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STATE OF WASHINGTON
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No. 100904-6
Court of Appeals No. 83338-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Repondent,

v.

RONALD BIANCHI
Petitioner

PETITION FOR REVIEW

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A. Introduction

After Ronald Bianchi successfully vacated his conviction of the nonexistent crime of attempted felony murder, and nearly two decades after the state filed the original charges, he was convicted of the charges that were not a part of the original charges. Instead, the state had "amended" the original information to add these new charges. Because the statute of limitations had long since expired, Mr. Bianchi argued the new charges must be dismissed as they impermissibly and substantially broadened the charges beyond what he originally faced.

Applying an improper standard, the Court of Appeals affirmed the convictions. *State v. Bianchi*, 83338-3. This Court should accept review under RAP 13.4.

B. Issues Presented

1. The state cannot amend the charging document after the expiration of the statute of limitations if the amended charges broaden or substantially amend the timely-filed charge.

The trial court erred when it denied Mr. Bianchi's motion to dismiss the state's untimely amendments. Those amended charges alleged for the first time, and well after the statute of limitations had expired, that he or an accomplice had acted with premeditation, with intent to kill, and with knowledge that the alleged victims were law enforcement officers?

2. The constitutional right to present a defense protects an accused person's right to introduce relevant, admissible evidence that is critical to the defense. The trial court violated Mr. Bianchi's right to present a defense by prohibiting him from eliciting evidence at his second trial that his accomplice had planned only to disable the car of any police officer who chased them, not to harm the officer, when that evidence was critical to Mr. Bianchi's theory of the defense.

3. A prosecutor commits misconduct by misstating the law to the jury. The prosecutor commit misconduct at Mr. Bianchi's trial by telling the jury they did not need to find that Mr. Bianchi or an accomplice knew that there were two people

in one of the cars when the state was required to prove that knowledge in order to convict?

3. A defense attorney provides ineffective assistance of counsel by objecting to inadmissible, prejudicial evidence only on incorrect grounds. Mr. Bianchi's attorneys provided ineffective assistance by objecting to evidence that was inadmissible under ER 404(a) only on relevance and ER 403 grounds.

C. Statement of the Case

Mr. Bianchi adopts and incorporates by reference the Statement of Facts and Prior Proceedings from his Opening Brief in the Court of Appeals.

D. Argument

1. The opinion of the Court of Appeals impermissibly permits the state to "broaden [and] substantially amend" the charges against Mr. Bianchi – by adding elements of premeditation and intent to kill – well after the statute of limitations had expired.

In 1997, the state made a choice to charge Mr. Bianchi *only* with attempted felony murder – a nonexistent crime. CP 1-

6, 21-34; *In re Richey*, 162 Wn.2d 865, 869, 175 P.3d 585 (2008). The prosecution explicitly decided not to charge premeditated or intentional murder in the alternative, even though the state regularly does so in other cases. *See e.g. State v. Condon*, 182 Wn.2d 307, 343 P.3d 357 (2015).. That choice has consequences in Mr. Bianchi's case.

Under the timely-filed charges for attempted felony murder, the state had to prove only that Mr. Bianchi acted with intent to commit robbery, not with premeditation or intent to kill. RCW 9A.32.030(1)(c); *State v. Gamble*, 154 Wn.2d 457, 471, 114 P.3d 646 (2005) (Madsen, J. concurring).

Because the statute of limitations had long expired by the time Mr. Bianchi's convictions for attempted felony murder were vacated, the state is limited at this point to charges that do not "broaden or substantially amend" the timely-filed charges, in order to comply with the statute of limitations. *In re Thompson*, 141 Wn.2d 712, 729, 10 P.3d 380 (2000).

Late-filed charging amendments impermissibly "broaden or substantially amend" original charges if do not "rest[] on the same factual allegations" as the original charges or require "preparation of new evidence or defenses on the part of the defendant." *Thompson*, 141 Wn.2d at 729. Untimely amendments are not permissible if they require the accused "to answer for any activities that he had not been required to defend" under the original charges. *Id.*

In Mr. Bianchi's case, the amendment of the charges to add elements of premeditation and intent drastically changed the evidence presented at trial.

For example, the state presented lengthy evidence of Mr. Bianchi's alleged involvement in uncharged crimes – such as a burglary of a "boys' camp," theft of several guns, ammunition, and a grenade, possession of armor piercing ammunition, alteration of a shotgun – on the basis that it was relevant to prove premeditation and intent to kill. RP 806-14. None of that evidence would have been relevant in a trial on the timely-filed

charges of attempted felony murder because premeditation and intent to kill would not have been at issue.

The state also presented evidence that one of Mr. Bianchi's accomplices thought portions of a movie about killing police officers were "cool" and that that type of lifestyle would be desirable. RP 3207-17. Again, the court held that the evidence was relevant to prove intent to kill. RP 3160-64. The evidence would have been irrelevant at a trial on the original charges of attempted felony murder.

The question of whether the late-filed charges broadened or substantially amended the original charges by requiring Mr. Bianchi to answer for new factual allegations is not a theoretical inquiry in this case. The state quite literally admitted evidence against Mr. Bianchi at trial that would never have been admitted at a trial on the original charges because they did not require proof of premeditation or intent to kill.

The addition of the premeditation and intent to kill elements also required Mr. Bianchi to prepare defense evidence

that would not have been relevant to a trial on the original charges. Mr. Bianchi presented evidence, for example, that his accomplices had only been trying to shoot out the engine of one of the police cars, to rebut the state's claim that they had acted with intent to kill. RP 1830.[1] He also prepared a defense theory that his accomplices had attempted to alter the grenade so that it would act only as a smoke bomb, not as a weapon. *See* RP 863, 3828. Defense counsel cross-examined the ballistics expert on that issue at length. *See e.g.* RP 1239-44. Again, none of that evidence would have been admissible in a trial on the original charges of attempted felony murder.

Even so, the Court of Appeals holds that the late-filed charges did not violate the statute of limitations because Mr. Bianchi's new charges were "substantially related to the original charges filed in 1997." Appendix, p. 10. First, that is

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[1] The trial court excluded this evidence at the second trial. RP 3574-75.

not the standard, as any late amendment will almost certainly bear some substantial relationship to the original charge.

The opinion goes on to recount Mr. Bianchi's 1997 statements to the police – which were played at trial on the late-amended charges – in which he admits to driving the car while an accomplice shot at the police and later threw a grenade. Appendix, p. 10. The Court of Appeals goes on to conclude that the late-filed charges do not "broaden or substantially amend" the timely charges because all of the charges rested on the facts in Mr. Bianchi's statement to the police. Appendix, p. 10.

But Mr. Bianchi's statements to the police are completely silent on the elements of premeditation and intent to kill and would almost certainly have been insufficient, on their own, to secure conviction on the late-filed charges. For this reason, the prosecution sought out and offered significant additional evidence (recounted above) to attempt to prove that – in addition to driving the car while an accomplice shot a gun and threw a grenade – Mr. Bianchi or an accomplice had also acted

with the premeditated intent to kill the officers. The Court of Appeals does not meaningfully address Mr. Bianchi's argument that the evidence presented by the state at trial above literally required him to "answer for… activities that he had not been required to defend" under the original charges." *See* Appendix *generally*.

This Court should grant review pursuant to RAP 13.4(b)(4) because this issue is of substantial public interest. No published Washington case has addressed a question directly analogous to the statute of limitations issue raised in Mr. Bianchi's case. The Court of Appeals appears to have been (understandably) puzzled as to the scope of the inquiry. Guidance from this court is needed on this issue.

2. The opinion of the Court of Appeals affirms the violation of Mr. Bianchi's constitutional right to present a defense by prohibiting him from eliciting evidence that directly rebutted the state's theory of premeditation and intent to kill.

At Mr. Bianchi's first trial, he presented evidence that he and at least one of his accomplices had discussed what they

would do if they were followed by the police after the bank robbery. RP 1828-31. He demonstrated Brock had claimed that he would be able to shoot out the engine to a police car, so as to disable it, if the police pursued them. RP 1830.

