72405-3

NO. 72405-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KENNON FASTRUP,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE ELIZABETH BERNS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

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2. Has Fastrup waived the right to challenge the court's admission of prior misconduct evidence to which he did not object below? Did the trial court properly exercise its discretion to admit Fastrup's prior uncharged misconduct to rebut his material assertions and complete the picture of evidence that he offered? Was any error in the admission of the misconduct evidence harmless?

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B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Appellant Kennon Fastrup was charged with first-degree murder for the slaying of his girlfriend, Denise Grigsby. CP 23. He was also charged with second-degree arson for setting her car on fire with her dead body in the trunk. CP 24. He was further charged with attempting to elude based on his leading law enforcement on a high speed chase to avoid capture. CP 24. Finally, because he committed the crime along with Michelle Backstrom, whom he was prohibited from contacting, Fastrup was charged with misdemeanor violation of a domestic violence court order. CP 25.

On July 9, 2014, following a jury trial, Fastrup was convicted of all charges. CP 30-35, 91-92. The Honorable Judge Elizabeth Berns, who had presided over the trial, sentenced Fastrup to a total standard-range sentence of 548 months incarceration. CP 133; 16RP 13.[1] Fastrup now appeals his conviction. CP 145.

2. SUBSTANTIVE FACTS

Kennon Fastrup and Michelle Backstrom dated for nearly three years. 6/23/14RP 6-7, 92. In January of 2012, Fastrup met Denise Grigsby. 6/23/14RP 8. He soon left Backstrom and began dating

[1] The State adopts Appellant's designation of the Verbatim Report of Proceedings.

Grigsby. Id. Initially Backstrom was upset, but she quickly felt relief over the breakup. 6/23/14RP 8-9; 7RP 63, 85. Fastrup had been abusive toward Backstrom during their relationship. 7RP 62.

After their breakup, Backstrom and Fastrup maintained contact with one another. On May 4, 2012, despite the existence of a no-contact order prohibiting Fastrup from contact with Backstrom, he called her to come and pick him and Grigsby up. 6/23/14RP 9-10. Fastrup and Grigsby were out of money, her car had been impounded, and they had nowhere to stay. 6/23/14RP 10. Backstrom lived with her mother and her ten-year-old son in Kent. 6/23/14RP 5-6.

After Backstrom picked up Fastrup and Grigsby, they returned to Backstrom's home where Backstrom and Fastrup used methamphetamine, and Grigsby smoked marijuana and drank alcohol. 6/23/14RP 12. Later that evening, Grigsby convinced her mother to meet her at the tow yard with money to retrieve her impounded car. 6RP 99; 6/23/14RP 13. Backstrom, her son, Fastrup, and Grigsby all went to the tow lot in Backstrom's car. 6RP 100; 6/23/14RP 13. Backstrom, her son, and Fastrup left Grigsby with her mother at the tow lot and went to the dollar store down the street. 6/23/14RP 13-14. After Grigsby's mother paid the impound fees, Grigsby told her mother that she loved her and left to go

meet Fastrup and Backstrom at the dollar store. 6RP 100-02; 6/23/14RP 14-15. Grigsby's mother never heard from her again. 6RP 102.

After returning to Backstrom's house from the dollar store, they parked Grigsby's car inside the garage so that Grigsby and Fastrup could remove the impound stickers and load their belongings into it. 6/23/14RP 15. Then, Backstrom, her son, Fastrup, and Grigsby all went to Blockbuster Video in Backstrom's car. 6/23/14RP 16-20. Surveillance video from the store captured their presence at 8:10 p.m. 6/23/14RP 19. After returning to Backstrom's house, Backstrom made dinner. The adults ate in the bedroom and watched the movie, while Backstrom's son played video games in the living room. 6/23/14RP 19-20.

Around 10:30 p.m., after Backstrom put her son to bed, she went into the bathroom and used heroin. 6/23/14RP 20. Backstrom had been using heroin daily for the previous year and a half. 7RP 60. When Backstrom exited the bathroom, she heard Fastrup and Grigsby arguing in the kitchen. 6/23/14RP 21. The two of them had been arguing all evening over the same topic – Grigsby wanted to leave and go meet a man she had run into at the dollar store. 6/23/14RP 21-22, 117. Grigsby wanted to "pull a trick" (prostitute herself) and get money for drugs and a motel room for her and Fastrup. Id. Fastrup just wanted to stay at Backstrom's house and go to bed. 6/23/14RP 22, 117.

