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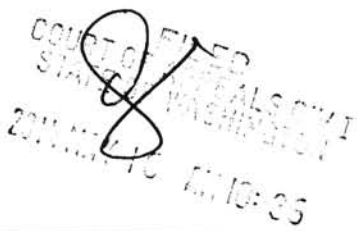

NO. 70520-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

DEREK JOHN CARTMELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Alan R. Hancock, Judge
Superior Court Cause No. 12-1-00250-0

BRIEF OF RESPONDENT

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B. Whether the trial court abused its discretion by admitting the testimony of DOC Officer Helen Desmond when it was necessary to establish the ownership of the defendant's cell phone found in the stolen truck.

C. Whether the issue of the search warrant's legal sufficiency is before the court when the trial court ruled that the items searched had been abandoned and the defendant does not challenge that determination.

D. Whether the trial court abused its discretion by admitting text messages retrieved from the defendant's cell phone when they were not offered for the truth of the matters asserted and any outgoing messages were party statements.

E. Whether the issue of improper burden shifting has been preserved for appeal when no objection was made during the argument.

F. Whether any errors were committed and were of sufficient magnitude to find cumulative error warranting reversal of the defendant's convictions.

II. STATEMENT OF THE CASE

The day after Halloween, November 1, 2013, Washington State Patrol Trooper David Martin observed a maroon pick-up truck speeding in the area of Oak Harbor, Washington in Island County at approximately

9:00 a.m. 2RP 59-60, 65.[1] After activating his emergency lights to initiate a traffic stop, Trooper Martin completed a U-turn and began pursuing the vehicle. 2RP 64-65. Trooper Martin was then lead on a high speed chase that ended only when the truck crashed into a house. 2RP 65-85. Once the truck hit the house, the driver fled from the vehicle. 2RP 88. The driver was able to get away without Trooper Martin getting a good look his face. 2RP 88. The Trooper was able to provide a physical description of the driver[2], but admitted that he would be unable to recognize the driver's face if he were to see him again. 2RP 89.

After having chased the driver to no avail, Trooper Martin returned to the truck, which was still in gear and running, turned it off,[3] and retrieved the vehicle's registration that was lying on the front seat. 2RP 94-97. He then observed several items in the vehicle including a backpack, a glass pipe, and small baggies. 2RP 97.

Eventually, a number of other law enforcement officers arrived at the scene, as well as the owner of the truck, Pastor Michael Hurley, who had reported the truck stolen the morning of the high speed chase. 4RP

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[1] The Verbatim Report of Proceedings will be cited in this brief as follows: RP – Defense Motion to Suppress; 1RP – Volume 1; 2RP – Volume 2; etc.

[2] "light brown hair that was shoulder length. He was wearing a black fleece-type hoodie with blue jeans and appeared to be possibly about my height, five-eight to five-ten, about 190, 200 pounds."

[3] The ignition lock had been busted off and the lock on the passenger door had been drilled out. 2RP 96.

374. Pastor Hurley then gave permission to search the truck, whereupon the defendant's cell phone and backpack were found. 1RP 155-161. After getting search warrants, the defendant's cell phone and backpack were searched, and the defendant's wallet was found inside the backpack. *Id.* In the wallet. Officers found the defendant's social security card, driver's license, DOC card, and a Quest card. *Id.* Upon further investigation and search of the truck, the defendant's fingerprint was discovered inside the truck. 3RP 291.

The defendant, Derek Cartmell, was arrested and charged with possession of a stolen vehicle, attempting to elude a pursuing police vehicle, possession of a controlled substance, and hit and run (property damage). CP 179-81. At trial the defendant was convicted on all counts. CP 108-11.

Prior to trial, the defendant sought to exclude his (1) Department of Corrections (DOC) identification card, (2) the testimony of DOC Correction's Officer Helen Desmond, and (3) text messages extracted from the defendant's cell phone. First, the defendant sought to exclude the DOC card and the testimony of Correction's Officer Desmond as unduly prejudicial and cumulative. CP 169-75, 176-78, 145-47; 1RP 1-39; RP 1-51. Second, the defendant sought to exclude the text messages as hearsay. *Id.* The defendant's motions to exclude were denied.

The trial court found that the DOC card and Correction's Officer Desmond's testimony was "highly relevant" evidence and that although there was "other evidence of Mr. Cartmell's identity ... it would not be appropriate for the Court to limit the state in presenting the relevant evidence that it has on the issue of identity." 1RP 41. The court also found that the relevance of the DOC card and any brief identifying testimony of Correction's Officer Desmond was substantial and clearly outweighed any danger of unfair prejudice from any inference that might be drawn from the evidence that Mr. Cartmell was the subject of DOC supervision because of criminal activity. 1RP 42. Before the DOC card was introduced, the trial court gave a limiting instruction to the jury requiring that it be used only for the purpose of identification. RP 222. The jury was also provided an instruction before deliberations began, again limiting the use of the DOC card and Correction's Officer Desmond's testimony to the purpose of identification. CP 112-140, Instruction #7.

