NO. 43762-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

LA'JUANTA CONNER,

Appellant.

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

The Honorable Jeanette Dalton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court's material departure from the statutory requirements for jury selection requires remand for a new trial.

2. Improper admission of a police officer's opinion as to appellant's veracity violated his right to a jury trial and requires reversal.

3. Trial counsel's failure to object to the improper opinion testimony constitutes ineffective assistance of counsel.

4. The court's improper missing witness instruction denied appellant his constitutional right to a fair trial.

5. The court commented on the evidence by instructing the jury to disregard key arguments of the defense.

6. An error in the Judgment and Sentence must be corrected

Issues pertaining to assignments of error

1. Before the jury was sworn one of the jurors informed the court that the judge had presided over her son's trial. The juror was questioned by the court and the parties. No challenge was made, and she was sworn as a juror. After two days of trial, the prosecutor moved to exercise a peremptory challenge based on information she had learned from the prosecutor who tried the previous case. Where the prosecutor could have learned this information by questioning the juror or

investigating before the jury was sworn, did the mid-trial exercise of a peremptory constitute a material departure from the rules regarding jury selection, requiring reversal?

2. A police officer testified that he used a ruse when interviewing appellant because he did not believe appellant was being truthful and he wanted to elicit the truth. Did this opinion as to appellant's credibility or guilt violate his right to a jury trial?

3. Where trial counsel failed to object to the officer's improper opinion, did appellant receive ineffective assistance of counsel?

4. The court granted the State's request for a missing witness instruction based on its mistaken belief that defense counsel had told the jury in opening statement that the witness would testify. Where the witness could not have provided material testimony and would have risked self-incrimination by testifying, did the instruction and argument that the jury could infer the potential testimony would be unfavorable to the defense deny appellant a fair trial?

5. During defense counsel's closing argument, the court sustained the prosecutor's objections that counsel was mischaracterizing the evidence and instructed the jury to disregard the argument. Where counsel's arguments drew reasonable inferences from the evidence at trial, did the court's instructions constitute a comment on the evidence?

6. The jury found by special verdict that appellant was not armed with a firearm during one of the charged burglaries. Although the judgment and sentence correctly indicates the total confinement imposed by the court, it incorrectly indicates that a firearm enhancement is imposed on that offense. Must the judgment and sentence be corrected?

B. STATEMENT OF THE CASE

1. Procedural History

On June 8, 2011, the Kitsap County Prosecuting Attorney charged appellant La'Juanta Conner with conspiracy to commit first degree burglary and first degree robbery, and second degree unlawful possession of a firearm. CP 1-9. The information was amended twice, and Conner went to trial before the Honorable Jeanette Dalton on six counts of first degree burglary, eight counts of first degree robbery, two counts of unlawful possession of a firearm, two counts of possession of a stolen firearm, one count of possession of marijuana, four counts of second degree theft, one count of theft of a firearm, one count of third degree theft, and one count of third degree possession of stolen property. CP 208-30. The State alleged that Conner was armed with a firearm during the burglaries and robberies. Id.

The jury found Conner not guilty of possession of marijuana and not guilty of possession of stolen property but guilty of the remaining offenses. It found he was not armed with a firearm during the commission of the burglary alleged in count XIX but found the firearm allegations were proven as to the other counts. CP 300-315. The court imposed a total sentence of 1148.5 months. CP 333. Conner filed this appeal. CP 342.

2. Substantive Facts

a. 12th Street

On September 15, 2010, Robert Dato sat in the living room of his apartment on 12th Street in Bremerton, watching television with the front door open. He heard a knock, and when he looked up he saw a black man with a mask and a gun. The man said, "Where is the shit?" Dato thought at first that it was a joke, but then he realized he was being robbed. 20RP[1] 1025-27. The man waved the gun around and walked into the bedroom, where Dato's brother, Aaron Dato, was sitting. Robert followed him into the room and told Aaron they were being robbed. 20RP 1027-28.

[1] The verbatim report of proceedings is designated as follows: 1RP—10/6/11; 2RP—12/2/11, 1/20/12; 3RP—12/16/11; 4RP—4/9/12; 5RP—4/11/12; 6RP—4/12/12; 7RP—4/16/12; 8RP—4/19/12; 9RP—4/20/12; 10RP—4/23/12 a.m.; 11RP—4/23/12 p.m.; 12RP—4/24/12; 13RP—4/25/12; 14RP—4/26/12; 15RP—5/3/12; 16RP—5/7/12; 17RP—5/8/12; 18RP—5/9/12; 19RP—5/10/12; 20RP—5/14/12; 21RP—5/15/12; 22RP—5/16/12; 23RP—5/17/12; 24RP—5/17/12; 25RP—5/21/12; 26RP—5/22/12; 27RP—5/23/12; 28RP—5/24/12; 29RP—5/29/12; 30RP—5/30/12; 31RP—5/31/12; 32RP—6/4/12; 33RP—6/5/12; 34RP—6/6/12; 35RP—6/7/12; 36RP—6/8/12; 37RP—6/11/12; 38RP—7/27/12; 39RP—5/7/12 (opening statements).

The first man to enter the apartment was wearing a red bandana and had braids. He pulled the bandana off his face at one point. Robert saw the arm of a second man, which he described as light-skinned black and holding a silver gun. 20RP 1029-30. The intruders took two televisions, two Xboxes, a Blackberry, $700 in cash, and Robert's backpack with tools in it. 20RP 1031. When they left, Robert and Aaron walked to their sister's house to call the police. 20RP 1034.

Bremerton police responded. They contacted Robert Dato and drove him back to the apartment. Robert reported that there were multiple assailants with guns, and police saw spaces in the apartment where televisions and gaming systems were missing. 19RP 776-77. The odor of marijuana was prevalent in the apartment, and Robert told police his roommate was a social user of marijuana. 19RP 779. Robert never mentioned that his brother was at the apartment during the robbery, because Aaron was not supposed to be living with him. 19RP 815; 20RP 1035.

Dato was robbed again two weeks later. He was sitting in the living room, while Aaron and Jeffery Turner were in the bedroom playing video games. 20RP 1037. Someone knocked on the door, and when Robert tried to open the door a little bit to see who was there, a man pushed the door all the way open. 20RP 1038-39. Two more men came

in as well, and Robert recognized one of them from the first robbery. He was wearing braids, a black bandana, and green shoes. The first man was light-skinned black and had a gap in his teeth. Robert did not see the third man. 20RP 1040-41. The two men he saw were both holding guns. 20RP 1043.

The men forced Robert into the room with Aaron and Turner, and they took two televisions, two Xboxes, a phone, some cash, and a laptop from the apartment. 20RP 1044-45. When they left, Robert called the police. Police spoke to Robert, Aaron, and Turner. 20RP 1010. Aaron reported that one of the robbers had used the name "Mook." 20RP 1013.

b. Shore Drive

On September 29, 2010, Brett Cummings arrived at his apartment on Shore Drive in Bremerton. As he opened his door, two men pointed guns in his face and followed him inside. The men were wearing ball caps with bandanas over their faces. 21RP 1173-74. They kept asking for marijuana. 21RP 1175. Cummings was a medical marijuana user who spoke openly about his use. 21RP 1182.

When one of the men told the other to shut the door, Cummings became scared and walked toward the door. One of the men tried to stop him by hitting him in the face with a gun, but Cummings pushed past him and got to the door. Then the other man grabbed him, and both men

repeatedly hit him over the head with the butts of their guns. 21RP 1175-76. Cummings started screaming for help, and the men ran off. One of them took Cummings's laptop. 21RP 1176.