Mr. Bianchi relied on this evidence in closing to argue he, Ahern, and Brock had not been trying to kill the officers, but merely to disable their cars. RP 1968-69.

This evidence could have formed the basis for the jury's hung verdicts on the counts regarding Zapata and Millard at the first trial. But the court prohibited Mr. Bianchi from eliciting the same evidence at his second trial on those counts. RP 3574-75. That ruling violated Mr. Bianchi's constitutional right to present a defense.

The constitutional right to present a defense is among the "minimum essentials of a fair trial." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 296 (1973); U.S. Const. Amends. VI, XIV. An accused person has "the right to put before a jury evidence that might influence the

determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Rules excluding evidence from a criminal trial may not infringe upon the "weighty interest of the accused" in having a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L.Ed.2d 503 (2006).

If there are questions of the strength or accuracy of evidence that is critical to the defense, those weaknesses must be established by cross-examination, not by exclusion:

> [T]he trial court should admit probative evidence [offered by the defense], even if it is suspect. In this manner, the jury will retain its role as the trier of fact, and *it* will determine whether the evidence is weak or false.

State v. Duarte Vela, 200 Wn. App. 306, 321, 402 P.3d 281 (2017) (emphasis in original).

The exclusion of defense evidence violates the Sixth Amendment right to present a defense when "the omitted evidence evaluated in the context of the entire record, creates a

reasonable doubt that did not otherwise exist." *Id.* at 326 (citations omitted).

Evidence relevant to a theory of defense may be barred only where it is of a character that undermines the fairness of the trial. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The state bears the burden of showing that the evidence is "so prejudicial as to disrupt the fact-finding process at trial." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Darden*, 145 Wn.2d at 622). For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." *Id*.

In Mr. Bianchi's case, the evidence that Ahern planned to merely disable the vehicle of a pursuing police officer was directly relevant to the primary factual issue: whether Mr. Bianchi's accomplices had been trying to kill the police officers.

Hearsay from an unavailable declarant is admissible if it tends to subject the declarant to criminal liability. ER 804(b)(3). Ahern's statements meet this criteria because shooting at a police car in order to disable it would have exposed him to prosecution for a crime.

In a criminal case a statement against penal interest is admissible if "corroborating circumstances clearly indicate the trustworthiness of the statement." ER 804(b)(3). When offered by the defense there is a presumption this type of evidence is admissible because of the application of the constitutional right to present a defense. *State v. Roberts*, 142 Wn.2d 471, 497, 14 P.3d 713 (2000), *as amended on denial of reconsideration* (Mar. 2, 2001) (*citing Chambers*, 410 U.S. at 302).

Brock's statements to his girlfriend were supported by corroborating circumstances. The statements discussed his plans regarding what he would do if followed by the police after robbing a bank, saying that he would shoot at their cars.

RP 1828-31. Shortly thereafter, he actually *did* rob a bank, was followed by the police, and *did* shoot at the police cars.

This Court has recognized nine factors for consideration of whether a statement against penal interest can be considered trustworthy under ER 804(b)(3). *Roberts*, 142 Wn.2d at 497–98 (internal citations omitted). As outlined in Mr. Bianchi's Court of Appeals Opening Brief, these factors weigh in favor of admission of the evidence. *See* Appellant's Opening Brief, pp. 38-39.

Even so, the Court of Appeals affirmed exclusion of the evidence, reasoning that the trial court did not abuse its discretion by weighing the factors so as to exclude the evidence. *See* Appendix, pp. 14-15.

The Court of Appeals completely fails to give effect to this Court's admonition that a typical weighing of the factors is insufficient when considering evidence offered by the defense in a criminal case is insufficient. *Roberts*, 142 Wn.2d at 497. Instead, in a circumstance such as Mr. Bianchi's, the

constitutional right to present a defense requires any doubt regarding trustworthiness to be resolved in favor of admission. *Id.* That critical rule is missing in both the trial court's ruling and the opinion of the Court of Appeals. That failure, alone, justifies review under RAP 13.4(b)(1) because the Court of Appeals' decision conflicts with This Court's holding in *Roberts*.

The trial court violated Mr. Bianchi's constitutional right to present a defense by prohibiting him from eliciting evidence at his second trial demonstrating that Brock had intended only to disable the police cars, not to hurt the police officers. *Darden*, 145 Wn.2d at 622. The Court of Appeals should have reversed Mr. Bianchi's convictions for Counts II-III and V-VI. *Id.*

This Court should grant review pursuant to RAP 13.4(b)(1), (3), and (4). The Court of Appeals' decision conflicts with This Court's decision in *Roberts*. The significant issue of constitutional law is also of substantial public interest

because it could affect a large number of criminal cases in which evidence is offered by the defense under ER 804(b)(3).

*3. Prosecutorial misconduct deprived Mr. Bianchi of his right to a fair trial***.**

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during closing argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated

with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Even absent an objection below, reversal is required when misconduct is “so flagrant and ill-intentioned that an instruction would not have cured the prejudice.” *Glasmann*, 175 Wn.2d at 704. Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Id.* at 707. Misconduct is also ill-intentioned when it was planned in advance. *State v. Thorgerson*, 172 Wn.2d 438, 452, 258 P.3d 43 (2011).

In order to convict Mr. Bianchi of attempt to murder Officers Zapata and Millard, the state was required to prove beyond a reasonable doubt that he and/or an accomplice had specific intent to commit each charged offense. RCW 9A.28.020;.

But the prosecutor argued during closing at the second trial that neither Mr. Bianchi nor his accomplices needed to even be aware that two officers were in the car in order to be guilty of two counts of attempted murder:

> Now, we also don't have to prove that they knew Officers Zapata and Millard personally. For Murder, it doesn't have to be some vendetta that's been closely held for years and years. You don't have to know the person at all. *We don't even have to prove that they knew both of them were in that vehicle*. We have to prove that when they fired the guns at the police officers in the car, what their intent was.

RP 3793 (emphasis added).

This is a misstatement of the law. Though the completed crimes of first- and second-degree murder encompass the killing of either the person the accused intended to kill "or of a third person," criminal attempt is a specific intent offense. RCW 9A.32.030; RCW 9A.32.050; RCW 9A.28.020.

A person is guilty of criminal attempt, if: "with intent to commit a *specific crime*, he or she does any act which is a

substantial step toward the commission of *that crime*." RCW 9A.28.020 (emphasis added).

Accordingly, to convict for attempted murder, the state must prove that the accused has taken "substantial step in causing another's person's death with the intent to cause *that person's* death." *State v. Mannering*, 112 Wn. App. 268, 274, 48 P.3d 367 (2002), *affirmed*, 150 Wn.2d 277 (2003) (*citing State v. Smith,* 115 Wn.2d 775, 782, 801 P.2d 975 (1990)) (emphasis added).

This rule is also supported by the jury instructions at Mr. Bianchi's trial. The instructions required the jury to find that either Mr. Bianchi or an accomplice had acted with intent to kill *both* Millard *and* Zapata. CP 1129, 1130, 1134, 1135.[2] It necessarily follows that Mr. Bianchi and/or his accomplices

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[2] Under the "law of the case doctrine," these instructions would require proof of those elements, even they weren't otherwise required by statute or caselaw. *See State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017).

needed to be aware that both Millard and Zapata were in the car.

Even so, the prosecutor explicitly told the jury the opposite, specifically admonishing them that they should find Mr. Bianchi guilty of both attempted murders even if the state failed to prove that he or an accomplice was aware that there were two officers in the vehicle. RP 3793.

The Court of Appeals agrees that this argument constituted a misstatement of the law by the prosecutor. Appendix, p. 20. Even so, the Court affirms Mr. Bianchi's conviction, claiming that he has failed to demonstrate prejudice. Appendix, p. 21.

Mr. Bianchi was prejudiced by the prosecutor's improper argument. The "prestige associated with the prosecutor's office" lent "special weight" to the prosecutor's argument and increased the risk that the jury would rely on the prosecutor's interpretation of the law over their own or that of Mr. Bianchi. Commentary to the *American Bar Association Standards for*

Criminal Justice std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Furthermore, the interplay between the criminal attempt statute and the elements of the completed crimes of first- and second-degree murder was one of the most complex legal issues presented to the jury in their instructions. There was a significant risk in Mr. Bianchi's case that the jury would misunderstand that concept on their own and rely on the prosecutor's statements.

