NO. 30485-0-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

BILLY WAYNE DAVIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

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On August 20, 2010, Michael Acton worked at 508 North 4th Avenue, Pasco, Washington. (1RP at 30-32). Acton began work at 10 p.m. (1RP at 32). During the course of the evening, a regular by the name of Moses Sanders came in several times. (1RP at 33). During one of the visits, Acton noticed that Sanders had a friend with him although he did not get a good look at him. (1RP at 34). Sanders and that same friend also drove by in a large Lincoln type vehicle several times throughout the night. (1RP at 36).

Later that night Sanders returned with the Appellant, Billy Davis, and told Acton they would be holding him up and that he needed to cooperate. (1RP at 38). The Appellant then approached Acton holding what appeared to some kind of firearm inside his coat. (1RP at 38). Acton did not know the Appellant and took him and the firearm as a serious threat. (1RP at 39). Acton was then escorted to the cash register by Sanders while the Appellant kept the weapon pointed at him. (1RP at 40). Acton unlocked the register and Sanders began taking the money out. (1RP at 40). As Sanders took out the money, the Appellant

directed him by saying "Hurry up. Let's go. Hurry up. Let's go." (1RP at 41). Once they had the money Sanders ran out first and the Apellant went second, still pointing the gun at Acton and telling him to "just give us five minutes." (1RP at 42). When they went out the door Acton immediately contacted police. (1RP at 42-43).

Pasco Police responded to the scene and contacted Acton. (1RP at 50). The observed that Acton was upset, scared, and crying. (1RP at 50). Other officers responding drove north of the location, attempting to locate the fleeing suspects. (1RP at 78). Officer Jose Becho observed two males running through the park, going northeast. (1RP at 78). He stopped the individuals and made contact with them. (1RP at 79). The Appellant complied and was taken into custody while Sanders tried to hide but was eventually arrested at that same location. (1RP at 79-80). During the arrest the Appellant had no trouble following Officer Becho's instructions. (1RP at 81).

Once under arrest, Officer Becho searched the Appellant and found $289 on his person. (1RP at 82-83). He then confirmed the Appellant's identity and read him his Miranda rights. (1RP at 84). The Appellant appeared to have no problem understanding his rights and gave Officer Becho a statement answering his

questions about the robbery. (1RP at 85). During that statement the Appellant admitted to taking part in the robbery but attempted to shift the blame to his co-defendant, Sanders. (2RP at 138, Exhibit #6). After the arrest, Pasco Police brought the Appellant and Sanders to the store and Acton identified both Sanders and the Appellant as the individuals who had robbed him at gunpoint. (1RP at 51-52).

Canine handler, Officer Bob Harris, also responded to the scene of the arrest. (1RP at 98). Harris conducted a back track from the location of the arrest across the park. (1RP at 100). During the track Officer's Harris's canine alerted on a rifle and the Officers secured it. (1RP at 101). The Pasco Police Department's evidence technician, Dave Renzelman, described the rifle as a modified BB gun. (1RP at 59). According to Renzelman the BB gun had been modified to take the plastic ceiling out of the barrel to make it appear to look like a regular rifle. Near the rifle they found a Lincoln Mark IV, consistent with what the Appellant and Sanders had been seen driving earlier in the night. (1RP at 101).

On August 24, 2010, the Franklin County Prosecutor's Office charged the Appellant with Robbery in the First Degree. (CP 67). On September 14, 2010, a First Amended Information was filed

alleging that the crime would activate the three strikes sentence under RCW 9.94A.570, 9.94A.030(37), and 9.94A.555.

Approximately a month later, a defense investigator met with the Appellant. (1RP at 130). That investigator reported that the Appellant exhibited strange behavior and seemed to delusions which reminded him of his mother, who had suffered from dementia. (1RP 125-128). On October 19, 2010, the court entered an order for a competency evaluation. (RP 10/19/2010 at 2). That evaluation was ordered because of concerns raised by Ms. Ajax, the Appellant's trial attorney, during her contact with her client. (RP 10/19/2010 at 2).

At Eastern State Hospital, Dr. Nelson conducted a mental status exam. (2RP at 275). During that exam Dr. Nelson found, contrary to the defense investigators observations, the Appellant to be oriented, gave appropriate responses, and appeared to have his thoughts organized. (2RP at 275). Dr. Nelson also found the Appellant had adjustment disorder with anxiety, cocaine dependence, alcohol abuse, and antisocial traits. (2RP at 275).

Later, after speaking to the Appellant and his wife, Dr. Nelson changed his opinion and began to look for "unusual and extraordinary" circumstances that might explain the Appellant's

decision to commit robbery. (2RP at 231). After approximately thirty days of working with the Appellant, Dr. Nelson opined that a due to Binswanger's disease, a possible mystery ingredient in 4 Loko alcohol drink, vitamin B-12 deficiencies, possible septicemia, COPD, and neutropenia, the Appellant could not tell the difference between right and wrong at the time of the offense. (2RP at 213-215). Dr. Nelson filed a Sanity Commission Report on December 29, 2010 laying out his findings. (CP 31). This constituted the first indication that the Appellant wished to plead not guilty by reason of insanity.

Following this report the State made a motion to allow the State to re-examine the Appellant with another expert. (1/25/11RP 7). The Appellant objected, arguing a second evaluation was not allowed. The court found that the State could conduct the evaluation as the State did not specifically stipulate to Dr. Nelson as their single expert. (CP 50). Based on the supplemental evaluation of the Appellant, and upon review of medical records, Dr. Grant found the Appellant to be sane at the time of the offense. (3RP at 3-54). Dr. Grant based his testimony to his own forensic conclusions about the data available. He also testified to the flaws in Dr. Nelson's report and his failure to follow proper forensic

procedure. (RP at 3-54). The jury found the Appellant guilty of the crime of Robbery in the First Degree. (CP 16).

C RESPONSE TO ARGUMENT.

