Supreme Court No. 100029-4
No. 36763-1-III

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

DAVIEL CANELA,

Petitioner.

PETITION FOR REVIEW

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
richard@washapp.org
wapofficemail@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Washington Court of Appeals

Other Cases

Constitutional Provisions

Statutes

Rules

A. IDENTITY OF PETITIONER AND DECISION BELOW

Daviel Canela, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review. The Court of Appeals issued its opinion on May 6, 2021. The State filed a motion to reconsider. The court denied this motion on June 24, 2021. The opinion and order denying the motion to reconsider are attached in the appendix.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Due process, the right to effective assistance of counsel, and the court rules require the prosecution to disclose the contact information of witnesses it intends to call, along with any record of prior criminal convictions of these witnesses. Before trial, the prosecution did not disclose the contact information of Joseph Stueckle, a key witness the prosecution intended to call, and did not disclose Mr. Stueckle's criminal history. As the least severe sanction capable of remedying the prosecution's mismanagement, should the trial court have excluded the witness's testimony?

2. The Constitution and court rules require the prosecution to disclose impeachment evidence. After the jury's verdicts, the defense learned that the prosecution failed to disclose that Mr. Stueckle had *additional* prior convictions for theft. This evidence would have been used to impeach Mr. Stueckle. Was this impeachment evidence materially

exculpatory? Did the prosecution's discovery violations require a new trial under the court rules?

3. It is misconduct for a prosecutor to cite matters outside the evidence or to vouch for the credibility of a witness. During closing arguments, the prosecutor vouched for Mr. Stueckle's credibility and his identification of Mr. Canela. He did so by asserting there had been no mistake in Mr. Stueckle's identification of Mr. Canela because Mr. Stueckle knew Mr. Canela from serving time with him in jail. This fact was outside the evidence. Did prosecutorial misconduct deprive Mr. Canela of a fair trial?

4. Did any combination of the foregoing errors cumulatively deprive Mr. Canela of his due process right to a fair trial?

5. For a guilty verdict by a jury to be upheld, the law of the case doctrine requires that any burden imposed by the jury instructions be met. Due process requires the prosecution to prove every element of an offense. To convict Mr. Canela of unlawful possession of a firearm, due process and the law of the case doctrine required the prosecution to prove he had previously been convicted of a felony. The record does not show the jury received any stipulation as to this element. Must the jury's guilty verdict be reversed under either the law of the case doctrine or due process?

C. STATEMENT OF THE CASE

A detailed recitation of the facts is set out in the opening brief. Br. of App. at 7-13. A more concise summary is as follows.

The prosecution charged Daviel Canela with first degree attempted murder and unlawful possession of a firearm in the second degree. CP 9-10. The charges stemmed from the non-fatal shooting of Victor Garcia outside of an apartment. RP 133, 164.

Mr. Canela contested the prosecution's claims, contending he had been wrongfully identified. RP 122-24. Mr. Garcia, who was incarcerated at the time of trial, was not called to testify. RP 103, 108, 119-387.

Shortly before the trial started, Mr. Canela alleged the prosecution had not complied with its discovery obligations and the court rules. RP 8-12, 81-98. This included the fact that the prosecution had not listed an address or contact information for "Josef Simeon Stueckle," a person on the prosecution's witness list. Supp. CP 102, 109; RP 92-93. The prosecution also did not provide any records of criminal history for Mr. Stueckle. RP 85, 106-07.

Mr. Stueckle was a purported eyewitness to the shooting. The prosecutor belatedly disclosed that Mr. Stueckle was in Benton County Jail in Kennewick. RP 11, 95.

Following further requests by defense counsel that he be provided

Mr. Stueckle's criminal history and after being afforded only a very brief opportunity to speak with Mr. Stueckle, the defense moved to exclude Mr. Stueckle from testifying. RP 196-97, 204. The court denied the motion. RP 204-06.

Mr. Stueckle testified about witnessing the shooting. RP 331-345. He identified Mr. Canela as the shooter. RP 337-38.

Defense counsel impeached Mr. Stueckle with prior convictions for burglary and theft. RP 338. Mr. Stueckle denied he was promised leniency in a prosecution against him in exchange for testifying. RP 360.

During the prosecutor's closing argument on rebuttal, the prosecutor asserted Mr. Stueckle had not made a mistake in identifying Mr. Canela because Mr. Stueckle knew Mr. Canela from being in jail with him. RP 427. This was not a fact in evidence.

The defense and the prosecution entered into a stipulation about Mr. Canela having a previous felony conviction. RP 364-66. This was an element that the prosecution had to prove to convict Mr. Canela of unlawful possession of a firearm. But the record does not show this stipulation was actually admitted and received by the jury.

The jury convicted Mr. Canela as charged.

Following the verdicts, the defense learned that Mr. Stueckle had two other recent convictions for theft. 4/16/19 RP 11-15; CP 54, 75. The

prosecution failed to disclose this evidence, which were admissible to impeach Mr. Stueckle. Based on this and the other violations by the prosecution as to its discovery obligations, Mr. Canela timely moved for a new trial. CP 52-67. The trial court denied Mr. Canela's motion. RP 4/16/19 RP 21-22.

On appeal, Mr. Canela argued his convictions should be reversed due to the discovery violations and the prosecution's failure to disclose exculpatory evidence. He argued the conviction for unlawful possession of a firearm should be reversed due the lack of evidence about Mr. Canela having a prior felony conviction. The Court of Appeals rejected these arguments. The court, however, reversed the conviction for attempted murder because the charging document was deficient. The court denied the prosecution's motion to reconsider.

D. ARGUMENT

1. The Court should grant review to decide whether a trial court is obliged to exclude the testimony of a key witness sought to be called by the prosecution when the prosecution fails to timely disclose the witness's contact information and criminal history.

Defendants have the right to effective assistance of counsel, which includes the right of defense counsel to be prepared for trial. State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). Preparation requires investigation and includes interviewing witnesses in advance of trial. Id. at

180-81; State v. Wilson, 149 Wn.2d 1, 12-13, 65 P.3d 657 (2003).

The trial court erred by denying Mr. Canela's request to exclude Joseph Stueckle's testimony due to the prosecution's violation of the discovery rules. Br. of App. at 14-24. The trial court ruled that the prosecution violated the discovery rules by not providing Mr. Canela's lawyer the contact information for Mr. Stueckle. RP 200. The prosecution also violated the discovery rules by not turning over Mr. Stueckle's criminal history to the defense until trial. RP 106-07, 198-99.

Still, the trial court denied Mr. Canela's request to exclude Mr. Stueckle from testifying, instead recessing for the afternoon to allow defense counsel to speak to Mr. Stueckle. RP 204-06. The court noted that defense counsel now had Mr. Stueckle's criminal history. RP 207. Mr. Stueckle testified the next day. RP 326.

As the trial court recognized, the prosecution committed misconduct or mismanagement by its lack of timely disclosure. CrR 4.7(h)(2); Salgado-Mendoza, 189 Wn.2d 420, 434, 403 P.3d 45 (2017). This prejudiced Mr. Canela because "late disclosure of a key witness presenting unique testimony . . . is likely to prejudice the defense." Salgado-Mendoza, 189 Wn.2d at 437. Here, the prosecution belatedly disclosed contact information and impeachment evidence concerning a key witness for the prosecution in the midst of trial. This impacted defense

counsel's ability to prepare for trial, including his examination of witnesses. Counsel was preparing for issues regarding hearsay from police officers, not examining Mr. Stueckle. RP 93. Defense counsel had to prepare to examine Mr. Stueckle during the trial. He was only able to interview him less than 24 hours before he testified. He was belatedly provided Mr. Stueckle's criminal history, which was incomplete. This late disclosure improperly required Mr. Canela to either demand a continuance and give up his right to speedy trial, or proceed with counsel who was not adequately prepared. This prejudiced Mr. Canela. See State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). State v. Brooks, 149 Wn. App. 373, 390, 203 P.3d 397 (2009).

To remedy the prejudice, the trial court was obliged to grant Mr. Canela's request to exclude Mr. Stueckle's testimony. Exclusion of this testimony was the least severe sanction capable of remedying the prejudice caused by the prosecution's misconduct. See Salgado-Mendoza, 189 Wn.2d at 431. The trial court erred by denying Mr. Canela's request.