The evidence that Mr. Bianchi or an accomplice knew that there were two officers in the vehicle was also far from overwhelming. There is a substantial likelihood that the prosecutor's improper misstatement of the law on that exact issue affected the outcome of Mr. Bianchi's trial. *Glasmann*, 175 Wn.2d at 704.

The prosecutor's misconduct requires reversal even though defense counsel did not object below. The fact that criminal attempt is a specific intent offense is "a well-

established rule," which had been available to the prosecutor for decades. As is the caselaw regarding a prosecutor's duty to correctly characterize the law for the jury during closing. The improper arguments were flagrant and ill-intentioned because they directly violated case law and professional standards that were available to the prosecutor at the time of the improper conduct. *Glasmann,* 175 Wn.2d at 707.

Additionally, the prosecutor's argument was not passing or accidental. Rather, it was a key part of her trial strategy as evidenced by the fact that she made the same misstatement of the law during Mr. Bianchi's first trial (in which the jury was hung on the charges related to Zapata and Millard). RP 1921. The misconduct qualifies as flagrant and ill-intentioned because it was planned in advance. *Thorgerson*, 172 Wn.2d at 452.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct at Mr. Bianchi's trial by misstating the law regarding the elements of criminal attempt to the jury. The

Court of Appeals should have reversed Mr. Bianchi's convictions for Counts II-III and V-VI. *Id.*

This issue is significant under the State and Federal Constitutions and is of substantial public interest. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

4. Mr. Bianchi's attorney provided ineffective assistance of counsel at trial by objecting to inadmissible, prejudicial evidence but only on an incorrect basis.

At Mr. Bianchi's second trial, the state introduced evidence of Ahern's character for the first time. The state introduced evidence that his favorite movie, *Natural Born Killers*, was about a couple who went on a killing spree. RP 3207-09. Specifically, the state elicited evidence that Ahern thought the part of the movie in which the protagonists kills a police officer was "cool" and that he was interested in living that type of lifestyle. RP 3208.

Later, during closing and rebuttal arguments, the state relied on that evidence as evidence Mr. Bianchi was guilty of

attempted murder because Ahern had evinced a general desire to kill police officers, which means that he had acted with premeditation and intent. RP 3795, 3857-58.

Mr. Bianchi's defense attorneys objected to the *Natural Born Killers* evidence, on grounds of relevance and ER 403. RP 3163. But the evidence was inadmissible under ER 404(a), which defense counsel failed to raise. Mr. Bianchi's defense attorneys provided ineffective assistance of counsel by waiving the correct objection to inadmissible, highly prejudicial evidence, which the state was then able to rely on to demonstrate the key factual issues in the case – premeditation and intent to kill.

The Sixth Amendment guarantees the effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An attorney's performance constitutes ineffective assistance of counsel when her actions "fell below an objective standard of reasonableness" and "there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different." *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1482, 176 L.Ed.2d 284 (2010) (quoting *Strickland,* 466 U.S. at 688);

Defense counsel provides ineffective assistance by waiving a valid objection without any sound strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). An attorney waives evidentiary objection by objecting on the incorrect grounds. *State v. Powell*, 166 Wn.2d 73, 82–83, 206 P.3d 321 (2009).

ER 404(a) provides that "evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." ER 404(a). Unlike ER 404(b), subsection (a) does not allow for any exceptions when the evidence is offered to show motive, intent, plan, etc. *See* ER 404(a).

The evidence that Ahern thought the parts of a movie depicting the killing of police officers were "cool" constituted

character evidence. The state offered the evidence specifically to attempt to prove "action in conformity therewith on a particular occasion." The evidence was inadmissible under ER 404(a).

Mr. Bianchi's defense attorneys provided deficient performance by waiving the valid objection to the evidence. This was clearly not a strategic choice, since defense counsel did object to the evidence, albeit on different grounds. RP 3163.

Mr. Bianchi was prejudiced by his attorneys' deficient performance. The question of whether Ahern and/or Brock had acted with premeditation and/or intent to kill Officers Zapata and Millard was really the only factual issue for the jury at the second trial. In response to the failure to obtain a unanimous verdict on those questions at Mr. Bianchi's first trial, the state was able to rely on inadmissible evidence at his second trial to argue that Ahern had acted with the necessary mental state because he had previously demonstrated that he thought

violence, in general, and specifically the killing of police officers was "cool."

Defense counsel objected to the evidence, recognizing its prejudicial effect. But counsel failed to raise the proper objection – that under ER 404(a). There is a reasonable probability that defense counsel's unreasonable failure to raise the proper objection affected the outcome of Mr. Bianchi's second trial. *Id.*

Mr. Bianchi's defense attorneys provided ineffective assistance of counsel by waiving the proper objection to highly prejudicial evidence that was inadmissible under ER 404(a). *Saunders*, 91 Wn. App. at 578; *Powell*, 166 Wn.2d at 82–83. The Court of Appeals should have reversed Mr. Bianchi's convictions pursuant to his second trial. *Id*

This significant issue of constitutional law is of substantial public interest. This Court should grant review under RAP 13.4(b)(3) and (4).

E. Conclusion

This should accept review in this matter under RAP 13.4.

This brief contains 4328 words and complies with RAP 18.17.

Respectfully submitted this 3rd day of May, 2022.

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Case #: 833383
State of Washington, Respondent v. Ronald J. Bianchi, Appellant
Clark County Superior Court No. 97-1-01674-6

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "Affirmed in part, reversed in part, and remanded to correct the sentence."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived. Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Lea Ennis
Court Administrator/Clerk

cc: Hon. Bernard Veljacic
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lls

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RONALD JAY BIANCHI, Appellant.	No. 83338-3 DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Bianchi argues the charges on which he was convicted were barred by the statute of limitations. He argues that he was denied his right to present a defense, that his counsel was ineffective, and that the prosecutor engaged in misconduct at closing argument. Bianchi claims the charges of malicious explosion were defective, the related jury instructions were defective, and the evidence was insufficient. He argues his multiple convictions of possession of stolen property violate double jeopardy. And, he argues that cumulative error requires reversal. Affirmed in part, reversed in part, and remanded to correct the sentence.

FACTS

On October 17, 1997, Ronald Bianchi, Michael Brock, and Aaron Ahern robbed Seafirst Bank in Vancouver, Washington. Before the bank robbery, Bianchi stole three cars: a Mustang, a LeBaron, and a Camaro. He parked these cars at different locations throughout the area. In preparation for the robbery, Bianchi and

Ahern made pipe bombs. He and Ahern stole firearms, ammunition, and a grenade.

Before the robbery, the men placed a bomb behind a Kmart store, to draw attention away from the bank. When the bomb exploded, a truck driver was behind the Kmart store completing a delivery at Kmart's loading dock, but he was not injured.

When the three men entered the bank, one of them held a gun to an employee's head. The men stole money from the bank. Bianchi drove the getaway car, the LeBaron. They drove the LeBaron to the Mustang, and got into that car. In the Mustang, they noticed police following them.

Sergeant Craig Hogman, from the Clark County Sheriff's Office, was on traffic patrol at the time, driving in an unmarked police car. He heard radio broadcasts about the explosion and the bank robbery. Sergeant Hogman was in the area of the bank and noticed a Mustang with three people in it, and he started to follow the car to see if they were the suspects. When the Mustang accelerated, Sergeant Hogman turned his lights and siren on. Someone in the Mustang hung out the passenger door window to fire at him with a high powered rifle. He stated the rear window of the Mustang disintegrated, and someone fired out of the back window of the car. He testified, "[M]y assumption was that they had shot out the rear window so that they would have a clear line of sight for shooting at me." Rounds of "constant" gunfire struck his patrol car.