Upon hearing the arguing, Backstrom went into her kitchen and observed Fastrup and Grigsby physically fighting; they were both on the floor grappling with one another. 6/23/14RP 22-23. Backstrom told them to "get their shit and get out," but they continued to fight. 6/23/14RP 23. Backstrom tried to pull them apart, but Grigsby bit down on Backstrom's thumb and would not let go. Id. Fastrup got up and handed Backstrom a meat cleaver from the counter. 6/23/14RP 24. When Grigsby would still not let go of her thumb, Backstrom struck her on the hand with the meat cleaver. Grigsby released her bite on Backstrom's thumb. Id.

Fastrup and Grigsby continued to struggle. The door to the garage was off the kitchen, just two feet from where they were fighting. 6/23/14RP 25. Backstrom opened the door to the garage in an effort to move them that way, because they were loud. 6/23/14RP 28. Fastrup and Grigsby grappled just inside the entrance to the garage, with Grigsby bleeding from her hand, where Backstrom had hit her with the meat cleaver. Id. There was a broken cable sitting on the utility shelf just inside the garage, which Fastrup grabbed and wrapped around Grigsby's neck. 6/23/14RP 29. He tried to strangle her, but the cable became too slippery due to the blood from Grigsby's hand. Id.

Backstrom was angry that Grigsby had bitten and injured her thumb. 6/23/14RP 25. When she saw Fastrup's hand slipping from the

cable, Backstrom grabbed a red lanyard lying nearby and wrapped it around Grigsby's neck. 6/23/14RP 30. Grigsby told Backstrom that she was "sorry" and that she had a son. 6/23/14RP 31. Although Grigsby told Fastrup that she loved him, Fastrup grabbed a broken "Mag Light" flashlight and began to repeatedly hit Grigsby in the head with it. 6/23/14RP 31-32. Grigsby quit struggling, slumped over to the floor, bleeding and making "gurgling" noises. 6/23/14RP 31. Fastrup told Grigsby, "I told you not to fuck with me, bitch. I told you I was a killer." 6/23/14RP 33. Grigsby lay there for several minutes before she died. 6/23/14RP 32.

Afterwards, Fastrup told Backstrom to help him get Grigsby's body into the trunk of Grigsby's car, which was parked in the garage, nose first. 6/23/14RP 33-34. Fastrup dragged Grigsby to the rear of the car, and together with Backstrom, they lifted her into the trunk. Id. Fastrup closed the trunk and told Backstrom to go inside and clean herself up while he cleaned "the mess." 6/23/14RP 35.

Backstrom took off her bloody clothes and went inside. She checked on her son and then took a shower. 6/23/14RP 36. Fastrup came in a few minutes later and got into the shower as well. Id. After they cleaned off, the two of them went to bed, leaving Grigsby's body in the trunk of her car. 6/23/14RP 37.

Backstrom woke up around noon, made a sandwich for her son, and the two of them watched a movie while Fastrup slept the entire day. 6/23/14RP 37. After Fastrup awoke that evening, Backstrom, her son, and Fastrup went back to Blockbuster Video, where they swapped the movies they had rented the night before for more movies. 6/23/14RP 37, 40-41. Again, video surveillance from the store documented their presence, but this time without Grigsby; her body remained in the garage, in the trunk of her car. 6/23/14RP 39-40. After they left the video store, they went to QFC for jo-jos and chicken strips. 6/23/14RP 41. Fastrup and Backstrom did not discuss Grigsby's murder that night, except that Backstrom suggested they dump her car in a river. 6/23/14RP 38-39, 41. Fastrup did not agree with Backstrom's plan, stating, "Fuck that, I'm going to burn that bitch and all the evidence." Id. See also 6/23/14RP 57 (Fastrup's idea to burn the car and the evidence).

Late that night, Backstrom's friend Rodney Bonneville and his girlfriend came over to Backstrom's home. 6/23/14RP 54-55; 8RP 98-99, 118. The four of them, including Fastrup, smoked methamphetamine. 6/23/14RP 55; 8RP 99. Backstrom asked Bonneville and his girlfriend if they would stay at her house with her son so that she and Fastrup could get rid of a stolen car. 6/23/14RP 55-56; 8RP 101-02, 120. They agreed, and Backstrom took her car to the gas station, got gasoline in a can, and

returned home. 6/23/14RP 55-56. As she returned, Fastrup drove Grigsby's car out of the garage, with her body still in the trunk. 6/23/14RP 56. Backstrom followed Fastrup in her own vehicle. Id.