1. THE JURY NEED NOT HAVE BEEN INSTUCTED ON ACCOMPLICE LIABILITY UNDER THE CIRCUMSTANCES OF THIS CASE.

The law no longer makes a distinction between principal and accomplice liability. State v. McDonald, 138 Wn.2d 680, 687-88, 981 P.2d 443 (1999). The Legislature, initially in RCW 9.01.030, and currently with RCW 9.08.020, has shown its intention look at group and individual culpability through the same lens:

> [t]he legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principle, regardless of the degree or nature of his participation. Whether he hold the gun, hold the victim, keeps a lookout, stands by ready to help the assailant, or aid in some other way, he is a participant. The elements of the crime remain the same.

State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974), *disapproved of on other grounds by* State v. Harris, 102 Wn.2d 148, 153-54, 685 P.2d 584 (1984). The prosecutor does not have to elect whether or not they are charging a defendant as an accomplice or principle because such a distinction is empty. Carothers, 84 Wn.2d at 263.

The Appellant seeks modify this principle by suggesting that the State must elect to treat a defendant as either an accomplice or a principle by either asking for, or not asking for, the accomplice liability jury instruction, WPIC 10.51. This argument seeks to add additional requirements to the State's burden of proof. The State need not ask a jury to decide who exactly participated in which specific elements of a crime, it is enough that the crime occurred and the defendant participated. Carothers, 84 Wn.2d at 261. The McDonald Court stated "the jurors need not have decided whether it was Bassett or McDonald who actually killed Michael "so long as both participated in the crime." 138 Wn.2d at 688.

To require the State to give WPIC 10.51 in all cases involving multiple criminal actors cuts against this principle. If there are no principle or secondary actors, then the State is not required to instruct the jury to treat an "accomplice" as a principle. That individual is already a principle and an accomplice.

WPIC 10.51 is a tool for explaining accomplice liability to jurors. It allows jurors to understand that someone with lesser involvement is not less culpable. In this particular case, such an instruction was not needed. The Appellant, while not physically pulling the money out of the register, still obviously committed the

robbery. His co-defendant, Sanders, played a more minor role but obviously worked with him. The jury did not need a special accomplice liability instruction to understand that the Appellant and his co-defendant worked in unison. Failure to ask for the instruction does not suddenly dissipate the rule that if you participate in a crime you are fully culpable for it. If this were the case, the State would be required to elect a defendant as either a principle or accomplice in their charging document in order to put a defendant on notice as to what type of defense he would need to put on. The jury did not have a problem with the concept as they found the Appellant guilty beyond a reasonable doubt.

The Appellant states that the "prosecution did not ask the jury to convict Davis based on another person's conduct, as was its choice." This suggests that the State has the additional burden of selecting the type of liability it is alleging. This statement is inconsistent with case law stating that a jury need not reach unanimity on whether a defendant acted as a principle or an accomplice. State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). The jurors need not reach unanimity because it is not the State's burden to select a type (principle or accomplice) of liability. In other words, accomplice liability does not find one guilty of

another's conduct, it simply allows culpability for aiding another in criminal activity.

The Appellant fails to cite any authority for the proposition that an accomplice liability instruction must be given in order for a defendant to be culpable when committing a crime with another person. The official comment to WPIC 10.51 states, "This instruction may be given when a defendant is on trial alone and is charged as a principal, if there is substantial evidence that someone else committed the offense." (Emphasis added; citations omitted). 11 WASHINGTON PRACTICE, at 221. Here, there was no evidence that anyone other than Davis and Sanders committed the crime. Even if it would not have been error to give WPIC 10.51 in this case, it was certainly not mandatory.

The official comment cites to State v. Taplin, 9 Wn. App 545, 513 P.2d 549 (1973), which provides a good illustration of this distinction. In Taplin, the manager of a motel left her apartment adjacent to the motel office for an errand that took three to five minutes. When she returned, she saw the defendant seated in the passenger seat of a car parked in a driveway by the office. The manager asked the defendant what she wanted, and she said her husband was looking for someone from whom to rent a unit. The

manager continued toward her apartment and as she rounded a corner, she encountered the defendant's husband; he proceeded to rent a room and then drove off with the defendant. The manager then discovered her apartment had been forcibly entered and checks, credit cards, money, and other property had been stolen. About two hours later, the defendant and her husband registered at a second motel under the name of the first motel's manager. Some of the stolen property from the burglary was found in the room they rented at the second motel. The jury could have found that the defendant remained in the car and acted as a lookout while her husband committed the burglary. Id. at 546. Accordingly, an accomplice liability instruction was appropriate (and arguably essential) in that case. In contrast, here the evidence plainly and unambiguously showed that Davis and Sanders both entered the store and committed the robbery in tandem.

The instant case is more akin to State v. Fenderson, 443 A.2d 76 (Me. 1982). While the defendant in Fenderson did not request an instruction on accomplice liability or object to the instructions which were given, he argued on appeal that the omission of accomplice instructions was prejudicial error. The Supreme Judicial Court of Maine disagreed, stating there was no

error "since the evidence did not generate the issue of accomplice liability." Id. The court explained:

> The evidence established that the defendant and three companions were arrested by two police officers as they were driving away in a pickup truck from a private residence in York County less than fifteen minutes after the same officers had seen the same individuals in another location. The officers had found the house secure only twenty minutes before the arrest. When they returned to the house, one of the officers observed the pickup truck parked next to the house and unoccupied. The front door of the house was open and two adults were seen running past a window. One of the codefendants testified that the group had gone to the house but merely sat in the truck drinking beer and relieved themselves on the property and had not heard or seen anything unusual. A piano, one of the few pieces of furnishings in the house, had sustained extensive damage of $2,500.00.

Id. The court concluded:

> Upon this evidence, we cannot say that it was irrational for the jury to conclude that the defendant and all of his companions were participants in the aggravated criminal mischief. We find the evidence was sufficient to sustain the jury's verdicts [even without an accomplice liability instruction].