At one point, the Mustang was stopped in the middle of the road, and the shooters in the Mustang "opened fire." Sergeant Hogman says he "took on the

most rounds in [his] patrol car." Sergeant Hogman ducked under his dashboard, "trying to move around in attempt not to get hit." He felt "bits of material that [were] like little bits of shrapnel that [were] exploding inside the car." His "radar unit that [was] directly in front of [him] in the patrol car explode[d]." His "driver's window exploded," and the "entire car interior [wa]s exploding at that point." After the shooting stopped and the Mustang drove away, Sergeant Hogman continued to pursue the Mustang at a distance until he lost sight of it.

Officer Lawrence Zapata and Officer Adam Millard, from the Vancouver Police Department, heard from dispatch that Sergeant Hogman needed help. They located the suspects' car, and heard a gunshot coming from the direction of that vehicle. The officers followed the car, and Officer Zapata could see someone firing a rifle out the back of the car, and another person firing a shotgun out of the passenger side window. Officer Zapata testified that he heard both weapons firing, and counted "five or six" shots. Officer Zapata fired a single shot. After this, "rounds [were] still being shot at us," and he saw muzzle flashes.

Eventually, the Mustang hit a tree. Bianchi, Ahern, and Brock ran from the car into a nearby ravine. After the car crashed, Bianchi took off running, while Brock and Ahern fired at the officers. Officer Zapata trained his shotgun on Bianchi, but watched Bianchi run into the ravine out of his sight. Officer Zapata testified that he heard gunfire coming from the ravine, and saw one of Bianchi's accomplices with a shotgun. The officers returned fire, and at some point, the two suspects firing from the ravine were no longer moving. Bianchi fled the ravine and attempted to hide, but he was eventually apprehended by a police officer.

On October 23, 1997, the State charged Bianchi with first degree robbery, three counts of attempted first degree felony murder, and second degree malicious explosion. A second amended information added two additional counts of first degree robbery, two counts of second degree assault, attempt to elude, and three counts of first degree possession of stolen property. Bianchi pleaded guilty to all counts. In exchange for Bianchi's guilty plea, the State dropped charges against his girlfriend, who was charged with multiple felonies related to being an accomplice in all the crimes Bianchi pleaded guilty to in 1998. Bianchi was sentenced to 72 years in prison. .

In 2008, the Washington Supreme Court held that attempted felony murder was no longer a crime. In re Personal Restraint of Richey, 162 Wn.2d 865, 870, 175 P.3d 585 (2008). Following that decision, Bianchi brought a personal restraint petition challenging the validity of his convictions for that offense. In re Pers. Restraint of Bianchi, No. 49296-2-II, slip op. at 1, 4 (Wash. Ct. App. Feb. 22, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2049296-2-II%20 Unpublished%20Opinion.pdf. The Court of Appeals vacated his three counts for attempted first degree felony murder. Id. at 1, 4. On remand, the trial court granted Bianchi's motion to withdraw his guilty plea for the rest of his counts.

The State filed a fourth amended information on September 1, 2017, charging Bianchi with three counts of attempted first degree murder against the three officers. It also charged him with three counts of robbery in the first degree, two counts of assault in the second degree, attempting to elude a pursuing police vehicle, three counts of possession of stolen property, and malicious explosion in

the second degree. A fifth amended information added three charges of attempted murder in the second degree.[1]

The case first went to trial in January 2019. The jury found Bianchi guilty of most charges, including attempted murder in the first degree of Sergeant Hogman. The court declared a mistrial on the charges related to attempted first and second degree murder of Officers Zapata and Millard.

The State retried Bianchi on the attempted murder charges, with trial beginning in September 2019. The jury found Bianchi guilty of both attempted first and second degree murder of Officers Zapata and Millard at the second trial. Bianchi was sentenced to 1,131 months, or over 94 years, in prison.

Bianchi appeals.

DISCUSSION

I. New Charges

A. Collateral Estoppel

Bianchi argues that the 2017 charges for first degree and second degree attempted murder were barred by the statute of limitations. The State counters that Bianchi previously made this argument to the court, so collateral estoppel bars reviewing the issue again. Bianchi responds that collateral estoppel does not apply because the prior decision did not include any discussion of whether the statute of limitations had run for particular crimes.

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[1] The State also filed sixth and seventh amended charges before the first trial ended. The sixth amended information removed the charge for attempting to elude a pursuing police vehicle. The seventh amended information removed one charge of assault in the second degree.

"The doctrine of collateral estoppel applies in criminal cases and bars relitigation of issues actually adjudicated." State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992). When applying collateral estoppel, the court must determine which issues were raised and resolved by the former judgment and if those issues are identical. Id. In response to Bianchi's prior personal restraint petition, we held, "[O]n remand, the State will be able to file any charges for which the statute of limitation has not run." Bianchi, No. 49296-2-II at 3. Bianchi did not determine whether any specific charges could be filed. It merely warned that a new filing was a possibility for charges not barred by the statute of limitations. Because the issue of whether the statute of limitations on the murder charges had run was not raised and resolved in the prior case, collateral estoppel does not apply.

B. Statute of Limitation

1. Tolling of the Statute

At the time of Bianchi's crime in 1997, the statute of limitations for attempted murder was three years. Former RCW 9A.04.080(1)(h) (1997). The fourth amended information charging Bianchi with attempted murder was filed in 2017, twenty years after Bianchi's crime. The State argues that the charges were properly filed, as the statute of limitations was tolled when the original information was filed, in 1997. Bianchi argues that the tolling provision does not apply and that the new attempted murder charges against him are barred by the statute of limitations.

Washington state law sets guidelines for time periods in which the State can bring criminal charges against a defendant after the commission of a crime. See

RCW 9A.04.080. RCW 9A.04.080(4) provides a tolling provision to extend the statute of limitations:

> if, before the end of a period of limitation prescribed in subsection (1) of this section, an indictment has been found or a complaint or an information has been filed, and the indictment, complaint, or information is set aside, then the period of limitation is extended by a period equal to the length of time from the finding or filing to the setting aside.

Statutes of limitation in criminal cases are measures of public policy. State v. Hodgson, 108 Wn.2d 662, 667, 740 P.2d 848 (1987). They can be changed or repealed in any case where the right of dismissal has not been "absolutely acquired by the completion of the running of the statutory period of limitation." Id. Therefore, when a statute extends a period of limitation, or allows for tolling, the prosecution can commence at any time within the newly established limitation period, even if the original period had expired. Id. at 668.

"[S]tatutes of limitation usually do not bar recharging a defendant whose conviction has been reversed due to a defective charging document." City of Auburn v. Brooke, 119 Wn.2d 623, 639, 836 P.2d 212 (1992). When recharging someone due to a defective charging document, the prosecution is not barred from including a new charge, as long as both charges are for the same offense. In re Pers. Restraint of Thompson, 141 Wn.2d 712, 728-29, 10 P.3d 380 (2000). "[I]n the statute of limitation, an 'offense' is an act or conduct and not the statutory definition of an offense through the enumeration of its elements." Id. at 728.

In considering if the charges are for the same offense, courts determine whether the new charges broaden or substantially amend the original charges by

examining whether the charges rest on the same factual allegations. See id. at 729. Courts also review if the new charges require preparation of new evidence or defenses on the part of the defendant. Id.

In Thompson,[2] the accused was charged with first degree rape of a child even though that charge did not exist at the time he committed the offense. Id. at 719. To determine whether the State could recharge Thompson with the similar charge of first degree statutory rape, the court reviewed the factual allegations by examining how Thompson himself described his offense. Id. at 729. The court held that the facts at hand supported elements of both the old and new statute. Id. Following Thompson, we review Bianchi's new charges to determine whether the new attempted murder charges rest on the same factual allegations, and if he needed to present new evidence or defenses.

2. Amended Charges

The State originally charged Bianchi with attempted felony murder on October 23, 1997. This charge included,

> That he, Ronald Jay Bianchi did, together with two others, commit the crime of Robbery in the First Degree as charged in Count I, and in furtherance of such crime or immediate flight therefrom the defendant or other participants did attempt to cause the death of a person other than one of the participants.

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[2] Bianchi argues that his case is similar to Thompson, and that the statute of limitation had run in that case. 141 Wn.2d at 729. However, Bianchi misinterprets this case. Thompson holds that the statute of limitation did not run, but had tolled. Id. at 729-30.

