NO. 100341-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
JARROD ALLAN AIRINGTON,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

ANSWER TO PETITION FOR REVIEW

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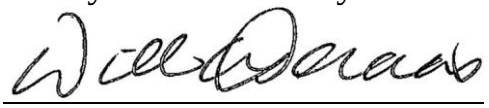
BY: 

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1. **The trial court properly admitted indicia of dominion and control found in the Petitioner's bedroom, which included a felony judgment & sentence for the Petitioner's last conviction. This is not a constitutional issue. To any extent there was error, it was not preserved, but is harmless.**

2. **The defense witness' testimony was inadmissible hearsay, so the trial court was correct to exclude it.**

3. **Because rebuttal evidence may properly overlap evidence from the case-in-chief, the trial court was well within its discretion to allow the testimony of the victim in rebuttal, but the error assigned on appeal is not preserved.**

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

The State adopts the facts as set forth in the Court of Appeals opinion below, Slip Opinion pp. 1 – 12.

ARGUMENT

Petitioner cites to RAP 13.4 (Petition page 1), RAP 13.4(a) (Petition page 12, 20, 24, 29) and RAP 13.4(b) (Petition page 32); he never really specifies upon which grounds he is

seeking review. RAP 13.4(a) does not govern acceptance of review by this court; it specifies how to seek review. Review will be accepted by this Court pursuant to RAP 13.4(b) *only if* the decision of the Court of Appeals is in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals (RAP 13.4(b)(1) & (2)), presents a significant question of constitutional law, state or federal (RAP 13.4(b)(3)), or involves an issue of substantial public interest (RAP 13.4(b)(4).

It appears from Petitioner's briefing that he is relying on RAP 13.4(b)(1), (b)(2) and (b)(3).

1. <u>The indicia found in the Petitioner's bedroom, which included a record of the Petitioner's prior convictions, was properly admitted; any error is evidentiary and unpreserved.</u>

In Petitioner's first assignment of error he claims that the introduction of a document bearing his name, which was used to prove his possession of a large quantity of narcotics, violated his constitutional right to a fair trial because it was a judgment

& sentence which contained a record of his prior criminal convictions. The document was admitted because it was highly probative of a contested issue – whether drugs found in a bedroom belonged to Petitioner. This is an evidentiary issue, not constitutional. This is important because the precise issue the Petitioner raises was never raised in the trial court, as recognized by the Court of Appeals below.

> **The judgment & sentence, which contained the Petitioner's criminal history on page 2, was not a stand-alone exhibit, but one piece of indicia among several that were seized at once.**

The judgment & sentence was contained in Exhibit #72, a police evidence bag of indicia. The documents were seized from one of three bedrooms in the house that the assault on Craven took place. RP 2/27/2019 at 276-78. In this bedroom, referred to as the "middle bedroom," the police found thousands of dollars' worth of methamphetamine, thousands of dollars of US currency, clean sandwich baggies of the type used to package narcotics for sale, and crib notes.

The evidence bag was sealed when the items were seized. RP Vol. II at 276. The State's witness Sgt. Wallace opened the bag in front of the jury when the exhibit was admitted. RP Vol. II at 277.

The bag contained multiple documents, most bearing the Petitioner's name. Many of them documented his recent prison stay. The bag also contained what Sgt. Wallace identified only as a "Superior Court judgment and sentence for Mr. Airington." RP 2/27/2019 at 279. On the second page of that judgment & sentence is the following table:

2.2 Criminal History (RCW 9.94A.525):

Crime	*Date of Crime*	*Sentencing Court (County & State)*	*A or J (Adult or Juvenile)*	*Type of Crime*	*Points*
Burglary 2	4/9/87	King 87-8-1784-4	J	FB	.5
TMVWOP	3/1/88	King 88-8-1087 2	J	FC	.5
Criminal Trespass 2	10/8/89	King	A	M	
Assault 4 DV	2/28/94	Hoquiam	A	GM	
Assault 4 DV	3/6/94	Aberdeen	A	GM	
Obstructing	4/7/94	Aberdeen	A	GM	
UPF 2	3/9/94	Grays Harbor 95-1-108-7	A	FC	1
VUCSA (meth)	5/27/94		A	FC	1
Assault 4	9/19/94	Hoquiam	A	GM	
Resisting Arrest	10/5/94	Aberdeen	A	M	
Malicious Mischief 3	10/12/94	Aberdeen	A	M	
VUCSA (meth)	11/27/96	Grays Harbor 97 1 2-8	A	FC	1
UPF 2	8/1/97	Grays Harbor 97 1 279-9	A	FC	1
VUCSA (meth)	2/5/99	Grays Harbor 99-1-47-4	A	FC	1
UPF 2	2/28/99	Grays Harbor 99-1-121-7	A	FC	1
Poss Stolen Property 2	2/23/01	Grays Harbor 01 1 107-1	A	FC	1
Resisting Arrest	10/7/01	Aberdeen	A	M	
Disorderly Conduct	10/7/01	Aberdeen	A	M	
VUCSA (meth)	12/6/02	Thurston 02-1-02105-4	A	FC	1
Poss Short-Barreled Shotgun	12/6/02		A	FC	1
UPF 1	12/6/02		A	FB	1
Poss of Dangerous Weapon	4/14/03	Grays Harbor	A	GM	
False Statement	4/14/03	Grays Harbor	A	GM	
Poss of Unlawful Weapon	6/9/06	Aberdeen	A	GM	
Assault 4 DV	4/22/10	Grays Harbor	A	GM	
UPF 2	3/20/11	Grays Harbor 11-1-118-3	A	FC	1

* DV Domestic Violence was pled and proved.

Exhibit #72.

In closing, the State argued that the indicia in Exhibit #72, including the judgment & sentence, proved that the middle bedroom, and the methamphetamine within, belonged to the Petitioner. RP Vol. III at 568. No witness made any mention

of any prior conviction of the Petitioner at trial, and neither of the attorneys mentioned it in argument.

Rulings concerning evidence of prior bad acts are evidentiary, not constitutional.

Petitioner claims admission of this document is error of constitutional magnitude. Petition page 12.

However, it has been long established that admission of evidence showing prior crimes, wrongs, or bad acts is, even if error, is not constitutional. *See State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009). The general prohibition on admitting evidence of prior bad acts is contained in ER 404(b).

Petitioner's claim that this assignment of error is constitutional seems to be based on a flawed syllogism. Petitioner appears to argue 1) Petitioner exercised his a constitutional right not to testify; 2) Exhibit #72 contained impeachment evidence under ER 609; therefore 3) the State impeached the Petitioner, even though Petitioner did not testify, and therefore violated his constitutional rights.

There are numerous flaws in this proposition. For one, a person who does not testify cannot be impeached. *See State v. Newbern*, 95 Wn. App. 277, 292, 975 P.2d 1041, 1049 (1999) (citing 5A K. Tegland, Washington Practice, *Evidence* § 256, at 310 (3d ed.1989) and 3A J. Wigmore, *Evidence* § 1043, at 1059–61 (1970).) Impeachment means, "[t]he act of discrediting a witness, as by catching the witness in a lie or by demonstrating that the witness has been convicted of a criminal offense." B. Garner, Black's Law Dictionary 768 (8th ed. 2007).

But most importantly, despite Petitioner's ER 609 arguments, the judgment & sentence was never admitted to impeach Petitioner under ER 609 nor to prove bad acts under to ER 404. In this case, the evidence in question was used to establish the Petitioner's dominion and control, which circumstantially proved he possessed the drugs, cash, packaging material and crib notes found nearby.

Relevancy and the admissibility of relevant evidence are governed by ER 401 and ER 402. *State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726, 729 (1987). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Appellate courts review a trial court's finding of relevance and balancing of probative value against prejudice with a great deal of deference using a "manifest abuse of discretion" standard. *State v. Russell*, 125 Wn.2d 24, 78, 882 P.2d 747, 781 (1994). The trial judge is in the best position to judge the prejudice of evidence. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Discretion is only abused when no reasonable person would have decided the issue as the trial court did. *Russell* at 78.