Id. In Fenderson, there was no evidence of which person or persons committed the physical acts of breaking into the house and damaging the piano. Nonetheless, the jury could conclude that all four defendants left the vehicle, went to the house, and jointly committed the crime, even if their physical acts were not identical.

The same rationale applies here. In the instant case, Davis pointed the gun at the victim while Sanders removed the money from the cash drawer. (1RP 35-41). While the two perpetrators performed different physical acts, they both entered the store and jointly committed the crime. As in Fenderson, the evidence did not generate an issue of accomplice liability.

In any event, Davis never denied at trial that he and Sanders committed the physical acts constituting the robbery. His entire defense was one of insanity. In addressing the issue of bifurcation, the trial court noted its understanding that defense counsel was not pursuing a defense on the merits and the only defense was insanity; the trial court gave defense counsel an opportunity to make a proffer of evidence that would be a bone fide defense on the merits, and none was offered. (2RP 145-146). Defense counsel's closing argument related entirely to insanity and did not suggest any defense on the merits. (3RP 120-130). As far as the prosecutor's closing argument is concerned, the brief discussion of the merits was well within the court's instructions. (3RP 103-106). The balance of the State's argument related to the insanity question. (3RP 106-120, 130-135).

The evidence showed Davis held the gun on the clerk while

Sanders removed the money from the cash drawer; Davis was telling Sanders to "hurry up" and asked the clerk to "give [them] five minutes" as they left. (1RP 35-41). Any reasonable juror would understand that pointing the gun at the clerk was part of the process of taking personal property from the presence of the clerk against that person's will by the threatened use of force, every bit as much as physically removing the money from the cash drawer. The jury was not confused, and Davis was not prejudiced, by the language in the "to-convict" instruction requiring findings that "the defendant unlawfully took personal property . . . in the presence of another . . . [with intent] to commit theft of the property . . . against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person . . . [with such fear or force being] used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking . . [and that] in the commission of these acts or in the immediate flight therefrom the defendant displayed what appeared to be a firearm or other deadly weapon[.]" (CP 29).

Davis did not raise this issue in any way in the trial court. (3RP 82). Thus, on appeal he must show the existence of manifest error affecting a constitutional right. See RAP 2.5(a); State v.

Turpin, 94 Wn.2d 820, 823, 620 P.2d 990 (1980). Constitutional error omitting an essential element from jury instructions is subject to harmless error analysis. State v. Brown, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002); State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). Such error is harmless if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Brown, 147 Wn.2d at 341; Thomas, 150 Wn.2d at 845. When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is shown by uncontroverted evidence. Brown, 147 Wn.2d at 341; State v. Thomas, 150 Wn.2d at 844-45. These principles apply to both accomplice instructions (Brown) and "to-convict" instructions (Thomas).

As previously noted, Davis did not assert any defense on the merits; his sole defense was one of insanity. (2RP 145-146). Accordingly, the uncontradicted evidence showed Davis committed sufficient physical acts to constitute the crime of first degree robbery; the only issue was one of his sanity to the time. Any omissions from the instructions on the merits did not contribute to the verdict obtained and were harmless beyond a reasonable doubt.

2. THE STATE DID NOT INSTRUCT THE JURY ON A TRUE ALTERNATIVE MEANS OF THE CRIME AND IN ANY EVENT, THERE WAS NO POSSIBILITY THAT THE JURY CONVICTED THE APPELLANT BASED ON THAT UNCHARGED ALTERNATIVE.

When a statute allows for multiple means by which a crime can be committed it is the responsibility of the State to allege which means it is alleging in its charging document. State v. Chino, 117 Wn. App. 531, 539, 72 P.3d 256 (2003). The purpose of this requirement is to provide the defendant with notice of which he should address in his defense. This purpose of the jury instructions is slightly different:

> The purpose of a jury instruction is to provide the jury with the applicable law to be applied in the case. On the other hand, the purpose of an information is to give a defendant notice of the crime with which he or she is charged. Because of these different purposes, jury instructions must necessarily contain more complete and precise statements of the law than are required in an information.

State v. Borrero, 97 Wn. App. 101, 107, 982 P.2d 1187, 1190 (1999). The jury instructions should not contain alternative means of committing offenses not cited in the information. Chino, 117 Wn. App. at 540. However, merely because an instruction has additional language in it does not automatically mean the jury is being improperly instructed. Such additional language creates

error when it leaves open the opportunity for the jury to convict a defendant of an uncharged alternative. Id.

In the case, the charging document alleged that the Appellant took property "in the presence" of the victim, Michael Acton. The "to convict" jury instruction stated the property was taken "in the presence" or from "the person" of Michael Acton. Although the statute allows for either type of taking, these are not true alternative means of committing the crime because they overlap and one of them is entirely contained within the other.

In State v. Nam, Division 2 describes robbery as including two alternatives, "taking from a victim's person or taking property in a victim's presence." 136 Wn. App. 698, 704, 150 P.3d 617 (2007). In that case the court dealt with an argument regarding insufficiency of the evidence. Id. The defendant argued that the State had plead "from the person" in their charging document but then proceeded to offer evidence which only proved that the stolen property had been taken "in the presence" of the victim. Id. In ruling against the State, the court pointed out that the particular facts of the case "falls within the category of cases where the distinction between person and presence will matter." Id. at 707.

Because the State plead the more narrow definition, "person," the court held the State to the more narrow definition under the statute.

The present case involves the opposite category of case. In this instance the State plead the more broad term "in the presence" and incidentally, included the more narrow term "from the person" in the jury instructions. By including the more narrow instruction along with the broad instruction, the State didn't ask the jury to convict the Appellant of an alternative version of the crime. The State simply included surpluage which was already contained in the term "in the presence."

