No. 72001-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERIC SLANE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Regina S. Cahan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Eric Slane's attorneys violated his constitutional right to a jury determination of every element of the crime beyond a reasonable doubt by conceding that he committed all the acts underlying four felony and ten misdemeanor charges over his objection.

2. Mr. Slane's attorneys violated his constitutional right to counsel by conceding that he committed all the acts underlying four felony and ten misdemeanor charges over his objection.

3. The trial court erred by informing Mr. Slane that he could not object to his attorney's decision to pursue defenses that required concessions that he committed all of the acts underlying the four felony and ten misdemeanor charges against him.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused has the constitutional rights to a jury trial, proof of every element of the crime beyond a reasonable doubt, and the "assistance" of counsel. U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 9, 21, 22. As a result, defense counsel cannot enter a plea of guilty or stipulate to any element of the charged offense absent the defendant's knowing, intelligent, and voluntary waiver of his constitutional rights. Mr. Slane's court-appointed attorneys conceded

elements of thirteen counts of malicious mischief in pursuing a diminished capacity defense and conceded all of the elements of bail jumping in arguing the affirmative statutory defense of uncontrollable circumstances. Where Mr. Slane objected to pursuing these defenses and felt that he had no counsel representing him, did counsel violate Mr. Slane's constitutional rights to counsel and to have a jury determine every element of the charged offenses beyond a reasonable doubt?

2. The constitution guarantees the accused the "assistance" of counsel in presenting his defense, and counsel cannot enter a plea of guilty or stipulate to elements of the charges against the defendant's wishes. Mr. Slane's attorneys conceded all of the factual elements of four felony and ten misdemeanor charges over his express objection. Where Mr. Slane's attorneys did not assist him in presenting his defense resulting in a breakdown of the adversarial process, does the denial of his right to counsel require the automatic reversal of Mr. Slane's convictions?

3. The accused, not his lawyer, has the constitutional rights to have a jury trial find every element of the charged offenses beyond a reasonable doubt. U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 9,

21, 22. The trial court told Mr. Slane that he could not object and permitted his attorneys to pursue defenses they Mr. Slane did not want. Where defense counsel conceded all of the essential elements except the mental element to numerous counts of malicious mischief and offered an affirmative defense to bail jumping that assumed Mr. Slane committed that crime, did the trial court when it allowed defense counsel to present the defenses over Mr. Slane's objection?

C. STATEMENT OF THE CASE

Seattle police responding to 911 calls one evening in August 2011 found that tires on several cars in a north Seattle neighborhood had been slashed. 4/23/14 RP 38-39; 5/1/14 RP 8-9.[1] One neighbor reported seeing a man wearing a white hat and dark pants, but the officers' search for a suspect was unsuccessful. 4/23/14 RP 24-25; 5/1/14 RP 10, 15. Later, an officer noticed Eric Slane crouching in

[1] The verbatim report of proceedings in this case contains several volumes. Volumes prepared by court reporters will be referred to by date and, if necessary, by court reporter name. Court reporter Kimberly Girgus filed two different versions of the proceedings on April 22, 2014, because the first transcript she filed was not complete. The second April 22, 2014, transcript, filed in February 2015, is referred to here.

Three volumes prepared by transcriptionists from Reed Jackson Watkins are referred to by the volume number on the cover. 1RP contains hearings on December 17, 2012; January 14, February 11, and October 29, 2013; and April 1, April 7, and April 16, 2014. 2RP contains portions of April 21and 22, as well as proceedings on May 9, and May 22, 2014. 3RP contains jury voire dire and opening statements on April 21 and 22, 2014.

nearby bushes and ordered him to come out. 5/1/14 RP 16-17. Mr. Slane explained that he lived nearby and came outside when he heard a commotion. 4/22/14 RP 45; 5/1/14 RP 20. Mr. Slane was wearing similar clothing to the suspect, and a search revealed he had two folding knives. 5/1/14 RP 17-18, 20. He was placed under arrest, and the knives were seized. 4/24/14(Girgus) RP 74-75.