The trial found that the text messages retrieved from the defendant's cell phone were not being offered to prove the truth of the matters asserted within them, and were therefore not hearsay. 1RP -31-33. The Court also found that any text messages sent from the defendant's cell phone were admissible as admissions of a party opponent and not hearsay 1RP 32.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE DEFENDANT'S PHOTO ID CARD FOUND AT THE CRIME SCENE BECAUSE ITS PROBATIVE VALUE OUTWEIGHED ANY UNFAIR PREJUDICE

1. Standard of Review

Trial court rulings relating to the admission of evidence are reviewed for abuse of discretion. *State v. Ruiz*, 176 Wn.App. 623, 634, 309 P.3d 700 (2013) (citing *State v. Thomas,* 150 Wn.2d 821, 856, 83 P.3d 970 (2004)). "An abuse of discretion occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Katare,* 175 Wn.2d 23, 35, 283 P.3d 546 (2012), *cert. denied,* —— U.S. ——, 133 S.Ct. 889, 184 L.Ed.2d 661 (2013).

2. *It Was Not Manifestly Unreasonable To Admit Identification Found In The Stolen Truck Because It Was A Significant Piece Of Evidence Placing The Defendant In The Stolen Truck*

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence." ER 401; *State v. Luvene*, 127 Wn.2d 690, 706, 903 P.2d 960 (1995). "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Briejer*, 172 Wn.App. 209, 225, 289 P.3d 698 (2012) (quoting *State v. Darden,* 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial. *State v. Johnson*, 90 Wn.App. 54, 62, 950 P.2d 981 (1998).

However, "[t]he ability of the danger of unfair prejudice to substantially outweigh the probative force of evidence is 'quite slim' where the evidence is undeniably probative of a central issue in the case." *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994) (citing *United States v. 0.161 Acres of Land,* 837 F.2d 1036, 1041 (11th Cir.1988)). Furthermore, a trial court's balancing of the evidence's probative value

against its prejudicial effect or potential to mislead is entitled to great deference. *State v. Luvene,* 127 Wn.2d 690, 706–07, 903 P.2d 960 (1995).

First, the evidence, a Department of Corrections photo identification card belonging to the defendant found in the stolen truck after it crashed into a house, is highly relevant and makes it more probable that the defendant was the driver of that truck. Because the identity of the driver of the stolen truck is *the* fact of consequence, the DOC card was not only relevant evidence, it was also significantly probative evidence.

Second, the probative value of the DOC card was significant and the danger of unfair prejudice was slim. As the trial court made clear in its pretrial ruling on the admissibility of the DOC card, "[t]his is a circumstantial evidence case. The issue is who done it, as it were. This is an identity case. The primary issue is the identity of the person who committed the crimes." RP 41. The court found that the DOC card was "substantial" and "highly relevant" evidence and that although there was "other evidence of Mr. Cartmell's identity … it would not be appropriate for the Court to limit the state in presenting the relevant evidence that it has on the issue of identity." *Id.* Furthermore, in its finding that the probative value outweighed any danger of unfair prejudice, the Court, on the defendant's pretrial motion to suppress, found that,

> "[the DOC card] is something that Mr. Cartmell abandoned in the vehicle when he fled, allegedly, and it is highly relevant on the issue of identity.
> The relevance of [the DOC card], which is substantial, clearly outweighs any danger of unfair prejudice from any inference that might be drawn from the evidence that Mr. Cartmell was the subject of DOC supervision because of criminal activity. First of all, the Court would certainly not permit any evidence of why this card was issued or what the crimes were that he was previously convicted of that required that he have an offender DOC card or something of that nature."

RP 42.

And, just as the court assured, there was no evidence presented as to why the card was issued or what crimes lead to the defendant needing the identification card.[4]

Furthermore, while the physical presence of the card in the stolen truck gave the card significant probative value, the actual content on the card was also significantly probative on the issue of identity. The only two pieces of identification found in the vehicle that had photos and physical descriptions of the defendant were the driver's license and the DOC card. Each of the two identification cards shows the defendant with longer hair but in different styles, and each card has the defendant listed at different weights (225 and 208 pounds). 4RP 456-57. However, the defendant's

[4] Although the fact that the defendant had been convicted of several crimes of dishonesty was revealed when the defendant testified, nothing was presented regarding the issuance of the DOC card.

testimony on redirect examination attempted to show that the person fleeing the stolen vehicle could not have been him because he did not fit the officer's physical description. 4RP 406. Thus, the DOC card provided the jury with physical characteristics of the defendant near the time the vehicle was stolen (long hair) that differed from those presented by the defendant in the courtroom (goatee and short hair). Accordingly, the jury could compare the officer's physical description of the person fleeing the stolen vehicle with the defendant's appearance at different times.

Finally, any inference from the word "DOC card," that the defendant was under DOC supervision, was not so prejudicial as to warrant exclusion of the relevant and probative piece of evidence. Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. *State v. Gould*, 58 Wn.App. 175, 180, 791 P.2d 569 (1990); *State v. Gatalski,*40 Wn.App. 601, 610, 699 P.2d 804, *review denied,* 104 Wn.2d 1019 (1985). Therefore, because the trial court's weighing of the DOC card's probative value against any danger of unfair prejudice must be given great deference, this court should find that no error was committed.

3. *The DOC card was not cumulative evidence as it was only one of two pieces of photo identification found in the stolen truck and the defendant claimed misidentification*

The possibility that evidence may be cumulative may be a basis for exclusion only if the risk of unfair prejudice substantially outweighs the probative value of the evidence. ER 403. Evidence is not cumulative if it presents different views or perspectives on the evidence. See *Dunn,* 125 Wn.App. at 588–89, 105 P.3d 1022. It has long been recognized that the admission of cumulative evidence is not reversible error. *State v. Todd,* 78 Wn.2d 362, 372, 474 P.2d 542 (1970); *State v. Dunn,* 125 Wn.App. 582, 589, 105 P.3d 1022 (2005).