In a call to 911, Cummings's neighbor reported hearing a man yelling for help and seeing three men run out of his apartment. 21RP 1163. Police responded and contacted Cummings, who said he had just been robbed. 21RP 1166. Cummings described the guns as "Glock-style" smaller automatics. He said the men were thin, average height or a little taller, maybe 20 to 24 years old. One was wearing a red cap with a black bill and the other might have been wearing a black hoodie over a hat. One wore a red bandana and the other wore a black one, and the bandanas looked new. 21RP 1178-79. Cummings did not recognize any of the men. 21RP 1180.

c. Weatherstone

On October 3, 2010, Kimberly Birkett returned to her home in the Weatherstone Apartments in Bremerton to discover her home had been ransacked. 22RP 1212, 1220. Birkett had spent the evening with her son at the home of her friend Kesha. Kesha's friend Megan Duckworth had been there for a while as well, but she left. A few minutes later, Megan called Kesha saying she had a fight with her boyfriend, and Kesha left to

pick her up. 22RP 1215-16. Kesha returned about a half hour later. 22RP 1237. Kesha later drove Birkett and her son home. 22RP 1217.

Everything in the apartment was torn apart and moved around. Birkett's television was missing, as was the cash she kept in her bedroom. 22RP 1224-25. Her son's television, cash, DVDs, Xbox, games, and controllers were all taken, as well as a sword and some brass knuckles from his room. 22RP 1228-30, 1232.

d. Wedgewood

On November 3, 2010, police were dispatched to investigate a robbery at an apartment on Wedgewood Lane. They spoke to Aaron Tucheck, his wife Ann Marie Tucheck, and their roommate Keefe Jackson. 22RP 1252-53. When they arrived at the apartment, law enforcement saw that the door casing was broken, the plate for the deadbolt was knocked off, and there was a muddy shoe print on the door. 22RP 1254. The apartment was in general disarray. 22RP 1255. There was an odor of marijuana in the apartment, and there was a glass marijuana pipe on the floor. 22RP 1256. Tucheck explained that he is a medical marijuana user. 22RP 1417.

Shortly before midnight Aaron Tucheck had been playing video games in the living room while both his wife and roommate were sleeping. He heard a knock at the door, and looked through the peephole. He saw a

man wearing a camouflage jacket zipped to his nose. 22RP 1302. Tucheck opened the door slowly, saw three men with guns pointed at him, and slammed the door shut. 22RP 1304. As Tucheck turned to call the police, the men kicked the door in and entered the apartment. 22RP 1305. The man in the camouflage jacket was holding a big silver revolver with a purple bandana. A second man was wearing a grey hoodie and a blue bandana, and the third man was wearing a blue hoodie and a blue bandana. 22RP 1308. They both held black guns. 22RP 1309.

The man in the camouflage jacket told Tucheck to sit down, and the man wearing a blue hoodie got Jackson from his room. 22RP 1305. The man in the jacket stayed in the living room with Tucheck and Jackson while the other two men went into the bedrooms. 22RP 1307. The man in the grey hoodie brought Tucheck to his bedroom to open a safe. 22RP 1308. Tucheck asked the man not to wake his wife. The man hit Tucheck with a gun and took the contents of the safe, Ann Marie's phone, a jar of marijuana, a game system and some games, and $250 in cash. 22RP 1312, 1327. Ann Marie's wallet was taken from her purse on the kitchen table. 22RP 1333.

When Tucheck returned to the living room, he saw the man with the blue hoodie come out of Jackson's room with a blanket wrapped around some items, including Ann Marie's shot gun and Jackson's safe.

22RP 1315-16. Inside Jackson's safe were some cash and a zippered pouch containing his rosary. 22RP 1356. When the men left, Tucheck woke his wife and they left the apartment to call the police. 22RP 1318-19.

Jackson had been home alone earlier that day when he heard a knock at the door. 22RP 1359. He looked through the peephole and saw two African American men he did not recognize. One of the men looked like he was examining the lock. After a few minutes, the men left. Jackson could not say whether these were the same men who broke into his apartment later that night. 22RP 1360-61.

e. Traffic Stop

Bremerton Police Detective Mike Davis was investigating these and other home invasions in the Bremerton area. 16RP 425-26. He had no suspect information until November 17, 2010, when he received a call from Chris Devenere. 16RP 426. Devenere gave him the name of Joe Perez. 16RP 429.

Devenere had met Perez at a friend's house, where Perez was bragging about some robberies he had done. One of the robberies Perez described was committed against Devenere's friend. 19RP 854-55. When Devenere learned that Perez was planning to rob his friend again, he went

to the police. 19RP 859, 861. He spoke to Detective Davis and Kitsap County Sheriff's Detective Chad Birkenfeld. 19RP 861; 20RP 924.

Devenere devised a plan to convince Perez and his associates that there was a better house to rob. 19RP 863-64. Working with police, Devenere arranged to meet Perez at the Fred Meyer parking lot in Bremerton, where he would pass on information about this other, fictitious location. 16RP 434-35; 19RP 864-85. Police would conduct surveillance of the meeting, then follow Perez as he left and conduct a traffic stop. 16RP 430; 19RP 864.

Devenere told Davis that the people he was meeting would be in a black pickup truck, and he and his friend would be in a red Chevy Tahoe. 16RP 434-35. The surveillance team observed both vehicles enter the parking lot. 16RP 436; 20RP 926.

When the black truck pulled up, Devenere saw two black men in the truck with Perez. Perez stepped out of the truck, and the front seat passenger opened his door but remained inside. 19RP 867-68. Perez asked Devenere about the house they were supposed to rob, and Devenere asked Perez if they had guns. Perez said they did. 19RP 869. Perez did most of the talking during this conversation, but the front seat passenger asked Devenere how he knew about the person they were supposed to rob. 19RP 870.

After this meeting, Devenere pulled out of the parking lot, and the black truck followed. 19RP 872. A patrol car followed the vehicles, and Davis and Birkenfeld followed the patrol car. 16RP 436. The black pickup truck was pulled over, and the occupants were ordered out. 16RP 437, 440. The driver was Jerrell Smith, the front seat passenger was La'Juanta Conner, and the rear passenger was Joe Perez. 16RP 441. The three men were placed in separate patrol cars and transported to the police department for interviews. 16RP 442.

Davis obtained and executed a search warrant for the truck. 16RP 442-43. In the bed of the truck he found a black bag containing some paperwork, two blue bandanas, and two loaded firearms. One gun was a Hi-Point .40 caliber semiautomatic pistol, and the other was a .44 Magnum revolver. 16RP 448-55. The serial number of the Hi-Point had been filed off, but the crime lab was able to restore it, and it was determined that the gun was stolen. 16RP 451, 460. The Magnum was also determined to be stolen. 16RP 456.

Davis took swabs from the trigger guards of the guns and sent the swabs, the guns, and the bandanas to the crime lab for DNA testing. 16RP 458, 463. Partial complex mixtures of DNA from multiple people were found on the guns and bandanas. No meaningful comparisons were possible. 17RP 502-507.

In the glove compartment of the truck, Davis found the cell phone that had been taken from Ann Marie Tucheck. 16RP 467. When the phone was powered up, police saw a photo of Kevion Alexander on the screen. 16RP 469. A baggie of marijuana was found behind the back seat of the inner cab, where Perez had been sitting. 18RP 694, 696.

After completing his search of the truck, Davis returned to the station to interview the suspects. 16RP 470. He and Birkenfeld first spoke to Perez, who declined to be interviewed. 16RP 470; 20RP 958. Then the detectives interviewed Conner. Conner told the detectives he had been staying with his girlfriend, Rachel Duckworth, then he and Perez drove to the Olive Garden in Silverdale to pick up Smith from work. They were headed back to Rachel's apartment, but he changed his mind. 16RP 475-76. Conner initially denied being at the Fred Meyer parking lot for a meeting but then said there had been a conversation between Perez and two men in an SUV. Conner said he was not involved in the conversation, and he was on the phone the entire time. 16RP 478-79; 17RP 604; 32RP 2302. Conner asked Davis to look at his phone to see that he had been texting at the time, but Davis never did so. 32RP 2302-03.

