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IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,558

DYRON TUCKER,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

FILED

SID J. WHITE

JUN 12 1998

CLERK, SUPREME COURT

By

Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

Amended

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, **DYRON TUCKER**, was the Petitioner in the trial court and the Appellant in the Third District Court of Appeal. The Respondent, **THE STATE OF FLORIDA**, was the respondent in the trial court and the Appellee in the Third District Court of Appeal. The parties shall be referred to as they stood in the trial court.

STATEMENT OF THE CASE AND FACTS

Dyron Tucker was charged with possession of a firearm by a convicted felon, in violation of sections 790.23, 775.084(4), Florida Statutes (1995). In order to establish the defendant's status as a convicted felon, the State sought to introduce the defendant's prior convictions for burglary, robbery, and carrying a concealed firearm. The defendant objected to the defendant's conviction for carrying a concealed weapon being admitted. (T. 135-136). The trial judge noted that the defendant was not currently charged with committing that offense and only case law which has found the admittance of prior convictions to be prejudicial involved the exact same crime currently charged and that for which a conviction was obtained. (T. 135-136). The State argued that the conviction was essential to prove the "convicted felon" element of the charge. The State showed a conviction which showed the defendant's name on that certified prior conviction to be an alias, Edward Charles James. Defense counsel objected and asked for a curative instruction to the jury to disregard. Defense counsel argued that the State should not be allowed to show that the defendant used a different name in order to prove that the prior conviction did in fact belong to the defendant. (T. 138-139).

The trial court informed defense counsel that she would give a curative instruction that the jury should not be influenced by

the fact that the defendant had been convicted using another name. (T. 139). Defense counsel refused the curative instruction and argued that there was no probative value to show that the defendant used a different name and that the issue was whether the person was the same person who had a previous conviction. (T. 139). The trial court asked defense counsel how this could be done, and defense counsel responded, "tape over it." The trial judge contended that would be telling the jury that there was something wrong. The court asked defense counsel if he wanted a curative instruction. Defense counsel asked that the court instruct the jury to disregard the last statement.

The prosecutor for the State informed the court that the defendant had certified prior convictions which could not be tampered or altered with before the convictions were sent back to the jury. The prosecutor informed the court that the State could not simply redact the defendant's name, unless defense counsel was prepared to enter a stipulation that the name of the defendant was used by his client, and the jury would know that it was one and in fact, the same person. The prosecutor stated that he would not ask the jury to disregard the evidence that is part of the State's case. The prosecutor further stated that it was part of the State's burden to prove up the elements which included proving the defendant's certified convictions. (T. 140). In order to prove that the defendant was the same

individual who was convicted of the prior convictions, under a different name it was essential to have the finger print technician testify that the finger print on the certified copy of the prior conviction matched the defendant's finger print.

The trial court admitted into evidence the certified copy of the defendant's prior conviction for carrying a concealed firearm. The defendant was ultimately convicted and sentenced for unlawful possession of a firearm by a convicted felon.

On appeal, the defendant argued that the trial court erred in allowing the State to introduce into evidence the defendant's prior conviction for carrying a concealed firearm. The State argued that the defendant had failed to preserve the issue for appellate review since he did not renew his objection at either the close of the State's case or at the close of the defendant's case. The State further argued that proof of the defendant's prior conviction was an essential element of the crime and relevant evidence. The State submitted that the probative value was not outweighed by the danger of unfair prejudice. The State argued that defense counsel did not offer to stipulate to the previous felony which was unlike the situations in the cases cited by the defendant in support of his argument. The jury was never specifically apprised as to which felonies the defendant had previously committed. The State further argued that the previous felony was not identical to the felony that the

defendant was currently charged with which was also unlike the cases cited by the defendant. The previous felony committed was for carrying a concealed firearm, not possession of a firearm by a convicted felon. As such, the State reasoned, the nature of the prior conviction was not likely to support the defendant's conviction on improper grounds.

The defendant argued on appeal, that the United States Supreme Court case of Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997), was analogous to his case. The defendant urged the Third District Court of Appeal to follow the United States Supreme Court opinion in Old Chief and to find that the trial court abused its discretion by admitting Tucker's convictions.