The State had to prove that Petitioner had dominion and control over the room and its contents, specifically the drugs, crib notes, money and empty packaging material to prove that he constructively possessed methamphetamine with the intent to deliver it. *State v. Canabrana*, 83 Wn. App. 813, 817-17, 939 P.2d 220 (1997).

The issue here is evidentiary, not constitutional. This Court should not even entertain this assignment of error unless the Petitioner can show that the error is preserved and that he was prejudiced.

This issue is not preserved for appeal.

Petitioner objected to admission of the judgment & sentence as evidence of the conviction on the face of the document, under 404(b). But 1) 404(b) governs admission of evidence of prior bad acts as character evidence; and 2) the defense never raised the issue of the criminal history table that

the Petitioner now assigns error to. His objection below was substantively different than his assignment of error on appeal.

The precise point upon which an appellant assigns error "must have been brought to the attention of the trial court and passed upon." *State v. Reano*, 67 Wn.2d 768, 771, 409 P.2d 853, 855 (1966). An objection that is insufficient to apprise the trial judge of the grounds is insufficient to preserve an issue for appeal. *State v. Hamilton*, 196 Wn. App. 461, 475 n.7, 383 P.3d 1062 (2016).

Requiring preservation also "precludes counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second trial if the first decision is adverse to the client." *State v. Cardenas-Flores*, 189 Wn.2d 243, 278, 401 P.3d 19, 37 (2017) (Gonzales, J., concurring.) "The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter." *State v. O'Hara*,

167 Wn.2d 91, 98, 217 P.3d 756, 760 (2009), *as corrected* (Jan. 21, 2010).

Petitioner objected to the judgment & sentence on the basis of ER 404(b). RP Vol. II at 265. The trial court asked the prosecutor what crime the judgment & sentence was a record of, and the prosecutor explained he had only seen it through the evidence bag, but that the Petitioner's last conviction was for "a solicitation under [RCW Chapter] 69.50… to possess controlled substances." RP Vol. II at 266. The trial court ruled that the document was highly probative of dominion and control, any prejudice was outweighed by that probative value, and overruled the objection. RP Vol. II at 267. As noted by the Court of Appeals below:

> And if a document such as a judgment and sentence is offered in its entirety and only portions are objectionable, "an objection should specify the portions which are objectionable. It is not the judge's obligation to sort out the inadmissible evidence from that which is admissible." 5 Karl B. Teglund, Washington

> Practice: Evidence Law and Practice sec. 103.11, at 62-62 (6th ed. 2016) (citing cases).

Slip Op. at 17.

Only the record of the single conviction was before the trial judge and the Petitioner's objection was to the use of the prior conviction to prove the Petitioner's character.

In *State v. Powell*, *supra*, the State wanted to introduce evidence that the defendant had consumed methamphetamine before committing a burglary to show his mental state. *Powell* at 74. The defense objected on the basis that the witness who would testify about the defendant being on methamphetamine was not credible. *Id*. at 82. The evidence was admitted and the defendant appealed the decision.

The Washington Supreme Court ruled that 1) the issue was not constitutional; and 2) neither an ER 403 or 404(b) issue was preserved for appeal because trial counsel only objected to the evidence based on the witness' credibility. *Id*. at 84-85.

This Court should follow *Powell*'s precedent and rule the assignment of error unpreserved, as did the Court of Appeals, and not constitutional.

That the criminal history table was not before the trial court is critical because much of the remaining indicia in Exhibit #72 documented Petitioner's recent incarceration, but the Petitioner did not object to any of that material. RP Vol. II at 265-67. The judgment and sentence was essentially cumulative.

Petitioner argued that the judgment & sentence was barred by ER 404(b) simply because it contained a record of a prior bad act. But ER 404(b) prohibits the use of criminal history to prove action in conformity therewith. ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The trial court was right to overrule the 404(b) objection.

Here, the judgment & sentence was evidence proving dominion and control, not character nor impeachment evidence. The issue Petitioner raises on appeal and in his petition is not constitutional, was not preserved for appeal and this Court should not grant review on this issue.