Presentation of two identification cards that show the defendant's name and photograph cannot be considered cumulative. The central issue at trial was the identification of the person driving the stolen vehicle. The DOC card displayed the defendant's name and photograph, and was one of four identifying cards found in the stolen truck. Of those four cards, only three displayed the defendant's name, and only two displayed a photograph of the defendant. As discussed above, the probative value of the DOC card was substantial and the danger of unfair prejudice, was at the most, slight.

Furthermore, evidence is not cumulative if it presents different views or perspectives on the evidence. See, *Dunn*, 125 Wn.App. at 588–89, 105 P.3d 1022. Again, identification was the central issue in this case and there was testimony about the physical description of the person driving the stolen truck from the officer that pursued the truck. There was also testimony from the defendant suggesting that he did not look like the officer's physical description of the person fleeing the stolen vehicle. 4RP 406. Having two pieces of evidence with pictures of the defendant taken at different times only months prior to the truck being stolen, provided the jury with the ability to see the defendant with significantly different physical characteristics. Thus, the presentation of two different pieces of evidence with pictures of the defendant allowed the jury assess the present physical appearance of the defendant in the courtroom against his physical appearance in two different photos on two different ID cards, and thereby form an opinion as to whether the officer's physical description of the driver was similar to or matched the defendant.

Accordingly, the DOC card presented the jury with a different view or perspective on other evidence, mainly the defendant's driver's license photo, the physical description of the driver by the officer, and the defendant's physical appearance in the courtroom. Therefore, the card was

not cumulative evidence and it was not a manifest abuse of discretion to admit it into evidence.

a. Defense counsel was provided the opportunity to prevent any potential for unfair prejudice but declined to do so.

Any potential unfair prejudice resulting from the word "offender" on the DOC card could have been avoided outright had counsel taken the opportunity to do so. As a general rule, appellate courts will not consider issues raised for the first time on appeal. *State v. McFarland,* 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995); *see also* RAP 2.5(a).

Upon denying the defendant's motion to suppress the DOC card in its entirety, the court noted:

> "The Court: I remain open to additional argument that might be presented ... about how this [the DOC card] would come into evidence. I'd like to take some further argument about that and make my final decisions about it at that point."

RP at 43.

When the trial court took additional argument on how the DOC card would be presented at trial, it made clear that it was open to ways in which potential prejudice could be addressed. In returning to the issue, the Court stated:

> "The Court: Well, I did rule that the testimony [of the DOC officer] would generally be relevant and admissible and that the document [a scanned image of the DOC card and the other cards], assuming it's properly authenticated, can come in. **I did leave open other issues. For example, a possible redaction of the word "offender" from the card that Mr. Cartmell has with the Department of Corrections. So let's take any further argument about possible redactions or other tinkering**, if you will, with the exhibit that might reduce any possible prejudice."

1RP 8.

Defense counsel, however, made no argument after the Court's suggestion and simply gave up on the issue, taking an all or nothing approach to the DOC card.

> "Defense Counsel: Your Honor, I'm not sure, when it says Department of Corrections over the top of it and clearly not an employee badge, that there's anything that one can do to the document to limit its prejudicial content, and so I'm not sure there's much that can be done in regards to that."

1RP 8.

Even after having made specific suggestions to counsel about what could be done to the DOC card, i.e., redaction, to limit any possible prejudice, the court affirmed that defense counsel did not want to make any adjustments to the document with the identification card.

> "The Court: Do I understand, then, that you're not asking for any redaction from the document?

Defense Counsel: No, Your Honor, we're not.

The Court: Okay. That's noted."

1RP 9.

However, now, on appeal, the defense argues that the word "offender" on the DOC card, which the trial court specifically entertained a possible redaction of, caused unfair prejudice warranting reversal and a new trial. So, even though any potential for prejudice from the language on the DOC card did not outweigh its probative value in linking the defendant to the stolen vehicle, this issue was addressed by the trial court and it gave counsel the opportunity to prevent the possible prejudice now complained of on appeal. The defendant should not now benefit from his decision to forego the trial court's suggestion that redactions be made to the DOC card.

b. Any potential for unfair prejudice resulting from the DOC card was diminished when the defendant's criminal history was appropriately revealed on his cross-examination

Even if admission of the DOC card was error, the error was harmless. An error is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Bourgeois,* 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting *State v. Tharp,* 96 Wn.2d 591, 599, 637 P.2d

961 (1981)). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *Bourgeois*, 133 Wn.2d at 403.

Even if the defendant had been unfairly prejudiced by the admission of the DOC card in its entirety, any possible unfair prejudice stemming from the card was quickly diminished when the defendant testified. On cross examination, evidence of the defendant's prior convictions for crimes of dishonesty came to light.

"Prosecutor: Mr. Cartmell, you have been in court for various instances before, correct?

Defendant: Yes.

Prosecutor: You've been convicted in 2008 of possession of stolen property in the second degree?

Defendant: Yes.

Prosecutor: And convicted also in 2008 for a different charge of possession of stolen property in the second degree?

Defendant: Yes, I have.

Prosecutor: And you were convicted in 2010 for making a false statement to a public servant?

Defendant: Yes."

4RP 405.