They drove down Highway 18 to Black Diamond until they found an isolated area. 6/23/14RP 57. Fastrup pulled Grigsby's car off of the main road onto a narrow dirt road and Backstrom followed in her car. 6/23/14RP 58. Fastrup retrieved the gasoline can from Backstrom's car and began to douse Grigsby's car with it, while Backstrom turned her car around in the narrow road. 6/23/14RP 58-59. Fastrup lit Grisby's car on fire and the two of them then left in Backstrom's car. Id. Backstrom could see that Grigsby's car was in flames as they drove away. 6/23/14RP 60. The pair returned to Backstrom's home and went to sleep. 6/23/14RP 61-62.

Meanwhile, a young man who lived in Black Diamond was returning home when he saw the burning car and called the police. 6RP 14-23. Firefighters responded and put out the flames. 6RP 30-31. After Fire investigator Thomas Devine arrived, he looked through the burned-out speaker hole into the trunk of the car. He smelled burned flesh and saw what appeared to be a body. 6RP 52-53. Firefighters opened the trunk and they observed Grigsby's remains. 6RP 25-35, 54. King County Sheriff's detectives and an associate medical examiner responded to the

arson site. 6RP 59; 8RP 12-13. What was left of Grigsby's body was burned beyond recognition. 8RP 17-20; 9RP 48. There were bicycle and motorcycle tires on top of her in the trunk, which had melted and stuck to her remains. 6RP 69-70; 8RP 13-15. A piece of red lanyard was observed in the crook of Grigsby's neck. 8RP 21.

After he performed an autopsy of Grigsby's remains, Forensic Pathologist Dr. Mazrim concluded that Grigsby had died from skull fractures and cerebral contusions due to blunt force injury to her head. 8RP 37. Because there was no soot in her airway or carbon monoxide in her blood, it was apparent that Grigsby was dead before the car was set on fire. 8RP 36-37. Although there was no way to tell what instrument was used to kill Grigsby, Dr. Mazrim testified that her injuries were consistent with being inflicted by a flashlight. 8RP 31.

After King County Sheriff's Detectives Pavlovich and Mellis discovered that the car was registered to Grigsby, they learned that her mother had last seen her at the tow yard, two evenings earlier, with Fastrup and Backstrom. 9RP 50-52; 10RP 11, 16-18. They began looking for Backstrom and Fastrup. 10RP 18. They knocked on Backstrom's door, but no one answered. 6/23/14RP 62; 10RP 19.

After Detective Mellis knocked on their door, Backstrom and Fastrup packed up and fled. 6/23/14RP 62. They got a money wire from

Backstrom's father, which they used to buy methamphetamine from Bonneville. 6/23/14RP 63; 8RP 104-07. They slept at Doug Swaney's house, who was a long-time friend of Backstrom's. 6/23/14RP 63-64; 9RP 7, 9. Backstrom was crying and distraught while she was there, and she and Fastrup screamed at one another much of the time. 8RP 106; 9RP 9-11.

Backstrom and Fastrup tried to take Backstrom's son to his grandmother's house in Yakima, but Backstrom's car only made it as far as Cle Elum. 6/23/14RP 66. Backstrom's brother met them there and took Backstrom's son to Yakima. 6/23/14RP 66-67. Backstrom and Fastrup returned to King County, where they camped off of a Forest Service Road near North Bend. 6/23/14RP 67; 9RP 16-19.

Meanwhile, Detective Mellis called Fastrup's phone and spoke to him. 10RP 79. Fastrup claimed to be in Oregon. 10RP 83-84. Fastrup claimed that he was not with Backstrom, and that he was looking for Grigsby. Id. Unbeknownst to Fastrup, the police were using cell phone tower information to locate Fastrup; they knew that he was not in Oregon. 10RP 81. They narrowed his phone's location to the area covered by a cell phone tower to the east of North Bend. 10RP 81-82.

One week after Grigsby's murder, on May 11, 2014, Forest Service Officer McIntosh located Backstrom's car under a tarp next to a

tent. 9RP 17-19. See also 6/23/14RP 78-80 (Backstrom describing hearing McIntosh outside the tent). As he staged nearby and advised Detective Mellis of his discovery, McIntosh saw Backstrom's car drive away, with Fastrup behind the wheel. 9RP 20-21. Instead of pulling over when Officer McIntosh attempted to stop the vehicle, Fastrup led law enforcement on a chase that exceeded 100 miles per hour on Interstate 90. 6/23/14RP 80-82; 9RP 22-25, 35-36.

While Fastrup was eluding the police in Backstrom's car, he called Detective Mellis and said, "Tell them to back the fuck off." 6/23/14RP 80; 10RP 85-86. Fastrup was highly agitated but finally agreed to meet Detective Mellis at the Snoqualmie Casino. Id. Before that could occur, Washington State Patrol troopers implemented a precision immobilization technique ("PIT maneuver") to stop Fastrup's car on an off-ramp to North Bend. 6/23/14RP 82-84; 9RP 36-38. Backstrom and Fastrup were arrested from the vehicle. 9RP 39; 10RP 87-88.

