Chief prohibited the State from offering evidence of the priors. Had the stipulation been rejected, the jury would have

questioned that defense counsel's decision to enter into an Old Chief stipulation in order to prevent the jury from hearing of Humphries' prior robbery convictions was a reasonable strategic choice.

In sum, the decision to enter into a particular factual stipulation, in order to prevent unfairly prejudicial evidence from being presented to the jury, is a strategic decision that is to be made by counsel pursuant to the guidelines set forth in RPC 1.2(a) and the ABA Standards. The defendant's consent is not required. The stipulation may be successfully challenged on appeal if the defendant can show that counsel's stipulation was unreasonable and prejudicial under the ineffective assistance of counsel standards.

2. THE TRIAL COURT PROPERLY DENIED HUMPHRIES' MOTION FOR A NEW TRIAL BECAUSE HE FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Humphries argues that his trial counsel rendered ineffective assistance of counsel because he failed to propose a limiting instruction in regard to the jury's consideration of his prior conviction. At sentencing, Humphries moved for a new trial based

learned that Humphries had been convicted of robbery four times stemming from at least three separate occasions. Any "error" in giving the stipulation did not change the result of this trial.

on this claim of ineffective assistance of counsel. CP 50-52;
RP 1/6/11 3. The trial court denied the motion. Id. at 7-9. The trial
court's denial was not an abuse of discretion; Humphries failed to
establish either deficient performance or prejudice.

An appellate court reviews a trial court's factual findings
relating to a claim of ineffective assistance of counsel under the
substantial evidence standard. State v. Holm, 91 Wn. App. 429,
957 P.2d 1278 (1998). The trial court's legal conclusions are
reviewed de novo. Id. A trial court's denial of relief is reviewed for
abuse of discretion. Id.

A criminal defendant has a constitutional right to effective
assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging
a claim of ineffective assistance of counsel is whether counsel's
conduct "so undermined the proper functioning of the adversarial
process that the trial cannot be relied on as having produced a just
result." Id. at 686.

The defendant has the burden of establishing ineffective
assistance of counsel. Id. at 687. To prevail on a claim of ineffective
assistance of counsel, the defendant must meet both prongs of a
two-part standard: (1) counsel's representation was deficient,

meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Id.; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990). The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688.

In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Id. at 689. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Id. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice

is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. If the standard were so low, virtually any act or omission would meet the test. Id. Petitioner must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694. The difference between Strickland's prejudice standard and a more-probable-than-not standard is slight. Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011).

In the present case, Humphries failed to establish deficient performance because he failed to provide evidence that counsel did not make a tactical decision in refraining from requesting a limiting instruction. Courts have held that a limiting instruction is appropriate when an unnamed prior conviction is admitted to prove an element of the charged crime. State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008); Spencer v. Texas, 385 U.S. 554, 561, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967) (approving use of limiting instruction where prior conviction admissible to prove element of charged crime). However, Washington courts have long held that a failure to request a limiting instruction can be a tactical decision. See, e.g., State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27

(2005); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942
(2000); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447
(1993).⁶

The record as it exists does not overcome the strong presumption that defense counsel made a reasonable tactical decision not to request a limiting instruction. Notably, defense counsel did not say that he failed to make a tactical decision; he said, "I should have asked the Court to enter a limiting instruction." RP 1/6/11 3. This statement could mean that counsel simply forgot to request a limiting instruction. But another, equally reasonable interpretation is that counsel made a tactical decision not to request a limiting instruction, which in hindsight he came to believe was a tactical error after speaking to the jury. The context, as shown by the entire record, is more consistent with the second interpretation. After the trial prosecutor specifically argued that defense counsel's actions were tactical, defense did not offer the slightest rebuttal to that argument. RP 1/6/11 6-7. In short, this record suggests that

⁶ Other states have applied this reasoning to "Old Chief" stipulations. See Herrington v. State, 102 So.3d 1241, 1246 (Miss. Ct. App. 2012) (a limiting instruction can actually focus the jury's attention on sensitive information); Martin v. Wilson, 419 F.Supp.2d 976, 988 (N.D. Ohio 2006), *citing* Stamps v. Rees, 834 F.2d 1269, 1276 (6th Cir.1987) (failure to request instruction on the permissible use of prior conviction evidence did not constitute ineffective assistance "as it is quite evident that ... counsel simply wanted to get past the prior convictions as quickly as possible without bringing undue attention to them").

defense counsel may have had second thoughts about his strategy to limit the impact of the "serious offense" stipulation by not requesting a limiting instruction, but Humphries has failed to establish that counsel failed to make a considered choice. Thus, Humphries has failed to establish deficient performance.⁷

Moreover, as the trial court found, Humphries failed to establish prejudice.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is reasonably likely the result would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

Richter, 131 S. Ct. at 791-92 (internal quotation marks and citations omitted).

The trial prosecutor argued and the trial court agreed that the strength of the case rested entirely on the credibility of the officer. This case was not a credibility contest. The defendant did not testify. The defense theory was that the circumstances were

⁷ The trial court did not directly address the performance prong. RP 1/6/11 9.

such that the officer could not have accurately observed the events. See RP 10/14/10 63-67. The fact that Humphries had been previously convicted of an unnamed serious offense could not have had much bearing on the jury's evaluation of whether the circumstances were such that the officer could accurately observe what happened. Humphries failed to establish either deficient performance or prejudice below. Thus, the trial court properly exercised its discretion in denying the motion for a new trial based on ineffective assistance of counsel.

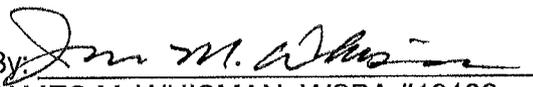
D. CONCLUSION

For the foregoing reasons, this Court should hold that the stipulation entered by Humphries' counsel was properly received, that any error was harmless, and that Humphries has failed to show ineffective assistance of trial counsel.

DATED this 16th day of July, 2013.

Respectfully submitted,

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By: 
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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 petitioner, 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. MARIO HUMPHRIES, Cause No. 88234-7, in the Supreme Court, 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.

U Brame

Name

Done in Seattle, Washington

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Please accept for filing the attached documents (Motion to File Overlength Brief and Supplemental Brief of Respondent) in State of Washington v. Mario Humphries, No. 88234-7.

Thank you.

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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Jim Whisman's direction.

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