Any error was harmless.

Error in admitting evidence of prior bad acts is nonconstitutional. *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220, 1229 (1991). Therefore, any error is not reversible unless, within reasonable probabilities, it materially affected the outcome of the trial. *Id*.

In this case, it is unlikely that the document in question was what the jury relied upon to convict, or that they even looked at it. As the Court of Appeals noted:

> By the time jury deliberations began, exhibit 72 had become irrelevant. Only one count of possession of methamphetamine with intent to deliver remained, and defense counsel had conceded that Mr. Airington possessed the methamphetamine, telling jurors, "Did [the

> State] prove their case beyond a reasonable doubt? I would say yes on possession of methamphetamine.

Slip Op. at 16.

As the State said in closing argument, the assault and kidnapping charges came down to the credibility of the victim, Brandon Craven. RP Vol. III at 556-57. With regard to the possessory charges, the Petitioner had an even larger amount of narcotics with him in his car when he was arrested seventeen days later. RP Vol. I at 209-10. This evidence was more prejudicial than the cryptic recitation of the Petitioner's criminal history on page two of a 16-page document folded up in a bag of paper.

Petitioner cites *State v. Young*, 25 Wn. App. 468, 119 P.3d 870 (2005) for the proposition that the admission of Exhibit 72 merits reversal. However, in *Young* the prejudicial information was immediately and specifically objected to in the form of a motion for a mistrial. *Young*, 25 Wn. App. at 471.

Here, no objection was made and this issue has not been preserved.

Because the evidence against the Petitioner was overwhelming, any error in the inadvertent inclusion of the criminal history table on the judgment & sentence was harmless.

2. Petitioner's proposed impeachment testimony of Matthew Price was inadmissible hearsay.

Petitioner claims that his right to present a defense was violated when his trial attorney was not allowed to elicit hearsay from a defense witness. The right to present a defense does not allow a criminal defendant to admit inadmissible evidence. Furthermore, the defense had this information available to it when Mr. Seward was on the stand and chose not to confront him with it.

Petitioner called Matthew Price, who was incarcerated with TJ Seward, to testify. RP Vol. II at 387. The defense attempted to elicit testify from Mr. Price that Seward said he

would "would lie to the Court, would lie to the jury, would lie to anybody to make sure that he got off of his charges and make sure that [Petitioner] was convicted of the underlying offenses." RP Vol. II at 388.

However, Seward had not been confronted with any such statements. RP Vol. II at 394. The trial court ruled that such testimony was hearsay, and sustained the State's objection. RP Vol. II at 395. Trial counsel conceded the testimony was inadmissible hearsay. RP Vol. II at 395.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless an exception applies. ER 802. Appellate courts review a trial court's evidentiary decisions for an abuse of discretion. *State v. McWilliams*, 177 Wn. App. 139, 147, 311 P.3d 584, 588 (2013) (citing *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *abrogated on other*

grounds by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).) Abuse of discretion means that no reasonable person would have decided the matter as the trial court did. *Id*. (citing *Thomas*.)

In *State v. Harmon*, 21 Wn.2d 581, 152 P.2d 314, (1944) this Court held that questioning a witness about his or her out-of-court statements was necessary foundation before using those statements to impeach or show bias or prejudice:

> Whether the testimony of Carriker was attempted to be introduced for the purpose of impeachment *or for the purpose of showing bias or prejudice of the witness Brehan*, based upon prior inconsistent statements made out of court, it is necessary, before the impeaching evidence or the evidence by which it is attempted to show bias or prejudice can be introduced, that the attention of the witness be called to the contradictory statements, the time when and the place where they were made, and the circumstances surrounding the making.

Harmon, 21 Wn.2d at 590 (emphasis added).

In *Harmon* the trial court's decision to prohibit the defense from calling a witness to impeach the State's witness

was upheld because such foundation had not been laid. *Id*. at 591.

Here, as in *Harmon*, the Petitioner failed to lay the foundation to impeach Seward with Matthew Price's testimony that Seward said he would lie, which was clearly offered to try to prove Seward had lied to the jury.