Immediately after their arrest, both Backstrom and Fastrup were advised of their rights and questioned by police. 9RP 54-58; 10RP 88-90. Backstrom admitted to being involved in the arson, but initially denied knowledge of Grigsby's murder. 6/23/14RP 84-85; 10RP 88-90. However, during the course of the interview, Backstrom admitted to the

details of the murder, with the exception that she omitted that she had struck Grigsby's hand with the meat cleaver. 6/23/14RP 86.

Fastrup's version of events shifted throughout his interview. He initially told Detective Pavlovich that Grigsby had left Backstrom's house to go meet the man from the dollar store, and that he never saw her again. 9RP 58. He claimed that she had left in her own car. 9RP 62. He initially claimed that Grigsby had left her phone behind and that the man she was supposedly meeting had called her phone that day and the records would be on it. 9RP 60, 62. Later, he said that it was a prepaid phone, implying the records would not exist. 9RP 61-65. When Detective Pavlovich assured him he could get the records of a prepaid phone, Fastrup claimed that he had deleted the records. 9RP 65-66. Finally, he said that he had given Grigsby's phone away. 9RP 66-67, 76.

Fastrup told Detective Pavlovich that he did not think Backstrom would have hurt Grigsby. 9RP 80. He continued to deny any knowledge of what had happened to Grigsby until Detective Pavlovich told him that his cell phone had "hit" off a tower near the arson site at the time of the fire. 9RP 80-81. Fastrup maintained he was not there and knew nothing about it. 9RP 81. Pavlovich told Fastrup that Backstrom had admitted being at the arson site. 9RP 82. Fastrup told Pavlovich that must have been why his phone was there – that Backstrom must have had it. Id.

Fastrup demanded to know what Backstrom was telling the police. 9RP 82-83. After Pavlovich told him that Backstrom admitted that they were both there when the car was burned, Fastrup admitted being there, but continued to maintain he did not know what had happened to Grigsby. 9RP 83.

Fastrup claimed he was "down the road" when Grigsby's car was set on fire. 9RP 84-85. He claimed he did not know Grigsby was dead. 9RP 86. When pressed, he admitted that he had driven Grigsby's car there, that Backstrom had followed in her car, and that Grigsby was in the trunk. 9RP 86-88. Fastrup denied looking in the trunk or seeing Grigsby. 9RP 88. Later, he admitted to "seeing" Grigsby in the trunk. 9RP 104. After initially claiming that he had nothing to do with setting the fire, Fastrup later admitted that he had lit the fire. 9RP 105, 126-27.

Fastrup changed his story from Grigsby leaving Backstrom's house to him leaving Backstrom's house to get drugs. 9RP 92-93, 113. He initially claimed that he had left in Backstrom's car, but later said that he left on foot. 9RP 113. He said that he was gone for an hour, and that Grigsby's car was there when he returned, but Grigsby was not. 9RP 114, 119. He claimed that he never asked Backstrom what had happened, because he "didn't want to know." 9RP 116, 121.

The police documented injuries on Fastrup that were consistent with the injuries that Backstrom told the police Fastrup incurred during the murder. 6/23/14RP 76-77; 7RP 81-82; 9RP 128-31.

Backstrom pled guilty to second-degree murder, was sentenced to fifteen years in prison, and agreed to testify against Fastrup. 6/23/14RP 87-88, 90-91; 7RP 83-84.

C. ARGUMENT

1. THE COURT DID NOT VIOLATE FASTRUP'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Fastrup alleges that the court interfered with his right to counsel by "eavesdropping" on "private communications" with his lawyer in the courtroom. He asks this Court to presume prejudice and reverse his convictions. His claim fails in the absence of any facts showing that his right to counsel was violated. He cannot establish that the bailiff "eavesdropped" on attorney-client conversation, or that the trial court required him to disclose or explain any confidential communications.

Governmental intrusion into private attorney-client communications violates a defendant's right to effective representation and due process. State v. Cory, 62 Wn.2d 371, 374-75, 382 P.2d 1019 (1963). The Washington Supreme Court has consistently held that eavesdropping by the State on private communications between a

defendant and his lawyer violates the right to counsel. In Cory, the Sheriff's Office had installed microphones in the county jail's conference room and used them to listen to conferences between the defendant and his lawyer. 62 Wn.2d at 372. In State v. Pena Fuentes, 179 Wn.2d 808, 816, 318 P.3d 257 (2014), the investigating detective intentionally listened to six recorded phone calls between the defendant and his lawyer. Such eavesdropping is presumed prejudicial unless the State can prove beyond a reasonable doubt that the eavesdropping did not result in such prejudice. Pena Fuentes, 179 Wn.2d at 262.