The Third District held that the defendant's offer to stipulate to his felony status was not reason to reverse Tucker's conviction. The Third District cited to this Court's decision in Parker v. State, 408 So. 2d 1037, 1038 (Fla. 1982). It was in Parker, that this Court held that "[T]he state is not bound by the defendant's offer to stipulate to essential elements of the crime, stating the exclusion of such relevant evidence is left to the discretion of the trial court based on traditional grounds." "Therefore, proof of conviction is relevant evidence and is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues,

misleading of the jury, or needless presentation of cumulative evidence." 408 So. 2d at 1038. The Third District held that the probative value regarding the defendant's convictions was not substantially outweighed by any of these considerations.

The Third District held that the United States Supreme Court in Old Chief had construed federal law. The Third District stated that the conclusions reached by the United States Supreme Court in Old Chief were not binding on Florida courts when construing Florida statutes and rules. The Third District reasoned that this Court's decision in Parker was the binding authority from this court, which was directly on point. The Third District concluded as it did in Brown v. State, 700 So. 2d 447 (Fla. 3d DCA 1997), presently set for oral argument in this Court on June 3, 1998, by certifying the following question as a matter of great public importance:

SHOULD THE DECISION IN PARKER V. STATE, 408 So. 2d 1037 (Fla. 1982), BE OVERRULED IN FAVOR OF THE ANALYSIS OF THE EVIDENTIARY REQUIREMENTS FOR PROOF OF CONVICTED FELON STATUS IN FIREARM VIOLATION CASES ESTABLISHED FOR FEDERAL COURTS IN OLD CHIEF V. UNITED STATES, 117 S.CT. 644 (1997)?

QUESTION PRESENTED

SHOULD THE DECISION IN PARKER V. STATE, 408
So. 2d 1037 (Fla. 1982) BE OVERRULED IN FAVOR
OF THE ANALYSIS OF THE EVIDENTIARY
REQUIREMENTS FOR PROOF OF CONVICTED FELON
STATUS IN FIREARM VIOLATION CASES ESTABLISHED
FOR FEDERAL COURT IN OLD CHIEF V. UNITED
STATES, 519 U.S. 172, 117 S. CT. 644, 136
L.ED.2d 574 (1997)?

SUMMARY OF THE ARGUMENT

The decision in Parker v. State, 408 So. 2d 1037 (Fla. 1982), should not be overruled. This Court should find no abuse in the trial court's admission of the defendant's prior conviction. This Court should not follow the Supreme Court's decision in Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 135 L.Ed. 2d 574 (1997). A prior conviction is a substantive element of the crime of possession of a firearm by a convicted felon. The State should not be barred from proving facts pertinent to its prosecution simply because the defendant offers to admit them. Old Chief is not analogous to the present case.

The facts in this case differ significantly from those in Old Chief and thus warrant a different result. Indeed, if this Court were to follow the analysis in Old Chief, this Court would be expanding the Supreme Court's holding in Old Chief. Old Chief was charged with assault as well as possession of a firearm by a convicted felon under 18 U.S. C. Section 922(g) (1996). Defense counsel offered to stipulate to Old Chief's status as a convicted felon. The State introduced evidence of a past felony conviction for assault over defense counsel's objection. In the instant case, the prior conduct introduced by the State, was not shown to be indistinguishable from the charged offense as was the situation in Old Chief.

The evidence admitted did not inflame the jury and did not appeal strongly to the jury's prejudice. As such, even if the prior conviction should not have been admitted into evidence, a position the State does not agree with, any error must be deemed harmless. Cases applying the Old Chief analysis have also found that Old Chief does not create a per se rule that it cannot be harmless when a jury is informed of a defendant's prior conviction or convictions for serious violent felonies. An error by a court with respect to the admission of evidence is subject to the harmless error analysis, and it is well settled that an error which is not of constitutional dimension is harmless "unless it is more probable than not that the error materially affected the verdict." United States v. Daniel, 134 F.3d 1259 (6th Cir. 1998), citing United States v. Fountain, 2 F.3d 656, 668 (6th Cir. 1990). See also United States v. Taylor, 122 F.3d 685, 688 (8th Cir. 1997); United States v. Anaya, 117 F.3d 447, 449 (10th Cir. 1997).

Proof of the defendant's prior conviction in this case, was both relevant and admissible. The statute prohibiting possession of a firearm by a convicted felon makes a prior conviction an essential element of the crime. Proof of the conviction is therefore, relevant evidence. Therefore, the defendant's prior conviction was properly admitted into evidence. Nothing in this case necessitates this Court to recede from Parker.