Although the right to present a defense is guaranteed by both the State and Federal constitutions, the right to present a defense "does not extend to the introduction of otherwise inadmissible evidence." *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669, 675 (2010).

Petitioner cites *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 110, 539 L.Ed.2d 347 (1974) for the proposition that the constitution compels the admission of the inadmissible hearsay in the name of the right to present a defense. But that case is inapposite because its ruling is based on the right to confront.

In *Davis*, the defendant was on trial for burglarizing a bar. *Davis* at 309. 17-year-old Richard Green testified that he witnessed two men near his house, and identified the defendant as one of the men, and said he had had a crowbar. *Id*. at 310. Apparently, the safe stolen from the bar was found on Green's property. *Id*. at 312. Green was on probation to the juvenile court for having burgled two cabins. *Id*. at 310-11.

The prosecutor moved to exclude evidence of Green's juvenile record. *Id*. The defendant argued that he should be able to use Green's probation status to show that Green may have made a hasty and faulty identification, was trying to divert attention away from himself as a potential suspect, or was subject to undue pressure for fear of having his probation revoked. *Id*. at 311. However, the trial court excluded the evidence that Green was on probation. *Id*.

The U.S. Supreme Court reversed, finding that the defendant's Sixth Amendment right to *confrontation* had been violated by the *limitation on cross-examination*. *Id*. at 315.

This differentiates *Davis* from the instant case because here the Petitioner's attorney never asked TJ Seward about the alleged out-of-court statements about his intent to lie. Had he done so, the testimony of Price may have been proper impeachment evidence, as the trial court indicated. *See* RP Vol. II at 394.

The case of *Massey v. United States* is on point. In *Massey*, a rape case, the 9th Circuit Court of Appeals held that the defense could not call a witness to testify about out-of-court statements made by a witness who wasn't asked about those statements. *Massey v. United States*, 407 F.2d 1126, 1127-28 (9th Cir. 1969). In that case, the defense asked the victim, Evangeline, if she had ever gone out with someone named Sherman Wool. *Id*. Her answers were inconclusive. *Id*. The

defense then proceeded to call a nurse from a hospital Evangeline had received treatment. *Id*. at 1128. The defense asked the nurse if Evangeline had said she had lived with Sherman Wool. *Id*. The nurse answered yes. *Id*. The court struck this testimony. *Id*.

The defendant assigned error to this ruling, claiming that it was probative evidence of prior acts of unchastity. *Id*. But the 9th Circuit ruled that the nurse's testimony was hearsay, and not admissible for impeachment because the proper foundation, that of asking Evangeline about the statements, had not been laid. *Id*.

Just like *Massey*, without questioning Seward about the alleged statements, Price's testimony lacks foundation to be impeachment evidence, and is inadmissible hearsay. The trial court was right to exclude it.

Harmless error.

Even if the trial court's decision was error, it was harmless in context of the entire trial. A reviewing court evaluates hearsay in the context of all the other evidence presented at trial. *State v. Watt*, 160 Wn.2d 626, 633, 160 P.3d 640 (2007).

Even if this were a constitutional error, as Petitioner alleges, confrontation clause errors are subject to harmless error analysis. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640, 644 (2007).

In the end, Craven's testimony was vastly more important than Seward's, who was an unwilling, almost hostile witness for the State. And Craven's testimony was corroborated by the physical evidence, including the fact that his blood was found smeared in the house, Erick Knight's testimony, weapons matching his description found in the house, and most compellingly, his injuries, which were

observed by both Ms. Heath and Mr. Dawson and photographed by Officer Blundred.

As noted previously, the defense had the alleged information from Mr. Price that Mr. Seward intended to lie but chose not to confront him with it. Furthermore, the defenses' own witness, Mr. Jenkins, laid the blame on Mr. Seward. When cross examined he admitted his testimony was inconsistent with his statements to police, but claimed Mr. Seward had threatened him into making those statements to the police. Although not impeachment evidence, it certainly did not put Mr. Seward's testimony in a very favorable light and probably had the same effect as if he had been impeached. The jury probably got the idea they were not dealing with a bunch of Rhodes Scholars.