In December 2011, the King County Prosecutor charged Mr. Slane with three counts of malicious mischief in the second degree. CP 1-2. After a lengthy delay, including over 15 months while Mr. Slane's competency was in question, trial eventually began in April 2014. CP 11-31; 1RP 21, 86-87, 95. Several counts of third degree malicious mischief and a charge of bail jumping for failing to appear for a hearing on July 15, 2013, were added by amended information. CP 12, 109-113.

Public defenders Lauren McClane and Zannie Carlson presented a diminished capacity defense to the malicious mischief charges and an affirmative defense based upon their client's mental illness to the bail jumping count. See CP 70-71, 88-94, 149-50. To that end they called three witnesses – Mr. Slane's long-time friend Patrick Brockmeyer, a

mental health case manager, and forensic psychologist Paul Spizman. 4/23/14 RP 70, 93-94; 4/24/14(Girgus) RP 5.

Dr. Spizman reviewed Mr. Slane's mental health records and the police reports and talked to Mr. Brockmeyer and a social worker at the public defense agency. 4/24/14(Girgus) RP 18-20, 24-37, 40-59, 62-67. He also interviewed Mr. Slane, who was reluctant to speak to the psychologist and would not discuss the incident or his past. Id. at 20-23, 37-40, 82.

Dr. Spizman offered his opinion that Mr. Slane suffered from paranoid schizophrenia. 4/24/14(Girgus) RP 16. He could not state with certainly whether or not Mr. Slane was capable of forming the mental state of malice at the time he slashed his neighbors' tires. Id. at 98-99. Dr. Spizman also opined that Mr. Slane's symptoms may have interfered with his ability to appear in court in July 2013. Id. at 65.

Mr. Slane did not agree with the diminished capacity defense presented by his attorneys, and he attempted to voice his objections to the court. When defense counsel began her opening argument, she described Mr. Slane as a paranoid schizophrenic and claimed that he was in the middle of a psychiatric emergency when he damaged his neighbor's property. 3RP 422-23. Mr. Slane immediately spoke up,

stating, "No, you won't. . . . I did not want this defense. They did this – they wouldn't – let me come to court without this defense. It was the only way I could get in front of a jury. I need witnesses." Id. at 423.

The court responded by telling Mr. Slane to be quiet, and Mr. Slane asked if he would be able to say anything. 3RP 423-24. "I'm supposed to be silent through everything and you can just say anything you want?" he asked the court and counsel. Id. at 424. Counsel continued her opening statement by describing Mr. Slane's thought process to the jury. Id. Mr. Slane pointed out that counsel had not learned that information from him and questioned why his attorney could present a defense he did not want. Id.

The next day Ms. McClane asked the court to find that Mr. Slane was no longer competent to stand trial because of his comments during opening statement and her assessment that Mr. Slane was no longer capable of working with her. 4/23/14 RP 4-7, 12-13. During the court's colloquy with Mr. Slane, the judge told him that he had to "follow along with" his attorney's strategy whether he agreed with it or not. Id. at 11.

Mr. Slane then listened to the testimony largely without comment until defense counsel rested their case and the court was

ready to read the instructions to the jury. 5/1/14 RP 54. At that point Mr. Slane asserted that the defense did not rest, citing the Sixth Amendment and his right to competent counsel. Id. at 54-55 (emphasis added).

After the jury was excused and Mr. Slane was permitted to speak privately with his attorney, he made it clear to the court that he did not agree with the diminished capacity defense; he wanted competent counsel or to represent himself as co-counsel. 5/1/14 RP 56-57. The court insisted on continuing the trial without addressing Mr. Slane's concerns and told him he would be removed from the courtroom if he disrupted the proceedings again. Id. at 57-58. Mr. Slane opted to leave the courtroom "under protest" rather than sit mutely through closing arguments he did not agree with. Id. at 57-59.

Mr. Slane renewed his concerns that his attorneys were not competently representing him at a motion for a mistrial and again at sentencing. 5/1/14 RP 119-21, 127; 2RP 280-81, 287. He wanted to speak and wondered why he was there if no one would listen to him. 5/1/14 RP 119-21, 127. "I don't have counsel," he stated. Id. at 120.

The jury found Mr. Slane guilty of two counts of malicious mischief in the second degree, five counts of malicious mischief in the

third degree, and one count of bail jumping. CP 188-95. He appeals. CP 185-87, 206-13.