The three original charges for attempted felony murder included one charge for each officer: Officers Zapata and Millard and Sergeant Hogman. Bianchi pleaded guilty to these charges.

In the new charges filed in 2017, the State added three counts of attempted first degree murder, and three counts of attempted second degree murder. The listed elements for attempted first degree murder included: (1) a premeditated attempt to cause the death of each of the three officers, (2) an act which was a substantial step toward that crime, and/or (3) was an accomplice to that crime. The elements for attempted second degree murder included that Bianchi or his accomplices intended to cause the death of each of the three officers, and took a substantial step to do so, and/or was an accomplice of that crime. The new charges contained the additional elements of premeditation for attempted first degree murder and intent to kill for attempted second degree murder.

Bianchi argues that adding these elements substantially amended the charges, as proving these mental states required him to prepare new evidence and defenses. According to Bianchi, he needed to present new evidence that his accomplices had intended to shoot only the police cars and not the officers themselves in order to rebut the claims of premeditation and intent. Bianchi cites to Thompson, 141 Wn.2d at 729 in support of this theory. Thompson states that the charge in question was not broadened or substantially amended "because it rests on the same factual allegations and requires no preparation of new evidence or defenses." Thompson, 141 Wn.2d at 729. Bianchi speculates that he had to

prepare new defenses than he would have presented if his case had gone to trial in 1997.

However, the activities Bianchi would have needed to defend against for attempted felony murder in 1997 were the same activities he defended at his 2019 trials. The facts relied on for the attempted murder charges were the same facts relied on for the attempted felony murder charges. In 1998, Bianchi pleaded guilty to attempting to cause the death of Sergeant Hogman, Officer Zapata, and Officer Millard. At his 2019 trials, a recording of Bianchi's 1997 interview with a detective was played at both trials. In this recording, Bianchi narrated the steps he and his accomplices took in preparing for the robbery, starting up to two weeks before it occurred. He admitted that he robbed the bank. He described switching cars from the LeBaron to the Mustang, and stated that he drove the Mustang while Brock and Ahern fired at police. He said that Ahern threw the grenade at police officers. The new charges do not call for Bianchi to answer for any activities he would not have been required to defend but for his guilty plea.

Because the new charges substantially related to the original charges filed in 1997, the statute of limitation was tolled. Bianchi was properly charged in 2017 for attempted first degree and second degree attempted murder.

3. <u>"Set Aside" Equates With "Vacated"</u>

Bianchi argues in a statement of additional grounds (SAG) that the legislative intent of RCW 9A.04.080(4) extends the statute of limitation only when a case is set aside, not when a conviction is vacated. Bianchi's three counts for attempted felony murder were vacated. <u>Bianchi</u>, No. 49296-2-II at 1, 4. He argues

that because this court vacated his plea and did not set aside the charging information in the case, the statute of limitation was not extended.

RCW 9A.04.080(4) states,

> If, before the end of a period of limitation prescribed in subsection (1) of this section, an indictment has been found or a complaint or an information has been filed, and the indictment, complaint, or information is set aside, then the period of limitation is extended by a period equal to the length of time from the finding or filing to the setting aside.

Bianchi argues without citation to authority that there is a substantial difference between the language "set aside" and "vacate." There is no merit in this argument.

II. Right to Present a Defense

Bianchi argues that the trial court violated his constitutional right to present a defense at the second trial. He contends that the court did not allow testimony that the plan was to shoot at the police vehicles to disable them, rather than kill the officers. The State responds that the statements were properly excluded under the rules of hearsay, and that even with the exclusion, Bianchi was still able to argue his theory of the case.

"We review an alleged denial of the constitutional right to present a defense de novo." State v. Lizarraga, 191 Wn. App. 530, 551, 364 P.3d 810 (2015). The accused has a "right to a fair opportunity to defend against the State's accusations" under due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). However, the defendant's right to present testimony is not absolute. Lizarraga, 191 Wn. App at 553. "The defendant's right to present a

defense is subject to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" Id. (quoting Chambers, 410 U.S. at 302). Generally, a constitutional right to present a defense is not violated if a state or federal rule operates to exclude evidence. See State v. Strizheus, 163 Wn. App. 820, 833, 262 P.3d 100 (2011). But, an evidentiary rule violates the right to present a defense if the rule is arbitrary or disproportionate and infringes on a weighty interest of the accused. State v. Rafay, 168 Wn. App. 734, 796, 285 P.3d 83 (2012). "The Supreme Court has generally found such an abridgment only when the evidentiary ruling effectively prohibited the substantive testimony of the defendant on matters relevant to the defense or the testimony of a percipient witness." Id.

During the first trial, Shilley Walker, Brock's girlfriend, testified that she and Brock had discussed what he would do if he was followed after a bank robbery. She stated that he told her that "he would shoot at the engine to try to make the car stop following them."

Before the second trial, Walker did not respond to her subpoena to testify. Bianchi sought to play the recording of Walker's previous testimony. The State argued that the contents of Walker's testimony were inadmissible as hearsay because of the statement by Brock. The trial court ruled that the statement was problematic and excluded the evidence. With this evidence excluded at the second trial, Bianchi could argue during closing argument that Bianchi's accomplices had an intent to disable the police vehicles and not murder the officers.

Bianchi alleges that Walker's testimony is admissible as a statement against interest, a hearsay exception under ER 804(b)(3).[3] The State argues that the evidence does not qualify as a statement against interest because it is self-serving.

We review whether hearsay is a statement against interest under ER 804(b)(3) for abuse of discretion. State v. J.K.T., 11 Wn. App. 2d 544, 566, 455 P.3d 173 (2019). "Hearsay" is statement made out of court offered as evidence to prove the truth of the matter asserted. ER 801(c); State v. Bass, 18 Wn. App. 2d 760, 794, 491 P.3d 988 (2021), review denied, 198 Wn.2d 1034, 501 P.3d 148 (2022). Hearsay is not admissible unless an exception applies. ER 802. One exception allows admission of a statement against interest if the declarant is unavailable to testify. ER 804(b)(3). A statement against interest is a statement that a reasonable person in the declarant's position would have made only if the person believed it to be true, would expose the declarant to criminal liability, and is supported by corroborating circumstances that indicate its trustworthiness. ER 804(b)(3).

To determine both the reliability of Brock's statement, and if it was a statement against interest, the trial court considered the "Ryan factors."[4] See State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). Those factors include,

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[3] Bianchi also argues that there is a presumption for admissibility, allowing evidence in under ER 804(b)(3) because of the constitutional right to present a defense. To bolster this argument, Bianchi cites to State v. Roberts, 142 Wn.2d 471, 497, 14 P.3d 713 (2000). However, Roberts states, "Because the offered portions were against Cronin's interest and offered by the defense, the presumption is admissibility and not exclusion." Id. Bianchi misrepresents this rule.

[4] This refers to State v. Ryan, 103 Wn.2d 165, 175, 691 P.2d 197 (1984).

> ‘(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness’[; (6)] the statement contains no express assertion about past fact, [(7)] cross-examination could not show the declarant’s lack of knowledge, [(8)] the possibility of the declarant’s faulty recollection is remote, and [(9)] the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant’s involvement.

Id. (quoting State v. Parris, 98 Wn.2d 140, 146, 654 P.2d 77 (1982)). These factors are used to determine trustworthiness and reliability of the speaker and statements. Id. at 175; Parris, 98 Wn.2d at 146. In Ryan, a statement made spontaneously to one person helped weigh the statement as not trustworthy. See 103 Wn.2d at 176.