Questionable testimony by Price, an admitted felon, that Seward, another admitted felon, had said he would lie while in jail, would have been cumulative and relatively unimportant.

3. Allowing the testimony of Brandon Craven in rebuttal was not error.

Petitioner claims it was error to allow the State to present this rebuttal evidence because he had to change his defense, which he never alleged below. But rebuttal evidence may consist of evidence that could have been introduced during a case-in-chief. There was no error.

This alleged error is not preserved for appeal.

When Craven appeared in the State's rebuttal case, the Petitioner asked 1) for the trial court to grant a previously denied motion to dismiss for government mismanagement for losing track of Craven; or, in the alternative 2) for a mistrial. RP Vol. III at 457-58. Petitioner's trial counsel never said that the defense, which had been a total denial of all criminal conduct, had changed. Craven did not bring any new allegations against the Petitioner. He simply gave another account of what had already been presented.

However, for the first time on appeal, the Petitioner claims that he had only two hours to "alter his defense, which had substantially changed" due to the testimony of Craven, Brief of Appellant page 37, and that his "trial strategy was in a shambles." Petition page 31.

"A party may assign evidentiary error on appeal only on a specific ground made at trial." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125, 130 (2007) (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).) "The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756, 760 (2009), *as corrected* (Jan. 21, 2010). "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a).

Petitioner did not object on the basis that he assigns as error on appeal and, for that reason, this court should not grant review.

Rebuttal evidence may overlap with evidence from the case-in-chief.

"[T]he admission and determination of the propriety of rebuttal testimony rests largely in the discretion of the trial court." *State v. Fairfax*, 42 Wn.2d 777, 780, 258 P.2d 1212, 1214 (1953). Error in allowing rebuttal evidence can only be predicated upon a manifest abuse of discretion. *State v. White*, 74 Wn.2d 386, 395, 444 P.2d 661, 667 (1968).

"Frequently true rebuttal evidence will, in some degree, overlap or coalesce with the evidence in chief." *White* at 395. "[R]ebuttal evidence will frequently overlap with the evidence in chief." *State v. Swan*, 114 Wn.2d 613, 653, 790 P.2d 610, 631 (1990), *as clarified on denial of reconsideration* (June 22, 1990) (citing *White*, *supra*.) Once a defendant presents

evidence denying acts of misconduct, the door is opened to the State presenting evidence to impeach such assertions. *Id*.

Craven's testimony in large part corroborated what had already been presented through the testimony of TJ Seward, Erick Knight, Jonni Heath and Ryan Dawson. Just because his testimony *could* have been presented in the State's case-in-chief does not mean it *had* to be.

Here, the trial court ruled that, since the Petitioner's evidence completely contradicted pretty much everything the State had presented, there would be no limitation to Brandon Craven's rebuttal testimony. RP Vol. III at 455. This was well within the court's discretion.

Petitioner fails to establish how the timing of Brandon Craven's testimony effected the defense.

As noted previously "the admission and determination of the propriety of rebuttal testimony rests largely in the discretion of the trial court." *State v. Fairfax*, 42 Wn.2d 777, 780, 258 P.2d 1212, 1214 (1953).

Petitioner attempts to manufacture prejudice by claiming that he had to completely change his defense, from one impugning TJ Seward's testimony to having to impugn Brandon Craven's as well; it is not at all clear how this is such a substantive change in trial strategy.

To make the issue one of constitutional magnitude, the Petitioner raises the spectre of ineffective assistance of counsel. This appears to be based on the Petitioner's trial counsel's conclusory remark that, "my job, the Court's job, and [the Prosecutor]'s job is to make sure that [the Defendant] has a fair trial and he's not going to get a fair trial with an ineffective counsel." RP Vol. III at 458; Petition page 4. However, he provides no argument pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Craven had been expected to testify all along:

> [W]hen this trial started Tuesday morning you didn't know whether Craven was going to be here to testify or not. [The prosecutor] didn't know

> and certainly I didn't know. I mean so I think everyone came here prepared to hear testimony from Craven ….