In concluding otherwise, the Court of Appeals reasoned suppression of the prosecution's evidence was an "extraordinary remedy" and not appropriate under the four-part test set out by this Court in State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). Slip op. at 16-17. But Hutchinson concerned exclusion of a *defense* expert witness. Unlike

criminal defendants, the government, "as the prosecuting authority, has no Sixth Amendment right to compulsory process of witnesses." City of Seattle v. Lange, No. 78071-9-I, slip op. at 17, 2021 WL 2801512, at *7 (Wash. Ct. App. July 6, 2021). For this reason, Division One in Lange rejected application of Hutchinson in analyzing whether the trial court properly granted a defense request to exclude testimony. Contrary to Division One, Division Three applied Hutchinson to restrict the ability of trial court's to remedy discovery violations *by the prosecution*.

Division Three reasoned Mr. Canela "fail[ed] to demonstrate that any of the late disclosures in this case actually did result in surprise or prejudice or demonstrate bad faith." Slip op. at 18. But as Division One has reasoned, a showing of prejudice is not required, let alone proof of bad faith. Lange, No. 78071-9-I, slip op. at 15-16, WL at *7. Further, prejudice was shown by defense counsel's inability to adequately prepare to cross-examine Mr. Stueckle. He was given less than 24 hours to prepare. A late interview is not a substitute for adequate preparation. The prosecution effectively made Mr. Canela give up his right to have competent and prepared counsel in exchange for his speedy trial rights.

It was fundamentally unfair to permit Mr. Stueckle to testify given the failings by the prosecution to timely disclose his contact information and his criminal history. A real remedy was required. This sort of

misconduct or mismanagement is unfortunately sure to recur. Review of this issue warranted as one of substantial public interest. RAP 13.4(b)(4). Review is also especially warranted to resolve the conflict in the Court of Appeals on the application of Hutchinson. RAP 13.4(b)(2).

2. The Court should grant review to decide whether failure by the prosecution to disclose prior criminal convictions that can be used to impeach a witness qualifies as materially exculpatory evidence under *Brady*. Review is further warranted to decide whether the prosecution's discovery violations required a new trial under the court rules.

The prosecution has a constitutional duty to turn over material evidence that is favorable to the defense, including impeachment evidence. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); Giglio v. United States, 405 U.S. 150, 153-154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). The "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. This rule applies to evidence undermining witness credibility, including impeachment evidence. Giglio, 405 U.S. at 153-54. Evidence is material when there is any reasonable likelihood that the evidence could affect the jury's judgment. Id. at 154.

Brady requires a new trial if evidence discovered after conviction

undermines confidence in the verdict. Wearry v. Cain, 577 U.S. 385, 392-93, 136 S. Ct. 1002, 194 L. Ed. 2d 78 (2016). This does *not* require the defendant to prove by a preponderance that a different result would have occurred. Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

Washington's court rules go beyond Brady. CrR 4.7(a). Discoverable information under the court rules is not limited to information that is "material" within the meaning of Brady. Lange, No. 78071-9-I, slip op. at 8-9, WL at *4. This includes impeachment evidence. Id.

In this case, after Mr. Canela was already convicted, the prosecution belatedly disclosed that its key eyewitness, Mr. Stueckle, had additional convictions for theft. 4/16/19 RP 11-15; CP 54, 75. As crimes of dishonesty, these would have been admissible to impeach Mr. Stueckle. ER 609(a)(2); State v. Ray, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991).

The court rules unambiguously required the prosecutor to disclose these prior convictions before trial. CrR 4.7(a)(1)(vi), (a)(3). Further, as impeachment evidence that was material, the prosecution was constitutionally obligated to disclose.[1] Giglio, 405 U.S. at 153-54; Benn v.

[1] Defense counsel had no obligation to seek this material out as the prosecution represented that it had disclosed Mr. Stueckle's criminal history. See

Lambert, 283 F.3d 1040, 1057-58 (9th Cir. 2002). The two undisclosed prior convictions for theft undermine confidence in the verdict. That there was other impeachment evidence introduced at trial does not undermine this conclusion. As explained by the Ninth Circuit Court of Appeals in a case reviewing a Washington conviction on habeus review, when

> there is reason to believe that the jury relied on a witness's testimony to reach its verdict despite the introduction of impeachment evidence at trial, and there is a reasonable probability that the suppressed impeachment evidence, when considered together with the disclosed impeachment evidence, would have affected the jury's assessment of the witness's credibility, the suppressed impeachment evidence is prejudicial.

Benn, 283 F.3d at 1056.

Here, there is reason to believe that the jury relied on Mr. Stueckle's testimony despite the impeachment evidence because the prosecution cited his testimony and he identified Mr. Canela as the shooter. RP 337-38, 427. There is a reasonable probability that the suppressed impeachment evidence, when considered with the disclosed impeachment, would have affected the jury's assessment of Mr. Stueckle's testimony. The two undisclosed convictions for theft were very recent and would have bolstered Mr. Canela's impeachment of Mr. Stueckle.

Banks v. Dretke, 540 U.S. 668, 695, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004) ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed").

Accordingly, the Brady violation prejudiced Mr. Canela. Benn, 283 F.3d at 1056.

In denying Mr. Canela relief on appeal, the Court of Appeals held the exculpatory evidence was merely "cumulative" and therefore not material under Brady. In reaching this conclusion, the Court of Appeals ignored the test set out by the Ninth Circuit in Benn and instead followed a test set out by the second circuit in United States v. Avellino, 136 F.3d 249, 256-57 (2d Cir. 1998). There, the Appeals Court affirmed the denial of a defendant's request to *withdraw his guilty plea* based on a contention that the government failed to disclose evidence which could have been used to impeach a government informant. There was already "a wealth of disclosed evidence with which [the government's witness] could have been impeached." Id. at 258. Thus, additional information that the defendant might have committed perjury did not create a reasonable probability that the defendant *would have not pleaded guilty*. Id. at 259.

Here, this case concerns a jury trial, not a decision on whether to plead guilty. And the two convictions for theft were recent and would have significantly added to the impeachment of Stueckle. In light of these convictions, the jury could found Mr. Stueckle to not be credible. Defense counsel's impeachment would have been much more powerful with these additional and more recent prior theft convictions. Mr. Canela shows

prejudice, requiring a new trial.

Even setting Brady aside, Mr. Canela was entitled to relief because he showed there was a substantial likelihood that the prosecutor's misconduct affected the jury's verdict, requiring that his request be granted under the court rules. This conclusion is compelled by State v. Copeland, 89 Wn. App. 492, 949 P.2d 458 (1998). There, the prosecution failed to disclose that its complaining witness had a prior felony conviction for theft. Copeland, 89 Wn. App. at 497. The Court of Appeals held this discovery violation was misconduct. Id. at 497-98. The court further held the trial court had abused its discretion by denying the defendant's motion for a new trial. Id. at 498-99. The case turned on the credibility of the complaining witness and the theft conviction was admissible to impeach that witness's credibility. Id. at 498.

The same reasoning applies here. The case turned on credibility determinations, including Mr. Stueckle's testimony. The undisclosed impeachment evidence could "have created a reasonable doubt that did not otherwise exist." Id. at 498.

The Court of Appeals refused to follow Copeland, reasoning that Mr. Canela had not shown prejudice. This is incorrect. Under the court rules and Brady, Mr. Canela was entitled to have his motion for a new trial granted.

The Court of Appeals' decision conflicts with precedent, meriting review. RAP 13.4(b)(1), (2). Further, what kind of evidence qualifies as "material" rather than being merely "cumulative" under Brady is a significant constitutional question meriting review. RAP 13.4(b)(3). The issue will recur and is one of substantial public interest. RAP 13.4(b)(4). Review should be granted.

3. The Court should grant review to decide whether a prosecutor's flagrant misconduct during rebuttal in asserting that a witness served time in jail with the defendant—a fact outside the evidence—is properly raised for the first time on appeal when no curative instruction could have eliminated the resulting prejudice.

Citing evidence outside the admitted evidence, the prosecutor argued to the jury that there was no mistake by Mr. Stueckle in his identification of Mr. Canela as the shooter because Mr. Stueckle "knew the defendant from serving time with him at the jail." RP 427. "There is not one word of testimony in the record that" Mr. Canela had served time in jail with Mr. Stueckle, let alone that Mr. Stueckle even knew Mr. Canela. State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). The prosecutor's recitation of extrinsic evidence was flagrant and ill-intentioned misconduct. Id.; In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 705, 286 P.3d 673 (2012); Br. of App. at 33-35.