This exact issue has previously been addressed by the Court. In State v. Grant, the State alleged that the information charged that the taking was "in the presence" of the victim but the evidence showed the taking was "from the person" of the victim. 77 Wn.2d 47, 459 P.2d 639 (1969). The evidence clearly showed the defendants had taken the victim's "watch, wallet, and the money and change out of his pocket." Id. at 48. This is an obvious taking from "the person," yet, the information clearly stated "in the presence." Id. The Court answered by stating that while "personal property may be taken from the victim's presence without being

taken from his person, it cannot be taken from his person without being taken in his presence." Id. at 50.

Adding the term "from the person" to the jury instructions did not offer an alternative means of committing the crime because one cannot take something from the person of another without doing it in his presence. Nam acknowledges this, stating "[w]e note that this will only matter where the State voluntarily elects to omit the "presence" language in the charging document or instructions." 136 Wn. App. at 706. The State did not omit that language in the present case. The Appellant had full notice as to the allegations and the jury did not consider any charges which the State did not allege in the information.

In any event, even if the court considers the language used as an alternative means of committing the crime, the Appellant did not undergo any prejudice. When a statute offers multiple alternative means of committing a crime, it is error for the State to allege only one of the alternative means and then to instruct the jury on both of the alternative means of committing the crime. State v. Nicholas, 55 Wn. App. 261, 272-73, 776 P.2d 1385 (1989). Appellate courts wills presume that an instructional error causes prejudice unless the State meets its burden by affirmatively

showing that the error was harmless. State v. Smith, 131 Wn.2d 258, 263-64, 930 P.2d 1285 (1997). Therefore, instructing a jury on an uncharged alternative means of committing a crime is harmless if there is no possibility that the jury convicted the defendant on the uncharged alterative means. Nicholas, 55 Wn. App. 273.

At trial, the State offered evidence that the Appellant and his accomplice, Mr. Sanders, arrived at the convenient store location and ordered the clerk to open the cash register. Mr. Sanders then proceeded to take the money out of the register as the Appellant encouraged him to hurry. No evidence was offered at trial which indicated anything had been taken directly from the person of the victim. The Appellant's defense involved temporary insanity and in no way argued the underlying facts alleged by the State were untrue. The only thing argued by the Appellant was whether the Appellant intentionally took property in the presence of the victim, the store clerk. In convicting the Appellant, the jury rejected his insanity defense, it could not possibly have found that the Appellant took property from the person instead of in the presence of the victim.

Under these circumstances, adding the "from the person" language to the jury instructions is mere suplusage and has not impact on the case. In State v. Spiers, Division Two found that a provision making it unlawful to own firearms while a serious felony case was pending to be unconstitutional. 119 Wn. App. 85, 94, 79 P.3d 30 (2003). This created an issue because the jury had been instructed on the unconstitutional provision. Id. The court upheld the majority of the convictions, stating:

> The "to convict" instruction permitted the jury to convict Spiers of unlawful firearm possession if he knowingly owned, possessed, or controlled a firearm. For five of the counts, however, there was no evidence as to the alternative of "ownership." As to those counts, there was substantial evidence of possession and control; thus, the instructional error was mere surplusage. Those convictions need not be reversed.

Id. at 94 (citations omitted). Similarly, this current case involves the phrase "from the person" as mere surplusage. No evidence exists as to that alternative, therefore there is no possibility the Appellant was convicted via that particular means of committing the crime.

Moreover, as explained in the previous section of this brief, Davis did not assert any defense on the merits; his only defense was insanity. (2RP 145-146; 3RP 130-135). Overwhelming uncontradicted evidence showed Davis committed sufficient acts to

constitute the crime of first degree robbery. (1RP 35-41). Any errors or omission in the instructions on the merits did not contribute to the verdict and were harmless beyond a reasonable doubt. See Brown, 147 Wn.2d at 340-41; Thomas, 150 Wn.2d at 844-45.

3. RCW 10.77.060 DOES NOT LIMIT THE COURT TO ORDERING ONE COMPETENCY/INSANITY EVALUATION, THE APPELLANT RETAINED ALL HIS DUE PROCESS RIGHTS DURING THE SUPPLEMENTAL EVALUATION, AND IN ANY EVENT, THE SUPPLEMENTAL EVALUATION CONSTITUTED REBUTTAL EVIDENCE WHICH COULD HAVE BEEN OFFERED REGARDLESS OF THE COURT'S ORDER FOR THE SUPPLEMENTAL EVALUATION.

The purpose of RCW 10.77.060 is to lay out procedures for evaluating individuals who may have competency or sanity issues in their cases. The statute has a number of safeguards built in to protect defendants' rights. An example of this would be RCW 10.77.020, which allows a defendant to seek a second opinion if they are not happy with the initial evaluation. The main purpose of these provisions is to see that defendants get an adequate number of evaluations as needed. It is not the purpose of the chapter to limit court ordered evaluations which are done through the

discovery process.

The Appellant argues that RCW 10.77.060 sets out a procedure for an evaluation by either one or two experts and that once such an evaluation is done the State is then foreclosed from further evaluations. This argument ignores the plain reading of former RCW 10.77.060:

> (1)(a) Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant. The signed order of the court shall serve as authority for the experts to be given access to all records held by any mental health, medical, educational, or correctional facility that relate to the present or past mental, emotional, or physical condition of the defendant. At least one of the experts or professional persons appointed shall be a developmental disabilities professional if the court is advised by any party that the defendant may be developmentally disabled. Upon agreement of the parties, the court may designate one expert or professional person to conduct the examination and report on the mental condition of the defendant. For purposes of the examination, the court may order the defendant committed to a hospital or other suitably secure public or private mental health facility for a period of time necessary to complete the examination, but not to exceed fifteen days from the time of admission to the facility. If the defendant is being held in jail or other detention facility, upon agreement of the parties, the court may direct that the

> examination be conducted at the jail or other detention facility.

(emphasis added). At the time of this case, the statute set the procedural default at two experts. The court was required to appoint, or the secretary to designate, two experts in each case, unless the two parties agree to stipulate to one expert being designated by the court.

