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

STATE OF WASHINGTON,	)	
	)	No. 68879-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
STEVEN M. KRUMM,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: <u>July 22, 2013</u>
	)	

SPEARMAN, A.C.J. — Steven Krumm appeals his conviction for felony violation of a protection order. At trial, Krumm sought to stipulate that he had two prior convictions for violating protection orders, an element necessary to establish a felony violation, and to remove that element of the crime from the jury's consideration. Unlike the cases on which he relies, the trial court did not refuse to accept his stipulation in violation of evidentiary rules nor abuse its discretion in rejecting his proposal to remove the element from the jury's consideration. We affirm.

**FACTS**

The State charged Steven Krumm with violating a protection order, alleging that Krumm had contact with his spouse, Lynne Krumm, on March 5, 2012, in violation of a valid protection order. Violation of a protection order is a felony when the defendant has two prior convictions for violation of a protection order or violates a protection order by

committing an assault. RCW 26.50.110(4), (5). The State charged Krumm with both alternative means of committing the felony offense.

To establish the prior conviction element, the State offered booking photographs, purportedly of the defendant, to establish that the defendant and the person identified in the documentary evidence of the two prior convictions were one and the same. The defense objected to the booking photographs as unduly prejudicial because they depicted Krumm in jail clothing. Counsel suggested that Krumm might be willing to stipulate to the prior conviction element.<sup>1</sup> The State agreed that admission of the photographs would not be necessary if Krumm stipulated to the prior convictions. Krumm agreed to stipulate, but only if as a result, the jury would not hear or consider any evidence related to the prior convictions, including evidence of his stipulation. The trial court rejected the proposal and explained that if Krumm stipulated to the prior offenses, the court would read the stipulation to the jury in lieu of presenting other evidence of the prior convictions, including the booking photographs. Krumm withdrew the offer to stipulate. He was convicted as charged.

### ANALYSIS

Krumm contends that under Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997), and State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998), the trial court was required to accept his offer to stipulate. According to these

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<sup>1</sup> In a pretrial motion, Krumm initially requested that the court conduct the jury's fact-finding in two phases, by allowing the jury to first consider only whether Krumm violated a protection order on March 5, 2012. If the jury determined that a violation occurred, it would then consider the existence of prior convictions. However, when the issue came up at trial, Krumm abandoned this proposal in favor of stipulation.

cases, when the name or nature of a prior offense that serves as an element of the current crime might taint the verdict, and when the purpose of the evidence is solely to prove the element of a prior offense, it is an abuse of discretion for the trial court to refuse a defendant's offer to stipulate to the prior conviction. Old Chief, 519 U.S. at 174, Johnson, 90 Wn. App. at 64.

In Old Chief, the defendant, who had a prior felony assault conviction, was charged with assault and also with being a felon in possession of a firearm. The trial court refused Old Chief's offer to stipulate to being a felon and instead admitted evidence of his prior assault conviction. The United States Supreme Court concluded that the district court's refusal of Old Chief's offer was an abuse of discretion under ER 403<sup>2</sup> because the risk of prejudice created by admitting evidence of the nature or details of the prior offense substantially outweighed its probative value. Old Chief, 519 U.S. at 190-91. The Court reasoned that the sole purpose of the evidence was to establish that Old Chief was a felon and thus, fell within a category of persons that Congress had prohibited from possessing a gun. That purpose was served by Old Chief's proposed stipulation to being a felon. To the extent further evidence regarding the nature or details of his prior conviction was relevant at all, it was substantially outweighed by the risk of unfair prejudice. Id.

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<sup>2</sup> ER 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In similar circumstances, we have followed Old Chief's reasoning. In Johnson, the State had to prove that the defendant had been previously convicted of a serious offense in order to convict him of being a felon in possession of a firearm. Johnson, 90 Wn. App. at 62. Serious offenses included violent offenses and Johnson, who had been convicted of rape, offered to stipulate to a prior conviction for a serious offense to avoid naming the offense. Johnson, 90 Wn. App. at 60. The trial court did not allow the stipulation and permitted the State to admit evidence that his prior conviction was for rape. This court determined that the trial court abused its discretion. As in Old Chief, considering that the stipulation would have conclusively proved the prior conviction element, the prejudice of admitting evidence of the nature of the offense outweighed the probative value. Johnson, 90 Wn. App. at 62.