As a result of Smith's interview that night, police considered Conner a suspect in the home invasions. 17RP 608. When the detectives asked Conner about the home invasions, Conner said he was not involved

in any of them. 16RP 479. Conner said the word on the street was that the home invasions were occurring, but he did not know the names of anyone involved. 16RP 481-82. Conner said he was not planning to commit a robbery or burglary that night. 17RP 540.

f. Police Investigation

Smith was first interviewed on the night of the traffic stop. He talked about various home invasions and named numerous people in a lengthy recorded interview. 19RP 771-72. Police did not believe he was being entirely forthcoming, however. 19RP 771. During the interview the officers told Smith they wanted him to be honest. They said they could not make deals, but they assured him that if he cooperated they would ask the prosecutor for favorable treatment for Smith. 19RP 789. They mentioned the possibility that Smith could be released on personal recognizance. 19RP 790. They also told Smith that the first suspect to start talking would reap the benefits. 19RP 805.

After the interview, Smith agreed to ride in the patrol car and show officers the locations of the crimes. The ride-along was recorded, but 20 to 30 minutes into it, Smith asked the officers to stop recording. 19RP 772-73.

Police learned that everyone in Smith's truck at the time of the traffic stop was associated with Kevion Alexander, whose street name was

Mook. 20RP 978. Police obtained a warrant for Alexander's arrest, and they learned from Smith that he was staying at Rachel Duckworth's apartment. 17RP 564. Davis and about 25 officers executed a search warrant for Alexander at the apartment. 17RP 565, 574. Alexander was not found in the apartment, but the officers seized a safe like the one stolen in the Wedgewood robbery. 17RP 586. Inside the safe were documents belonging to Conner and Smith, as well as a zippered pouch containing a rosary. 17RP 587-592.

Davis interviewed Smith on December 14, 2010, and January 26, 2011. 17RP 553. Smith provided information about suspects in the 12th Street, Shore Drive, and Wedgewood robberies and the Weatherstone burglary. 17RP 555-56. He also gave information about other robberies and burglaries that had not been reported. 17RP 556.

Alexander was arrested and interviewed December 21, 2010. 18RP 712. He did not provide any details about the offenses at that time. 18RP 721. Davis interviewed Alexander on March 17, 2011, at the sheriff's office. 17RP 561. At that time Alexander provided specific information about robberies he had committed and about robberies and burglaries he said he did not commit. 17RP 562-63.

g. Trial testimony

Smith testified at trial that he met Conner through Troy Brown, and he used to buy marijuana from Conner. He met Alexander through Conner. 24RP 1426-27. According to Smith, he, Conner and Alexander lived together for a short time in the fall of 2010. 24RP 1426.

Smith testified that before he went to work on November 17, 2010, he was at Rachel Duckworth's apartment with Conner and Perez, and he heard them talking about doing a robbery. They asked to borrow his truck, and Perez dropped him off at work. 24RP 1428-30. Perez and Conner picked him up from work around 11:30. Smith drove a co-worker home, and then Perez told him to drive to the Fred Meyer in Bremerton. Smith knew they were meeting someone about a robbery, because Perez had texted him while he was at work. 24RP 1431-33.

Smith testified that when they got to Fred Meyer, Conner stepped out of the truck and spoke with two men in an SUV. He then told Smith to follow the SUV. 24RP 1434. They saw police cars as they pulled out of the parking lot, and Perez said he had marijuana and a gun on him. 24RP 1435-36. Smith was not surprised when Perez said he had a gun. He had seen and handled the guns the police found in his truck many times. 24RP 1438-41. According to Smith, Alexander and Brown had handled the Hi-

Point as well, but Conner used that gun more often than anyone else. 24RP 1441-43. At one point Smith had said that Perez owned both guns, but at trial he testified that the Hi-Point was Conner's gun. 24RP 1444, 1446-47.

Smith testified that he was not truthful in his interview after the traffic stop. 24RP 1447. He made up names because he did not want to involve real people in anything. 25RP 6-7. He talked about people called New York, Antonio, Money, and Ralph. 25RP 58. He told police that he did not know anyone named Mook, although he later testified he lived with Mook. And he told the police he did not know Vegas's real name, although he knew it was Perez. 25RP 59-61.

Smith spoke with law enforcement three times and his story changed from one interview to the next. 25RP 10. During the interviews the police told Smith that they did not think he had orchestrated the home invasions or that he was involved in all of them. Smith understood that if he was not the ringleader, he had a better chance of getting a good deal from the prosecutor. 25RP 56-57.

Although Smith testified that he was trying to protect Conner in his interviews, he told police that both Conner and Perez got out of the truck at the Fred Meyer parking lot to meet with someone about a burglary, and he told the police that it was Conner and Perez who planned the burglary

that night. 25RP 64. Smith pointed the finger at Conner and away from himself, saying he would be the driver and Conner and Perez would commit the burglary. 25RP 64-65.

Smith eventually entered an agreement with the State under which the State would not charge him with crimes he was involved in, in exchange for his cooperation. 25RP 10-11. Smith told police he was personally involved in four or five home invasions, including three he committed with Alexander and not Conner. 25RP 107; 26RP 1519. He pled guilty to attempted residential burglary, with no firearm allegation, and he faced a sentence of 2.75 months, which he had already served. 25RP 12, 54-55.

Smith testified that he was involved in the Shore Drive and Weatherstone home invasions, and he was aware of other incidents. 25RP 12-13. He testified that Conner and Alexander were involved in both robberies at 12th Street and that the stolen property was stored at his apartment, although he denied participating in those incidents. 25RP 13-15.

Smith had said in his initial interview that he never went inside the Weatherstone apartment, but he admitted at trial that that was a lie. 25RP 29. Smith testified that Conner asked him to come along, saying no one would be home. 25RP 20-21. According to Smith, Conner told him that

Megan Duckworth knew the woman who lived there and that she never locked her doors. 25RP 22. He also believed they would find $5000 in the apartment, because the woman did not use banks. 25RP 24.

Smith testified that he heard Conner and Alexander talk about the Wedgewood robbery, but he was not involved. 25RP 30. Smith said he was at Laneka Summers's apartment with Conner earlier that day. Conner left and returned a couple of hours later, saying he would not be able to kick the door down and he needed a crowbar. Then Conner and Alexander got a crowbar. 25RP 31. Later that night, Conner showed him a safe, some identification cards, some marijuana, and an iPod. 25RP 33. Smith testified that the safe that was seized from Rachel's apartment was the one Conner showed him. 25RP 34. Smith saw the safe at Laneka's apartment in early November and then at Rachel's apartment not long after that. 25RP 37.

Finally, Smith testified that Alexander, Conner, and Anthony Adams were involved in the Shore Drive robbery, but he did not take part. 25RP 44. According to Smith, Conner said it did not go as planned because the victim was home. 25RP 45. Alexander said the victim screamed for help and tried to run out of the apartment, so Alexander punched him in the stomach. 25RP 49.

Kevion Alexander also testified at trial. He acknowledged that his nickname is Mook, and that he wore his hair in braids in the fall of 2010. 26RP 1531, 1575. He met Conner in late 2009, and they became close like brothers. 26RP 1533. Alexander testified that he participated in robberies and burglaries in 2010. Some were set up by Conner or Adams, and some he just did. 26RP 1534-35. Alexander testified that someone in the group knew each of the victims and that the homes were chosen because they expected to find drugs there. 26RP 1536, 1547.

Alexander admitted participation in both 12th Street robberies. 26RP 1536-37. He said he committed the first one with Conner, Adams, and Troy Brown. 26RP 1539. Adams had a gap in his teeth, as described by the victims. 26RP 1582. Although he said he waited in the car, Alexander gave a fairly detailed description of the robbery. 26RP 1540, 1545-55. Alexander said that during the second robbery, he, Conner, and Adams went into the apartment. 26RP 1585. Adams was carrying a Glock 9mm, Alexander had the .40 caliber, and Conner did not have a gun. 26RP 1591.

Alexander also admitted committing the Shore Drive robbery with Adams and Conner. 26RP 1567. Alexander said they were all armed, and he was carrying Conner's .40 caliber, while Conner carried a .44 Magnum. 26RP 1568-69. Alexander testified that Adams and Conner hit the victim

with guns, but they all ran when he started yelling for help, and Adams took the man's laptop. 26RP 1571.