After individual questioning of the potential jurors who expressed that they might have heard of the facts of the case, the court took its morning recess. 4RP 12-13, 52-53. When the judge returned to the bench, the following exchange occurred:

> THE COURT: OK, counsel, while we were on our morning break, my bailiff had come with some information to me. When Juror 35 was brought in for individual questioning, she noted that Mr. Fastrup had ***demonstrated non-verbal recognition*** of Juror 35. And so I wanted to inquire whether that was someone that he was familiar with or knew in any way. And I'll just put that out there, and Mr. Todd, perhaps you want to have a conversation briefly in answer to that?
>
> MR. TODD: Is that the gentleman –
>
> MR. FASTRUP: The Tigger [sic] guy?
> MR. TODD: Big guy.

THE COURT: Yes.

MR. FASTRUP: He looks like a guy from Renton High School, Renton School District. I don't know. It might not be him. It just kind of looked like him.

THE COURT: That he was? I am sorry; I missed the first part.

MR. FASTRUP: He looked like somebody I knew from High School.

THE COURT: OK.

MR. FASTRUP: And I don't know if it is him or not. He just looked similar. And he is also from Renton, so I don't know.

MR. TODD: He is 28, as well.

THE COURT: So I just want to bring that up. I did not – I was focused on Juror 35. ***I didn't notice that there – that the recognition could be mutual.*** So that's why I wanted to inquire. So all right. Thank you.

MR. TODD: And if I may, what did Juror 35 say?

THE COURT: Juror 35 was the gentleman who had a girlfriend who had tried to save someone out of a burning car, and then was – had just some general information about a report. Didn't have any specific details if I recall correctly.

MR. TODD: With regard to knowing Mr. Fastrup?

THE COURT: Juror 35 did not report that.

MR. TODD: Oh.

THE COURT: He did not report it. My bailiff came to me and indicated that she ***had noticed that Mr. Fastrup had***

> ***responded when he saw Juror 35 in such a way that it looked like he knew Juror 35.*** So we just wanted to followup and I understand that now Mr. Fastrup has indicated he thought he looked like someone he had went to high school with, so.
>
> Mr. TODD: OK.
>
> THE COURT: And of course the court will be inquiring when we have our pool whether there is anyone who recognizes me, any of the lower bench, any of the parties or attorneys in the case, and so there is that opportunity as well if there seems to be some recognition that we need to address.

4RP 53-55 (emphasis added).

Based on this exchange,[2] Fastrup contends that the bailiff "eavesdropped" on "private communications" with his lawyer, "relayed this private conversation to the judge," who then announced the "conversation" in open court, and "required" Fastrup to "state his thoughts about Juror 35 on the record." Brf. of Appellant at 15. Fastrup argues that the State was able to use this private communication to its advantage.

The record simply does not support these claims. The bailiff's *observation* of Fastrup's *non-verbal demonstration* that he recognized a potential juror does not equate to eavesdropping on privileged

[2] Following his conviction, Fastrup moved for a new trial on multiple grounds, including that the court interfered with his right to counsel regarding Juror 35. CP 96-100, 105-16, 119-21. As factual support for his claim on appeal, Fastrup cites to his trial attorney's briefing in support of the motion for new trial. But his trial attorney provided no factual support for the motion; he merely made conclusory statements characterizing events in a manner contradictory to the record itself.

conversation. Nor did the Court's inquiry about Fastrup's non-verbal demonstration of recognition that he exhibited for the bailiff to see require Fastrup to relay privileged communications or "state his thoughts" about a potential juror. There are no facts to support Fastrup's claim that his right to counsel and right to participate in jury selection were violated.

For the same reason, the trial court did not abuse its discretion when it denied Fastrup's motion for a new trial based on his claim that his right to counsel was violated. CrR 7.5(a) provides that "[t]he court on motion of a defendant may grant a new trial ... when it affirmatively appears that a substantial right of the defendant was materially affected." A trial court's decision to grant or deny a motion for new trial is a matter within its sound discretion, and will be reversed only for abuse of that discretion. State v. McKenzie, 157 Wn.2d 44, 51, 134 P.3d 221 (2006). An abuse of discretion occurs only when *no reasonable judge* would have reached the same decision. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). Fastrup's factually unsupported motion for a new trial was insufficient to affirmatively demonstrate that his right to a fair trial was materially affected. The court properly exercised its discretion to deny the motion.