Even if the court where to enter an order stipulating one evaluator, no where in the statute is that court later foreclosed from its inherent authority to order further evaluations. The statute is concerned with the procedures which are followed when an evaluation is needed. It does not concern itself with foreclosing the court's authority to order further evaluations.

Case law indicates that the determination of when a competency evaluation is needed should be at the discretion of the trial court. State v. Thomas, 75 Wn.2d 516, 518, 452 P.2d 256 (1969). The Appellant confusing the "mandatory" provisions of *how* a competency evaluation is done with the question of *if* a evaluation should be done. The closer reading of the case law cited by the Appellant bears this out. In Re Pers. Restraint of Fleming, addresses the issue of if a competency evaluation should

have been ordered. 142 Wn.2d 853, 863, 16 P.3d 610 (2001). That court points out that once a competency issued is raised, the directives of RCW 10.77 take effect. Id. But the case is clear the determining when they take effect is up to the trial court. Id.

RCW 10.77.060 states that "[w]henever a defendant has pleaded not guilty by reason of insanity..." the court shall order an evaluation. The Appellant pled not guilty by reason of insanity after his initial evaluation by Dr. Nelson. The court then ordered another examination under RCW 10.77.060. This was a proper use of the court's discretion. The Appellant argues that because a box remained unchecked on the original competency order, the court's authority to order evaluations is foreclosed. This argument is contrary to RCW 10.77 which concerns itself with making sure an adequate number of evaluations take place, not preventing evaluations from taking place.

A trial court has inherent authority to order the mental evaluation of a criminal defendant. State v. Sisouvanh, 175 Wn.2d 607, 621, 290 P.3d 942 (2012). "[T]he prosecution would be placed at a serious disadvantage if it could not introduce its own expert testimony, based upon the examination of the defendant, in response to the alleged lack of responsibility due to mental

condition." State v. Huskey, 946 S.W.2d 892, 897 (Tenn. 1998) (quoting Wayne R. LaFave, *Criminal Practice and Procedure* § 19.4). RCW 10.77.060 meets this need for fundamental fairness by assuring that when a defendant puts forth an insanity defense, he or she will be evaluated by a qualified expert or professional person who shall be approved by the prosecuting attorney.

In any event, even if the court finds RCW 10.77.060 limits the number of evaluations allowed, the court in this case acknowledged that it did not designate one expert which the prosecuting attorney approved, therefore, it was proper to allow another evaluation. As allowed as originally written, RCW 10.77.060(1)(a) provided in pertinent part: "Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant." (Emphasis added). The statute was amended in 2004 to add: "Upon agreement of the parties, the court may designate one expert or professional person to conduct the examination and

report on the mental condition of the defendant." The amendment did not eliminate the requirement of approval by the prosecuting attorney; the parties must agree to one particular expert being designated by the court. This is apparent from the 2012 revision of the statute, which rewrote RCW 10.77.060(1)(a) to read: "Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant." (Emphasis added).

The trial court's order of October 19, 2010, did not appoint or designate any particular expert to evaluate Davis. (CP 59-63). By default, such designation was left to the secretary. The trial court's order was clearly not made pursuant to the 2004 amendment to RCW 10.77.060(1)(a); to comply with that provision, it would have been necessary for the court to designate one expert or professional person pursuant to the agreement of the parties.

The secretary initially designated Dr. Avery Nelson to evaluate Davis. (CP 49). The principal problem with this

designation is that Dr. Nelson was not approved by the prosecuting attorney. As the trial court found, the order of October 19, 2010 did not specify "that the State had approved any specific evaluator to conduct the examination." (CP 49). The correctness of this finding is apparent from the face of the order. (CP 59-63). As the trial court stated in its Conclusion of Law No. 2, "In any case where competency and/or sanity is at issue, the prosecuting attorney is entitled to have the defendant examined by an expert approved by that official. RCW 10.77.060." (CP 50). As explained above, this requirement is essential to the fairness of the judicial proceedings.

Contrary to Appellant's argument, the State's objection to Dr. Nelson was not based solely on the conclusion of his evaluation. While undoubtedly a competent therapeutic psychiatrist, he had little experience doing forensic evaluations. He acknowledged he had written "only several" such reports and only "three or so" in the past couple of years. (2RP 229-230). In contrast, the supplemental evaluator, Dr. William Grant, is "a psychiatrist specializing in forensic psychiatry." (3RP 3). Dr. Grant testified that Dr. Nelson does not normally do forensic reports. (3RP 9). Dr. Grant testified, "I think he was pressed into service on this one, but I don't really know how." (3RP 9). Dr. Grant testified he was surprised that Dr.

Nelson's original report did not include a section on the actual incident. (3RP 15). Dr. Grant further testified it is "an absolutely critical part of any forensic interview, and without it the interview is deficient." (3RP 15). Without the supplemental evaluation and the testimony of Dr. Grant, it would have been impossible for the people of the State of Washington to get a fair trial in this case.

In any event, Davis cites no authority supporting his claim that suppression would be an appropriate remedy for an improperly ordered evaluation. He cites only to State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009), a case addressing the suppression of evidence obtained by illegal search and seizure. As this court has explained:

> The exclusionary rule generally requires that evidence obtained from an illegal search and seizure be suppressed. Evidence obtained from an illegal search may also be suppressed as the fruit of the poisonous tree. Typically the testimony of a witness whose identity is discovered through a constitutional violation is not suppressed; the free will of the witness attenuates any taint that led to the discovery of the witness. . . . Evidence tainted by unlawful police action also is not subject to exclusion if it is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action.