For the Weatherstone burglary, Alexander testified that he joined Conner, Smith, and Adams while the burglary was in progress. 26RP 1601. Alexander said that Conner had dropped him off at a nearby convenience store to sell marijuana, and when the sale was complete he noticed Smith's truck at the apartment. He walked over and saw the others carrying televisions down to the truck. He wanted part of the action, so he joined them. 26RP 1601. Alexander testified that the connection to this apartment was Conner's friend Megan Duckworth, who was drinking with Kesha and the woman who lived at the apartment. Megan took the woman's keys when she was drunk and let them into the apartment. 26RP 1612.

The next robbery was the Wedgewood apartment. Alexander testified that his ex-girlfriend, Shantel Ross, worked with the person who lived there. She told him there would be marijuana and some cash in the apartment. 27RP 1626-27. He, Conner, Adams, Brown, Perez, and Ross planned the robbery. 27RP 1627. They checked the apartment out earlier in the day and decided to return with a crow bar. 27RP 1629. They went back that night, and he, Perez, and Conner entered the apartment while the others waited in the truck. Perez was wearing a camouflage jacket, he was

wearing a grey hoodie, and Conner was wearing a black hoodie. He and Conner also wore bandanas. 27RP 1638-39. Alexander testified that he carried the Glock 9mm, Conner had the .40 caliber, and Perez had the .44 Magnum. 27RP 1639-40. Alexander admitted taking cash, a cell phone, a shotgun, and some marijuana. He said Conner took a safe, a bunch of pipes, and a rosary. 27RP 1645, 1648, 1653.

Alexander testified that when he was arrested, he tried to distance himself from Conner, Smith, and Perez and minimize his involvement, because he did not want to pay the consequences for what he had done. 27RP 1696. He was not completely honest with the police. He said he was only involved in three or four incidents, which was not true. In fact, he was involved in three incidents in addition to the ones he testified about. He also claimed he did not have a gun in any of the incidents, which was another lie. 27RP 1697-98, 1702.

Alexander then entered a plea agreement. In exchange for his cooperation, Alexander was charged with only first degree robbery, first degree burglary, residential burglary, and possession of a firearm. The State agreed to recommend a sentence of six years. 27RP 1700-01.

The State also presented testimony from Paul Woods that he owned the Hi-Point .40 caliber gun that had been discovered in Smith's truck. 24RP 1388. He did not know that the gun was missing until

September 2011, and he did not report it stolen because he thought he might have misplaced it when he moved earlier that year. 24RP 1391-92. Woods testified that his friend Troy Brown had brought Conner to his apartment twice. The second time, Brown also brought a man called "Chicago" who was a light-skinned black man with a gap in his teeth. 24RP 1392-93. Woods testified that he had shown Brown his gun. 24RP 1393.

Brandon Bird testified that he was the victim of a burglary on November 1, 2010. Several items were stolen from his home, including the .44 Magnum revolver found in Smith's truck during the traffic stop. 24RP 1403-05.

The State presented recordings of phone calls between Conner and Rachel Duckworth, Laneka Summers, Megan Duckworth, and Alexander while Conner was in jail. 29RP 1936.

In the calls Conner talked to Rachel about establishing that Smith carried a gun. He also said he was done with "all that shit" and that he is "not going through this shit again." Supp. CP (Sub. No. 101, transcripts of jail calls, filed 4/13/12, at 5). He told Rachel "I want to get out of here, man. Getting all this dumb shit behind me. I'm done with all that shit….I'm gonna get out of here, you know what I'm saying, and I'm changing over a new leaf." Id. at 10. He told her again in another call,

"I'm just trying, I'm getting out of here. I'm done with all this crazy shit. You know, I'm gonna turn over a new leaf." Id. at 14.

In another call, Rachel told Conner she would leave him if he did not leave the streets alone. She said she knew it would be tempting, and he told her there was nothing tempting about going to jail. Rachel told Conner that the next time he felt like he wanted some money and he was "going to get it doing this and that," he had better think. Conner told her she did not need to worry about that because he was "done with all that shit." Id. at 18.

The State presented no physical evidence placing Conner at the scene of any home invasion. Although he was present in Smith's truck at the traffic stop, there was no physical evidence placing either of the guns found in the back of the truck in his possession.

Moreover, none of the victims identified Conner at trial. Robert Dato testified that he kind of knows Conner and had met him before, but he did not know any of the suspects who robbed him, and he did not see Conner in his apartment. 20RP 1070. Cummings testified that he did not recognize the men who robbed him, and he did not identify Conner at trial. 21RP 1185. Aaron Tucheck did not know any of the people involved in the robbery and did not identify Conner at trial. 22RP 1319-20.

Aaron Tucheck testified that he knows Shantel Ross, who is a friend of his wife. 22RP 1320. Ann Marie Tucheck testified that she works with Shantel Ross and that Ross introduced her to her boyfriend Mook at a Halloween party just before the robbery. Ross pointed out the man standing next to Mook, saying it was Mook's cousin Juanee. 22RP 1338-39. Ann Marie testified that Mook had interesting braids and she could probably identify him. She did not identify Conner at trial, however. 22RP 1341.

Several witnesses testified for the defense. Laneka Summers testified that she and Conner have known each other since high school, and they have three children together. 30RP 1964. Summers testified that sometime before Halloween 2010, Conner brought home a safe. He had a key for the safe, and he used it to store his birth certificate and other documents. 30RP 1970, 1973, 1976. She was certain that the safe in evidence was Conner's safe. 30RP 1987.

Conner was at Summers' apartment earlier on the day he was arrested, but then he left. Summers and Conner were having a disagreement, and they texted throughout the day. Summers wanted him to spend the night at her apartment so that they could take their daughter to a doctor's appointment the next morning. He finally agreed to return to her place, but he was arrested. 30RP 1977-80.

Summers testified that she never saw Conner or any of his friends with a gun. 30RP 1975, 1986. She never heard them discuss robberies, and she was unaware that anyone was committing home invasions. 30RP 1981, 1985. Summers also testified that she often saw Alexander wearing rosaries to match his outfits. 33RP 2404-05.

Megan Duckworth testified that she has known Conner and Summers for over five years, and they are good friends. 30RP 2000. She testified that she went to college with Kesha, and she met Kimberly Birkett one time at Kesha's house. 30RP 2004. Megan is a certified medical assistant who works for a cardiology practice. As she was driving home from Kesha's that night, Kesha called her and said her father was having chest pains. Megan went to Kesha's parents' house, stayed for a while, and went home. 30RP 1999, 2005. Megan testified that she never talked to anyone about robbing Birkett, and she did not know why anyone would accuse her of letting anyone into Birkett's apartment. 30RP 2006, 2009.

Conner testified in his defense that he never possessed any of the guns described at trial. He has a prior felony conviction and is not permitted to possess a gun. 30RP 2018-19. He had seen Smith carry the .40 caliber Hi-Point before, but he had never seen the .44 Magnum. 30RP 2020, 2037-38. He did not know the guns were in Smith's truck when

they were pulled over. 31RP 2140. When he learned he had been accused of carrying these guns he was angry, and he asked his attorney to arrange a DNA test. 30RP 2038.

Conner met Perez in November 2010, and he bought marijuana from someone Perez knew. 30RP 2020. He had met Alexander through a drug transaction as well. Conner sold him some marijuana, and they started hanging out. 30RP 2022.

Conner identified the safe in evidence as one he bought from Smith. 30RP 2024. The rosary that was found in the safe was not his, however. Conner testified that Alexander had a collection of rosaries and liked to wear them. 30RP 2034. Alexander also had a bandana he wore around his neck. 30RP 2039.

Before he was arrested Conner knew of one burglary Smith and Alexander were involved in, but he never went with them to commit any robbery or burglary. 30RP 2044. Conner disputed Alexander's claim that he sent Alexander to deliver marijuana near the Weatherstone Apartments, and he testified that he has never been inside Birkett's apartment. 30RP 2049. He explained that Summers lives near those apartments, and Alexander hung out in that neighborhood when he was staying with her. 30RP 2050. Conner testified that he only went to the 12th Street apartment to sell one of the residents drugs, and Alexander was with him at the time.