The Court of Appeals excused the flagrant misconduct, reasoning

"[w]hen making a closing argument, a lawyer might not have clearly in mind exactly what the jury had heard." Slip op. at 25. As this Court has reasoned, this is no excuse. The "prosecutor's 'reasonable intentions' are irrelevant because [the appellate court] do[es] not assess a prosecutor's subjective intent when deciding whether error occurred" and citing a fact outside the admitted evidence is improper. State v. Loughbom, 196 Wn.2d 64, 76, 470 P.3d 499 (2020). Further, given that there was no admitted evidence that the two men even knew each other, it is obvious that the "prosecutor knew that [this fact] was not in evidence." Reeder, 46 Wn.2d at 892. Still, he engaged in the misconduct.

No instruction could have cured the resulting prejudice. The jury could not unhear what the prosecutor said. The "harm had already been done." Reeder, 46 Wn.2d at 893. "The jury knows that the prosecutor is an officer of the State" who is privy to information beyond that which was admitted. State v. Allen, 182 Wn.2d 364, 380, 341 P.3d 268 (2015). Mr. Stueckle's testimony and identification of Mr. Canela as the perpetrator was key evidence that the prosecution relied upon.

The Court of Appeals' conclusion that the error was waived is in conflict with precedent and should be reviewed. RAP 13.4(b)(1), (2). Notwithstanding a lack of an objection (which would only highlight the statement for the jury), prosecutors should not be able to cite damning

facts to the jury that are outside the evidence. Review is warranted because this issue is one of substantial public interest. RAP 13.4(b)(4).

4. The Court should grant review to decide whether any combination of the foregoing errors deprived Mr. Canela of his due process right to a fair trial.

Due process entitles criminal defendants to a fair proceeding. U.S. Const. amend. XIV; Const. art. I, § 3. An accumulation of errors may deprive a defendant of this right. Chambers v. Mississippi, 410 U.S. 284, 290 n.3, 93 S. Ct. 1038, 1043, 35 L. Ed. 2d 297 (1973); State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426 (1997). Because any combination of the foregoing errors deprived Mr. Canela of his right to fair trial, reversal is required. Br. of App. at 40-41. If the Court grants review of any of two foregoing issues, it should also grant review of this issue. See RAP 13.7(b) ("If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues.").

5. The Court should grant review to decide whether due process and the law of the case doctrine requires a conviction to be reversed when the evidence does not support a finding on an essential element in the jury instructions and the record does not show that the jury received a stipulation that would permit the jury to make the necessary finding.

Due process demands the prosecution prove all the elements of a

criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. In reviewing whether the prosecution has met this burden, the appellate court analyzes "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Apart from the due process requirement that the prosecution prove all the elements of an offense beyond a reasonable doubt, the prosecution must prove the requirements set out in the jury instructions. This is Washington's law of the case doctrine. State v. Johnson, 188 Wn.2d 742, 756, 762, 399 P.3d 507 (2017); State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

As charged and instructed in this case, an essential element of unlawful possession of a firearm in the second degree is that the defendant has been previously convicted of a felony. RCW 9.94.040(2)(a)(i); CP 7, 14-15.

Because admission of evidence showing that a defendant has been convicted of felony poses a great risk of unfair prejudice, the defendant may stipulate to the fact of having a prior felony. See State v. Case, 187

Wn.2d 85, 91, 384 P.3d 1140 (2016); State v. Johnson, 90 Wn. App. 54, 63, 950 P.2d 981 (1998). "A 'stipulation' is an express waiver that concedes, for purposes of trial, the truth of some alleged fact, with the effect that one party need offer no evidence to prove it and the other is not allowed to disprove it." Case, 187 Wn.2d at 90.

Outside the presence of the jury, Mr. Canela indicated that he would stipulate to having a prior felony. RP 364-65. The record, however, contains no written stipulation and no stipulation was read to the jury. To be sure, the record indicates there was some kind of a written stipulation, but there is no actual written stipulation in the record or indication the jury actually received one. RP 364-66. Notwithstanding that the court instructed that a stipulation be marked and admitted as exhibit 50, there is no exhibit 50. RP 430-31; CP 117-123 (exhibit list).[2]

The trial court instructed that the evidence consisted of testimony, stipulations, and admitted exhibits. CP 12 (instruction 1). The record contains no testimony, stipulation, or admitted exhibit establishing that Mr. Canela was previously convicted of a felony. Consequently, due process and the law of the case doctrine compel reversal for insufficient

[2] Appellate counsel consulted the clerk's office for Franklin County on this matter. According to an email from the clerk, who consulted with the prosecutor, exhibit 50 does not exist and the stipulation was not marked.

evidence. State v. Jussila, 197 Wn. App. 908, 932, 392 P.3d 1108 (2017).

Still, the Court of Appeals held Mr. Canela was not entitled to reversal, and that no reference hearing was necessary to determine whether the jury actually received a stipulation. Slip op. at 30-34. In so holding, the court applied the framework used by Ninth Circuit Court of Appeals in analyzing a similar issue in United States v. James, 987 F.2d 648 (9th Cir. 1993) and United States v. Bentson, 947 F.2d 1353 (9th Cir. 1991). In James, the appeals court reversed a conviction for insufficient evidence on an essential element because no evidence supported it and the jury had not received or been read a stipulation on that element. James, 987 F.2d at 649. The James court distinguished Bentson, which had rejected a similar claim because defense counsel made a concession about the stipulation during closing argument to the jury. Id. at 651; Bentson, 947 F.2d at 1356.

Applying these cases, the Court of Appeals reasoned that Mr. Canela waived the requirement that the State prove the element of a prior felony conviction based on a stipulation. Slip op. at 34. The court cited defense counsel's closing argument about the stipulation as providing the jury a basis for considering the element proved. Slip op. at 34.

But argument of counsel is not evidence. And regardless of whether this properly disposed of the insufficiency claim under due

process, it did not dispose of Mr. Canela's law of the case claim, which the Court of Appeals ignored. Under the jury instructions, the arguments of lawyers were not evidence. CP 13 (instruction 1). Thus, any concession did not obviate the need for evidence or receipt of a stipulation. Because the jury instructions were the law of the case, and Mr. Canela was entitled to a not guilty verdict under these instructions and the evidence submitted, the Court of Appeals should have reversed. Jussila, 197 Wn. App. at 932.

Stipulations are often entered into by the prosecution and the defense. Whether such stipulations must actually be received by the jury is an issue of substantial public interest. RAP 13.4(b)(4). And whether statements by defense counsel are adequate to waive the due process requirement of proof beyond a reasonable doubt on all essential elements presents a significant constitutional question that should be deiced by this Court. RAP 13.4(b)(3).

E. CONCLUSION

For the foregoing reasons, this Court should grant Mr. Canela's petition for review.

Respectfully submitted this 26th day of July, 2021.

Richard W. Lechich – WSBA #43296
Washington Appellate Project – #91052
Attorney for Petitioner

Appendix

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

May 6, 2021

E-mail
Richard Wayne Lechich
Gregory Charles Link
Washington Appellate Project
1511 3rd Ave Ste 610
Seattle, WA 98101-1683

E-mail
Shawn P Sant
Frank William Jenny, II
Franklin County Prosecutor's Office
1016 N 4th Ave
Pasco, WA 99301-3706

CASE # 367631
State of Washington v. Daviel Canela
FRANKLIN COUNTY SUPERIOR COURT No. 181502186

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through this court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Attachment

c: **E-mail**—Hon. Cameron Mitchell

c: **E-mail**—Daviel Canela, #382626
Stafford Creek Corr. Center
191 Constantine Way
Aberdeen, WA 98520

FILED
MAY 6, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 36763-1-III
Respondent,	)	
	)	
v.	)	
	)	
DAVIEL DAVIS CANELA,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, A.C.J. — Daviel Canela appeals his convictions for attempted first degree murder and second degree unlawful possession of a firearm. Omission of an essential element from the charging document requires reversal of the attempted murder conviction without prejudice to refiling. We affirm the firearm conviction. We remand for resentencing, at which Mr. Canela can raise his objections to terms of his judgment and sentence and to his offender score calculation.

FACTS AND PROCEDURAL BACKGROUND

On an afternoon in March 2018, Pasco police officers responded to calls reporting that someone had been shot outside an apartment complex. The victim, Victor Garcia, had been shot twice, but survived.