Any concern about the DOC card and possible unfair prejudice from its admission was immediately dashed once the jury was made aware of the defendant's actual convictions. The jury no longer had any reason to speculate about why the defendant would have a DOC card, as it would be reasonable to assume that the jury simply connected the DOC card with those offenses. Thus, even assuming the word "offender" on the DOC card carried some prejudice, it was, in effect, cured by the properly admitted evidence of his prior convictions.

Thus, even assuming it was improper to admit the DOC card in its entirety and that it was unfairly prejudicial, the admission of the card could not have materially affected the outcome of the trial, and the overall, overwhelming evidence made any error in admitting it harmless.

c. The jury is presumed to have used the DOC card for the sole purpose of identifying the defendant as the driver of the stolen vehicle

Any unfair prejudice was cured by instructions to the jury. Jurors are presumed to follow the court's limiting instructions. *State v. Hecht* --- P.3d ----, 2014 WL 627852, Wn.App. Div. 1 (2014) (citing *State v. Lough,* 125 Wn.2d 847, 864, 889 P.2d 487 (1995)). Before the DOC card was introduced, the trial court gave a limiting instruction to the jury:

> "The Court: Ladies and gentlemen of the jury, I'm allowing evidence about to be discussed and presented to you that is the subject of this instruction, and in connection with this evidence that's about to be presented to you, you may consider this evidence only for the purpose of identification."

3RP 222.

The following jury instruction was also given to the jury:

> "Instruction #7: Certain evidence has been admitted in this case for only a limited purpose. The testimony of Ms. Helen Desmond, **the Department of Corrections Identification** and Exhibit 40, the cellular telephone records may be considered only for the purpose of identification. You may not consider this testimony or evidence for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation."

CP 112-140. (Emphasis added.)

Therefore, because the jury is presumed to have followed the court's instructions to use the DOC card as evidence for identifying the driver of the stolen vehicle, any unfair prejudice resulting from the card's admission was cured.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING DOC OFFICER DESMOND'S TESTIMONY BECAUSE IT DIRECTLY LINKED THE DEFENDANT TO HIS CELL PHONE

Standard of Review

Trial court rulings relating to the admission of evidence are reviewed for abuse of discretion. *State v. Ruiz,* 176 Wn.App. 623, 634,

309 P.3d 700 (2013) (citing *State v. Thomas,* 150 Wn.2d 821, 856, 83 P.3d 970 (2004)). "An abuse of discretion occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Katare,* 175 Wn.2d 23, 35, 283 P.3d 546 (2012), *cert. denied,* —— U.S. ——, 133 S.Ct. 889, 184 L.Ed.2d 661 (2013).

1. The testimony of Desmond was not cumulative because it covered new evidence completely unrelated to the DOC identification card.

The possibility that evidence may be cumulative may be a basis for exclusion only if the risk of unfair prejudice substantially outweighs the probative value of the evidence. ER 403. Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial. *State v. Johnson,* 90 Wn.App. 54, 62, 950 P.2d 981 (1998). The ability of the danger of unfair prejudice to substantially outweigh the probative force of evidence is quite slim where the evidence is undeniably probative of a central issue in the case. *Sisley v. Seattle School Dist. No. 1*, 171 Wn.App. 227, 233, 286 P.3d 974 (2012) (citing *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994)).

The trial court has wide discretion in balancing the probative value of evidence against its potentially prejudicial impact. *State v. Rivers*, 129 Wn.2d 697, 710, 921 P.2d 495 (1996). Generally, an appellate court will

defer to the assessment of the trial judge, who is best suited to determine the prejudicial effect of evidence. *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009).

Although Officer Desmond was employed as a DOC officer, her testimony was unrelated to the defendant's DOC identification card. While the DOC card linked the defendant to the stolen vehicle, Ms. Desmond's testimony linked the defendant to a cell phone found inside the stolen vehicle. Furthermore, there was no stipulation that the phone belonged to the defendant and the defendant had not yet testified when Desmond testified. Although the defendant later testified that the phone belonged to him, at the time Desmond testified, there was no direct evidence establishing the ownership of the cell phone. While the defendant offered to stipulate "that the phone was his at one time," during motions in limine, outside the presence of the jury, the offer to stipulate was in relation to a completely different issue—the admission of the text messages. 1RP at 30.

2. The significant probative value of the testimony identifying the defendant as the owner of the phone found in the stolen vehicle outweighed any unfairly prejudicial effect

The probative value of the testimony of Desmond was not outweighed by unfair prejudice because it did not include any evidence

likely to provoke in the jury an emotional response rather than a rational decision. DOC Officer Desmond testified that the she was a "community corrections officer," and that she receives "contact information from particular people," and the defendant was one of those people. 3RP 318-22. Desmond further testified that she had received from the defendant emergency contact information for the defendant's father and the specific phone numbers that were provided. 3RP 320-21.

This testimony allowed the jury to determine that the defendant was the owner of the cell phone found in the stolen vehicle. While it would not be difficult to connect the dots and assume that the defendant was under DOC supervision, there was absolutely no information elicited from Officer Desmond as to what the defendant had done to require DOC supervision or as to why she had the defendants contact and emergency contact information. Furthermore, it is unclear how the defendant was labeled as a "felony offender," as there is no mention of "felony" in the record.

The evidence directly linking the defendant to the cell phone that was found in the stolen vehicle was substantially probative and aided the jury in determining that the defendant was the person driving the stolen vehicle during the high speed chase.