30RP 2023, 2052. Conner knew nothing about the Shore Drive robbery and testified that he was not there. 30RP 2053.

On the day of the traffic stop, Conner had been at Summers' apartment before heading to Rachel's. Perez and Smith met him at Rachel's, and they smoked some marijuana, then Perez and Smith left. 30RP 2054-55. They did not say anything about doing a robbery. Later, Perez picked Conner up, and they went to get Smith from work. 30RP 2056. After driving Smith's co-worker home, they headed to Fred Meyer, where Perez was meeting someone he said owed him money. While Perez had his meeting, Conner texted Summers to tell her he was on his way. 30RP 2057. Conner did not hear anything that was being said. 30RP 2059. He never heard any conversation about a robbery. 30RP 2062.

Conner explained that after he was arrested, detectives told him that someone had said he had a gun, and he remembered talking on the phone about that accusation later. He told Rachel that he planned to ask Megan how many times she had seen Smith with the gun. 30RP 2063.

He also explained that when he talked to Rachel about changing his ways, he was talking about partying and selling and smoking marijuana. 30RP 2064-65. He told her he wanted to leave the streets behind, because the extra money from selling drugs was not worth the time in jail. 30RP 2065; 31RP 2202-23.

Next, Shantel Ross testified for the defense. Ross testified that she dated Alexander briefly in October 2010, and she had seen him with rosaries often. 32RP 2272-73. Ross worked with Ann Marie Tucheck, and they were close friends. She also knew Aaron Tucheck and Keefe Jackson. She invited them to her Halloween party, and she introduced them to Alexander. 32RP 2274-76. Conner was at the party, but he sat in the corner texting the entire time. 32RP 2277.

Ross testified that on the night of the Wedgewood robbery, Aaron Tucheck texted her that they had been robbed. 32RP 2279. Conner had been with her at a friend's house from about 10:00 p.m. until midnight. He left and then returned about ten minutes later because he had forgotten something. About two seconds after they left, she got Aaron's text about the robbery. 32RP 2307. She did not learn until the last week of trial that Conner was charged with the Wedgewood robbery, and at that time she told defense counsel what she remembered. 32RP 2308. Aaron confirmed that he had texted Ross about the robbery, about 20-30 minutes after it happened. 33RP 2446.

Ross testified that she did not know anything about the Wedgewood robbery before it happened, and she did not know Alexander was involved until he was arrested. 32RP 2280. Ross broke up with Alexander when she found out what he was doing. 32RP 2281.

C. ARGUMENT

1. THE COURT'S MATERIAL DEPARTURE FROM THE STATUTORY REQUIREMENTS FOR JURY SELECTION IS PRESUMED PREJUDICIAL, AND CONNER IS ENTITLED TO A NEW TRIAL.

After the jury was selected but before it was sworn, one of the jurors informed the court that she remembered that Judge Dalton had presided over her son's case when he was tried and convicted of attempted murder. 16RP 386. Judge Dalton described what she could remember about the case, and when the prosecutor asked if the juror had been a witness in the case, the court said she had not. 16RP 387.

The court then brought the juror into the courtroom for questioning. 16RP 387. The juror stated that she felt her son got a fair trial, although she felt the sentencing was a little harsh. 16RP 388. She stated she had no concerns about her ability to remain fair and impartial in this case. Id. The prosecutor asked the juror to clarify what she meant about the sentence being harsh, and the juror stated that it was harsh because she would miss her son, and her son would miss out on raising his children. 16RP 389. In response to defense counsel's question, the juror repeated that her prior experience would not prevent her from being fair in this case. Id. The State asked whether the fact that Conner has children would impact her ability to sit on the jury, and she said she did not think it

would but she was not sure. 16RP 389-90. Upon further questioning by the court, the juror indicated that her knowledge about sentencing would not prevent her from convicting if the crimes were proved, and she would make sure everyone got a fair trial. She said she did not harbor any ill will toward the judge, and in fact did not even remember her, and she repeated that her son got a fair trial. 16RP 390.

After the juror left the courtroom, the judge informed the parties that she had imposed an exceptional sentence of 30 years on the juror's son. The court found that the juror had shown no bias or prejudice. 16RP 391. The prosecutor did not challenge the juror for cause or seek to exercise a peremptory challenge at that time, and she was sworn as a juror. 16RP 392-93.

Two days later, the prosecutor informed the court that she had learned that the juror had, in fact, been a witness at her son's trial, and the prosecutor in that case had accused her of lying and manipulating other people's testimony to help her son. Moreover, that prosecutor indicated that he heard her gasp during sentencing. 18RP 649. The State moved to excuse the juror, and the court took the matter under advisement. 18RP 650.

The next day, the State asked to use its remaining peremptory challenge to excuse the juror. 19RP 828. The prosecutor stated that if she

had known the juror had been a witness in her son's case when the court questioned the juror, she would have followed up with further questions. The prosecutor indicated she relied on the court's faulty recollection that the juror had not been a witness. 19RP 831-32.

Defense counsel objected, arguing that Conner was entitled to the jury that was chosen and sworn. The prosecutor had been given the opportunity to question the juror when this issue came up before the jury was sworn, and she could have asked for more time to investigate the matter, but she did not. While the State may regret not having asked to have the juror removed, it had waived the opportunity to exercise a challenge. 19RP 837-38.

The court ruled that allowing the State to exercise a remaining peremptory challenge was the proper procedure. 19RP 841-42, 844. The court excused the juror. 19RP 846.

A party's acceptance of the jury panel during voir dire waives that party's ability to use a peremptory challenge against anyone on the panel as accepted. RCW 4.44.210; CrR 6.4(e). Neither the statute nor the court rule specifically prohibits the trial court from allowing a party to use a remaining peremptory, even after the jury is sworn, based on unforeseen circumstances, however. Where circumstances arise which the parties could not have anticipated before the jury was sworn, the trial court has

discretion to allow the exercise of an unused peremptory during trial. State v. Williamson, 100 Wn. App. 248, 254, 996 P.2d 1097 (2000).

In Williamson, after the State's first witness began to testify, a juror told the court that she knew the witness. The court refused to remove the juror for cause, but it allowed the State to exercise an unused peremptory challenge. Williamson, 100 Wn. App. at 252. Because of the unforeseen circumstance, the court did not abuse its discretion in permitting the midtrial exercise of the peremptory challenge. Williamson, 100 Wn. App. at 254.

The court below relied on Williamson in allowing the State to exercise a peremptory on a seated and sworn juror, but this case differs from Williamson in a significant respect. Here, the circumstance which caused the State to want to excuse the juror was not unforeseen.

Before the jury was sworn the juror informed the court that the judge had presided over her son's trial. This was an unforeseen circumstance, and it would have been appropriate to allow the parties to exercise an unused peremptory challenge at that point. The State did not make such a request at that time, however.

The court and both parties questioned the juror, and the State had the opportunity to ask whether she was a witness in her son's trial and whether she had any lingering resentments toward the prosecutor's office.

The State could also have asked for a brief recess to talk to the prosecutor from the earlier case about the juror before accepting the panel. The need for such investigation was certainly foreseeable based on the information the prosecutor had about the juror. Instead, the prosecutor accepted the panel including that juror, the jury was sworn, and the case proceeded to trial. The circumstance on which the State exercised its mid-trial peremptory was foreseeable before the panel was accepted and the jury was sworn, and the court abused its discretion in excusing the juror.

Prejudice is presumed when there is a material departure from the statutes or rules governing jury selection. State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991); Williamson, 100 Wn. App. at 253. The court's decision to allow the State to exercise a peremptory challenge on a juror who the State had previously accepted and who had been seated and sworn was a material departure from the statutory procedure for jury selection. See RCW 4.44.210. Prejudice is presumed, and Conner is entitled to a new trial. See Tingdale, 117 Wn.2d at 603.