2. THE ADMISSION OF FASTRUP'S UNCHARGED MISCONDUCT DOES NOT WARRANT REVERSAL.

Fastrup alleges that the trial court erroneously admitted unduly prejudicial evidence of uncharged misconduct. This claim must be rejected.

First, Fastrup did not object to evidence that he had previously "pistol-whipped" and stolen from Backstrom, and thus he cannot challenge it for the first time here. The evidence was part and parcel of an incident that Fastrup himself moved to admit on the theory that it proved Backstrom's motive to kill Grigsby out of jealousy. Further, the trial court properly admitted a photograph of Backstrom's injuries from the "pistol-whipping" incident after Fastrup opened the door to it by cross-examining Backstrom in such a manner that distorted and cast doubt on her version of events. The State was entitled to corroborate Backstrom's asserted motivation for breaking Grigsby's car window (anger about the pistol-whipping and theft). As such, Fastrup cannot complain that the State was allowed to properly complete the picture of an incident that he himself wanted before the jury.

Next, evidence that Fastrup threatened to assault Backstrom in open court, and that the jail officers would have to "fuck him up" to stop him, was properly admitted to rebut Fastrup's material assertion that he

was scared of Backstrom and had only helped her burn Grigsby's body out of fear that she would kill him too.

As to the remaining misconduct evidence Fastrup complains of, he elicited it during cross-examination of Backstrom and failed to object or move to strike portions of it. As such, he cannot challenge that evidence for the first time on appeal. With respect to the evidence to which Fastrup objected, the court properly admitted some of it after Fastrup opened the door, and instructed the jury to disregard the rest. Finally, any error in the admission of the misconduct evidence was harmless.

a. Incident Regarding Fastrup's "Pistol-Whipping" Of Backstrom.

i. Relevant facts.

Shortly before Grigsby's homicide, Backstrom had broken out the windshield of Grigsby's car with a hatchet.[3] 6/23/14RP 9, 95-96; 7RP 43-44. The incident occurred because Fastrup beat Backstrom, pistol-whipped her, and stole her phone and her wallet. When Grigsby arrived to pick Fastrup up, Backstrom demanded her phone back from Fastrup.

[3] Fastrup had met Grigsby in January of 2012 and immediately left Backstrom for Grigsby. 6/23/14RP 8. Grigsby was murdered on May 4, 2012. Backstrom testified that the incident with the hatchet occurred "about three months" after Fastrup left her for Grigsby. 6/23/14RP 9. Thus, the incident occurred approximately one month prior to Grigsby's murder.

Fastrup refused and Backstrom hit the windshield of Grigsby's car with a hatchet. 6/23/14RP 9.

During pretrial motions, Fastrup informed the court that he wanted to admit evidence that Backstrom had broken Grigsby's car window with a hatchet to show the "continued animosity that [Backstrom] had towards [Grigsby] culminated in [Backstrom] and [Backstrom] alone killing [Grigsby]." 1RP 114-15. The State agreed that the evidence was admissible. 1RP 115.

During Backstrom's direct examination, the State inquired about the incident, and Backstrom admitted to breaking Grigsby's windshield with the hatchet and explained the surrounding circumstances without objection. 6/23/14RP 9. During cross-examination, Fastrup brought up the incident more than once and tried to get Backstrom to admit that she had broken the windshield because she was angry that Fastrup had left her for Grigsby. 6/23/14RP 95-96; 7RP 43-44. Backstrom explained that she was mad at Fastrup for beating her and stealing her phone; Fastrup did not object. 7RP 43-44. Instead, he repeatedly attempted to get Backstrom to admit that she was mad at Fastrup for leaving her, and that she was mad at Grigsby for "taking her boyfriend." 7RP 62-64.

After Fastrup had cross-examined Backstrom about her motivations for breaking Grigsby's windshield, the State moved to admit a

photograph of the injuries that Backstrom had suffered as a result of the pistol-whipping by Fastrup.[4] 7RP 89-90, 92. The State explained that through cross-examination, Fastrup had gone to great lengths to paint Backstrom as a jealous ex-girlfriend who had taken a hatchet to Grigsby's car out of anger and jealousy. The State pointed out that the photograph of her injuries corroborated Backstrom's version of events that she had broken the windshield out of anger for being beaten and having her property stolen. 7RP 89-90, 92. The prosecutor argued that Fastrup should not be allowed to attempt to give Backstrom a motive to commit the crime and "lie against the defendant" without the State being permitted to introduce evidence that contradicted such a theory. 7RP 92-93.