ARGUMENT

THE DECISION IN PARKER V. STATE, 408 So. 2d 1037 (Fla. 1982) SHOULD NOT BE OVERRULED IN FAVOR OF THE ANALYSIS OF THE EVIDENTIARY REQUIREMENTS FOR PROOF OF CONVICTED FELON STATUS IN FIREARM VIOLATION CASES ESTABLISHED FOR FEDERAL COURTS IN OLD CHIEF V. UNITED STATES, 519 U.S. 172, 117 S. Ct. 644, 136 L.Ed. 2d 574 (1997).

The defendant asks this Court to apply the United States Supreme Court's opinion in Old Chief v. United States, 519 U.S. 172 (1997), to this case and thus find an abuse of discretion in the lower court's admission of the defendant's prior conviction. This Court, however, in State v. Barquet, 262 So. 2d 431, 435 (Fla. 1972), specifically held that state courts are not bound to follow a decision of a federal court, even the United States Supreme Court, dealing with state law. See also, State v. Owen, 696 So. 2d 715, 719 (Fla. 1997), where this Court held that it had the authority to reaffirm its' decision in Owen v. State, 560 So. 2d 207 (Fla. 1990), regardless of federal law.

The defendant argues that the federal firearm statute at issue in Old Chief, and the federal evidentiary balancing test of Rule 403, Federal Rules of Evidence, are virtually identical to their Florida counterparts. This, according to the defendant, compels Florida to re-examine the decision in Parker v. State, 408 So. 2d 1037 (Fla. 1982). The State, respectfully, does not agree.

This Court in State v. Barquet, held that where the federal and state statutes are similar and intended to accomplish like objects, state courts, in construing the state statute, are not bound to follow the construction put on the federal statute by federal court construction. This Court in State v. Barquet, in support of the holding stated as follows:

As further stated in 21 C.J.S. Courts Section 205, pp. 362-364:

'(T)he state courts are free to decide for themselves all questions of the construction of state constitutions and statutes. An exception to this rule has been made, however, where the federal supreme court has decided that it is necessary to construe a state statute in a certain way to prevent its being violative of the federal constitution; and where the question presented is as to the construction or violation of a provision of the state constitution which is similar to a provision of the federal constitution, and the same question has been decided by the federal supreme court with respect to the federal constitution, the federal decision is strongly persuasive as authority, and is generally acquiesced in by the state courts, although it is not absolutely binding.'

262 So. 2d at 436.

The State would also point to the Supreme Court's decision in Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475 (1991). In that case, the court, was faced with the question whether the admission of evidence (evidence that the infant victim suffered from battered child syndrome) violated McGuire's federal constitutional rights. In holding that McGuire's due process rights were not violated by the admission of the evidence, the Court cited to its' earlier

decision in Spencer v. Texas, 385 U.S. 554 (1967) as follows: "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial...But it has never been thought that such cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure" (citations omitted). 502 U.S. at 70.

The State would respectfully submit that the Third District Court of Appeal was correct in concluding that the holding in Old Chief was not binding on Florida courts construing Florida state statutes and rules, particularly in light of binding Florida Supreme Court precedent directly on point.

This Court should answer the certified question in the negative. There is no basis to overrule the well-reasoned opinion in Parker v. State, in favor of the analysis in Old Chief. A prior conviction is a substantive element of the crime of possession of a firearm by a convicted felon. State v. Vazquez, 419 So. 2d 1088 (Fla. 1982). See also Williams v. State, 492 So. 2d 1051, 1052-1053 (Fla. 1986) (allowing the State to "introduce the particulars of a prior conviction for armed robbery in a prosecution for possession of a firearm by a convicted felon).

In Parker, this Court held that the State may introduce into evidence the particulars of a defendant's prior felony conviction for breaking and entering with intent to commit grand theft in a

prosecution for possession of a firearm by a convicted felon. In so holding, this Court noted that the State may introduce the particulars of a prior conviction when the prior conviction is an essential element of the crime charged unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. Id. at 1038.