2. IMPROPER ADMISSION OF THE POLICE OFFICER'S OPINION AS TO CONNER'S VERACITY VIOLATED HIS RIGHT TO A JURY TRIAL AND REQUIRES REVERSAL.

On cross examination, Detective Davis admitted that in his interview with Conner, he told Conner that Perez and Smith were in the

other room pointing the finger at him, when that was not true. 17RP 605. He admitted he was lying when he told Conner that Smith and Perez said he had handled the Hi-Point firearm. Davis explained that this was a ruse. 17RP 607-08.

On redirect, Davis testified that a ruse is a statement used by police to elicit the truth of the matter. He reiterated that he used a ruse in interviewing Conner, to elicit the truth. 18RP 727-30. Davis testified that he only uses such a technique when he suspects the truth is other than what the suspect is saying, only if he has facts or opinions that the person is not being truthful. 18RP 730. Defense counsel did not object to this testimony.

"Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Improper opinion testimony violates the defendant's constitutional right to a jury trial. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Thus, an explicit or nearly explicit opinion on the defendant's guilt or credibility can constitute a manifest constitutional

error, which may be challenged for the first time on appeal. Kirkman, 159 Wn.2d at 936; RAP 2.5(a).

Whether testimony constitutes an improper opinion depends on the circumstances of each case, including the type of witness, the nature of the charges, the defense presented, and the other evidence in the case. Demery, 144 Wn.2d at 759. It is well established that a witness may not testify about the credibility of another witness. Demery, 144 Wn.2d at 758-58; State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). When the jury learns the witness's opinion of the defendant's credibility, reversal may be required. Id. "Particularly where an opinion on the veracity of a defendant is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the factfinder and deny the defendant of a fair and impartial trial." State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011) (citing Dolan, 118 Wn. App. at 329).

In Demery, the trial judge admitted a tape recording of the defendant's interview with the police, during which the police officers suggested Demery was lying. One of the detectives testified at trial that when he made these statements to Demery, he was employing a common interrogation technique designed to see if Demery would change his story. Demery, 144 Wn.2d at 757. The Court of Appeals reversed Demery's conviction, concluding that the officers' statements constituted

impermissible opinion testimony regarding the veracity of the defendant. Demery, 144 Wn.2d at 755.

The Washington Supreme Court reversed the Court of Appeals opinion. Four justices concluded that the officers' statements were not impermissible opinion testimony but merely placed the defendant's statements during the police interview into context. Demery, 144 Wn.2d at 764 (plurality opinion). Another four justices concluded that, although the officers' statements were made in the course of an interrogation, their words clearly stated their belief that the defendant was lying. They therefore constituted impermissible opinion as to the veracity of the defendant and should have been excluded. Demery, 144 Wn.2d at 771 (Sanders, J., dissenting). Justice Alexander agreed with the dissent that the accusation that Demery was lying was opinion evidence regarding the defendant's veracity which should not have been admitted. Demery, 144 Wn.2d at 765 (Alexander, J., concurring). He concluded that the error was harmless, however, and concurred with the plurality only as to the result. Id.

Applying the majority holding in Demery to this case, Davis's testimony that he used a ruse because he suspected Conner was not being truthful was improper opinion as to the veracity of the defendant. Davis was not merely recounting his statements to Conner during the

interrogation to explain the technique he employed. See, e.g., Notaro, 161 Wn. App. at 669. He went on to testify that the reason he used the technique was that he personally believed Conner was lying, and he wanted to elicit the truth. 18RP 730. Nor was the prosecutor merely responding to the cross examination when eliciting this opinion. Defense counsel asked about the ruse to clarify that there was actually no information that Conner had been in possession of the Hi-Point. That line of questioning did not open the door to testimony that Davis used the ruse because he thought Conner was lying.

Although defense counsel did not object to Davis's improper opinion testimony, Davis's explicit or nearly explicit opinion on Conner's guilt or credibility constitutes a manifest constitutional error, which this Court may review on appeal. Kirkman, 159 Wn.2d at 936; RAP 2.5(a). Admission of improper opinion evidence violates the constitutional right to a jury trial and requires reversal unless the error was harmless beyond a reasonable doubt. Dolan, 118 Wn. App. at 330 (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Demery, 144 Wn.2d at 759; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)).

In Demery, the improper admission of opinion testimony was deemed harmless because the officers' accusation during the interrogation that the defendant was lying did not play a significant role in the State's case. From the way it was presented at trial, it was clear that the officer was not expressing a judgment about the defendant's veracity, but merely trying to trick the defendant into changing his story. Demery, 144 Wn.2d at 766 (Alexander, J., concurring). Given this context and the strength of the State's other evidence, the error was harmless. Id.[2]

Here, on the other hand, Davis not only described his interview technique, he also testified that the reason he employed that technique was that he did not believe Conner's claims that he did not handle or know about the guns in Smith's truck. Conner was charged with possession of the firearms and firearm enhancements on numerous charges of first degree burglary and first degree robbery. The State could not prove with physical evidence that Conner had handled the guns, and the only witnesses placing the guns in Conner's hands had serious credibility issues. Testimony from Davis that he did not believe Conner likely carried a lot of weight with the jury on this key issue. See Demery, 144

[2] Justice Alexander applied the non-constitutional harmless error standard, because neither party in that case asserted that the error was of constitutional magnitude. Demery, 144 Wn.2d at 765-66 (Alsexander, J., concurring). The plurality opinion recognized, however, that admitting impermissible opinion testimony violates the constitutional right to a jury trial. Demery, 144 Wn.2d at 759.

Wn.2d at 765 (testimony from law enforcement officer carries "special aura of reliability"). The State cannot prove that the improper admission of Davis's opinion as to Conner's veracity and guilt was harmless beyond a reasonable doubt, and his convictions must be reversed.

3. IF TRIAL COUNSEL'S FAILURE TO OBJECT TO THE IMPROPER OPINION TESTIMONY WAIVED THE ISSUE FOR APPEAL, CONNER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend, VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). In this case, counsel's failure to object to admission of Davis's opinion constituted ineffective assistance of counsel.

Defense counsel did not object when Davis testified that he used a ruse when interrogating Conner because he believed Conner was not being truthful. As a result, there was nothing preventing the jury from considering that opinion when evaluating Conner's credibility. As

discussed above, there were significant issues with the State's evidence regarding Conner's possession of the guns, and it is likely the jury was unduly swayed by the opinion of Davis, a law enforcement officer, that Conner was lying. Counsel's deficient performance prejudiced the defense, and Conner's convictions must be reversed.

4. THE IMPROPER MISSING WITNESS INSTRUCTION AS TO RACHEL DUCKWORTH DENIED CONNER HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The State first presented evidence about Rachel Duckworth through Detective Davis, who testified about executing a search warrant at her apartment. Davis testified that when he contacted Rachel, she was very hostile, screaming, and out of control. 17RP 567. The defense argued that testimony about Rachel's demeanor was irrelevant, and it prejudiced the jury against Conner, because they had been told Rachel was his girlfriend. 17RP 568. The State responded that the testimony was relevant because it planned to present evidence of phone calls between Conner and Rachel to show they were collaborating on a defense. 17RP 570.

Then the State presented recordings of phone calls between Conner and Rachel. In the calls Conner told Rachel that he was done with "all that shit," he was "getting all this dumb shit behind" him, and he was "gonna turn over a new leaf." Rachel warned Conner that if he did not

leave the streets alone she would leave him, and Conner again said he was "done with all that shit." Supp. CP (Sub. No. 101, at 5, 10, 14, 18). Conner explained in his direct testimony that when he talked to Rachel about changing his ways, he was talking about partying and selling and smoking marijuana. 30RP 2064-65. He told her he wanted to leave the streets behind, because the extra money from selling drugs was not worth the time in jail. 30RP 2065; 31RP 2202-23.

Near the close of the defense case, the State proposed a missing witness instruction as to Rachel. The prosecutor argued that Rachel was identified as a defense witness early on, as Conner's ex-girlfriend she was available to the defense, she had been hostile to law enforcement from the outset, and it was unlikely she would have responded to attempts by the State to reach her. The prosecutor stated that since Rachel could have explained the phone calls with Conner, and she could have explained the stolen property in her possession, it would have been in Conner's interest to call her. 32RP 2357-58.