The trial court here analyzed each Ryan factor. First, whether Brock had a motive to lie did not apply here. Second, on Brock’s general character, the judge stated, “[W]hat we heard about that was that Mr. Brock said a lot of stuff that wasn’t true -- that’s a negative indicator.” Third, only one person heard the statements, which, following Ryan, weighs against trustworthiness. Fourth, the statements were not spontaneous, they were part of a conversation; the trial court stated this factor did not apply here. Fifth, the timing of the statement was unknown, and Brock was saying it to a trusted person, which weighs towards trustworthiness. The trial court noted the difficulty of analyzing the sixth factor. The statement was not an express assertion of past fact at the time it was made, and appeared to be problematic due to its prospective hypothetical nature. Seventh, cross-examination would not help, as Brock was deceased. Eighth, the possibility of

whether Brock's recollection was faulty does not apply, as he was not stating something that happened in the past. Ninth, and finally, the factor looking to the circumstances surrounding the statement to see if the declarant misrepresented their involvement did not apply. Overall, the trial court stated, "As I review these Ryan factors, it really underscores what appears to be a problematic statement. I'm going to disallow the evidence because I don't think there are indications of trustworthiness." We agree that under the Ryan factors, the statement was not a statement against interest.

The trial court did not abuse its discretion in excluding Walker's previous testimony about the statement by Ahern. Bianchi was not deprived of his constitutional right to present his theory of the case nor his defense.

III. Ineffective Assistance of Counsel

Bianchi argues that defense counsel failed to raise the proper objection to inadmissible evidence at the second trial, amounting to ineffective assistance of counsel. We review an ineffective assistance of counsel claim de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution both assure the right to effective assistance of counsel. State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). The constitutional right to effective assistance of counsel is analyzed by the Strickland test, which determines whether or not errors rise to a level of ineffective assistance, and is two-pronged. In re Pers. Restraint of Crace, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012); Strickland v. Washington, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The defendant must show that (1) deficient performance caused (2) prejudice. Strickland, 466 U.S. at 687.

To prove deficiency, the appellant must show that counsel fell below a minimum objective standard of reasonable attorney conduct. State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). To prove prejudice, the defendant must demonstrate that the trial outcome would have been different if not for defense counsel's mistake. Id.

The State called Donna Nightingale to testify about Ahern, her significant other. She testified that Ahern expressed an interest in killing police officers when they watched their favorite movie Natural Born Killers together.[5] Nightingale said Ahern thought it was "cool" when the movie characters killed police officers. She stated it was the first movie they watched together. They had been together two years. She implied they had watched it multiple times but did not testify that they had watched it shortly before the robbery.

Before Nightingale testified, the trial court reviewed the admissibility of the statement. The State argued it was admissible under a state of mind exception to hearsay.[6] The judge stated,

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[5] The trial court also stated that the State was proffering evidence from Nightingale about watching the movie Heat the night before the robbery. However, the State did not question Nightingale at trial about watching this movie.

[6] ER 803(a)(3) allows a hearsay exception for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition." We disagree that this statement was admissible under the state of mind hearsay exception. Nightingale testified that the movie was the first she and Ahern watched together, and they had been together two years. We infer that the couple watched this long before the robbery, placing Ahern's statements at some point before the robbery as well. This does not show Ahern's existing state of mind for the crime.

> In particular, I think -- what the State has notified me that they're going to elicit as a statement regarding -- that he made regarding when the characters in Natural Born Killers killed police and that that was cool. I would think that's relevant as to the declarant's intent, which is at issue in this case because of the intent of Mr. Bianchi as an accomplice.
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> So I think it's relevant and I do find it's relevant. Is there another reason why you would think that should not be admitted?

(Emphasis added). Responding to this, defense counsel objected to the testimony on the grounds of relevance.[7] The court overruled this objection, stating that the movie testimony was relevant and "probative of what Mr. Ahern's intent was in this timeframe, which is, in turn, at issue in the case." Bianchi has not assigned error to this ruling.

Bianchi argues that defense counsel should have objected to the evidence as inadmissible character evidence under ER 404(a). ER 404(a) states, "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion."

Bianchi did not assign error to the admission of the movie evidence for the purpose of showing Ahern's mental state. Therefore, the evidence was properly before the jury for that purpose. An objection stating that the evidence was character evidence, even if sustained, would not have resulted in the exclusion of the evidence. At best, the jury would have been instructed not to use the evidence for purposes of establishing his character. Since the evidence was properly before

[7] Relevance is governed by ER 403, which states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

the court, counsel's failure to object on character grounds cannot establish the prejudice necessary to establish an ineffective assistance claim.

IV. Prosecutorial Misconduct

Bianchi argues that prosecutorial misconduct deprived him a fair trial. Specifically, he argues that the prosecutor misstated the law to the jury, misrepresented the defense's argument, and told the jury that it needed to hold Bianchi accountable for his actions.

Prosecutorial misconduct affects the defendant's right to a fair trial. In re Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). To prevail on a prosecutorial misconduct claim, the defendant must show that the prosecutor's conduct was both improper and prejudicial. Id. at 704. "[I]mproper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). To show prejudice, the defendant must demonstrate that there was a substantial likelihood that the misconduct affected the jury's verdict. Glasmann, 175 Wn.2d at 704.

If a defendant fails to object to an improper comment, the error is waived unless the comment is "so flagrant and ill intentioned" that it causes prejudice that would not be cured by a jury instruction. Id. If proven, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury verdict. Id. at 711.

A. Misstatement of the Law

Bianchi argues that the prosecutor misstated the law during the closing argument at his second trial, amounting to prosecutorial misconduct. He claims that the prosecutor erroneously stated that the jury did not need to find that Bianchi was aware of the presence of two officers in the car for him to be convicted of attempted first degree murder of Officers Zapata and Millard. Because Bianchi did not object to this statement at trial, he has the burden to prove that the statement was so flagrant and ill-intentioned that a jury instruction could not have cured it. Id.

Bianchi was charged with attempted murder in the first degree, under statutes RCW 9A.32.030(1)(a), RCW 9A.28.020(3)(a), and RCW 9A.08.020(3). RCW 9A.32.030(1) states, "A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." Under RCW 9A.28.020, "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(3)(a) states that an attempt is a "[c]lass A felony when the crime attempted is murder in the first degree [or] murder in the second degree." Under RCW 9A.08.020(3),

> [a] person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
>
> (i) Solicits, commands, encourages, or requests such other person to commit it; or

> (ii) Aids or agrees to aid such other person in planning or committing it.

A person is guilty of murder in the first degree when "a substantial step was taken to criminally end someone's life." State v. Smith, 115 Wn.2d 775, 782, 801 P.2d 975 (1990) (emphasis omitted). "First degree murder is the killing of one person by another person with premeditation." State v. Mannering, 112 Wn. App. 268, 273, 48 P.3d 367 (2002), aff'd, 150 Wn.2d 277, 75 P.3d 961 (2003). The two jury instructions about attempted murder in the first degree state that the jury must find beyond a reasonable doubt that, "the act was done with the intent to commit Murder in the First Degree" of Officers Zapata and Millard.

"A prosecuting attorney commits misconduct by misstating the law." State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). In the closing argument, the prosecutor stated:

> Now, we also don't have to prove that they knew Officers Zapata and Millard personally. For [m]urder, it doesn't have to be some vendetta that's been closely held for years and years. You don't have to know the person at all. We don't even have to prove that they knew both of them were in that vehicle. We have to prove that when they fired the guns at the police officers in the car, what their intent was. And again, that's clear from their actions. And it's clear, again, from what they brought.

(Emphasis added.) Because first degree murder requires premeditation, and because the jury instructions included an "intent to commit Murder," Bianchi and his associates needed to know that the individual police officers were in the car when they were shooting. The prosecutor misstated the law.

The burden is on Bianchi to show that this statement is flagrant, ill-intentioned, and so prejudicial that an instruction to the jury could not cure it.

Glasmann, 175 Wn.2d at 704. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. Id. Bianchi does not argue that the court could not have instructed the jury adequately to cure this mistake, or that the jury verdict was affected by the misstatement. And, as a practical matter it would have been easy for the court to correct the State's error had Bianchi objected. Bianchi has not shown prejudice.

B. Straw Man Argument

Bianchi alleges the prosecutor mischaracterized the defense theory during rebuttal. A prosecutor has "wide latitude to argue reasonable inferences from the evidence," but must seek convictions based on probative evidence and sound reason. Id. For Bianchi to prevail on this claim, he needs to prove that these statements were improper and prejudicial. Id.