In Williams v. State, 492 So. 2d at 1053, this Court took the opportunity to note that the above standard also applies when the State seeks to introduce the particulars of more than one prior felony conviction. In Williams, the defendant argued that he was particularly prejudiced by the evidence of the nature of his prior conviction when entered in conjunction with the comments of the State made to the jury during opening statement. The State informed the jury, in Williams, that the area in which the defendant was stopped was a high crime area where armed robberies had occurred. The defendant claimed that the combination of this evidence entered over objection, with his prior felony conviction of armed robbery, would cause the jury to speculate whether the defendant was carrying a firearm to commit the armed robbery. This Court, stated that jury speculation is an uncontrollable, inherent factor of every jury trial. This court held that the nature of the defendant's prior conviction, even when combined with the reference by the State to the fact that armed robberies had occurred in the

neighborhood, did not comprise such substantial prejudice as to vitiate the entire trial. This Court further found, as is the situation in the instant case, that, "this is not an occasion where the state is trying to introduce multiple convictions for the same crime as that charged to establish a pattern of criminal behavior". This Court in Williams, held that the trial court did not abuse its discretion by allowing the nature of the defendant's prior felony conviction into evidence.

This Court's decision in Parker, was based upon this Court's earlier holding in Arrington v. State, 233 So. 2d 634 (Fla. 1970). In Arrington, this Court pointed out that criminal defendants often seek to stipulate to the existence of certain evidence in an attempt to obviate "legitimate moral force" of such evidence. This Court held that the State is not barred from proving facts pertinent to its prosecution simply because the defendant offers to admit them. The trial judge, this Court, held, always retains the authority to sustain objections to evidence upon traditional grounds.

In the instant case, there was no other evidentiary rule which rendered the evidence that was clearly relevant, inadmissible, as unnecessary in establishing the offense. This Court in Parker concluded that the test of "legal relevancy", is set out in Section 90.403, Florida Statutes as follows:

[P]roof of conviction is relevant evidence and is admissible unless its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or needless presentation of cumulative evidence.

408 So. 2d at 1038.

Applying the above test to the facts of this case, this Court must first determine whether it can be said that the probative value of defendant's prior conviction was "substantially outweighed" by the danger of unfair prejudice or the needless presentation of cumulative evidence. As with other discretionary evidentiary determinations which a trial court is called upon to make, a decision to admit evidence will not be disturbed absent a showing of abuse of discretion. See Jent v. State, 408 So. 2d 1024, 1029 (Fla. 1981), or in other words, a demonstration of prejudice to the substantial rights of the defendant. Brown v. State, 426 So. 2d 76, 79 (Fla. 1st DCA 1983).

In the absence of such a demonstration, the erroneous admission of evidence may require the application of the harmless error rule, thus making reversal improper unless "the error committed was so prejudicial as to vitiate the entire trial." State v. Murray, 443 So. 2d 955 (Fla. 1984). See also Stephenson v. State, 634 So. 2d 1155 (Fla. 4th DCA 1994), where the appellate court held that although the court was approaching the outer limits of the harmless error doctrine explained in State v. Diquilio, 491 So. 2d 1129 (Fla. 1986), in a trial in which the State introduced copies of the defendant's four prior convictions, the State also

made several references at various stages of the trial to crimes of which the defendant had been convicted, and referred to other criminal activity in which the defendant had been involved. Even if this Court finds that admitting the defendant's prior conviction was error, there are more reasons to find an error, harmless in this case. In this case, the trial court admitted the defendant's conviction for carrying a concealed weapon into evidence. The previous felony was not identical to the felony the defendant was currently charged with committing. It is this fact, that distinguishes the case at hand from that in Old Chief. The trial judge in fact, noted that the defendant was not currently charged with carrying a concealed weapon, and that case law which has found the admittance of prior convictions to be prejudicial have involved the exact same crime currently charged and that for which a conviction was obtained. (T. 135-136). The nature of the prior conviction was not likely to support the defendant's conviction on improper grounds. The jury was not apprised as to the nature of the prior conviction. In this case, as the State argued on appeal, the defendant failed to even preserve the issue for appellate review since he didn't renew his objection at either the close of the State's case or at the close of the defendant's case.

Section 90.403, Florida Statutes, does not bar this evidence. The evidence admitted did not inflame the jury and did not appeal strongly to the jury's prejudice. As such, the State would

respectfully submit that even if this Court maintains that the conviction should not have been admitted into evidence, a position that the State does not agree with, any error must be deemed harmless. See Vidal v. State, 300 So. 2d 688 (Fla. 3d DCA 1974) (appellant was convicted of unlawful possession of a firearm by a convicted felon, evidence was submitted at trial to show that the appellant had been previously convicted not only of the felony crime of conspiracy to sell narcotic drugs but also of the crime of unlawful possession of a firearm while engaged in a criminal offense. The Court held that no reversible error occurred where the appellant claimed that he misunderstood the stipulation procedure and failed to object). The State would submit that there was no error in admitting the convictions in the instant case.