Fastrup objected to the photograph, stating that because he did not specifically question Backstrom with, "Kenny really didn't beat you up," there was nothing to corroborate, and that the probative value of the photograph was outweighed by the danger of unfair prejudice. 7RP 91, 93-94, 98-99. The court noted that the subject was brought up on multiple occasions during cross-examination, agreed with the State's reasoning, and admitted the photograph. 7RP 94-95. The court provided the jury with the limiting instruction that was proposed by Fastrup. CP 26; 7RP 109, 123.

[4] Although not before the jury, the pistol-whipping and its attendant photograph was the subject of a pending felony charge against Fastrup. 7RP 98.

ii. Fastrup has waived a challenge to the testimony that he pistol-whipped Backstrom.

Generally, a defendant cannot raise an issue for the first time in the appellate courts. RAP 2.5(a). Accordingly, in order to challenge a trial court's admission of evidence, a party must raise a timely and specific objection at trial. State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006), rev. denied, 160 Wn.2d 1008 (2007). The reason for this rule is to afford the trial court with an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

An exception to the general rule is made when the appellant demonstrates that the error complained of constitutes manifest constitutional error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). "Evidentiary errors under ER 404 are not of constitutional magnitude." State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). See also State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321, 328 (2009) (a claim that evidence was erroneously admitted is not of constitutional magnitude). Therefore, where a defendant does not object at trial to the admission of evidence on the basis of ER 404(b), the defendant may not assert on appeal that the trial court erred by admitting

such evidence. State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007); State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).

Fastrup did not object to the *testimony* that he pistol-whipped Backstrom. He objected only to the photograph depicting her injuries. Thus Fastrup cannot complain on appeal that testimony regarding the incident was erroneously admitted.

iii. The court properly admitted the photograph of Backstrom's injuries from the "pistol-whipping."

The decision to admit prior bad act evidence lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Brown, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997). While reasonable minds might disagree with the trial court's evidentiary ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, Fastrup must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Fastrup has not met this burden.

Under ER 404(b), evidence of other misconduct is not admissible to show that a defendant is a "criminal type." Brown, 132 Wn.2d at 570;

State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). But uncharged misconduct may be admitted for other reasons. Prior misconduct may be admitted to rebut a material assertion by the defendant. State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). Moreover, a trial court may admit evidence that might otherwise be inadmissible if the defendant "opens the door" to it. State v. Warren, 134 Wn. App. 44, 64-65, 138 P.3d 1081 (2006), aff'd on other grounds, 165 Wn.2d 17, 195 P.3d 940 (2008). Specifically, the State may pursue an otherwise inadmissible subject to clarify a false impression created by the defendant. State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009) (citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)); State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006). As stated by the court in Gefeller:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Gefeller, 76 Wn.2d at 455.

Like a trial court's decision to admit prior misconduct evidence, its determination that the defendant has "opened the door" to otherwise-inadmissible evidence is reviewed for abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); Ortega, 134 Wn. App. at 626.

Here, the court properly exercised its discretion to admit the photograph of Backstrom's injuries. Fastrup's cross-examination of Backstrom asserted she had attacked Grigsby's vehicle out of jealousy and anger that Fastrup had left her for Grigsby. See 7RP 43 ("You had actually used that hatchet to break out [Denise]'s windows, correct? ... Because you were mad, correct? ... Because Kenny was with Denise?"); 7RP 62 ("Now with regards to Denise, you were mad at Denise for taking your boyfriend, weren't you?"). The court properly allowed the State to present corroborating evidence that Fastrup had pistol-whipped Backstrom to rebut the impression Fastrup created during his cross-examination of Backstrom – that she had broken the windshield because she was jealous. Fisher, 165 Wn.2d at 750. The trial court did not abuse its discretion.

b. Evidence That Fastrup Threatened To Assault Backstrom In Court.

i. Relevant facts.

The court recessed for lunch during Fastrup's cross-examination of Backstrom. 7RP 100-01. During the recess, Fastrup was very upset about

Backstrom's testimony, and told King County Correctional Officer Jeffrey Gaw, "If you guys take me back up to court and you take the cuffs off, I am going to jump over the counter and beat her up. And you guys are going to have to fuck me up." 7RP 107; 10RP 19-30. The court and parties were informed, Fastrup's attorney spoke with him in an effort to calm him, and after discussing various security scenarios, Fastrup returned to court with extra corrections officers present. 7RP 101-08.

The State moved to admit evidence of Fastrup's threat toward Backstrom as evidence of his guilty conscience and his intent to intimidate a witness who was testifying against him. 8RP 75-76, 79, 86-87. Fastrup objected to the evidence as irrelevant and prejudicial. 8RP 78-79. The court concluded that the threat had limited probative value of guilty conscience that was substantially outweighed by the danger of unfair prejudice and excluded the evidence. 8RP 89-91.