Bianchi argues:

> The prosecutor's rebuttal theme that Mr. Bianchi was trying to suggest that Officers Zapata and Millard had been lying was improper. The argument went "beyond the bounds of acceptable behavior by disparaging defense counsel." [State v.]Thorgerson, 172 Wn.2d[438,] 451-52[, 258 P.3d 43 (2011)]. It also created a "straw man," mischaracterizing Mr. Bianchi's theory of the defense in order to invalidate it. [State v.]Thierry, 190 Wn. App.[680,] 694[, 360 P.3d 940 (2015)]. The argument is also improper because it mischaracterized the state's burden of proof by presenting the jury with a false choice between finding that the officers were lying and finding Mr. Bianchi guilty. [State v.]Miles, 139 Wn. App.[879,] 889-90[, 162 P.3d 1169 (2007)]; [State v.]Fleming, 83 Wn. App.[209,] 213[, 921 P.2d 1076 (1996)].

We do not agree with Bianchi's characterization of the State's closing argument.

Bianchi's closing argument raised questions about the officers' statement about the shootings:

> So in this case, the State has to prove to you beyond a reasonable doubt that the intent of Brock and Ahern was to kill -- that was their intent. Now, when it comes to these officers testimonies, they are wildly inconsistent with the physical evidence. But I can't say -- I'm not going to argue because I don't have proof of it. I can't prove that they're intentionally lying because I don't have evidence of it.

During rebuttal, the State made the two statements in question:

> . . . . [T]here was a lot of talk about that ravine and, frankly, suggestion that the law enforcement officers in this case were lying. That is what was said -- that was a suggestion. The only inference was that Officer Zapata and Officer Millard sat up there and they lied to you about being shot at. . . .
>
> . . . .
>
> . . . . So all this suggestion about the ravine going to these officers' credibility -- what's the implication there that Defense was trying to make? That they're lying and therefore they weren't shot at? I mean, that's the only implication they can be making because all that matters is whether or not these officers have been shot at.

The State was responding to Bianchi's closing argument that the officers' testimony was not credible in light of the physical evidence. The defense said it could not prove that the officers were intentionally lying, which implied that they were lying. The State did not misrepresent defense counsel's arguments or the record. The State drew reasonable inferences. These statements made during rebuttal do not amount to misconduct by the prosecutor. In portions of the closing not addressed by Bianchi, the prosecutor responded directly to the strength of the evidence. And, the prosecutor properly referenced the burden of proof in the closing argument: "[I]f you are convinced beyond a reasonable doubt that I have proven these elements, it is your duty to convict the [d]efendant." These statements were not improper.

C. Accountability of Defendant

Bianchi argues that the prosecutor committed misconduct by asking the jury to hold Bianchi accountable for his actions. He argues that this statement made by the prosecutor at the first trial is improper: “[A]fter these twenty-one years, I am asking you to hold [Bianchi] accountable for what he did. I’m asking you to hold him accountable for the actions of him and his accomplices on October 17, 1997.”

“Prosecutors have a duty to seek verdicts free from appeals to passion or prejudice.” State v. Perez-Mejia, 134 Wn. App. 907, 915, 143 P.3d 838 (2006). Prosecutors engage in misconduct “when making an argument that appeals to jurors’ fear and repudiation of criminal groups or invokes racial, ethnic, or religious prejudice as a reason to convict.” Id. Additionally, “inflammatory remarks, incitements to vengeance, exhortations to join a war against crime or drugs, or appeals to prejudice or patriotism are forbidden.” Id.

Bianchi cites to Perez-Mejia.[8] In that case, the prosecutor asked the jury to “send a message.” Id. at 917. The prosecutor stated, “Send a message to Scorpion, to other members of his gang . . . and to all the other people who choose to dwell in the underworld of gangs. That message is we [have] had enough. We will not tolerate it any longer.” Id. Elsewhere in closing argument, the prosecutor

[8] To further argue prosecutorial misconduct, Bianchi cites a case from New Jersey to argue that the prosecutor’s statement about holding Bianchi accountable misstates the jury’s role, which should be only to weigh the evidence and hold the state to its burden of proof, instead of considering accountability. State v. Neal, 361 N.J. Super. 522, 537, 836 A.2d 723 (App. Div. 2003). This case is not controlling in Washington. He also argues that this statement had an “inflammatory effect on the jury,” is not curable by instruction, and is flagrant and ill intentioned. However, Bianchi just states these allegations without other legal argument.

made statements about the defendant's ethnicity. Id. at 918. In Perez-Mejia, the "send a message" language improperly injected issues about nationality and ethnicity, bringing up issues of racial prejudice. Id. at 917-18.

However, Perez-Mejia is inapposite. First, the prosecutor stating, "I'm asking you to hold him accountable" does not raise any issues of the racial prejudice that was found improper in Perez-Mejia. Nor did the prosecutor appeal to the passion and prejudice of the jury generally. Second, the prosecutor in Perez-Mejia asking the jury to "send a message" to gang members differs from asking the jury to "hold the defendant accountable" based on the evidence. Conviction and sentencing are by nature holding one accountable for criminal acts.

We hold there was no prosecutorial misconduct.

V. Malicious Explosion

A. Insufficient Evidence

Bianchi argues that the State presented insufficient evidence for a rational jury to find him guilty of second degree malicious explosion beyond a reasonable doubt. "[E]vidence is sufficient if a rational trier of fact could find each element of the crime beyond a reasonable doubt." State v. Jussila, 197 Wn. App. 908, 932, 392 P.3d 1108 (2017). Both direct and indirect evidence can support the jury's verdict. Id. We draw all reasonable inferences in favor of the State. Id.

Bianchi was charged with malicious explosion in the second degree under RCW 70.74.280(2),[9] which states,

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[9] Bianchi was also charged under RCW 9A.08.020(3), for being an accomplice to the crime.

> A person who maliciously, by the explosion of gunpowder or any other explosive substance or material, destroy or damage any building, car, airplane, vessel, common carrier, railroad track, or public utility transmission system or structure is guilty of:
>
> . . . .
>
> (2) Malicious explosion of a substance in the second degree if the offense is committed under circumstances not amounting to malicious explosion of a substance in the first degree and if thereby the life or safety of a human being is endangered. Malicious explosion of a substance in the second degree is a class A felony.

Bianchi argues that because McGregor's life or safety was not endangered, a rational jury could not find that Bianchi was guilty of malicious explosion.

The question before us concerns what qualifies as "endangered" for the purposes of the statute, and whether the evidence before the jury demonstrates endangerment. "Construction of a statute is a question of law." State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). To determine the legislative intent, we look to the plain language of the statute, the context of the statute, and the statutory scheme. State v. Feely, 192 Wn. App. 751, 761, 368 P.3d 514 (2016). "Where the language of a statute is clear, legislative intent is derived from the language of the statute alone." Engel, 166 Wn.2d at 578.

The plain language of the statute reads that malicious explosion in the second degree occurs "if thereby the life or safety of a human being is endangered." RCW 70.74.280. The statute does not require injury. "Endangered" is not defined, so we may consider its ordinary meaning. Feely, 192 Wn. App at 761. "Endangered" is defined as, "[t]he act or an instance of putting someone or something in danger; exposure to danger or harm." BLACK'S LAW DICTIONARY 667

(11th ed. 2019). The evidence must show that a person was exposed to danger by the explosion.

We look to the evidence to see if the jury could have found beyond a reasonable doubt that the safety of any person may have been exposed to danger by the bomb Bianchi placed. See Jussila, 197 Wn. App. at 932. Bianchi, Brock, and Ahern placed the bomb behind a Kmart store. Bianchi stated that he "[j]ust wanted to make a loud boom, draw some attention, and get people there." At trial, the State called McGregor to testify about the explosion. McGregor was a truck driver who was parked in the Kmart alley when the explosion occurred. He had just pulled into the loading dock area to make a delivery when he heard something "quite loud," like a bomb exploding, which startled him. McGregor was not injured, and his truck was not damaged.