There were four eyewitnesses to the shooting. One was Zeima Cadenas Quintero, Mr. Garcia's girlfriend. She testified at Mr. Canela's trial that she and Mr. Garcia were

outside his sister's apartment building, moving items from Mr. Garcia's brother-in-law's van to Ms. Cadenas's car, when they saw Mr. Canela, who they knew. Mr. Garcia walked over to speak with Mr. Canela. Nothing about the men's actions led Ms. Cadenas to believe they were arguing, but there came a point when she heard Mr. Canela say something to Mr. Garcia about being "Xed out," after which she heard the popping of gunshots. Report of Proceedings (RP) at 292. She turned to look and saw that Mr. Canela had his arm extended and was shooting at Mr. Garcia. Mr. Garcia appeared to have been walking away from Mr. Canela. Ms. Cadenas testified that Mr. Garcia had been "Xed out" from a gang to which Mr. Canela still belonged, "meaning that [Mr. Garcia] is like no longer from it, because they're saying that he snitched on somebody or something." RP at 301. When the shooting stopped, Ms. Cadenas ran toward Mr. Garcia and claims to have seen Mr. Canela smirk and run off.

Two of the eyewitnesses to the shooting were 16-year-old high school friends, U.G. and C.S.,[1] who were on their way from a grocery store to one of the teen's homes. U.G. testified in the trial below that the shooter was wearing a gray hoodie and blue jeans. He testified that after shooting his victim, the shooter ran away down an alley.

[1] Initials are used to protect the juvenile witnesses' identities, consistent with a general order of this court. *See* General Order of Division III, *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012), available at https//www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders & div=III.

Because U.G. saw a black vehicle drive away at that point, he believed the shooter might have left in the vehicle. He did not see the shooter get into the car.

C.S. also testified that the shooter was wearing a gray hoodie and dark blue pants. He, too, testified that the shooter ran away through an alley, although he never saw the shooter run toward a black car.

The fourth eyewitness was Josef Stueckle. Mr. Stueckle testified he had been visiting a friend at the apartment complex and stepped outside to smoke. He spoke with Mr. Canela and Mr. Garcia and offered them cigarettes. When he finished his cigarette, he went back to his friend's apartment to return a borrowed lighter. He returned to the sidewalk and began walking toward another friend's apartment when he heard shouting. He heard the words, "Weren't you Xed out?" RP at 333. He saw Mr. Canela firing shots in his direction and that Mr. Garcia had already fallen. After Mr. Canela ran off, Mr. Stueckle remained at the scene and spoke to responding officers. They took him to a police location where they presented him with a photomontage of six males and asked him if he believed any of them was the shooter. Mr. Stueckle identified Mr. Canela.

Information from witnesses led the responding officers to look for Mr. Canela at his friend's apartment a few blocks away, where they located him. After obtaining a search warrant for the apartment, police found a .22 caliber revolver in a leather holster that was hidden in the toilet tank. Three other guns were found in a cutout in the wall

that was located behind the bathroom mirror. Police located a gray hooded sweatshirt in a bedroom located next to the bathroom where the guns were found.

Mr. Canela was charged with one count of attempted first degree murder and one count of unlawful possession of a firearm in the second degree. Although the means of attempted first degree murder that the State relied on at trial was premeditated intentional murder, its charging document did not identify premeditation as an element of the charge.

Trial

In October 2018, Mr. Canela's trial was continued for a week at the request of the defense. When the State then moved to further continue the trial to late November, Mr. Canela's attorney objected, stating, "I'm really ready to go on the current trial date." RP at 5. The court denied the continuance.

At the outset of trial, defense counsel complained to the trial court that the State's witness list did not provide all the information about its witnesses required by the criminal rules. The two juvenile witnesses were identified only by their initials and date of birth, and Mr. Stueckle was named but no contact information was provided. The prosecutor explained that it was State policy to identify juvenile witnesses by initials and birthdate. He explained that Mr. Stueckle was a "street person" who had no permanent address and was presently in jail in Kennewick. RP at 95. The prosecutor claimed this was the first he had heard that defense counsel was having difficulty contacting the witnesses.

Asked by the trial court if these three witnesses would be called, the prosecutor said that they would be, and he expected them to appear.

Although the trial court expressed frustration at the failure of the defense to raise the issue earlier, it ultimately found a discovery violation by the State and strove to identify the least-onerous remedy that would allow the defense to be prepared to examine the witnesses. Having been informed by the State that the two juveniles were presently at the court, were available to be interviewed, and had no prior convictions, it accepted a defense proposal that it recess for the remainder of the day, giving the defense an opportunity to interview those witnesses. The State informed the court that Mr. Stueckle did have a criminal history, which it would provide to defense counsel.

The next morning, the State informed the court it was in the process of running the criminal histories for its remaining civilian witnesses. Defense counsel said he was under the impression he would receive the criminal histories the day before. The prosecutor explained that his staff's workday ends at 4:00 p.m., and no one able to run the histories was around by the time court concluded the prior day. The trial court directed the prosecutor to provide the information and give defense counsel a chance to look at it. The court said to defense counsel, "[I]f you don't have enough time to prepare, you can address that with the Court." RP at 107.

After the noon recess, defense counsel informed the court that he had been "literally dragged in back from lunch" to be offered an unexpected three-minute

interview with Mr. Stueckle, and only after that was he given Mr. Stueckle's criminal history. RP at 197. He argued that "[a]t this point the only option" was to exclude as witnesses Mr. Stueckle and two other civilian witnesses whose criminal histories he had not yet received. *Id.* Recriminations ensued. The prosecutor informed the trial court that he could fill the following trial day (a Friday) with officer testimony, meaning that the lay witnesses would not be called until the following Monday.

After hearing from counsel, the trial court said it knew that excluding witnesses was an option, but it was instead going to recess for the day so that defense counsel could interview Mr. Stueckle. It told the lawyers it would have the jurors return at 9:30 a.m. the next morning and expected to see the lawyers at 8:30 a.m.

Asked the next morning by the trial court if the lawyers were ready to proceed, the following exchange occurred:

> [DEFENSE COUNSEL]: . . . I had the opportunity to speak with [Mr. Stueckle]. I was advised by the state that the other two witnesses will be available all day today since they're not going to be called until Monday. I can maybe do it during the lunch hour. I can find enough time between now and then.
>
> THE COURT: I appreciate that. Do we have the, criminal histories for all those witnesses as well?
>
> [PROSECUTOR]: Yes, your Honor.
>
> THE COURT: Excellent. Thank you. I did just see an order for transporting Mr. Stueckle. Is he here?
>
> [PROSECUTOR]: He's in Kennewick, your Honor, and I expect to call him this afternoon. So we'll get him transported, and he'll be in civilian clothes and be ready to go.

> THE COURT: . . . [Addressing defense counsel], you have spoken with him?
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: So we are going to be ready at 9:30 when the jurors are here to take up with testimony?
>
> [PROSECUTOR]: Yes, your Honor.
>
> THE COURT: Any issues that we can address between now and then?
>
> [DEFENSE COUNSEL]: None that I can think of.

RP at 207-08. Trial proceeded with no further defense objections about witness disclosures.

The State called as trial witnesses four officers, an evidence technician, a medically trained firefighter, U.G., C.S., Ms. Cadenas, and Mr. Stueckle. Their testimony was consistent with the foregoing statement of the facts. Mr. Canela did not call any witnesses.

Toward the end of the State's case, the prosecutor informed the trial court outside the presence of the jury that Mr. Canela had stipulated to the prior felony that the State was required to prove as an element of the firearm possession charge. He stated:

> I have a stipulation, along with a certified copy of the judgment and sentence that the stipulation's based on.
>
> One of the interesting things about the stipulation, your Honor, is that the certified copy does not go to a jury, but a copy of the stipulation would.

RP at 364. The trial court asked defense counsel if he was in agreement and defense counsel affirmed that he was. Both counsel had signed the stipulation and

the trial court announced for the record that it was signing the stipulation "and it will be provided to the jury." RP at 365.

Defense counsel argued in closing that holes in the State's case were "plentiful," and after his own investigation the State's case was "almost like looking at Swiss cheese." RP at 407. Among reasons for reasonable doubt he argued to the jury were inconsistencies in the witness's testimony about the shooter's clothing, discrepancies between the gun described by witnesses and the gun offered by the State as the one used in the crime, and challenges to the reliability of the four eyewitnesses.

In rebuttal, the prosecutor defended the reliability of Mr. Stueckle's identification, saying:

> Mr. Stueckle knew the defendant from serving time with him at the jail. There was no mistake on his part. He actually looked at a photo lineup, picked the defendant out of the photo lineup. The officers knew who shot Garcia from almost the point of arriving at the scene, because they were told by two eye witnesses.