Cases applying the Old Chief analysis have also found that Old Chief does not create a per se rule that it cannot be harmless when a jury is informed of a defendant's prior conviction or convictions for serious violent felonies. An error by a court with respect to the admission of evidence is subject to the harmless error analysis, and it is well settled that an error which is not of constitutional dimension is harmless "unless it is more probable than not that the error materially affected the verdict." United States v. Daniel, 134 F.3d 1259 (6th Cir. 1998), citing United States v. Fountain, 2 F.3d 656, 668 (6th Cir. 1990). See

also United States v. Taylor, 122 F.3d 685, 688 (8th Cir. 1997); United States v. Anaya, 117 F.3d 447, 449 (10th Cir.)1997.

There is no reason for this Court to recede from Parker in favor of the decision in Old Chief. Old Chief is completely distinguishable from the case at hand. Old Chief was charged with assault as well as possession of a firearm by a convicted felon under 18 U.S. C. Section 922(g). Defense counsel offered to stipulate to Old Chief's status as a convicted felon. The State introduced evidence of a past felony conviction for assault over defense counsel's objection. Upon review, the Supreme Court held that where alternative evidence such as a stipulation is available to establish the defendant's felony convict status and where the nature of the prior conviction introduced by the state is likely to support a conviction on improper grounds, the prior conviction must be excluded.

Old Chief is distinguishable from the case at hand, since the prior conduct introduced by the State in this case, was not shown to be indistinguishable from the charged offense as was the situation in Old Chief. See also United States v. Wilson, 107 F.3d 774 (10th Cir. 1997), where the court held that it was error to admit the appellant's prior conviction for possession of cocaine in a case where the appellant was charged with possession of cocaine. The court specifically stated as follows: "...as with the defendant in Old Chief, Mr. Wilson offered to stipulate to his prior

conviction solely to limit the prejudice that would result from the jury being informed that he had previously been convicted on an unrelated charge of possession of cocaine. Because we find this case fits within the rule established in Old Chief, we hold that the district court erred in admitting Mr. Wilson's prior conviction for the purpose of supporting the prior felony element of the 18 U.S.C. 922(g)(1)" 107 F.3d at 784. (emphasis added). The court in United States v. Wilson, citing to Old Chief, went on to hold, "[I]f, indeed there was a justification for receiving evidence of the nature of prior acts on some issue other than status (ie., to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident'), Rule 404(b) guarantees the opportunity to seek its admission." 107 F. 3d at 784. (emphasis added). The court in United States v. Wilson, held that the appellant's prior conviction was neither highly probative nor similar to the criminal activity for which he was currently indicted. The conduct giving rise to Mr. Wilson's prior conviction occurred when he was arrested for driving with a suspended driver's license, and a subsequent search uncovered cocaine and marijuana on his person. 107 F.3d at 785.

Unlike the situation in Old Chief, the jury in this case, was not apprised of the underlying facts of the defendant's prior convictions. There was no evidence admitted detailing the nature of the prior felony convictions to the jury.

There is nothing in the instant case which necessitates this Court to recede from its' holding in Parker v. State. A prior conviction is a substantive element of the crime of possession of a firearm by a convicted felon. State v. Davis, 203 So. 2d 160 (Fla. 1967). In charging possession of a firearm by a convicted felon, proof of the conviction is relevant evidence. The defendant, in the instant case suffered no unfair prejudice or confusion of the issues. Unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged." See Old Chief, 117 S. Ct. at 650. Unfair prejudice, however, does not include damage that occurs to a defendant's case because of the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis. United States v. Guerrero-Cortez, 110 F.2d 647 (8th Cir. 1997). The evidence in the instant case was not unfair, as it did not tend to support a decision on an improper basis. Proof of the prior convictions was both relevant and admissible.

The State would also respectfully submit that either under the rationale of Old Chief or under this Court's rational in Parker, any error in admitting the defendant's prior convictions into evidence must be deemed harmless since the evidence of the underlying facts of the defendant's prior conviction was never

submitted to the jury for consideration. In addition, the jury was not the nature of the defendant's prior felony conviction was never argued to the jury.