State v. Hilton, 164 Wn. App. 81, 89-90, 261 P.3d 683 (2011) (citations omitted). As a court in another jurisdiction has stated,

"[W]e are not aware of any authority which has determined that a court order committing a defendant for evaluation of mental competency to stand trial constitutes a search or seizure within the meaning of the Fourth Amendment." Cappelli v. Demlow, 935 P.2d 57, 67 (Col. App. 1996). The same rationale applies to an evaluation of the defendant's sanity at time the crime was committed. The evaluation was simply part of the litigation process, made necessary by Davis's own decision to enter a plea of not guilty by reason of insanity. While Davis was required to appear at his attorney's office to be interviewed by Dr. Grant, there was no significant infringement on his liberty interest.

The Appellant argues that mental health examinations should be curtailed or limited to cases of good cause because they are highly intrusive and that courts should require a showing of cause. The facts in this particular case do not lend themselves to such an interpretation. The Appellant remained out of custody during the pretrial process and simply had to come to his attorney's office for approximately two hours to complete the evaluation. The Appellant always claimed to have no memory of the incident so questions about the actual crime were not discussed. Such an evaluation can hardly be considered to be highly intrusive and

harassing.

It is not even clear what Davis wants suppressed. As noted, Dr. Grant had access to extensive information apart from his two-hour interview with defendant. See 3RP 14-15. There is no showing that disregarding the interview would have changed Dr. Grant's opinion. There was certainly no basis for preventing Dr. Grant from testifying to his opinion based on other materials or pointing out the deficiencies in Dr. Nelson's original report. The supplemental evaluation was concerned with rebuttal evidence and the majority of the conclusions that report used data already available to the second expert. That expert already had access to the video of the Appellant's statement to police, his medical history, police reports of the incident, etc. The State was free to put on its rebuttal case regardless of whether the judge went ahead and ordered the supplemental evaluation.

In any case, the Appellant made his objection to the evaluation clear. The trial court heard the argument and given the content of the order, chose to allow the State to have another expert do an evaluation of the Appellant. The Appellant's rights remained intact for this evaluation. Under RCW 10.77.020, "[a]ny time the defendant is being examined by court appointed experts or

professional persons pursuant to the provisions of this chapter, the defendant shall be entitled to have his or her attorney present. The defendant may refuse to answer any question if he or she believes his or her answers may tend to incriminate him or her or form links leading to evidence of an incriminating nature." State v. Carneh, 153 Wn.2d 274, 278, 103 P.3d 743 (2004). Contrary to the Appellant's assertion, these rights are not waived when a defendant pleads not guilty by reason of insanity. Id. at 286.

Regardless, the entire issue was rendered moot by this court's decision not to grant discretionary interlocutory review of the trial court's order for the evaluation by Dr. Grant. The evaluation has been completed and there is no meaningful relief this court can provide.

4. THE COURT PROPERLY ALLOWED THE STATE TO INQUIRE ABOUT PRIOR CRIMINAL HISTORY AS THAT IS THE PRIMARY FACTOR USED TO DETERMINE DANGEROUSNESS AND IN ANY EVENT SUCH EVIDENCE WAS ADMISSIBLE TO REFUTE THE APPELLANT'S EXPERT'S THEORY THAT THE APPELLANT MUST HAVE BEEN INSANE BECAUSE HE WOULD NEVER HAVE NORMALLY COMMITTED SUCH AN OFFENSE.

During the course of Dr. Grant's testimony, he brought up the subject of the Appellant's criminal history in the context of his

dangerousness. The Appellant objected to mention of the criminal history but did not ask for any specific limiting instructions to the jury. The court ruled that Dr. Grant could mention the prior criminal history if he relied on it in his opinion.

The Court reviews whether a lower court interpreted an evidentiary rule de novo, however, once the rule is correctly interpreted, a trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. State v. DeVincentis, 150 Wn. 2d 11, 17, 74 P.2d 883 (1998). "A court abuses its discretion when its evidentiary ruling is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons." State v. Williams, 137 Wn. App. 736, 743-44, 154 P.3d 322 (2007).

In this instance the trial court allowed the testimony in question under ER 703. The Appellant does not dispute whether this rule allows testimony of prior criminal history if relied on by an expert. Instead, the Appellant argues that the rule was improperly applied or that the court didn't tailor the evidence allowed in to limit prejudice. This is not an objection to the evidentiary rule applied; therefore, the review is not de novo. The admission of such evidence is reviewed for abuse of discretion. These grounds given for admitting the evidence are clearly tenable and especially made

sense given the prior testimony of the Appellant's expert witness.

ER 703 allows testimony by experts about the facts and data used in their particular field on which they rely on to make inferences or conclusions. Dr. Grant testified that the "best single predictor of future behavior is past behavior. So you look at past behavior." (3RP at 46). The reason Dr. Grant opined that the Appellant remained dangerous was because of his criminal history. Within that history, Dr. Grant saw a nexus between, the Appellant being put under stress, drugs and alcohol, and violence. He opined that the Appellant remained dangerous because when you put him under stress he would continue to do drugs and alcohol and that would then lead to the potential for another serious offense. (3RP at 52).

Under ER 703, in order to rely upon facts that are inadmissible in evidence, the experts must establish that in that expert's profession they rely on such evidence to draw their conclusions. This reasonable reliance need not be established by independent evidence. "The proponent may establish the necessary foundation by the expert's own testimony." Karl B. Tegland, 5B Wash. Prac, Evidence Law and Practice §703.5 (5th ed.). "Whether the expert's reliance is reasonable is determined by

the judge as a preliminary matter pursuant to Rule 104. Id. Therefore, the offer of proof requested by the Appellant in this case was not appropriate under the circumstances. Through Dr. Grant, the foundation had been laid. Dr. Grant said past behavior was the number one indicator of future behavior and that was what he based his opinion on. Based on that testimony, the court properly allowed testimony about the Appellant's criminal history.

Other courts have acknowledged that prior criminal history is a factor in determining future dangerousness. Perhaps the most common testimony in this context occurs in Sexually Violent Predator cases. Courts have routinely allowed evaluators in those cases to consider prior criminal history. (See In Re Young, 122 Wn.2d 1, 857 P.2d 989 (1993)). The trial court properly allowed Dr. Grant to explain how the Appellant's prior criminal history had shaped his opinion.