D. ARGUMENT

Mr. Slane's constitutional rights to counsel and to due process were violated when his counsel conceded elements of the charged offenses over his objection

Eric Slane did not agree with his court-appointed counsels' decision to assert a diminished capacity defense to several malicious mischief charges and an uncontrollable circumstances defense based upon his mental illness to the crime of bail jumping. His lawyers nonetheless pursued both defenses and conceded that he committed all of the acts underlying the malicious mischief and bail jumping charges. Counsel's actions violated Mr. Slane's constitutional right to a jury determination of every element of the charged offenses beyond a reasonable doubt. In addition, counsel failed to provide him the assistance of counsel guaranteed by the Sixth Amendment. Because counsel violated Mr. Slane's constitutional rights and failed to subject the State's case to adversarial testing, this Court should reverse Mr. Slane's convictions and remand for trial with new counsel.

1. Mr. Slane had the constitutional rights to counsel to assist him and to have a jury determination of every element of the crime beyond a reasonable doubt.

The federal and state constitutions provide the accused the right to the assistance of counsel as well as the right to self-representation. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); U.S. Const. amends. VI, XIV; Const. art. 1, § 22. The structure of the Sixth Amendment gives the defendant – not his lawyer - the rights necessary to defend himself.[2] Faretta, 422 U.S. at 819-20; accord United States v. Cronic, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 S. Ct. 657 (1984). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." The role of counsel is thus to aid and assist the defendant. Id. at 820. "Implicit in the Sixth Amendment is the criminal defendant's right to control his defense." State v. Lynch, 178 Wn.2d 487, 491, 309 P.3d 482 (2013) (holding court may not instruct the jury on lesser included offenses over the defendant's objection).

The history of the Sixth Amendment also suggests that the personal autonomy interest recognized in Faretta underlies many of the rights established in the constitution. Faretta, 422 U.S. at 821-32; Erica

[2] Article I, section 22 is similarly structured, giving the defendant several rights, beginning with "the right to appear and defend in person, or by counsel."

J. Hashimoto, "Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case," 90 B.U. L. Rev. 1147, 1163-69 (2010). When the Sixth Amendment was enacted "[t]he role of counsel was not to supplant the defendant as the primary decision-maker but instead to ensure that the defendant could adequately assert his rights." Hashimoto, 90 B.U. L. Rev. at 1179.

Mr. Slane also had the right to have a jury find every element of the charged offenses beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); United States v. Gaudin, 515 U.S. 506, 511, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Humphries, 181 Wn.2d 708, 716, 336 P.3d 1121 (2014); U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 9, 21, 22. This Court reviews constitutional claims de novo. Lynch, 178 Wn.2d at 491.

A waiver of constitutional rights must be knowing, intelligent, and voluntary. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); Humphries, 181 Wn.2d at 717; City of Bellevue v. Acrey, 103 Wn.2d 203, 207-09, 691 P.2d 957 (1984). Counsel thus cannot not stipulate to an element of the crime over Mr. Slane's

objection. Humphries, 181 Wn.2d at 717-18. That, however, is what counsel did with the court's acquiescence.

2. Mr. Slane's attorney conceded virtually all of the elements of the charged offenses.

Over Mr. Slane's objection, his attorneys presented a diminished capacity defense to the malicious mischief charges. "Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged." State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997); see State v. Marchi, 158 Wn. App. 823, 835, 243 P.3d 556 (2010), rev. denied, 171 Wn.2d 1020 (2011). The attorneys also asserted the statutory affirmative defense to bail jumping, asserting that Mr. Slane's mental condition prevented him from appearing in court. RCW 9A.76.170(2).

Mr. Slane did not confess to the police. See CP 87; 4/22/14 RP 45; 5/1/14 RP 20. In litigating the defenses that Mr. Slane did not approve, defense counsel presented evidence that helped the prosecution prove that Mr. Slane was responsible for the property destruction. Defense counsel, for example, called Mr. Slane's friend Patrick Brockmeyer as a witness. Mr. Brockmeyer testified that he asked Mr. Slane why he slashed the tires of people he did not know,

and Mr. Slane replied "everyone's guilty." 4/23/14 RP 78-79. According to Mr. Brockmeyer, Mr. Slane wanted to do something that would elicit a reaction so that he could tell what people were thinking of him. Id. at 87-88. This information was repeated by defense psychologist Paul Spizman, who added Mr. Brockmeyer's conclusion that Mr. Slane was "angry and angry at the world." 4/24/14(Girgus) RP 49-50, 87, 94-97.