The defendant relies upon this Court's decision in State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991) where this Court held that bifurcated proceedings are required in prosecutions for felony driving under the influence--an offense which requires proof of three or more prior D.U.I. convictions--in order to protect the defendant's presumption of innocence. A review of the reasoning in that case indicates that it is not applicable to cases involving possession of a firearm by a convicted felon. In State v. Rodriguez, this Court concluded that if a defendant charged with felony D.U.I. elects to be tried by a jury, the court shall conduct a jury trial on the elements of the single incident of D.U.I. at issue without allowing the jury to learn of the alleged prior D.U.I. offenses. If the jury returns a guilty verdict as to that single incident of D.U.I., the trial court shall then conduct a separate proceeding without a jury in order to determine whether the defendant had been convicted of D.U.I. on three or more prior occasions. All evidence of the prior D.U.I. convictions must be presented in open court and with full rights of confrontation, cross-examination, and representation by counsel. The trial court must be satisfied that the existence of three or more prior D.U.I.

convictions has been proved beyond a reasonable doubt before entering a conviction for felony D.U.I.

If, however, proof of the underlying conviction in a possession of a firearm by a convicted felon case were excluded, it would change the nature of the crime charged. See United States v. Barker, 1 F.3d 957, 960 (9th Cir. 1993), where it was determined that the lower court could not bifurcate the single offense of being a felon in possession into separate proceedings for felony status and possession because "[p]roof of the felony conviction is essential to the proof of the offense."

This Court's decision in Parker v. State is well reasoned and should continue to be followed. The State should not be compelled to accept a defendant's stipulation to the existence of an element of the charged offense in lieu of introducing evidence on that element. A stipulation is not adequate replacement for actual proof. Acceptance of that broad premise could allow criminal defendants to stipulate away all but the most hotly contested aspect of the charged offense.

The defendant's prior conviction, under an alias for carrying a concealed firearm was properly admitted into evidence. The previous felony was not identical to the felony involved in the instant case. Such a similarity is not dispositive however. See e.g. United States v. Booker, 706 F. 2d 860, 862 (8th Cir. 1983), cert. den., 464 U.S. 917 (1983). (admission of evidence conveying

identity of prior crime is not abuse of discretion, despite the similarity between the prior crime and the charged offense). In the instant case, the risk of prejudice was minimal. The evidence of the prior offenses consisted of a certified copy of the prior conviction. The State did not reveal the facts underlying the prior offense. The prior conviction was introduced as direct evidence of an element of the charged offense, and was clearly the most probative evidence available to prove that element of the offense.

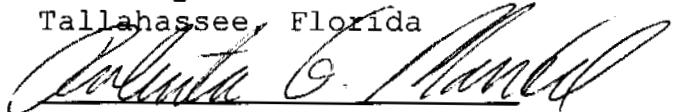
The defendant also argues that the prosecutor pointed to the defendant's prior felonies during closing argument. A review of the record indicates that the defense argued that the State did not have sufficient evidence to convict the defendant since the State did not have a gun in evidence. (T. 235). Later in the argument, the State asked the jury to look at the particular felonies for which he was convicted. In order for this Court to find this argument to have been made in error, this Court would have to find fundamental error since defense counsel never objected to the above argument at trial. No fundamental error, however, occurred, as the alleged error was not so prejudicial as to vitiate the entire trial.

CONCLUSION

Based upon the preceding authorities and arguments, the Respondent respectfully requests that this Court enter an opinion answering the certified question in the negative. The case at hand, is completely distinguishable from Old Chief v. United States. This Court's decision in Parker v. State, is sound and well-reasoned and should not be disturbed.

Respectfully submitted,

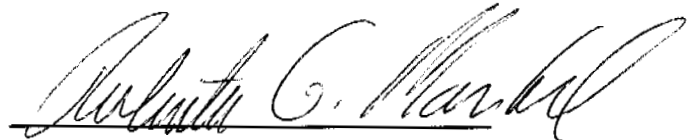
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON THE MERITS** was furnished by mail to **MARIA E. LAUREDO, Assistant Public Defender**, Public Defender's Office, Eleventh Judicial Circuit of Florida, 1320 Northwest 14th Street, Miami, Florida 33125 Florida, on this 15th day of June, 1998.



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Assistant Attorney General