The State also called Vancouver Fire Department Division Chief Richard Atkins to testify. He was dispatched to investigate the explosion after it occurred. Atkins corroborated that the explosion occurred in an alleyway behind the Kmart, near a trailer. He testified that there was evidence of shrapnel damage, and that the force of the explosion bent sheet metal near the detonation site.

Truckers like McGregor used the area to unload product being delivered to the Kmart. The explosion was strong enough to bend sheet metal on the trailer that was nearby. The explosion sent shrapnel flying. The jury could readily find from this evidence that the explosion exposed McGregor or any other truck driver in the vicinity at the time to danger or harm. The State presented sufficient

evidence from which a reasonable jury could find Bianchi guilty of malicious explosion.

B. Charging Language

Bianchi argues that the charging language for malicious explosion failed to allege critical facts, violating his Sixth Amendment rights. He alleges that the charging language is too vague, as it omitted critical facts about the building or structure he damaged, and the person he endangered.

The Sixth Amendment gives the accused the right "to be informed of the nature and cause of the accusation." U.S. CONST. AMEND. VI. We review a challenge to the sufficiency of the charging document de novo. See State v. Campbell, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995). If the defendant challenges the sufficiency of an information for the first time on appeal, the court construes the document liberally in favor of validity.[10] State v. Brown, 169 Wn.2d 195, 197, 234 P.3d 212 (2010). When looking to whether the information is sufficient, we conduct a two prong test. State v. Rivas, 168 Wn. App. 882, 887, 278 P.3d 686 (2012). The test includes "(1) do the necessary elements appear in any form, or by fair construction can they be found in the information and, if so, (2) can the

[10] The State argues that, because this is the first time Bianchi is raising this argument, the Court should decline to review this issue. A vague charging document can be corrected by requesting a bill of particulars at trial. State v. Leach, 113 Wn.2d 679, 687, 782 P.2d 552 (1989), abrogated on other grounds by State v. Pry, 194 Wn.2d 745, 761-62, 452 P.3d 536 (2019). However, if a defendant fails to request a bill of particulars at trial, they cannot challenge the charging document on vagueness grounds on appeal. Id. Bianchi did not state that he requested a bill of particulars at trial. The bill of particulars issue was not raised in State v. Brown, 169 Wn.2d 195, 197, 234 P.3d 212 (2010). So, in an abundance of caution, we consider the merits.

defendant show he or she was actually prejudiced by the vague or inartful language." Id. "[I]f the necessary facts appear in any form, or by a fair construction can be found within the terms of the charge, then the charging document will be upheld on appeal." State v. Kjorsvik, 117 Wn.2d 93, 104, 812 P.2d 86 (1991). Failing to allege specific facts may make the charging document vague, but that does not make it constitutionally deficient. State v. Laramie, 141 Wn. App. 332, 340, 169 P.3d 859 (2007).

The charging language in question states,

> COUNT 12 – MALICIOUS EXPLOSION OF A SUBSTANCE IN THE SECOND DEGREE – 9A.080.020(3)/70.74.280(2)
>
> That he, RONALD JAY BIANCHI, together and with others, in the County of Clark, State of Washington, on or about October 17, 1997, did maliciously destroy or damage any building or structure by the explosion of gunpowder or any other explosive substance or material and thereby did endanger the life or safety of any human being, contrary to Revised Code of Washington 70.74.280(2) and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

This language follows the language of RCW 70.74.280 closely to identify the elements of the crime. Bianchi is correct that the charging language does not identify the structure damaged or the people endangered.[11] But, Bianchi does not identify how any missing facts prejudiced his ability to defend against the charge.

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[11] In State v. Woodhouse, 151 Wash. 512, 513, 276 P. 539 (1929), the Supreme Court of Washington analyzed a different, lesser crime, but in a similar factual scenario. In that case, the sufficiency of the information was challenged because the charging information did not specifically state who was injured or endangered by a bomb. Id. at 513-14. The court held the information was sufficient stating, "Explosions are very likely to injure individuals. They may cause extensive and dangerous fires, they may result in panics among crowds in places of public resort, or in congested streets, and they constitute grave menaces to the public safety and security." Id. at 515, 517.

In fact, he does not actually argue that he was prejudiced. Therefore, Bianchi fails to show that the charging document was constitutionally insufficient.

C. Jury Instructions

In his SAG, Bianchi argues that the jury instruction for malicious explosion misstated the law. He argues that the words "if" and "is" are included in the statute, but left out in the jury instructions and this omission changes the meaning of the law. "Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

With the language of concern emphasized, RCW 70.74.280 reads,

> A person who maliciously, by the explosion of gunpowder or any other explosive substance or material, destroy or damage any building, car, airplane, vessel, common carrier, railroad track, or public utility transmission system or structure is guilty of:
>
> . . . .
>
> (2) Malicious explosion of a substance in the second degree if the offense is committed under circumstances not amounting to malicious explosion of a substance in the first degree and if thereby the life or safety of a human being is endangered.

The jury instruction reads,

> A person commits the crime of Malicious Explosion of a Substance in the Second Degree when the person maliciously destroys or damages any building or structure by the explosion of gunpowder or any other explosive substance or material and thereby endangered the life or safety of a human being.

Bianchi is correct that the jury instruction does not perfectly match the statute.

However, the instruction allowed both parties to argue the theory of their case. Bianchi argued that no human was actually endangered by the explosion, while the State argued that no one actually needed to be hurt, but that someone was endangered. Additionally, Bianchi does not establish that the omission of the two words changed the meaning of the instruction. This does not show any error or prejudice. The jury was properly informed of the applicable law, and the instruction is sufficient.

VI. Double Jeopardy

Bianchi was found guilty of possession of stolen property in the second degree. Bianchi was charged under RCW 9A.56.160 for both counts,[12] which states,

> (1) A person is guilty of possessing stolen property in the second degree if:
>
> (a) He or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value.

The stolen property included a Chevy Camaro, belonging to Sandra Ouellette, and a Ford Mustang, belonging to David Sooder. In his SAG, Bianchi argues that simultaneous possession of various items of property stolen from multiple owners constitutes the same offense for double jeopardy purposes. The State did not respond to this pleading.

[12] Bianchi was also charged with RCW 9A.08.020(3), for being an accomplice to the crime, and RCW 9A.56.140, which defines the crime.

Bianchi, in his SAG, relies on State v. McReynolds, 117 Wn. App. 309, 340, 71 P.3d 663 (2003) to argue that simultaneous possession of various items of property stolen from multiple owners constitutes one unit of prosecution of the crime. McReynolds held that a single possession of various items of stolen property was one unit of prosecution, and therefore multiple convictions for possessing that property violated the prohibition against double jeopardy. Id. McReynolds further states, "when a statute defines a crime as a course of conduct over a period of time, 'then it is a continuous offense and any conviction or acquittal based on a portion of that course of action will bar prosecution on the remainder.'" Id. at 339 (quoting Harrell v. Israel, 478 F. Supp. 752, 754-55 (E.D. Wis.1979)).

The evidence shows that Bianchi admitted to taking the two vehicles. Bianchi admitted to parking the cars at different locations the night before the robbery. It is clear from the record that all three men rode in the vehicles during the course of the robbery. The three men drove the Camaro to set the bomb. They fled the scene of the robbery in the LeBaron, and drove that car to the Mustang. After the men got into the Mustang to leave the vicinity, a police car started to follow them. Bianchi drove the Mustang while Brock and Ahern fired upon Sergeant Hogman. These facts demonstrate that Bianchi and his accomplices had control over the vehicles from the act of stealing them through the time the cars were used in the robbery and attempted escape.

We conclude that the possession of these two vehicles constitutes a single unit of prosecution. Charging them separately violates double jeopardy. Bianchi is entitled to be resentenced on a single count.

VII. Cumulative Error

Bianchi argues that his case should be reversed due to cumulative error. Cumulative error warrants reversal when the combined effect of several errors denies the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Bianchi does not illustrate how cumulative error would have affected the outcome of the trial. He also does not show that any prejudice against him occurred at trial. Cumulative error does not apply.

Affirmed in part, reversed in part, and remanded to correct the sentence.

Appelwick, J.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 83338-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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