ER 404(b) is not violated where a mental health professional refers to a defendant's prior criminal convictions as a basis for expert opinion on the defendant's mental status. State v. Medrano, 80 Wn. App. 108, 112-14, 906 P.2d 982 (1995). In Medrano, Dr. George Wang from Eastern State Hospital relied on the defendant's prior burglary convictions in opining he had the mental

capacity to commit the current burglary. Id. Here, Dr. Grant referred to the criminal history of Davis as a basis for an expert opinion on future dangerousness. This court in Medrano further noted, "Medrano's complaints about Dr. Wang's references to his prior criminal convictions are a bit troublesome because Medrano himself also referred to those convictions before Dr. Wang testified." Id. at 112. The same rationale applies here. Even if the court had not allowed the prior criminal history under ER 703, such evidence would have been admissible as rebuttal evidence to the Appellant's expert's opinion. The Appellant's expert, Dr. Nelson, based his theory of the case around the idea that the Appellant had no possible motive or benefit of the crime. (2RP at 166). He repeatedly stated that the Appellant was "reliable in the community." (2RP at 166-67). He described the act as "bizarre" on multiple occasions. (2RP at 175 & 219). Dr. Nelson said the last time any criminal activity occurred was as simple assault in 1987. (2RP at 223). Dr. Grant properly testified in rebuttal to Appellant's accurate criminal history. (3RP 51).

Overall, Dr. Nelson painted a picture of an individual with no major criminal convictions, with no antisocial traits, who was unlikely to ever "explode" and commit violent acts. (2RP at 223).

He used this background to explain his insanity diagnoses and his evaluation that the defendant did not present a substantial risk to community. (2RP at 226). In his report he stated:

> [i]rrespective of what transpired in the incident, is there medical evidence that something else unusual and extraordinary might have been involved that contributed to a severe loss of judgment? With these questions in focus the medical workup was pursued.

(2RP at 231). Dr. Nelson started from the perspective that the Appellant would not normally engage in the behavior which he engaged in the on the night in question.

The Appellant's extensive criminal history throws this hypothesis into doubt. The jury had the right to know that the Appellant had not always been an upstanding member of the community who never engaged in criminal history. In fact, Dr. Nelson's initial evaluation concurred with Dr. Grant, stating the Appellant suffered from cocaine dependence, alcohol abuse, and antisocial personality traits. (2RP at 275). The appellant's prior criminal history rebuts the Appellant and Dr. Nelson's theory of the case by placing a large hole at its premise; the idea that the Appellant's act was bizarre and totally out of character for him.

Davis also fails to distinguish between a trial where a defendant raises a defense on the merits and one where the only

defense is one of insanity:

> [A trial with an insanity defense] requires testimony that the crime charged was the product of the accused's mental illness. Ordinarily, this testimony will tend to make the jury believe that he did the act. Also, evidence of past anti-social behavior and present anti-social propensities, which tend to support a defense of insanity, is highly prejudicial with respect to other defenses. Moreover, evidence that the defendant has a dangerous mental illness invites the jury to resolve doubts concerning commission of the act by finding him not guilty by reason of insanity, instead of acquitting him, so as to assure his confinement in a mental hospital.

State v. Jeppesen, 55 Wn. App. 231, 236-37, 776 P.2d 1372 (1989) (quoting Holmes v. United States, 363 F.2d 281, 282 (D.C. Cir. 1966)). It is for that very reason that a trial court has discretion to bifurcate a trial into "guilt" and "insanity" phases where a defendant asserts both a defense on the merits and an insanity defense. Jeppesen, 55 Wn. App. at 237. As previously noted, here no defense on the merits was asserted and the only defense was one of insanity. (2RP 145-146, 3RP 130-135). Given the nature of the trial, it is not surprising that there were references to Davis's background beyond what would normally be seen in an ordinary trial on the merits. In any case where the issue of insanity is submitted to the jury, a trial court is required by statute to instruct the jury that if it acquits the defendant by reason of insanity, it must

also return a special verdict on future dangerousness. RCW 10.77.040.

5. THE COURT PROPERLY SENTENCED THE APPELLANT TO LIFE WITHOUT THE POSSIBILITY OF PAROLE AS THAT SENTENCE WAS THE STANDARD RANGE SENTENCE AND DID NOT REQUIRE ANY AGGRAVATING FACTORS TO BE FOUND. EVEN IF RESENTENCING IS NECESSARY, THE STATE WILL HAVE THE OPPORTUNITY TO PRESENT FURTHER EVIDENCE OF CRIMINAL HISTORY.

Under RCW 9.94A.570, a persistent offender is sentenced to life without the possibility of parole. RCW 9.94A.030(37) then defines a persistent offender as someone who has been convicted of three "most serious offenses." RCW 9.94A.555 defines the purpose and intent of the action:

(1) The people of the state of Washington find and declare that:

> (a) Community protection from persistent offenders is a priority for any civilized society.
> (b) Nearly fifty percent of the criminals convicted in Washington state have active prior criminal histories.
> (c) Punishments for criminal offenses should be proportionate to both the seriousness of the crime and the prior criminal history.
> (d) The public has the right and the responsibility to determine when to impose a life sentence.

(2) By sentencing three-time, most serious offenders to prison for life without the possibility of parole, the people intend to:

> (a) Improve public safety by placing the most dangerous criminals in prison.
> (b) Reduce the number of serious, repeat offenders by tougher sentencing.
> (c) Set proper and simplified sentencing practices that both the victims and persistent offenders can understand.
> (d) Restore public trust in our criminal justice system by directly involving the people in the process.

These statues provide clear and unambiguous language which indicates the intent of the legislature is to make the standard sentence for persistent offenders a life sentence without parole.