Dr. Spizman also informed the jury that Mr. Slane had stored urine in his home in the past. Id. at 34. This evidence was key in connecting Mr. Slane to the third degree malicious mischief offense charged in Count 7. Unlike the other malicious mischief counts, Count 7 did not involve slashed tires. Instead, the rear window of the Honda Pilot in that count was smashed, the car smelled of urine, and a broken bottle that appeared to contain urine was found inside the car. 2RP 252-53; 4/22/14 RP 108, 112. Defense counsel pointed out the connection to the jury in closing argument. 5/1/14 RP 92.

In their pursuit of the diminished capacity defense, Mr. Slane's attorneys also argued to the jury that he committed the acts of malicious mischief and bail jumping, thus conceding essential elements of the charges. In closing argument, counsel admitted that Mr. Slane

committed the acts constituting all of the malicious mischief counts, and conceded that he did not appear in court as required. 5/1/14 RP 82-87, 99-103. In opening statement, counsel told the jury that Mr. Slane left his house with two pocket knives and damaged his neighbors' property, and she added he was the person that one witness saw outside that evening. 3RP 423-25. Counsel also discussed Mr. Slane's statement to his friend when asked why he slashed the tires in both arguments. 3RP 427; 5/1/14 RP 83, 87, 96.

Mr. Slane made his objection to theses defenses clear to the lawyer and the court. 3RP 423-24l 4/23/14 RP 11; 5/1/14 RP 54-59, 119-21, 127; 2PR 280-81, 287.

3. Defense counsel's decision to pursue defenses and concede elements of the charged offenses over Mr. Slane's objection violated his constitutional rights to counsel and to a jury determination beyond a reasonable doubt of every element of the crimes.

The defendant controls a decision to stipulate to an element of the crime. Humphries, 181 Wn.2d at 714. Humphries was charged with second and third degree assault and unlawful possession of a firearm based upon two juvenile convictions for robbery. Id. at 712. Defense counsel wanted to stipulate that Humphries had a conviction for a "serious offense" so that the jury would not hear about the

robberies, but he informed the court that his client disagreed. Id. The court determined this was a tactical decision and admitted the stipulation, which the defendant had not signed. Id. at 712-13.

The Humphries Court noted that a stipulation to facts that establish an element of the crime relieves the jury of the duty to find the element beyond a reasonable doubt. Humphries, 181 Wn.2d. at 714. "[T]he stipulation therefore constitutes a waiver of the 'right to a jury trial on that element' as well as the right to require the State to prove that element beyond a reasonable doubt." Id. (citing United States v. Mason, 85 F.3d 471, 472 (10th Cir. 1996) and Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)). Because Humphries objected to the stipulation, the court could not accept it, as it waived his constitutional rights. Id. at 716.

Mr. Slane's case is similar to Humphries. Although no written stipulation was entered, defense counsel conceded that Mr. Slane did all of the acts needed for several counts of malicious mischief and challenged only the mental element. Counsel also admitted that her client did not appear in court as required and posed a mental health defense. Like Humphries, the trial court believed these decisions were to be assessed solely on the basis of whether they were "tactical," and

told Mr. Slane that he had no right to contest his attorneys' decision. Thus, Mr. Slane's constitutional right to require the jury to find every element of the crimes beyond a reasonable doubt was violated.

Also instructive is a Delaware Supreme Court case holding that the defendant's constitutional right to due process was violated when his attorney sought a verdict of "guilty but mentally ill" over his objection. Cooke v. State, 977 A.2d 803 (Del. 2009), cert. denied, 559 U.S. 962 (2010). During the course of the trial, Cooke made it clear that he did not agree with the guilty but mentally ill defense, but the court initially declined to speak to Cook about his objection to his attorney's defense, focusing instead on the prejudicial impact of Cooke's outburst and admonishing Cooke to be quiet. Id. at 817-18, 823-28. Eventually, the court told Cooke that his lawyers controlled the defense. Id. at 829. In support of their defense, Cooke's attorneys called a psychologist and elicited Cooke's contradictory statements about the murder, including a confession. Id. at 831.