Defense counsel responded that nothing prevented the State from calling Rachel as a witness. It could have subpoenaed her and compelled her attendance. Counsel indicated that Rachel chose not to testify to avoid incriminating herself, and therefore she was unavailable to the defense. 32RP 2358-59. When the court asked defense counsel why he mentioned

to the jury in opening statement that Rachel would testify, counsel said he did not remember doing so. 32RP 2360-61.

In fact, counsel was correct, and the court was mistaken. In opening statement counsel told the jury that Conner would testify, Summers would testify, and Megan Duckworth would testify. 39RP 45-46. He never said Rachel Duckworth would testify. Counsel mentioned that Rachel was Conner's girlfriend and someone he was getting serious about, and Conner was at Rachel's apartment earlier on the day he was arrested. 39RP 38-39. He also told the jury that Conner got a safe from Smith sometime in October, and he used it to store personal documents. 39RP 37-38.

The court granted the State's request for a missing witness instruction. It concluded that Rachel's potential testimony was material and not cumulative, relying on its mistaken belief that defense counsel said in opening statement that the jury would hear from Rachel about the safe found in her apartment and the weapons alleged to be in Conner's possession. The court further concluded that Rachel's testimony would have been material on Conner's meaning in the telephone conversations, since she was the other participant in the calls. 33RP 2415-16.

Next, the court concluded that Rachel was particularly under Conner's control, as opposed to equally available to both parties. It

reasoned that since Rachel had a Fifth Amendment privilege and had an attorney appointed for her, it would not have been a simple matter for the State to interview her. Since defense counsel had contact with Rachel and told her she potentially faced criminal charges, she was particularly under the defense control. 33RP 2416-18.

The court further concluded that Rachel's absence was not adequately explained. The court noted that the only explanation given was that she told defense counsel she did not want to testify. The court did not think that was adequate, given that Rachel had an attorney. 33RP 2418. Finally, the court concluded that the inference that Rachel's testimony would have been unfavorable to the defense did not infringe on Conner's right to silence or shift the burden of proof to the defense. The court did not explain its reasoning as to that factor. 33RP 2418.

The court gave the following instruction:

> If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:
>
> (1) The witness is within the control of, or peculiarly available to, that party;
>
> (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
>
> (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
>
> (4) There is no satisfactory explanation of why the party did not call the person as a witness; and

(5) The inference is reasonable in all of the circumstances. The parties in this case are the State of Washington and La'Juanta Le'Vear Conner.

CP 243 (Instruction No. 7). Defense counsel excepted to the missing witness instruction. 33RP 2425-27.

In closing argument, the prosecutor told the jury that the missing witness instruction related to Rachel Duckworth. She argued that Rachel is particularly associated with Conner, and he could have called her to explain the phone calls where she told him he needs a job and cannot go out on the street and make more money. The prosecutor argued that Rachel did not testify, even though defense counsel said in opening statement that she would, and the jury could infer that her testimony would have been unfavorable to Conner. 34RP 2548. Then, in rebuttal argument, the prosecutor stated that Rachel is the one who could have testified what she meant when she told Conner he needed to leave the streets behind, but she did not testify. She argued that the jury could infer that Rachel's testimony would have been contrary to Conner's interests. 35RP 2716-17.

In a criminal case, the burden of proof is on the State to prove every element of the crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends VI, XIV; Wash. Const. art. I, § § 3, 22. "A criminal

defendant has no burden to present evidence, and it is error for the State to suggest otherwise." State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). Thus, the prosecutor may not argue in a manner that suggests the defendant has the duty to present exculpatory evidence. State v. Cleveland, 58 Wn. App. 634, 647-48, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). Under limited circumstances, the State may "point out the absence of a 'natural witness' when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable." Montgomery, 163 Wn.2d at 598 (citing State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991)).

The court must adhere to strict limitations when the State seeks to apply the missing witness doctrine against a criminal defendant. First, the doctrine applies only if the potential testimony is material and not cumulative. Second, the missing witness must be particularly under the control of the defendant, rather than equally available to both parties. Third, the doctrine applies only of the witness's absence is not satisfactorily explained. And finally, the doctrine may not be applied if it would infringe on the defendant's right to silence or shift the burden of proof. Montgomery, 163 Wn.2d at 589-99; Blair, 117 Wn.2d at 488-91.

If any one of these factors is unsatisfied, the missing witness doctrine does not apply. Id.

The missing witness doctrine was not properly applied in this case. First, there was no reason to believe that Rachel Duckworth could provide material testimony. The State argued, and the court found, that her testimony would be relevant to explain her phone conversations with Conner. But those conversations were offered by the State on the theory that they showed Conner's consciousness of guilt. 15RP 438-39. It was Conner's understanding of what he said that was relevant, not Rachel's, and Conner addressed that in his testimony. The court also found that Rachel's testimony was material to corroborate Conner's explanation for the safe found in Rachel's apartment. But Summers had already corroborated that information. Any testimony from Rachel on that issue would have been cumulative.

Key to the trial court's conclusion that Rachel's testimony would have been material was its mistaken belief that defense counsel had told the jury in opening statement that she would testify. At no point did defense counsel or Conner assert before the jury that Rachel would corroborate any aspect of Conner's defense. Because Rachel's potential testimony was cumulative and not material, the missing witness instruction and argument were improper. See Montgomery, 163 Wn.2d at

599 (missing witness instruction improper where potential testimony not material because it would have been cumulative and defendant did not assert that the witness could corroborate his defense).

Furthermore, Rachel's absence from trial was adequately explained. The missing witness doctrine is based on the assumption that a party will call an important witness who will support the party's version of events. Blair, 117 Wn.2d at 485-86. The doctrine does not apply when the witness's absence can be satisfactorily explained. If the absent witness faced the possibility of self-incrimination if he or she were to testify, the absence is explained and no missing witness instruction or argument is permitted. Montgomery, 163 Wn.2d at 599; Blair, 117 Wn.2d at 489-90. That was the case here. The State presented the phone recordings in an attempt to show Rachel was colluding with Conner on a defense, it presented testimony about her behavior when the search warrant was executed to suggest she was obstructing, and it presented evidence that stolen property was found in her apartment. Rachel chose not to testify to avoid self-incrimination. Her absence from trial was satisfactorily explained, and the missing witness instruction and argument were improper.

When the trial court incorrectly instructs the jury that it may draw an adverse inference from the defendant's failure to call a witness, the jury

is improperly instructed on the burden of proof. Montgomery, 163 Wn.2d at 600. The appellate court must reverse the conviction unless the court finds beyond a reasonable doubt that the error did not contribute to the verdict. Id.

The State's case against Conner had weaknesses. None of the victims identified Conner and no physical evidence placed him at the scene of any home invasion or in possession of any gun. The witnesses who implicated Conner had changed their stories until they were finally given very favorable deals in exchange for their testimony. Conner testified in his defense that he was not involved in the home invasions, although he was involved in drug transactions. He explained that when he told Rachel he was changing his ways, he was referring to his lifestyle. These circumstances easily could have supported a reasonable doubt as to Conner's guilt. The improper inference that Rachel's absence meant Conner had something to hide cannot be considered harmless beyond a reasonable doubt, and Conner's convictions must be reversed.

5. THE COURT COMMENTED ON THE EVIDENCE BY INSTRUCTING THE JURY TO DISREGARD KEY ARGUMENTS OF THE DEFENSE.

During closing argument, defense counsel argued that police prompted Smith about where to shift blame by telling him that if he was not the ringleader, they could help him get out of jail. Counsel suggested

that Alexander went through the same thing, and the prosecutor objected that these were not facts in evidence. The court sustained the objection and told defense counsel to move on. 34RP 2590-91. Defense counsel went on, arguing that by the time Alexander gave his statement to police, in an attempt to reduce his sentence, the only person left to accuse was Conner. The prosecutor objected and moved to strike, and the court responded, "Members of the jury, you will disregard the last argument of Counsel." 34RP 2591. Defense counsel then argued that Conner was the person left that they did not have the evidence they needed. The prosecutor moved to strike, and again the court sustained the objection. Id.