In discussing the probative value of the DOC identification card the DOC Officer Desmond's testimony, the trial court found that the value of the evidence outweighed any danger of unfair prejudice.

> "The Court: First of all, the item in question and any identifying testimony that Ms. Desmond from the Department of Corrections would give about this is highly relevant."

RP 41. The court continued:

> "The Court: The relevance of this, which is substantial, clearly outweighs any danger of unfair prejudice from any inference that might be drawn from the evidence that Mr. Cartmell was the subject of DOC supervision because of criminal activity. First of all, the Court would certainly not permit any evidence of why this card was issued or what the crimes were that he was previously convicted of that required that he have an offender DOC card or something of that nature. There will be no evidence whatsoever of that. I'm sure the State would not seek to introduce any such evidence. So it's just a matter of the card itself and any brief identifying testimony from Ms. Desmond.
>
> I guess the question arises to one extent or another as to whether any testimony would even be necessary, but perhaps there would be some identifying testimony, if necessary, from Ms. Desmond to the effect that this Derek Cartmell is in fact the Derek Cartmell who's identified on this card or something of that nature, although that may be obvious from the card itself and the picture on the card and the like."

RP 41-42.

Deference must be given to the trial judge's determination because he was the best suited to determine the prejudicial effect of the evidence.

Therefore, admission of Officer Desmond's testimony was not an abuse of discretion.

3. *The Court's Limiting Instruction Cured Any Unfair Prejudice Resulting From The Testimony Of Officer Desmond About Her Occupation*

The jury was given two separate instructions limiting its use of the testimony of Officer Desmond. Again, jurors are presumed to follow the court's limiting instructions. *State v. Hecht,*--- P.3d ----, 2014 WL 627852, Wn.App. Div. 1 (2014) (citing *State v. Lough,* 125 Wn.2d 847, 864, 889 P.2d 487 (1995)). Two different instructions were given to the jury addressing Desmond's testimony.

First, before Officer Desmond took the witness stand, the court gave the following limiting instruction:

> "The Court: Ladies and gentlemen of the jury, I'm allowing the witness to testify in this case, but the evidence that is given through the witness may be considered only for the purpose of identification."

3RP 317.

Then, at the close of the case, the jury was again provided with instructions regarding certain evidence, including Desmond's testimony:

> "Instruction #7: Certain evidence has been admitted in this case for only a limited purpose. **The testimony of Ms. Helen Desmond**, the Department of Corrections Identification and Exhibit 40, the cellular telephone records may be considered only for the purpose of identification. You may not consider this testimony or evidence for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation."

CP 112-140 (emphasis added).

Therefore, because the jury is presumed to have followed the Court's instructions to use Desmond's testimony only as evidence for identifying who was driving the stolen vehicle, any unfair prejudice resulting from the testimony regarding her occupation was cured.

C. THE ISSUE OF THE LEGAL SUFFICIENCY OF THE SEARCH WARRANTS IS NOT BEFORE THE COURT

Under article I, section 7, "[a] warrantless search is per se unreasonable and its fruits will be suppressed unless it falls within one of the carefully drawn and jealously guarded exceptions to the warrant requirement." *State v. Ortega,* 177 Wn.2d 116, 122, 297 P.3d 57 (2013). One of those exceptions is for voluntarily abandoned property, which officers may lawfully search without a warrant. *State v. Evans,* 159 Wn.2d 402, 407-08, 150 P.3d 105 (2007). Where property is voluntarily abandoned, law enforcement officers may retrieve and search it without implicating an individual's rights under the Fourth Amendment or under

article I, section 7 of our state constitution. *State v. Reynolds,* 144 Wn.2d 282, 287, 27 P.3d 200 (2001).

1. The Court did not rely on the search warrants in admitting the evidence gathered from the cell phone so the issue of whether the warrants were legally sufficient is not before this court

In its ruling on the defendant's motion to suppress the contents of the backpack and the cell phone, the Court stated:

> "The Court: In my judgment, after a thorough review of the file records and the case authorities, it is not necessary for the Court to reach the issue of whether these were proper affidavits for warrants and whether they were properly issued by the Court because it is evident to the Court from the record before the Court that Mr. Cartmell abandoned these items. That means that there was no search in connection with the backpack and the cell phone because they were abandoned."

RP 34.

The court then went on to its legal analysis regarding abandonment. The defendant is not challenging the court's determination that the items were abandoned. He is challenging the sufficiency of the search warrants. See Appellant's Brief; Appellant's Statement of Additional Grounds. The Court found that because the driver of the stolen vehicle fled from the scene, leaving everything behind in the crashed

pickup truck, the items, including the defendant's cell phone, had been abandoned.

Therefore, the Court found, no search warrants were required for any of the items, including the cell phone. Because the trial court did not rely on the search warrants and because the defendant has not raised the issue of abandonment on appeal, the issues of whether the warrants were legally sufficient or whether the items were actually abandoned, this court need not address them on appeal.

D. THE COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE TEXT MESSAGES BECAUSE THEY WERE NOT HEARSAY

Otherwise admissible evidence may be properly excluded as hearsay, which, absent the applicability of certain exceptions, is inadmissible. ER 802. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence *to prove the truth of the matter asserted.*" ER 801(c) (emphasis added). "Whether the statement is hearsay depends upon the purpose for which it is offered. If it is offered to prove the truth of the matter asserted, the evidence is hearsay. If it is offered for some other purpose, it is not." *Patterson v. Kennewick Public Hosp. Dist. No. 1*, 57 Wn.App. 739, 744, 790 P.2d 195 (1990) (quoting 5B K. Tegland, Wash. Prac., *Evidence* §

333, at 19 (1989)). Party statements offered into evidence against that party are not hearsay and are admissible under ER 801(d)(2)(i) as an admission by a party-opponent.