RP at 427. The affidavit of probable cause filed at the commencement of Mr. Canela's prosecution stated that Mr. Stueckle knew Mr. Canela from serving time with him at the jail. But no evidence on that score had been presented during the trial. The defense did not object.

Immediately following closing arguments and the discharge of the jury for deliberations, the prosecutor brought up the need to provide a copy of Mr. Canela's stipulation to a prior felony to the jury for its deliberations. The court clerk admitted she

might not have understood how the trial court expected the stipulation and judgment and sentence to be handled. The clerk had marked the judgment and sentence as an exhibit that had not been provided to the jury; the stipulation had not been marked as an exhibit and also had not been provided to the jury.

After both parties reaffirmed that the stipulation should be provided to the jury, the trial court said, "We'll mark it at this time and have it admitted. . . . So the stipulation will be marked and admitted as exhibit number 50." RP at 430-31.

The jury found Mr. Canela guilty as charged.

Motion for New Trial

A little over a week after the jury's verdict, Mr. Canela moved for a new trial after defense counsel obtained his own criminal history for Mr. Stueckle and discovered two convictions that had not been disclosed by the State. The convictions disclosed by the State had included one recent shoplifting (third degree theft) conviction, but the history obtained by defense counsel showed three recent convictions for third degree theft. Mr. Canela argued that this nondisclosure exacerbated the failures to disclose that he complained about at the outset of trial.

The State responded that any possible prejudice from the initial failures to disclose had been avoided by the continuances, disclosures, and interview opportunities ordered by the trial court. It argued that the two undisclosed misdemeanor convictions were de

minimis in light of the disclosed felonies, and that the evidence against Mr. Canela was overwhelming.

The trial court entertained oral argument of the new trial motion, at the conclusion of which it found that the State had committed misconduct by failing to disclose some witness contact and criminal history information prior to trial, and that the criminal history for Mr. Stueckle provided by the State was incomplete. It nonetheless concluded that Mr. Canela failed to show that the disclosure violations materially affected his right to a fair trial.

In thereafter sentencing Mr. Canela, the trial court imposed a $500 victim's assessment that the judgment and sentence provided would be interest-bearing, and the judgment and sentence included preprinted language requiring Mr. Canela to pay supervision fees as determined by the Department of Corrections. The court had said during the sentencing hearing that other than the crime victim's assessment and restitution, it would not impose any further fines, fees, or costs.

Mr. Canela filed a notice of appeal and obtained an order of indigency on the day he was sentenced. In addition to the customary briefing, we granted two motions by Mr. Canela to brief additional issues supplementally.

ANALYSIS

Between his opening brief and the two supplemental briefs authorized by this court, Mr. Canela makes a dozen assignments of error. We first address and agree with

Mr. Canela's contention that the State's amended information omitted an essential element of attempted first degree murder, which requires us to reverse that conviction without prejudice and remand for further proceedings. Because resentencing will be required, we do not address Mr. Canela's challenges to community custody conditions, to costs imposed, and to an offender score rendered inaccurate by our Supreme Court's recent decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Many of these challenges are conceded by the State. All can be raised at resentencing.

Of the assignments of error that remain, a second category relates to the trial court's refusal to grant relief for the State's discovery violations: it failed to exclude Mr. Stueckle as a witness and denied Mr. Canela's motion for a new trial.

A third category of error alleged is that the prosecutor's reference to facts outside the record during closing argument deprived Mr. Canela of his right to a fair trial.

A fourth category challenges Mr. Canela's firearm possession conviction for failure to give a unanimity instruction and because there was insufficient evidence of a predicate conviction.[2]

We address the assigned errors in the order stated.

[2] Mr. Canela also argues cumulative error, but we find no error affecting the conviction that we affirm.

I. FOR REASONS EXPLAINED IN *STATE v. MURRY*, ATTEMPTED MURDER WAS INADEQUATELY CHARGED

"[A] charging document is constitutionally adequate only if all essential elements of a crime, statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995) (*Vangerpen* II). Following *Vangerpen* II, premeditation is an element of first degree attempted murder for *charging purposes*, if not for conviction purposes. *State v. Murry*, 13 Wn. App. 2d 542, 552, 465 P.3d 330 (citing *Vangerpen* II, 125 Wn.2d at 791), *review denied*, 196 Wn.2d 1018, 474 P.3d 1050 (2020).

The first decision in Vangerpen's appeal of his attempted first degree murder conviction was the decision of this court. *State v. Vangerpen*, 71 Wn. App. 94, 856 P.2d 1106 (1993) (*Vangerpen* I) *aff'd*, 125 Wn.2d 782. The State intended to charge Vangerpen with attempted first degree (premediated) murder. Instead, the information stated in relevant part that the defendant

> in King County, Washington on or about July 20, 1991, with intent to cause the death of another person did attempt to cause the death of Officer D.C. Nielsen, a human being;
>
> Contrary to RCW 9A.32.030(1)(a) and 9A.28.020.

Id. at 97 n.1. At trial, and after the State rested its case, defense counsel moved to dismiss the charge, arguing that the information "failed to set out an essential element of attempted first degree murder, specifically premeditation." *Id.* at 97.

The trial court denied the motion and allowed the State to amend its information to include the element.

On appeal, this court held that allowing amendment after the State rested its case was prejudicial per se under *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). *Vangerpen* I, 71 Wn. App. at 102. This court next considered whether the charging document had been sufficient without the challenged amendment, and held that it had not been. *Id.* This court reasoned first that "the initial document charging appellant failed to include the necessary element of premeditation." *Id.* at 103. It also observed that "as drafted, the information failed to charge attempted first degree murder. Instead it charged attempted second degree murder. It is fundamental that an accused cannot be tried for a crime which has not been charged." *Id.*

Review was granted by our Supreme Court, which affirmed, explaining:

> In the present case, the information alleged only intent to cause death, not premeditation. Therefore, the State failed to charge one of the statutory elements of first degree murder and instead included only the mental element required for second degree murder.

Vangerpen II, 125 Wn.2d at 791.

In *Murry*, this court acknowledged that premeditation is actually not an element of attempted first degree murder. But it followed the Supreme Court's binding decision in *Vangerpen* II, reasoning that the Supreme Court held that premeditation was an element for charging purposes. *Murray*, 13 Wn. App. 2d at 552. In addition to observing that we

are bound by the high court's decision, this court observed that the statutory manner or means of committing a crime is an element that the State must include in the information, *id.* at 551 (citing *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988)), and of the three means of committing first degree murder, only premeditated murder can be the basis for an attempted first degree murder charge. *Id.* at 553. Unless premeditated murder is identified as the basis for the charge, "a charging document that merely states that a defendant took a substantial step toward committing first degree murder would fail to state a crime." *Id.*

The State attempts to distinguish *Murry* by arguing that in Mr. Canela's case, the amended information, liberally construed, includes the element of premeditation in some form. Since the sufficiency of the amended information is being challenged for the first time on appeal, "we construe the document liberally and will find it sufficient if the necessary elements appear in any form, or by fair construction may be found, on the documents face." *State v. Satterthwaite*, 186 Wn. App. 359, 362, 344 P.3d 738 (2015).

The State argues that the amended information in this case is sufficient because it specifies the act of shooting the victim with a handgun as the substantial step toward the crime of first degree murder.[3] It argues that the language implies a premeditated intent to

[3] The amended information included the following language in count I:

kill. The act of shooting the victim with a handgun could be used to support any of the three ways of committing murder in the first degree, however. *See* RCW 9A.32.030(1)(a)-(c).

The necessary elements cannot be found on the charging document's face. The remedy for this error is dismissal of the attempted first degree murder charge without prejudice. *Vangerpen* II, 125 Wn.2d at 792-93.

II. THE DISCOVERY VIOLATIONS ALLEGED BY MR. CANELA DID NOT DEPRIVE HIM OF A FAIR TRIAL

The evidence that Mr. Canela was the shooter was inextricably related to the State's proof that he unlawfully possessed a firearm, so the remaining assignments of error bear on his conviction on the second count. The second category of error he alleges is that the discovery violations should have resulted in the exclusion of Mr. Stueckle as a witness at trial and later, an order granting his motion for a new trial.

> **ATTEMPTED MURDER IN THE FIRST DEGREE, [RCW 9A.28.020(1) AND 9A.32.030(1)(a)], A CLASS A FELONY,** maximum penalty of LIFE and $50,000, committed as follows:
>
> That the said Daviel Davis Canela in the County of Franklin, State of Washington, on or about March 29, 2018, then and there, with intent to commit the crime of Murder in the First Degree, committed an act, to wit: did shoot the victim with a handgun, which was a substantial step toward that crime.