The Delaware Supreme Court held that Cooke's constitutional rights to plead not guilty, to testify in his own defense, and to an impartial jury were violated by his attorney's decision to enter a guilty but mentally ill defense over his objection. Cooke, 977 A.2d at 840-46.

Decisions such as whether to plead guilty, waive a jury, or testify are "inherently personal rights" which must be made by the defendant. Id. at 842.

> [T]he defendant has autonomy to make the most basic decisions affecting his case. . . . Moreover, counsel cannot undermine the defendant's right to make these personal and fundamental decisions by ignoring the defendant's choice and arguing affirmatively against the defendant's chosen objective.

Id. Accord Edwards v. State, 88 So.3d 368, 374-75 (Fla.App. 2012) (Florida's affirmative defense of insanity may not be raised over defendant's objection because it is "akin to a plea decision").

4. Ethical rules regarding the allocation of decision-making between counsel and client do not support defense counsel's actions.

Defense counsel is an assistant to the defendant, and counsel's overarching duty to advocate for the client is accompanied by the duty to consult with the client about important decisions. Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

> Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as an assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of

> important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Id. (emphasis added) (internal citations omitted). Because constitutional rights are personal to the defendant, several important decisions in criminal cases may only be made by the defendant, not a surrogate. These include whether to proceed with or without counsel, what pleas to enter, whether to accept a plea agreement, whether to waive the right to a jury trial, whether or not to testify, whether to speak and sentencing, and whether to appeal. Florida v. Nixon, 543 U.S. 175, 188, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004); see RPC 1.2(a); American Bar Association, Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-5.2(b) (4th ed. 2014) (hereafter ABA Standards); Washington Bar Association, Performance Guidelines for Defense Representation, Guideline 1.4(h)(1) (2011) (hereafter WSBA Guidelines). Counsel thus "lacks authority to consent to a guilty plea on a client's behalf." Nixon, 543 U.S. at 187.

Counsel is responsible for making tactical and strategic decisions after consultation with the client. ABA Standard 4-5.2(d); WSBA Guideline 1.4(h)(2). These decisions include how to pursue

plea negotiations, now to craft and respond to motions, whether and how to conduct cross-examination, what jurors to strike, what motions and objections to bring, and what evidence to introduce. Id. Notably, the ABA and WSBA Standards do not allocate responsibility for deciding the defense to the attorney.

The United States Supreme Court has not directly addressed the whether a concession violates a defendant's right to counsel. In Nixon, defense counsel made the decision to concede guilt at the penalty phase of a death penalty case in order to concentrate on establishing reasons to spare Nixon's life in the penalty phase. Nixon, 543 U.S. at 181. Nixon had confessed to a kidnapping and brutal murder, and the evidence against him was "overwhelming." Id. at 179-80. When defense counsel explained the strategy to Nixon, he never approved or disagreed with it. Id. at 181. On appeal he argued his attorney did not provide effective assistance of counsel. Id. at 176.

The Supreme Court held that defense counsel's decision to concede guilt was not ineffective assistance of counsel in a death penalty case given the "gravity of the potential sentence in a capital trial and the proceeding's two-phase structure." Nixon, 543 U.S. at 182-83, 190-91. Because defense counsel had explained the strategy

and the defendant was nonresponsive, counsel made a reasonable decision to focus on saving Nixon's life. Id. at 191-92. "When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interests and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." Id. at 192.

Nixon is easily distinguishable from Mr. Slane's case. First, Mr. Slane made it clear that he did not agree with his counsel's chosen strategy by not cooperating the defense psychologist and by voicing his objections throughout the trial and sentencing. 5/1/14 RP 119-21, 127; 2RP 280-871, 287. Second, he was not facing the death penalty or a sentencing hearing before a jury. Moreover, Mr. Slane did not confess to the charged offenses, and the prosecution's case was not overwhelming. After both sides rested, for example, the prosecutor withdrew five counts for lack of evidence, and another count was dismissed by the court at the end of the evidence. 4/14/14(Hoffman) RP 13, 26-27; compare CP 109-12 and CP 185-87.