Later, defense counsel argued that Alexander's stories did not make sense, and he had changed his testimony on the stand when counsel called him on the inconsistencies. Counsel argued that he was able to change his story quickly because he was experienced in it and had been doing it a long time. 35RP 2613-14. The prosecutor objected, and the court sustained the objection. 35RP 2614. Counsel then started to argue that the jury could look at Alexander's record, but the prosecutor objected that counsel was arguing facts not in evidence, and the court sent the jury out of the courtroom. When the prosecutor argued that there was nothing in the record to suggest that Alexander had been a liar for a long time,

Defense counsel responded that Alexander had been convicted of crimes of dishonesty in 2008, and that information was before the jury. 35RP 2614-15. The court ruled that the argument was improper based on the facts in evidence. 35RP 2616. When the jury returned, the court instructed them, "Members of the jury, I have sustained the objection, and you are instructed to disregard the last remarks of counsel." 35RP 2616-17.

In rebuttal closing argument, the prosecutor reminded the jury that it had heard her make a number of objections regarding mischaracterization of evidence by defense counsel. 35RP 2695. Defense counsel objected, and the court excused the jury. Defense counsel moved for a mistrial, arguing that the court's rulings sustaining objections by the State and instructing the jury to disregard counsel's argument amounted to a comment on the evidence. 35RP 2695. The court denied the motion for mistrial.

Washington's constitution explicitly prohibits judicial comments on the evidence. Wash. Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."). This provision "prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The purpose of this

provision "is to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence." State v. Sivins, 138 Wn. App. 52, 58, 155 P.3d 982 (2007) (citing State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981)). Furthermore, "[a] statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative the disputed issue is inferable from the statement." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The mere implication of a judge's feelings about a case is sufficient to constitute an impermissible comment on the evidence. State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

The court below commented on the evidence when it instructed the jury to disregard proper arguments by counsel. Counsel are permitted to argue reasonable inferences drawn from the evidence at trial. State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). The defense theory in this case was that Smith and Alexander implicated Conner in an attempt to obtain favorable treatment for themselves. The argument in support of this theory, which the court instructed the jury to disregard, drew reasonable inferences from Alexander's testimony on cross examination. Alexander testified that he had read the police reports prior to his interview with the police, and he went into the interview determined to

save himself by giving the police whatever information they wanted so that he could get out of jail. 28RP 1803-04. Alexander further testified that in his interview, Detective Davis gave Alexander a long speech about what he needed to do in order to get a deal, and after that speech Alexander first referred to the .40 caliber firearm as Conner's gun. 28RP 1801-02.

The argument regarding Alexander's experience in deceit was also proper. A witness's prior convictions for crimes of dishonesty are admissible for the express purpose of impeaching the witness's credibility. ER 609(a)(2). The prior conviction permits an inference that the witness is not credible, because he has a history of dishonesty. Id. Here, the jury was informed that Alexander had prior convictions for making a false statement to a public servant and residential burglary. 27RP 1701. A reasonable inference from this evidence, and the reason for which it was admitted, was that Alexander had a history of dishonesty and therefore was not a credible witness.

There was nothing improper about counsel's arguments, as they drew reasonable inferences from the evidence at trial. The fact that competing inferences were available, or other evidence might not have supported the defense theory, does not mean that counsel was mischaracterizing the evidence. By sustaining the prosecutor's objections

and instructing the jury to disregard the defense argument, the court resolved the factual dispute in favor of the State.

Under article IV, section 16, an instruction improperly comments on the evidence if it "resolves a disputed issue of fact that should have been left to the jury." State v. Eaker, 113 Wn. App. 111, 118, 53 P.3d 37 (2002) (citing Becker, 132 Wn.2d at 64). The mere implication that a factual issue has been resolved violates this constitutional provision. "'All remarks and observations as to the facts before the jury are positively prohibited.'" State v. Bogner, 62 Wn.2d 257, 252, 382 P.2d 254 (1963) (quoting State v. Walters, 7 Wash. 246, 250, 34 P. 938 1893)). The court's instructions to disregard defense counsel's argument constituted impermissible comments on the evidence.

Washington courts adhere to a "rigorous standard" when reviewing judicial comments on the evidence. Lane, 125 Wn.2d at 838. Once it is established that a remark or instruction constitutes a comment on the evidence, the reviewing court presumes prejudice. Jackman, 156 Wn.2d at 743. This presumption arises because of the great influence judicial comments have on a jury's appraisal of a case:

> [I]t is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

Lane, 125 Wn.2d at 838. Therefore, the burden rests on the State to show the defendant was not prejudiced, unless the record affirmatively shows no prejudice could have resulted. Jackman, 156 Wn.2d at 743; Lane, 125 Wn.2d at 838. The State fails to meet its burden, and the error is therefore prejudicial, when the jury conceivably could have determined an element was not met had the court not made the comment. See Jackman, 156 Wn.2d at 745.

Without the court's improper instructions to disregard defense counsel's argument, the jury could conceivably have determined that Alexander's questionable credibility created a reasonable doubt as to Conner's participation in the charged offenses. The State cannot prove that the court's comment could not have affected the jury's verdict, and Conner's convictions should therefore be reversed.

6. AN ERROR IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED

The jury found by special verdict that Conner was not armed with a firearm during the commission of count XIX. 37RP 2746; CP 312[3]. The judgment and sentence indicates, however, that the court imposed a 60-

[3] The special verdict form contains a typographical error. It asks whether Conner was armed with a firearm for count IX, rather than count XIX. The jury noticed this error during deliberations, and the court clarified that the question referred to count XIX. CP 231.

month firearm enhancement on count XIX. CP 332. The judgment and sentence imposes 14 firearm enhancements, rather than the 13 supported by the jury's findings. CP 332-33. Thus, while the total sentence of 1148.5 months is the sentence authorized by the court, the judgment and sentence improperly requires that the first 840 months be served as straight time under the firearm enhancement provisions, rather than 780 months. See RCW 9.94A.533(3)(e).

Clerical errors on the face of a judgment and sentence may be corrected at any time. "A court has jurisdiction to amend a judgment to correct an erroneous sentence, where justice requires, under CrR 7.8." State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996). This rule provides, in relevant part:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

CrR 7.8(a).

To determine whether a clerical error exists under CrR 7.8, the appellate court uses the same test used to determine clerical error under CR 60(a), the civil rule governing amendment of judgments. State v. Rooth, 129 Wn. App. 761, 770, 121 P.3d 755 (2005). The court looks at "whether the judgment, as amended, embodies the trial court's intention,

as expressed in the record at trial[.]" Presidential Estates Apartment Assocs. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). If the corrected judgment embodies the court's intentions, the error may be considered "clerical" because "the amended judgment merely corrects language that did not correctly convey the intention of the court[.]" Presidential, 129 Wn.2d at 326.

This is clearly a clerical error. The court stated at sentencing that it was imposing the required 65 years of firearm enhancements, which represents thirteen 60-month enhancements. 38RP 2768, 2779. The judgment and sentence must be corrected to conform to the sentence authorized by the jury's special verdicts and imposed by the court, and the remedy is remand to the trial court for correction of the clerical error. See In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005).

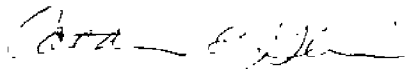
D. CONCLUSION

Conner's constitutional right to a fair jury trial was violated by the State's mid-trial exercise of a peremptory challenge, the improper admission of opinion as to his guilt or credibility, counsel's failure to object to the improper opinion testimony, the missing witness instruction and argument, and the court's comments on the evidence. Conner's convictions must be reversed and the case remanded for a new trial.

Moreover, remand is necessary to correct a clerical error in the judgment and sentence.

DATED May 22, 2013.

Respectfully submitted,



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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Port Orchard, WA
May 22, 2013

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