Clerk's Papers at 9.

Witness exclusion

CrR 4.7 addresses the parties' obligations to provide discovery in criminal cases. The prosecutor is required to disclose to the defendant, no later than the omnibus hearing, the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at trial. CrR 4.7(a)(1)(i). The prosecutor is further required to disclose "any record of prior criminal convictions known to the prosecuting attorney . . . of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial." CrR 4.7(a)(1)(vi). The obligations are continuing, requiring supplementation. CrR 4.7(h)(2).

"The purpose behind discovery disclosure is to protect against surprise that might prejudice the defense." *State v. Barry*, 184 Wn. App. 790, 796, 339 P.3d 200 (2014). "If the State fails to disclose such evidence or comply with a discovery order, a defendant's constitutional right to a fair trial may be violated; as a remedy, a trial court can grant a continuance, dismiss the action, or enter another appropriate order." *Id.*; *see also* CrR 4.7(h)(7)(i). Discovery violation sanctions are reviewed for an abuse of discretion. *State v. Bradfield*, 29 Wn. App. 679, 682, 630 P.2d 494 (1981). "Discretion is abused when a trial court's decision is exercised on untenable grounds or for untenable reasons or is manifestly unreasonable." *Barry*, 184 Wn. App. at 797.

"Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly." *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998), *abrogated on other grounds by State v. Jackson*, 195 Wn.2d 841, 467 P.3d 97 (2020)).

"The appropriate remedy for late disclosure is typically to continue the trial to give the other party time to interview the new witness and prepare to address his or her testimony." *State v. Kipp*, 171 Wn. App. 14, 31, 286 P.3d 68 (2012), *rev'd on other grounds by* 179 Wn.2d 718, 317 P.3d 1029 (2014).

When deciding whether exclusion is an appropriate sanction, courts should consider "(1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which [the other party] will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith." *Hutchinson*, 135 Wn.2d at 882-83 (citing *Taylor v. Illinois*, 484 U.S. 400, 415 n.19, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)).

Mr. Canela fails to demonstrate that by refusing to exclude witnesses, the trial court abused its discretion. His trial lawyer's actions belie prejudice. A week before trial, Mr. Canela's lawyer objected to the State's request for a continuance, saying, "I'm really ready to go on the current trial date." RP at 5. No mention was made of problems contacting witnesses as a result of inadequate disclosure. He first raised the issue of missing witness list information the day the jury was to be sworn in. Trial was recessed for the afternoon so that he could interview U.G. and C.S., who had no criminal histories. Defense counsel never informed the trial court that any further accommodation was needed with respect to U.G. or C.S.

Mr. Stueckle's criminal history was provided following a noon recess, and trial was again recessed for the afternoon so that defense counsel could interview him. Asked the next morning (a Friday) if the parties were ready to proceed, Mr. Canela's lawyer answered that he had spoken to Mr. Stueckle and would be able to find time to interview two remaining civilian witnesses the State planned to call on Monday. Asked if there were "[a]ny issues that we can address between now and [when the jury arrives]," defense counsel answered, "None that I can think of." RP at 208.

In arguing this issue on appeal, Mr. Canela provides a thorough description of the applicable law. He cites authority that disclosure that comes as late as it did here, concerning key witnesses such as eyewitnesses, *can* result in surprise, prejudice, and constitute evidence of bad faith. But he fails to demonstrate that any of the late disclosures in this case actually did result in surprise or prejudice or demonstrate bad faith. No abuse of discretion resulting in a violation of his right to a fair trial is shown.

Denial of new trial motion

After discovering postverdict that Mr. Stueckle had two undisclosed third degree theft convictions, Mr. Canela moved for a new trial under CrR 7.5(a)(5) and (a)(8). For the first time on appeal, he argues that the nondisclosures constituted a *Brady*[4] violation. A violation of *Brady* presents an issue of constitutional dimension, and because the

[4] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

constitutional challenge turns on the same facts Mr. Canela argued as a basis for his new trial motion, the alleged error is manifest and eligible for review. RAP 2.5(a)(3).

No Brady *violation is shown*

"In *Brady*, the United States Supreme Court articulated the government's disclosure obligations in a criminal prosecution: 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *State v. Mullen*, 171 Wn.2d 881, 894, 259 P.3d 158 (2011) (quoting *Brady*, 373 U.S. at 87). *Brady* and its progeny require the State to disclose material exculpatory and impeachment evidence favorable to a criminal defendant. *Id.* "The government must disclose not only the evidence possessed by prosecutors but evidence possessed by law enforcement as well." *Id.*

To establish a *Brady* violation, a defendant must demonstrate the existence of each of three elements: "'[(1)] the evidence at issue must be favorable to the accused, either because it is exculpatory, or impeaching; [(2)] that evidence must have been suppressed by the State, either willfully or inadvertently; and [(3)] prejudice must have ensued.'" *Id.* at 895 (alterations in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). With respect to the third element, prejudice, the terms "material" and "prejudicial" are used interchangeably. *Id.* at 897. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to

the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (Blackmun, J., plurality portion).

The State does not dispute that the undisclosed convictions were favorable evidence, because impeaching. It does argue on appeal that Mr. Canela fails to show that the two undisclosed convictions were in the prosecutor's database on the day that the prosecutor's office ran and provided Mr. Canela's history. But the State never made that argument in the trial court, despite having ample time to determine whether the undisclosed convictions were too recent to be available. Five months passed between the filing of Mr. Canela's new trial motion and the filing of the State's response. The State's only argument in the trial court was that the two additional convictions were immaterial and their nondisclosure was not prejudicial.

Mr. Canela's failure to demonstrate the element of prejudice is dispositive. The trial court found that Mr. Canela had not demonstrated prejudice, noting that Mr. Stueckle was not the only witness to the shooting and Mr. Canela was able to impeach Mr. Stueckle with other criminal history.

Mr. Stueckle was impeached with evidence that he had engaged in quite a bit of criminal conduct during his young life. The State began Mr. Stueckle's direct examination by establishing his age (24) and having him acknowledge his prior

convictions: a 2017 conviction in Cowlitz County for second degree theft, a Franklin County conviction for second degree burglary, and one other conviction out of Benton County, that year, for shoplifting. Defense counsel covered the same ground at the beginning of his cross-examination, coupled with questioning about whether the evidence Mr. Stueckle would provide was truthful:

> Q. . . . Now you had indicated that you had [a] recent conviction for shoplifting in Benton County? Is that right?
>
> A. Yes.
>
> Q. You also indicated that you have felony theft and felony burglary charges?
>
> A. Correct.
>
> Q. So the, one of the issues and one of the things that's raised here and before you were able to testify is the importance of telling the truth. So are you able to convince me that you are telling us the truth here?
>
> [PROSECUTOR]: Your Honor, I'm going to object to the form of the question. It's improper.
>
> THE COURT: I'll sustain the objection.
>
> Q. The information you're about to give us today, is that information to the best of your knowledge the truth?
>
> A. Before the Judge I swore. I was placed in custody for theft, not for dishonesty. Thank you.

RP at 338-39.

In general, impeachment evidence may be considered material where the witness in question supplied the only evidence linking the defendant to the crime or to an essential element of the offense. *United States v. Avellino,* 136 F.3d 249, 256-57 (2d Cir. 1998). "This is especially true where the undisclosed matter would have provided the

only significant basis for impeachment." *Id.* at 257. But "where the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." *Id.*

For example, in *Avellino*, the government failed to produce evidence that its chief informant had perjured himself as a government witness at other trials. *Id*. at 258. However, the appeals court determined the evidence was not material under *Brady* in light of the fact that the informant could be impeached with terms of his favorable plea agreement and other acknowledged illegal activities. *Id.*

Here, Mr. Stueckle was not the only eyewitness to the shooting, nor was he the only eyewitness who could identify Mr. Canela. And he was impeached with other convictions for more serious crimes. Because the evidence he provided was cumulative and the undisclosed impeachment material was cumulative, prejudice is not shown.

The failure to demonstrate prejudice is fatal to Mr. Canela's rule-based argument as well

Mr. Canela argues that "[e]ven setting *Brady* aside," he was entitled to a new trial because he demonstrated a substantial likelihood that the prosecutor's conduct affected the jury's verdict. Br. of Appellant at 29. He likens the circumstances of his case to that in *State v. Copeland*, 89 Wn. App. 492, 949 P.2d 458 (1998).