5. Defense counsel's actions violated Mr. Slane's constitutional right to counsel, requiring automatic reversal of his convictions.

Constitutional errors are presumed to be prejudicial. In most cases the State has the burden of proving the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Lynch, 178 Wn.2d at 494. Normally, allegations that the defendant's right to a jury determination of every element of the crime beyond a reasonable doubt was violated are reviewed for harmless error. Washington v. Recuenco, 548 U.S. 212, 219-20, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). A violation of the right to counsel, however, is structural error.

"Of all of the rights an accused person has, the right to be represented by counsel is by far the more pervasive because it affects his ability to assert any other rights he might have." Cronic, 466 U.S. at 654. The complete denial of the constitutional right to counsel, the denial of the right to self-representation, and the right to choice of counsel are therefore constitutional errors for which no harmless error analysis is required. United States v. Gonzalez-Lopez, 548 U.S. 140, 150-52, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (right to choice of counsel); McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L.

Ed. 2d 122 (1984) (right to self-representation); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (right to counsel).

As argued above, the Sixth Amendment provides the defendant with the "assistance" of counsel for his defense. "If no actual 'assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." Cronic, 466 U.S. at 654 (quoting Sixth Amendment). Thus, when defense counsel fails "entirely to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversarial process itself unreliable." Id. at 659. In such case, the error is presumed to be prejudicial and the traditional test for ineffective assistance of counsel is not used. Id. at 659-60.

In a Kansas case, defense counsel presented a theory to the jury that was inconsistent with the client's position that he was innocent of all charges and the court reversed because of the denial of the defendant's right to counsel. State v. Carter, 270 Kan. 426, 14 P.3d 1138 (2000). Carter was charged with first degree murder under two alternatives, and defense counsel conceded Carter's involvement in the murder, but argued lack of premeditation in hopes of obtaining a felony murder conviction. Carter, 270 Kan. at 429. Carter expressed his

disagreement with the attorney's strategy throughout the trial, but his motion to represent himself was denied. Id. at 429-33.

The Kansas Supreme Court held that defense counsel's guilt-based defense against his client's wishes violated his Sixth Amendment right to counsel and denied him a fair trial. Carter, 270 Kan. at 441. Applying the Cronic exception, the court found that Carter was entitled to new trial without a separate showing that he was prejudiced by his attorney's representation:

> [Defense counsel] abandoned his client, and the result was a breakdown in our adversarial system of justice. … such a breakdown compels the application of the Cronic exception. The conduct of [counsel] was inherently prejudicial, and no separate showing of prejudice was required.

Id.

North Carolina also holds that counsel is ineffective per se if she admits the defendant is guilty of the charges for which he is being tried, or a lesser included offense, without the defendant's express permission. State v. Harbison, 315 N.C. 175, 180, 337 S.E.2d 504 (1985); State v. Maready, 205 N.C.App. 1, 13-14, 695 S.E.2d 771 (2010).

Defense counsel conceded that Mr. Slane committed the acts that formed several felony and misdemeanor counts of malicious

mischief. Mr. Slane's lawyers also introduced his explanation of why he committed the offenses to a friend through two separate witnesses. And they conceded that he knowingly failed to appear for court by asserting the affirmative defense that his failure was excused. Mr. Slane's lawyers thus violated his right to have the State prove and the jury determine every element of the crime beyond a reasonable doubt.

Mr. Slane's lawyers pursued this strategy over his objection, and they thus were not assisting him in resenting his defense as required by the Sixth Amendment. His constitutional rights to counsel and to a jury determination of every element of the crime beyond a reasonable doubt were violated, and by ignoring Mr. Slane's wishes and conceding elements of the crime, his attorney failed to subject the State's case to adversarial testing. The trial process in this case was so unreliable that Mr. Slane's conviction must be reversed. See Cronic, 466 U.S. at 659-60.

E. CONCLUSION

Mr. Slane's constitutional right to a jury determination of every element of the charged offense beyond a reasonable doubt was violated when his attorney conceded that he committed the acts constituting all of the charged crimes. Mr. Slane's convictions for two counts of

malicious mischief in the second degree, five counts of malicious mischief in the third degree, and one count of bail jumping should be reversed and remanded for a new trial.

DATED this 9th day of April 2015.

Respectfully submitted,

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