1. The content of the text messages was not offered to prove the truth of the matters asserted

The content of the text messages was offered for the purpose of identification, but more specifically to show that the defendant was still in possession of his cell phone up to and at the time of the high speed chase. The specific content, while rather foul in some instances, was important in demonstrating the conversations were so intimate in nature that no one other than the defendant could have been the person sending and receiving those messages.

The trial court admitted information retrieved from the cell phone found in the stolen truck after the high speed chase. 1RP 31-33. This information included the dates and times of text messages sent and received, dates and times of phone calls made and received, as well as the content of several text messages. 1RP 31, 3RP 324-60.

As the prosecutor made clear during motions *in limine*, the purpose for using the content of the messages was to show the context of the

conversations and that the defendant was the person using his phone the night before and right up until the time of the high speed chase.

> "Prosecutor: I think it's overplaying defense's hand a little bit to say the statements in the text messages are clearly hearsay. The mere fact that they're statements made outside of court doesn't necessarily make them hearsay. They're not going to be hearsay unless they're presented as proof of the matter asserted within those comments or within those statements.
>
> And in this case we're not asking the Court to admit the statements or the text messages to prove the content of the messages. We're using them – asking the Court to admit those statements or those text messages for proof that they were sent, that the statements were made. The point of the exercise here is that the phone -- the fact that the phone was being used in and about the evening of October 31st and the early morning of November 1st, shows that whoever was using the phone was using it at midnight, 1:00 in the morning, 2:00 in the morning, was using it to communicate with that phone's contact list, friends and associates of Mr. Cartmell, having conversations of a very personal nature with Mr. Cartmell's girlfriend about things that were going on that evening."

RP 16-17.

The trial ruled that the text message evidence was relevant and were admissible for the purpose of context and for the purpose of identifying the driver of the stolen truck.

> "The Court: So I am going to admit this document if it's properly authenticated. I invite the defendant to offer a limiting instruction to make sure the jury considers it only for its proper purposes and so somehow or another the

> limiting instruction could point out to the jury that messages to the owner of the phone or the user of this particular phone is admitted for the limited purposes of identification and to show the context of the statements made by the owner of the phone or something to that effect."

RP 33; See also RP 31-32.

Therefore, because the text messages were offered for another purpose, and not for the truth of the matter asserted in the text messages, the messages were not hearsay and it was not error to admit them. Furthermore, the intimate and private nature of the messages was necessary to show that the defendant was in possession of his cell phone the night of the theft and at the time the vehicle was spotted by the Trooper.

2. *Any Text Messages Sent By The Defendant Were Not Hearsay*

Although all of the text messages are not hearsay because they were not offered to prove the truth of the matters asserted within them, the texts that were sent by the defendant were also not hearsay because they were party statements. Party statements offered into evidence against that party are not hearsay and are admissible under ER 801(d)(2)(i) as an admission by a party-opponent.

The trial ruled that any outgoing texts sent by the defendant were admissible as party-statements.

> "The Court: Derek Cartmell is the defendant so the state can reasonably argue that this was Mr. Cartmell's phone. He just offered to stipulate that it was his phone. It is certainly relevant to the State's case that the phone was being used by the defendant within the time period leading up to the incident which gave rise to these charges and for a period of time theretofore, as it were. Any statements made by the person who owned this phone, which the State's theory is that it was the defendant, Derek Cartmell, would be admissible as substantive evidence, not hearsay. Hearsay does not include statements by a party opponent. So those statements are all admissible by the possessor of the phone, as outlined in this document."

RP 31-32.

The text messages that were sent from the defendant's phone were properly admitted as admissions of party opponent.

E. THE ISSUE OF PROSECUTORIAL MISCONDUCT IS NOT BEFORE THE COURT BECAUSE NO OBJECTION WAS MADE DURING TRIAL

Absent a proper objection to the comments at trial, a request for a curative instruction, or a motion for a mistrial, the issue of misconduct cannot be raised on appeal unless the misconduct was so flagrant or ill-intentioned that the prejudice could not have been obviated by a curative instruction. *State v. Echevarria*, 71 Wn.App. 595, 597, 860 P.2d 420, 422

(1993) (citing *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990); *State v. Belgarde*, 110 Wn.2d ,504, 507, 755 P.2d 174 (1988)). "We focus less on whether the prosecutor's misconduct was flagrant and ill-intentioned and more on whether the resulting prejudice could have been cured." *State v. Emery*, 174 Wn.2d 741,762,278 P.3d 653 (2012). An objection is unnecessary in cases of incurable prejudice only because "there is, in effect, a mistrial and a new trial is the only and the mandatory remedy." *Id.* (citing *State v. Case*, 49 Wn.2d 66, 74, 298 P.2d 500 (1956).

The court's standards of review are based on a defendant's duty to object to a prosecutor's allegedly improper argument. *Emery* at 761-62, 278 P.3d 653, 664-65 (2012). (Citing, 13 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice And Procedure § 4505, at 295 (3d ed. 2004) ("If either counsel indulges in any improper remarks during closing argument, the other must interpose an objection at the time they are made. This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.")).

"Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." *Emery* at 762, 278 P.3d 653, 665 (2012); *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006) (were a party not required to object, a party " 'could simply lie back, allowing the trial court

to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.' " (quoting *State v. Sullivan*, 69 Wn.App. 167, 173, 847 P.2d 953 (1993)); *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (" '[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.' ")(alteration in original) (quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

1. The defendant did not preserve the issue of improper burden shifting for appeal

If a defendant fails to object to alleged improper burden shifting at trial, he fails to preserve the issue unless he establishes that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *State v. Emery*, 174 Wn.2d 741, 760–61, 278 P.3d 653 (2012).

The defendant did not make a single objection during the State's closing argument. 4RP 443-68. More specifically, the defendant did not object during the State's closing argument when the prosecutor allegedly shifted the burden to the defendant. 4RP 466-67. Thus, any misconduct that was not objected to must have been so flagrant and ill-intentioned that an instruction could not have cured the prejudice.

In *Emery,* our Supreme Court relied on the following four factors to determine that the defendant could not have shown that the State's burden-shifting statements had a substantial likelihood of affecting the jury's verdict: the prosecutor clearly and repeatedly stated the correct burden of proof; the statements were limited to nine sentences at the end of an eight-day trial and did not permeate the trial; the State's case was "very strong"; and the trial court's jury instructions stated the proper burden of proof. *Emery,* 174 Wn.2d at 764 n. 14.

Here, even if the prosecutor's comments potentially shifted the burden of proof, the defendant does not show a substantial likelihood that the comments affected the jury's verdict. The prosecutor's statements were similarly limited and did not permeate the trial, the State's case was very strong, and the trial court's instruction made it very clear that the State bore the burden of proof:

> "Instruction # 3: ...The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements...A defendant is presumed innocent..."

CP 112-140.

Any prejudice resulting from improper burden shifting, assuming that it happened, was cured by this instruction to the jury making clear that the defendant had no burden of proof.

2. Even had the defendant preserved this issue, he could not have shown error because the Prosecutor did not shift the burden

Generally, a prosecutor cannot comment on the lack of defense evidence because the defense has no duty to present evidence. *State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011). But the mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. *State v. Jackson*, 150 Wn.App. 877, 885–86, 209 P.3d 553, review denied, 167 Wn.2d 1007, 220 P.3d 210 (2009). In fact, a prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case. *State v. Killingsworth*, 166 Wn.App. 283, 291–92, 269 P.3d 1064, review denied, 174 Wash.2d 1007, 278 P.3d 1112 (2012).

It is not misconduct for the prosecutor to address the defendant's failure to call an alibi witness. Such argument is permitted under the missing witness doctrine because a party who would benefit from a witness's testimony would not knowingly fail to call the witness unless there was reasonable probability that the testimony would be unfavorable.

See *State v. Barrow*, 60 Wn.App. 869, 809 P.2d 209 (1991) (prosecutor could comment on defendant's failure to call his brother who would allegedly corroborate his explanation of events); See also *State v. Johnson*, 113 Wn.App. 482, 493, 54 P.3d 155 (2002) (holding prosecutor did not commit misconduct by arguing that defendant's alibi witness was incredible).

Although a defendant has no burden to produce evidence, a prosecutor may comment on the absence of a defense witness when the missing witness doctrine applies. *State v. Blair,* 117 Wn.2d 479, 491, 816 P.2d 718 (1991). The doctrine applies when a party has a natural interest in producing a witness, the witness is peculiarly available to that party, and the party inexplicably fails to call the witness to testify. A witness is peculiarly available to a party when the witness and the party have a community of interest, or the party has so superior an opportunity for knowledge of the witness that it is reasonably probable the party would have called the witness to testify unless the witness's testimony would have been damaging. *State v. Davis*, 73 Wn.2d 271, 277, 438 P.2d 185 (1968). If the testimony would have been important and necessary, the doctrine allows the jury to infer that the witness's testimony would have been unfavorable. Id. at 276, 438 P.2d 185 (quoting *Wright v. Safeway Stores, Inc.*, 7 Wn.2d 341, 346, 109 P.2d 542 (1941)). A prosecutor may

request a missing witness instruction, but such an instruction is not a prerequisite for comment on the failure to produce a witness. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

Here, the defendant claimed he had an alibi for the night the truck was stolen and for the time of the high speed chase. 4RP 391-92. For the night the truck was stolen, he claimed to have been trick-or-treating. Then, he claimed to have been dropping his kids off at school the next morning at the time of the high speed chase.

First, on direct examination, he claimed to be trick-or-treating on Halloween, the night the truck was stolen.

"Defense Counsel: Okay. So what were you doing on Halloween night?

Defendant: Took my kids trick-or-treating."

More specifically, he claimed to have been trick-or-treating with his kids and their mother, Angie.

"Defense Counsel: Okay. And who went trick-or-treating that night?

> Defendant: My two boys, my kids' mother, and friends of the family, and then her mom took us -- drove us around different locations around Oak Harbor."

4RP 391-92.

Furthermore, the defendant claimed that after going out with the kids and Angie that he had stayed in one place most of the night.

"Defense Counsel: And where did you go after -- were you taken back to the apartment?

Defendant: I went back there and then I left my girlfriend's house, and I was there most of the night."

4RP 392.

Second, the defendant claimed that he had picked up his kids from Angie, their mother, and was busy dropping them off at school when the high speed chase occurred the next day, on November 1 at approximately 9 a.m. 4RP 393.