"[P]rosecutorial misconduct requires a new trial only if the misconduct was prejudicial." *State v. Stith*, 71 Wn. App. 14, 19, 856 P.2d 415 (1993). "Misconduct is prejudicial when, in context, there is 'a substantial likelihood' that the misconduct 'affected the jury's verdict.'" *Id.* (quoting *State v. Barrow*, 60 Wn. App. 869, 876, 809 P.2d 209 (1991)). The defendant bears the burden of proving (1) there was prosecutorial misconduct, and (2) prejudice. *Id.* The determination of whether prosecutorial misconduct requires a new trial is within the discretion of the trial judge, and will not be disturbed absent an abuse of discretion. *State v. Carr*, 13 Wn. App. 704, 709, 537 P.2d 844 (1975) ("[W]hether prosecutorial misconduct prejudiced a defendant's right to a fair trial can be assessed most effectively by the trial judge.").

In *Copeland*, the defendant, having been convicted of second degree rape, made a rule-based motion for a new trial after discovering that the prosecution failed to disclose that the complaining witness had a prior felony conviction for theft. 89 Wn. App. at 495-96. The trial court denied the motion. *Id.* at 495. The appeals court reversed, reasoning the State's failure to disclose the prior conviction was prejudicial because "[t]he State's case essentially relied upon the credibility of the complaining witness." *Id.* at 498. Because the State's case depended on one witness and the undisclosed impeachment evidence could have created reasonable doubt, the court concluded "[t]here is a substantial likelihood that the [prosecution's] misconduct affected the jury's verdict." *Id.*

As previously explained, however, Mr. Canela does not demonstrate a substantial likelihood that the nondisclosure affected the jury's verdict because Mr. Stueckle's evidence was cumulative and he could be impeached with other convictions. For the same reasons a *Brady* violation is not shown, Mr. Canela does not demonstrate that the trial court abused its discretion in denying his rule-based motion for a new trial.

III. THE PROSECUTOR'S UNOBJECTED-TO REFERENCE TO FACTS OUTSIDE THE RECORD IS NOT SHOWN TO BE PROSECUTORIAL MISCONDUCT

Mr. Canela next contends that the prosecutor's reference to Mr. Stueckle knowing Mr. Canela from time spent in jail together was prosecutorial misconduct that deprived him of his right to a fair trial.

To repeat, a defendant alleging prosecutorial misconduct must demonstrate both improper conduct and prejudice. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). It is improper for a prosecutor to advance argument on the basis of facts unsupported by the record. *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).

When the misconduct alleged is improper argument, the defendant's failure to object constitutes waiver of the error unless the comment is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). "'Reversal is not required if the error could have been obviated by

a curative instruction which the defense did not request.'" *Id.* (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

This case is unlike *Reeder*, in which our Supreme Court held that the prosecutor's "flagrantly made" statement of matters outside the record could not have been cured by an objection and instruction because the "harm had already been done." 46 Wn.2d at 893. In *Reeder*, the prosecutor repeatedly argued that the defendant had threatened his wife with a gun despite testimony that was only to the contrary. The prosecutor also referred to a divorce complaint that he knew the court had excluded as evidence.

Here there *was* a factual basis for the prosecutor's statement and there was no order excluding it. But the evidence had not been presented to the jury. There is a reason the introductory and closing pattern jury instructions tell jurors (and told jurors in this case) that the lawyers' statements are not evidence, and that they must disregard any remark, statement or argument that is not supported by evidence in the form of testimony and exhibits. *See* RP at 109, 390. The lawyers will always be aware of more information than comes in as evidence. When making a closing argument, a lawyer might not have clearly in mind exactly what the jury has heard. Mr. Canela's lawyer makes a valid point that information about a defendant being in jail would ordinarily be a red flag to a lawyer that the information had not been presented to the jury. But here the jury was informed that Mr. Canela had a prior felony conviction.

We are unpersuaded that the prosecutor's improper reference to a fact outside the record could not have been cured by an instruction that Mr. Canela did not request. The objection was waived.

IV. THE RECORD IS CLEAR AS TO THE ONLY FIREARM POSSESSION AT ISSUE AT THE TRIAL, AND AMBIGUITY ABOUT WHETHER THE STIPULATION TO A PREDICATE FELONY WAS DELIVERED TO THE JURY DOES NOT REQUIRE REVERSAL

Finally, Mr. Canela makes two assignments of error specific to his firearm possession conviction. For the first time on appeal, he argues that a unanimity instruction was required. He also posits that Mr. Canela's stipulation to a predicate felony was not presented to the jury.

Unanimity instruction

Mr. Canela argues that the jury heard evidence that could have supported his unlawful possession of five different guns: the gun that witnesses testified was used in the shooting, the holstered gun found in the toilet of the apartment in which Mr. Canela was found, and the three additional guns discovered in a cutout behind a bathroom mirror in that apartment. He argues that without a unanimity instruction, the jury's guilty verdict might have been the result of different jurors finding that he possessed different guns.

Washington criminal defendants have a right to a unanimous jury verdict. *State v. Ortega-Martinez,* 124 Wn.2d 702, 707, 881 P.2d 231 (1994). "When the State presents evidence of several acts that could form the basis of one charged count, the State must either tell the jury which act to rely on in its deliberations or the court must instruct the

jury to agree on a specific criminal act." *State v. Beasley*, 126 Wn. App. 670, 682, 109 P.3d 849 (2005). Failure to do one or the other violates the defendant's state constitutional right to a unanimous jury verdict and his United States constitutional right to a jury trial. *Id.* Because jury unanimity is a constitutional right, the alleged failure to give a unanimity instruction may be raised for the first time on appeal. *State v. Holland*, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

Mr. Canela's argument presents a novel flaw: this is not a case in which "the State . . . present[ed] evidence of numerous *separate criminal acts*," thereby requiring an election or instruction to assure jury unanimity. *State v. Petrich*, 101 Wn.2d 566, 570, 683 P.2d 173 (1984) (emphasis added), *abrogated on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). There was evidence of the existence of more than one gun, but no suggestion by the State that Mr. Canela possessed any gun other than the one he used to shoot Mr. Garcia.

The State presented no evidence or argument that Mr. Canela, while found in the apartment where three firearms were secreted in a cutout behind a bathroom mirror, possessed or constructively possessed any of those guns. The State did nothing to suggest that those guns were evidence of "separate criminal acts" by Mr. Canela.

Similarly, the State's theory that the holstered gun found in the toilet was the gun used by Mr. Canela in the shooting does not make this a multiple acts case. By analogy, a prosecution for robbing a victim of her jewels is not a multiple acts case simply because

a juror could speculate that the jewels found under the defendant's bed—which the State contends were the stolen jewels—were actually a different set of stolen jewels. A prosecution for a murder seen by eyewitnesses is not a multiple acts case because a juror could speculate that the body found in the trunk of the defendant's car—which the State contends is the murder victim—was actually a second victim.

The State makes the alternative argument that if this *was* a multiple acts case, then it made an election. We believe the problem with Mr. Canela's assignment of error is more basic. But we agree that if this can be characterized as a multiple acts case, the State's clear election was that the gun unlawfully possessed was the gun used in the shooting. "An election by the State need not be formally pleaded or incorporated into the information. As long as the election clearly identifies the particular acts on which charges are based, verbally telling the jury of the election during closing argument is sufficient." *State v. Lee*, 12 Wn. App. 2d 378, 393, 460 P.3d 701 (2020) (citation omitted).

In his opening statement, the prosecutor told the jury that one of the charges against Mr. Canela was second degree unlawful possession of a firearm. It told jurors there were three elements to the crime and said, of the first, "One, on or about March 29th, 2018 the defendant knowingly had a firearm in his possession or control. That's the gun he actually used to shoot Victor Garcia." RP at 116.

The same identification of the firearm possession charged was made in closing argument:

> [THE STATE:] The second offense was unlawful possession of a firearm in the second degree. *I think it goes without saying the defendant had a gun that day when he pointed it at Victor Garcia and shot him a number of times. It was witnessed by the two high school boys from Delta* [*High School*]*, who just happened to be in the wrong place at the wrong time, but they without a doubt saw the individual shooting Victor Garcia with a handgun.* And that the possession or control of the firearm occurred here in the State of Washington.

RP at 400 (emphasis added).

This is not a multiple acts case; if it were, there was a clear election.