RP Vol. III at 458. It made no difference if Craven was going to testify during the State's case-in-chief or in rebuttal; the Petitioner's trial counsel would have prepared to attack Craven's testimony as part of routine trial preparation.

What the Petitioner's trial counsel was alleging was prejudice because he had not been able to depose Craven in hopes of eliciting inconsistent statements from him. RP Vol. III at 460.

But the defense had been provided with transcripts of three interviews of Brandon Craven. CP at 118 *and see* RP Vol. III at 462. And these transcripts contained inconsistent statements by Craven. Craven admitted to lying to Officer Blundred at the hospital. RP Vol. III at 504. He was cross-examined about his inconsistent statements as well. RP Vol. III at 514.

Although a criminal defendant has a right to interview potential state witnesses, the right is not absolute. *State v. Wilson*, 108 Wn. App. 774, 778, 31 P.3d 43, 46 (2001), *aff'd*, 149 Wn.2d 1, 65 P.3d 657 (2003) (citing *State v. Hofstetter*, 75 Wn.App. 390, 397, 878 P.2d 474, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994).) It is within the discretion of the trial court to decide what course of action to take if an ordered deposition is ineffectual. *State v. Peele*, 10 Wn. App. 58, 69, 516 P.2d 788, 794 (1973).

The trial court is in the best position to discern prejudice. *State v. Garcia*, 177 Wn. App. 769, 777, 313 P.3d 422 (2013). As properly noted by the Court of Appeals below, ""[a] denial of a motion for mistrial should be overturned only when there is a substantial likelihood that the prejudice affected the verdict." *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (citing *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000))." Slip Op. at 21. Here, there was no prejudice.

CONCLUSION

This Court will only grant review if a petitioner makes a showing under RAP 13.4(b) that the decision of the Court of Appeals in in conflict with a decision of the Supreme Court or the Court of Appeals or if there is a significant question of either state or U.S. constitutional law. Petitioner has not made that showing.

Petitioner assigns constitutional error to three evidentiary decisions of the trial court. But none of the alleged errors are constitutional in nature. "A constitutional argument that cites only general constitutional ideas without specific citations and support is inadequate." Slip Op. at 19, citing *State v. Barry,* 183 Wn.2d 297, 313, 352 P.3d 161 (2015) and RAP 10.3(a)(6). Petitioner makes several claims that an issue is constitutional (Petition pages 12, 23, 24 and 30), citing to either the state or federal constitution, without providing authority. "Mr. Airington makes a conclusory argument that the application of

ER 801 deprived him of his right to present a defense, but without explaining or providing legal authority that this is the exceptional case in which the constitutional right to present a defense applies." Slip Op. at 19.

Petitioner states that review of the admission of the judgment & sentence may be justified by manifest error, citing RAP 2.5(a)(3), without explaining how manifest error applies.

Petitioner alludes to ineffective assistance of counsel but provides no authority as to how trial counsel's performance was ineffective under *Strickland v. Washington, supra*.

Petitioner characterizes his trial as a trial by "ambush" (Petition page 29) and that "[r]ather than a search for the truth, [his] trial because [sic - became?] a "matter of luck" or a "misadventure" (Petition page 31); this, just because the victim of a brutal assault and kidnapping decided to show up and testify.

The judgment & sentence contained in exhibit 72 was properly admitted into evidence and the criminal history contained therein was not properly objected to and thus that issue was not preserved for appeal. Petitioner was not prevented from presenting a defense and the trial court did not abuse its discretion by allowing Mr. Craven to testify and in denying the motion for a mistrial. The decision of the Court of Appeals below was correct.

"A defendant is entitled to a fair trial but not a perfect one." *State v. Davis,* 175 Wn.2d 287, 345, 290 P.3d 43 (2012). Mr. Airington received a fair trial.

The Petition for Review should be denied.

This document contains 4989 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 4th day of January, 2022.

Respectfully Submitted,

BY: 

WILLIAM A. LERAAS
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GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

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