The location of this sentence confirms that this is a standard range sentence. The Sentencing Reform act places aggravating circumstances in RCW 9.94A.537. In order for a court to give a sentence above the standard range, it must ask a jury in most cases, or in some cases a judge, to find these factors to give an aggravating sentence. No mention of persistent offenders is in RCW 9.94A.537.

The Appellant mistakenly asks the court to apply Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), to persistent offender sentencing. This is not appropriate, the predicate offenses for being a persistent offender are the same as predicate

offenses which makes up an offender score, and they do not require a jury. The court in State v. Ball, points out this reasoning, stating that "Blakely does not apply to sentencing under the POAA. Blakely specifically was directed at exceptional sentences." 127 Wash.App. 956, 959, 113 P.3d 520 (2005). A persistent offender is not listed in RCW 9.94A.535, therefore POAA does not increase the normal statutory penalty for a defendant. Id. at 959-60.

The Appellant argues that the State essentially makes a finding of recidivism with the POAA, and therefore a jury should be empanelled to make such determinations. The United States Supreme Court has never made such a requirement. State v. Smith, 150 Wash.2d 135, 141, 75 P.3d 934 (2003). The Washington Supreme Court continues to follow Almendarez-Torres because the the U.S. Supreme Court expressly stated that prior convictions do not need to be proven by a jury and has not held otherwise. Id. at 143.

At the Appellant's sentencing hearing, the State provided certified copies of the Appellant's convictions for three most serious offense. The State also outlined the Appellant's criminal history in the Judgment and Sentence. (CP 6-7). Neither the Appellant nor his attorney had any objection to the criminal history proffered.

Appellant did more than simply fail to object to the criminal history. He affirmatively argued to the trial that life without possibility of release was the only possible sentence. Defense counsel stated, "[M]y research shows exactly what [the prosecutor] indicated to the court," and, "I don't have anything further to tell the court that is going to change the sentencing from mandatory to not-mandatory term or to an alternative placement." (10/25/11 RP, at 9). A party cannot set up error in the trial court and then complain about it on appeal. State v. Armstrong, 69 Wn. App. 430, 848 P.2d 1322 (1993). Undoubtedly the reason defense counsel did not argue for an alternative sentence was that she knew full well that the "three strikes" did not "wash out".

Even if the matter is remanded, it should be a resentencing hearing where the State will have an opportunity to present further evidence that the prior convictions do not "wash out".

Like the instant case, In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005) was a persistent offender case where the defendant argued one of his predicate strikes had "washed out". The State argued it should be allowed to show on resentencing that the defendant had an intervening non-strike offense that prevented the wash-out. However, the court held the

State would be limited at resentencing to the evidence presented at the first sentencing hearing.

The legislature subsequently enacted Laws of 2008, ch. 231, § 1, with one of the expressed purposes being to overrule Cadwallader. RCW 9.94A.530(2) now reads in pertinent part:

> On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

The Supreme Court recently found unconstitutional another portion of RCW 9.94A.530(2) which provided that a failure to object to a statement of criminal history amounted to an acknowledgment of it. State v. Hunley, __ Wn.2d __, 287 P.3d 584 (2012). However, the court also stated:

> We also affirm the Court of Appeals' remedy for resentencing, requiring the State to prove Hunley's prior convictions unless affirmatively acknowledged. The judgment and sentence should reflect Hunley's accurate offender score.

Hunley, 287 P.3d at 592. For its part, the Court of Appeals had stated that on remand, "the State may present evidence of Hunley's past convictions." State v. Hunley, 161 Wn. App. 919, 929, 253 P.3d 448 (2011). The court acknowledged that "this remedy is consistent with RCW 9.94A.530(2), which provides, 'On

remand for resentencing . . . the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.'" Hunley, 161 Wn. App. at 930.

In the instant case, it is abundantly clear from the record that Davis has criminal convictions besides his "three strikes" that prevent him from having ten crime-free years in the community and therefore preclude any wash-out. The face of his judgment and sentence shows a 1998 felony conviction for theft in the second degree. (CP 7). He also had misdemeanor or gross misdemeanor convictions. The prosecutor noted: "Mr. Davis had persistent driving offenses, a bunch of DWLS's. He's had a shoplift in 2001; a failure to cooperate; he's had misdemeanors." (2RP 141). Dr. Grant also testified:

> Well, his criminal history starts with being in juvenile custody for burglary when he was a teenager and goes through a substantial number of thefts, burglaries and robberies and assaults. He has spent 12 to 13 years of his life in prison, and some of the robberies were people got hurt. He said he had pistol whipped a drug dealer and had - - that had cheated him, and he said there was another situation where he had - - where a cabby had overcharged him and his friends, and so the way he put it to me was we charged the cabby, and he had some bruises. . . . Since 96 and probably before that, because he was in prison, he had only minor offenses.

(3RP 51). Even if the matter is remanded for resentencing, RCW 9.94A.530(2) will authorize presentation of the additional criminal history that will show the absence of wash-out (a possibility that was never even suggested in the trial court).

D. CONCLUSION:

The Appellant seeks to look at individual instances and find error in a vacuum, however, when looking at the entirety of the case, and the Appellant theory and arguments, such objections have no basis on the outcome of the trial. On the basis of the arguments set forth herein, it is respectfully requested that the decision of the Superior Court for Franklin County be affirmed.

Dated this 17th day of January, 2013.

Respectfully submitted,

SHAWN P. SANT
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By: 
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Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Deborah L. Ford, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that on the 17th day of January, 2013, a copy of the foregoing was delivered to Billy Wayne Davis, #622780, Appellant, Washington State Penitentiary, 1313 N 13th Ave. Walla Walla, WA 99362, by depositing in the mail of the United States of America a properly stamped and addressed envelope; and to Nancy P. Collins, opposing counsel, nancy@washapp.org by email per agreement of the parties pursuant to GR30(b)(4).

Signed and sworn to before me this 17th day of January, 2013.

Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2014

df