Insufficient proof

The last assignment of error we address is one that Mr. Canela characterizes as a challenge to the sufficiency of the evidence to prove that Mr. Canela had been previously convicted of a felony. He contends the evidence was insufficient to prove the element because "[t]he record . . . contains no written stipulation," and, while it contains the trial court's statement that a stipulation signed by counsel and the court was marked and admitted as exhibit 50, "there is no exhibit 50" on the clerk's exhibit list. Br. of Appellant at 42-43. The State responds that Mr. Canela's assignment of error is solely based on the fact that "the exhibit has been lost by the clerk," which is not a sufficiency challenge. Resp't's Br. at 35.

The parties' dispute on this score presents a factual question: was the stipulation that was signed and admitted and intended to be delivered to the jury for its deliberations *in fact* delivered to the jury for its deliberations? If the answer to that question was controlling, we would order a reference hearing. But the answer is not controlling, because the record is clear that Mr. Canela stipulated to the element and his lawyer admitted the element in closing argument.

"Under both the federal and state constitutions, due process requires that the State prove every element of a crime beyond a reasonable doubt." *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). The court's instruction 15 provided the jury with the elements of the firearm possession charge:

> To convict the defendant of the crime of unlawful possession of a firearm in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about March 29, 2018 the defendant knowingly had a firearm in his possession or control;
>
> (2) That the defendant had previously been convicted of a felony; and
>
> (3) That the possession or control of the firearm occurred in the State of Washington.

Clerk's Papers at 29.

This court held in *State v. Wolf*, 134 Wn. App. 196, 139 P.3d 414 (2006), that when a defendant stipulates to an element of a crime, he waives the requirement that the State prove it beyond a reasonable doubt. Similar to this case, the defendant in *Wolf* was

charged as a felon in possession of a firearm and stipulated to the element that he had been convicted of a prior serious offense. *Id.* at 197. By agreement of the parties, the stipulation was presented to the jury in the form of a jury instruction. *Id.* at 202. The stipulation was also mentioned by both parties in closing argument. *Id.* It was not offered into evidence or read to the jury, however. Following conviction, the defendant appealed, arguing that because the State did not offer the stipulation into evidence, the jury lacked sufficient evidence to convict. *Id.* at 198.

This court rejected the argument in strong terms, finding that stipulations are waivers. It suggested it might have been enough for the trial court to "simply tell the jury that certain matters have been the subject of a stipulation and that the jury need not concern itself with such matters." *Id.* at 203. Satisfied that the trial court's instruction and the lawyers' references to the stipulation in argument were sufficient, if not more than sufficient, this court concluded, "It is unnecessary for us to decide how a trial court should deal with a written stipulation of the parties." *Id.* It did observe that the Ninth Circuit has held that a concession made during closing argument is a binding judicial admission that may not be challenged on appeal. *Id.* at 202 n.26 (citing *United States v. Bentson*, 947 F.2d 1353, 1355 (9th Cir. 1991)).

The Ninth Circuit has held that where there is *nothing* in the record to support the jury's awareness of a stipulation to an essential element, there may be insufficient evidence to sustain a conviction. In *United States v. James*, 987 F.2d 648, 650 (9th Cir.

1993), a case distinguished by this court in *Wolf*, 134 Wn. App. at 202,[5] the Ninth Circuit reversed the defendant's conviction where the record showed the parties agreed to a stipulation on an aspect of the case, but the stipulation was neither mentioned to the jury nor placed in the record. The majority of the panel reasoned that a stipulation that had not been "read to the jury or received into evidence" could not sustain a conviction, because there was "no fact in evidence that the jury could take as proved." *Id.* at 650-51. It observed that even a correct, signed stipulation would not be enough if not presented to the jury in some manner, rejecting the argument that a defendant's stipulation outside the trial record meant that "no further evidence on the issue was required." *Id.* at 650.

The majority also rejected the dissent's suggestion that there was a judicial admission by James in the form of his lawyer's agreement with the State, in opening statement and closing argument, that the case presented only "one issue." *Id.* at 651. The majority could not conclude "that by focusing his comments on the issue of identification, [the defendant's] counsel thereby admitted all other elements of the crime." *Id.* It distinguished its earlier decision in *Bentson*, which had presented a sufficient admission. *Id.* In *Bentson*—a prosecution for willful failure to file federal tax returns—the appeals court held that defense counsel's statement in closing argument,

[5] The *Wolf* court questioned whether *James* holds that the jury must be presented with the stipulation in some manner. 134 Wn. App. at 201. It surmised that the fundamental reason for *James*'s reversal of the conviction was because the stipulation, not being a part of the record, could not be reviewed. *Id.*

"The defense is not suggesting that returns were filed for 1983 and '84, which the Internal Revenue Service would consider to be valid documents," was a binding concession that Bentson did not file valid returns for those years. 947 F.2d at 1356.

Assuming without deciding that Mr. Canela's undisputed stipulation is not enough, and there must be something in the trial record from which the jury could consider the stipulated fact proved, we hold that the record is sufficient. In closing arguments, the prosecutor addressed the stipulated element first. He spoke to the jurors about the elements of the firearm possession charge and told them that the second element—the element "that the defendant had previously been convicted of a felony"—was stipulated:

> The second element is going to be stipulated to by the defendant. And you will actually have a document to go back into the jury room. The second element was that the defendant had previously been convicted of a felony. He's admitting that through the stipulation, a written stipulation.

RP at 403.

Defense counsel implicitly agreed. In his own closing, he told jurors:

> The attempted murder charge and the gun possession charge that is before you here have certain elements. You recall we talked about those elements. It's like chicken soup. Chicken. Broth. Water. You need those elements in order to meet the requisite crime. And like the Judge said, you're going to get some instructions.

RP at 420. He first talked to the jurors about the elements of the attempted murder charge. He then turned to the elements for the gun possession charge, and stated:

> *Previous felony conviction when it comes to the gun possession charge. But that's not enough.* There has to be a possession of a gun. So this particular gun came back with no prints. They arrested him. There was no gun on him. So where's the possession?

RP at 421 (emphasis added).

Because Mr. Canela stipulated that he had a prior felony, he waived the requirement that the State prove that element. His lawyer's admission in his closing argument is sufficient to satisfy any requirement that the jury have a basis in the record for considering the element proved. No reference hearing is required.

We reverse the conviction for attempted first degree murder without prejudice, affirm the conviction for second degree unlawful possession of a firearm, and remand for resentencing and other proceedings consistent with this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, A.C.J.

WE CONCUR:

Staab, J.

Fearing, J.

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

June 24, 2021

E-mail
Richard Wayne Lechich
Gregory Charles Link
Washington Appellate Project
1511 3rd Ave Ste 610
Seattle, WA 98101-1683

E-mail
Shawn P Sant
Frank William Jenny, II
Franklin County Prosecutor's Office
1016 N 4th Ave
Pasco, WA 99301-3706

CASE # 367631
State of Washington v. Daviel Canela
FRANKLIN COUNTY SUPERIOR COURT No. 181502186

Counsel:

Enclosed is a copy of the order denying Appellant's motion for reconsideration of this court's May 6, 2021 opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a petition for review in this court within 30 days after the attached order on reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the court's e-filing portal. The petition for review will then be forwarded to the Supreme Court. The petition must be received in this court on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d). The address of the Washington Supreme Court is: Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Attachment

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVIEL DAVIS CANELA, Appellant.	)	No. 36763-1-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 6, 2021, is hereby denied.

PANEL: Judges Siddoway, Fearing, Staab

FOR THE COURT:

Siddoway, ACJ

LAUREL HOBBS SIDDOWAY
Acting Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT, v. DAVIEL CANELA, PETITIONER.	)))))))))	COA NO. 36763-1-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JULY, 2021, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	FRANK JENNY, DPA [fjenny@co.franklin.wa.us] [appeals@co.franklin.wa.us] FRANKLIN CO PROSECUTOR'S OFFICE 1016 N 4TH AVE PASCO, WA 99301	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X]	DAVIEL CANELA 382626 CLALLAM BAYCORRECTIONS CENTER 1830 EAGLE CREST WY CLALLAM BAY, WA 98326-9723	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF JULY, 2021.

X_____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

July 26, 2021 - 4:35 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36763-1
Appellate Court Case Title:	State of Washington v. Daviel Canela
Superior Court Case Number:	18-1-50218-6

The following documents have been uploaded:

- 367631_Petition_for_Review_20210726163514D3262371_8504.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.072621-16.pdf

A copy of the uploaded files will be sent to:

- appeals@co.franklin.wa.us
- fjenny@co.franklin.wa.us
- greg@washapp.org
- ssant@co.franklin.wa.us
- wapofficemai@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Richard Wayne Lechich - Email: richard@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20210726163514D3262371