In both Old Chief and Johnson the trial courts were required to accept stipulations that would have prevented the jury from hearing unnecessary and prejudicial details about the nature of prior convictions. The trial court here was willing to accept the type of stipulation involved in Old Chief.<sup>3</sup> The court stated that if Krumm stipulated to the prior convictions, it would read the stipulation to the jury but that other evidence of the convictions, including the booking photographs would not be allowed into evidence. But Krumm rejected this proposal. He insisted that the court exclude from the jury's consideration not only the evidence of his prior convictions but also evidence of his stipulation. In effect, Krumm asked the court to take the prior conviction element of the charged offense away from the jury.

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<sup>3</sup> Old Chief proposed that his stipulation would be incorporated in a jury instruction. Old Chief, 519 U.S. at 176.

Under this court's decision in State v. Gladden, 116 Wn. App. 561, 564-65, 66 P.3d 1095 (2003), and the Washington Supreme Court's decision in State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008), ruling upon such a request to remove an element from the jury's consideration by stipulation is a matter left to the trial court's discretion. In Gladden, we upheld a trial court's rejection of a substantially similar proposal. Gladden was charged with communicating with a minor for immoral purposes, a felony offense upon proof that he had been convicted of a felony sex offense. Gladden wanted to stipulate that he had a prior conviction for a sex offense to "prevent the jury from hearing any evidence related to that element of the crime." Gladden, 116 Wn. App. at 565. The trial court declined the proposed stipulation.

On appeal, Gladden raised the same argument that Krumm makes here. He claimed that the trial court's refusal to accept the stipulation was an abuse of discretion under Johnson and Old Chief. This court disagreed and concluded that the defendant was not entitled to "delete" all reference to a statutory element of the crime. Gladden, 116 Wn. App. at 565-66.

Like Gladden, Roswell was charged with communicating with a minor for immoral purposes as a felony which required proof of a prior conviction for a felony sexual offense. Roswell, 165 Wn.2d at 192. Roswell requested that he be allowed to stipulate to the existence of a prior sex offense so the jury would not be informed of his convictions. He proposed bifurcating the elements of the crime, so that the jury would decide only whether there had been communications with a minor for immoral purposes, but the judge would make a determination on the prior conviction element.

Roswell, 165 Wn.2d at 190. The trial court accepted Roswell's stipulation, but denied his request to bifurcate.<sup>4</sup>

The Supreme Court determined that, despite the potential prejudicial impact of the jury hearing evidence that Roswell had a prior conviction for a sex offense, the trial court was not required to shield the jury from all reference to prior convictions. Roswell, 165 Wn.2d at 198-99. In reaching this conclusion, the court observed that Gladden was consistent with Old Chief in that both decisions recognize that the "prejudicial nature of evidence regarding prior convictions must be balanced against the crucial role that elements, even prior conviction elements, play in the determination of guilt." Roswell, 165 Wn.2d at 195. Moreover, while having approved of efforts to minimize the prejudice inherent in the admission of evidence of prior convictions, the court denied any suggestion that "defendants have a right to waive their right to a trial by jury on certain elements so as to prevent the jury from hearing prejudicial evidence." Roswell, 165 Wn.2d at 197.

In sum, the trial court here did not reject Krumm's offer to stipulate in violation of Old Chief and Johnson.<sup>5</sup> Krumm's proposed stipulation was contingent upon his request that the stipulation not be heard or considered by the jury, in effect, removing

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<sup>4</sup> While preserving his objection to the trial court's denial of his request to remove the prior conviction element from the jury's consideration altogether, Roswell ultimately stipulated that he had a prior conviction and his stipulation was read to the jury. Roswell, 165 Wn.2d at 191.

<sup>5</sup> We do not suggest that granting Krumm's proposed bifurcation based on his stipulation would not have been equally within the trial court's discretion. See State v. Wolf, 134 Wn. App. 196, 202, 139 P.3d 414 (2006) (stipulating to an element waives the right to require the State to prove that element beyond a reasonable doubt); see also United State v. Mason, 85 F.3d 471, 472 (10th Cir. 1996) (stipulation to an element waives right to a jury as to that element).

the prior conviction element from the jury's consideration. As in Gladden and Roswell, the trial court acted within its discretion in denying this request. We affirm.

Spectman, A.C.J.

WE CONCUR:

Glenn J.                      Dyer, J.