"Defense Counsel: Okay. So the morning of November 1st -- and what time are the kids supposed to be at school?

Defendant: 8:45 and then 8:50. So I drop one off, and then I've got to go cross town and there's traffic always so I got to get over cross town to get there before nine.

Defense Counsel: Okay. Were you on time November 1st?

Defendant: No, I was little late. I got -- when I'm late I got to walk them in and drop them off to the teacher and I just waved. Don't got to sign them in or anything.

Defense Counsel: So when you got -- do you remember about what time you arrived at their mother's apartment?

Defendant: About 9:15, 9:30."

4RP 393.

While addressing the defendant's testimony and alibi in closing argument, the prosecutor stated:

> "Prosecutor: I was dropping my son off who didn't go to school that day is not reasonable. I was with Angie doesn't help us any, especially when he could have called Angie to help him out.
>
> I was with Tina [the defendant's girlfriend] all night. That's great. Where is Tina? I know who stole my backpack, but I'm not going to tell you. Not very helpful.
>
> The other thing you want to bear in mind – call it three things. The second thing you want to bear in mind is if it's going to generate a reasonable doubt, this alternative theory or this alibi that Mr. Cartmell wants to spin out for you, it needs to account for all the evidence, including the fingerprint, including all the text messages that didn't stop all night. If it doesn't do that, it can't create a reasonable doubt. It might create a science fiction doubt. Maybe it was his clone. Too bad there is no such thing."

4RP 466.

This did not result in burden shifting and it was not improper. The prosecutor was entitled to point out a lack of evidentiary support for the defendant's alibi. The possible witnesses, Angie, the mother, and Tina, the girlfriend, were available to the defendant and it was reasonably probable the defendant would have called them to corroborate his alibi unless their testimony would have been damaging. In fact, the State demonstrated that

their testimony would have been damaging by calling a rebuttal witness after the defendant testified and asserted an alibi.

The State called Linda Sharp, an office assistant at one of the defendant's children's school. 4RP 411. She testified that her duties at the school included, "Mostly attending to student records. I do all the attendance and keep folders and anything that has to do with students' records," including student attendance records which also keep track of late arrivals. 4RP 411-13.

The prosecutor and the witness then had the following exchange:

> "Prosecutor: And do the records show which class [the defendant's son] is in enrolled in?
>
> Witness: Yes.
>
> Prosecutor: What class is [the son] enrolled in?
>
> Witness: [The teacher]'s first grade classroom.
>
> Prosecutor: Were you able to -- did you take an opportunity to look and see if the records show if he was actually physically in class November 1, 2012?
>
> Witness: Yes.
>
> Prosecutor: Was he in class November 1, 2012?
>
> Witness: He was not.
>
> Prosecutor: What does the computer have him marked as?
>
> Witness: It has him marked as excused PC, which is parent called. Mom had called in and said he was sick.

Prosecutor: Who's mom?

Witness: Angela Martin.

Prosecutor: And does the record show that he showed up at school at all that day?

Witness: No. I mean, they show he did not show up at all that day.

Prosecutor: So the record affirmatively says he did not show up that day?

Witness: That's correct."

4RP 415-16.

A prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case, and it is not misconduct for the prosecutor to address the defendant's failure to call an alibi witness. Therefore, the prosecutor did not improperly shift the burden of proof to the defendant and no misconduct occurred.

3. Any error in the State's closing argument was harmless

An error is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Even assuming the prosecutor improperly shifted the burden of proof to the defendant, it was harmless because the court's instruction made clear that the State had the burden of proof and the defendant had no such burden. Furthermore, there was overwhelming evidence of the defendant's guilt including a blunt rebuttal of his alibi, personal possessions left in the stolen vehicle, text messages and phone calls to and from the defendant up until the high speed chase, and a fingerprint inside the stolen vehicle. The alleged burden shifting simply could not have materially affected the outcome of the trial and such an error in this case does not warrant reversal of the defendant's convictions.

F. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY

Under the cumulative error doctrine, a defendant may be entitled to a new trial when the trial court's multiple errors combined to deny the defendant a fair trial *In re Pers. Restraint of Lord,* 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The defendant bears the burden of proving an accumulation of error of sufficient magnitude to warrant a new trial. *Lord*, 123 Wn.2d at 332.

Assuming that the trial court erred in admitting the DOC evidence and that the prosecutor improperly shifted the burden of proof,

those errors would not rise to a magnitude requiring reversal and a new trial. Although the Sixth Amendment and Const. art. 1, § 22 grant defendants the right to trial by an impartial jury, the right does not include the right to an error-free trial. *State v. Latham,* 100 Wn.2d 59, 66, 667 P.2d 56 (1983). The defendant in this case was afforded such a trial, and he was convicted because of the overwhelming evidence against him. Those convictions should not now be overturned.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that the defendant's convictions be affirmed.

Respectfully submitted this 15th day of April, 2014.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: _____
ADAM R. LONG
DEPUTY PROSECUTING ATTORNEY
WSBA # 45933

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	
Plaintiff/Respondent,	NO. 70520-2-I
vs.	DECLARATION OF SERVICE
DEREK JOHN CARTMELL,	
Defendant/Appellant.	

I, Jennifer Wallace, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 15th day of May, 2014, a copy of the Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

Jan Transen
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101

Signed in Coupeville, Washington, this 15th day of May, 2014.

Jennifer Wallace