Later, Fastrup cross-examined Detective Pavlovich, who had interviewed Fastrup the day of his arrest, about statements Fastrup made about Backstrom. Specifically, he asked Pavlovich about Fastrup's statements about Backstrom – "Fucking bitch will kick my ass, dude," referring to why he never confronted her about what happened while he was gone. He also asked about Fastrup's statements that if he had left Backstrom's house or said something about Grigsby, then he would be "in

the exact same situation" as Grigsby. 9RP 168. Fastrup also cross-examined Pavlovich about his statements that when Backstrom asked him to help her get rid of the car, if he would have refused, "She would have fucking, would have fucking put me there with her ... She sort of threatened me a couple of times." 9RP 172. Fastrup also elicited his statements to police that it was "not physically possible" for him to kill Grigsby because of his small size in relation to her. 9RP 169. This came after Fastrup's questioning of Backstrom about how both she and Grigsby were both much larger than Fastrup. 7RP 62.

Following Fastrup's cross-examination of Detective Pavlovich, the State moved again to admit evidence of Fastrup's mid-trial threat toward Backstrom. CP 28; 10RP 21-24. The prosecutor contended that Fastrup's cross-examination of Detective Pavlovich, which elicited Fastrup's claims that Backstrom (who was larger than him) had threatened him, and that he was afraid she would kill him if he did not help her dispose of Grigsby's car, had painted him to be small, defenseless, and in fear of Backstrom. 10RP 22-23. The prosecutor argued that Fastrup's threat to beat Backstrom in court and that the jail officers would have to "fuck him up" - to stop him, was relevant to rebut Fastrup's claims of fear and defenselessness. 10RP 22-23, 67-68. Noting that it had previously determined that the probative value of the threat was outweighed by the

danger of unfair prejudice, the trial court concluded that Fastrup's questioning of Pavlovich had changed that balance. After careful re-weighing, the court admitted the threat. 10RP 74-75. The court indicated that it would provide a limiting instruction and encouraged Fastrup to propose one, which he did. CP 29; 10RP 75-76.

ii. The court properly admitted Fastrup's mid-trial threat toward Backstrom.

As noted above, prior misconduct may be admitted to rebut a material assertion by the defendant. Fisher, 165 Wn.2d at 750. Additionally, otherwise inadmissible evidence may be admitted if the defendant "opens the door" to it or creates a false impression of a relevant issue. Warren, 134 Wn. App. at 64-65; Fisher, 165 Wn.2d at 750.

After excluding Fastrup's mid-trial threat to assault Backstrom, the court reconsidered the State's motion to admit the evidence after Fastrup specifically elicited information from Detective Pavlovich about his post-arrest claims that he was scared of Backstrom (who was larger than him) because she had threatened him before and could "kick his ass," and that he only helped Backstrom dispose of Grigsby's body because he was scared Backstrom would kill him too. See 9RP 168-72. The court determined that Fastrup's stated intent to attack Backstrom in court,

requiring the jail officers to "fuck him up" to stop him, was relevant to rebut Fastrup's claims as stated by Detective Pavlovich. 10RP 74-76.

The court's ruling was proper. After all, the decision to admit prior bad act evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. Brown, 132 Wn.2d at 571-72.

c. Other Instances Of Misconduct Elicited By Fastrup During Cross-Examination.

Fastrup argues the court erroneously admitted a "myriad" of other misconduct evidence by Fastrup. He essentially alleges that the court should have intervened during his cross-examination of Backstrom when she blurted out negative things about him in response to his questioning. However, Fastrup did not properly object to some of the evidence he complains of, and thus cannot raise a challenge to that evidence for the first time on appeal. The remaining evidence does not require reversal because there is no reasonable probability that it materially affected the outcome.

i. Fastrup waived a challenge to prior misconduct evidence that he did not properly object to at trial.

As outlined above, a defendant is generally precluded from raising an issue for the first time in the appellate courts. RAP 2.5(a).

Additionally, "A party may only assign error in the appellate court on the *specific* ground of the evidentiary objection made at trial." State v. Elkins, 152 Wn. App. 871, 878, 220 P.3d 211 (2009) (quoting Guloy, 104 Wn.2d at 422) (emphasis added). See also ER 103(a)(1) (timely objection, stating the specific grounds, is required for claim of error). An exception to this general rule is made when the appellant demonstrates that the error complained of constitutes manifest constitutional error. RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 926-27. However, as stated previously, evidentiary errors under ER 404(b) are non-constitutional in nature. Jackson, 102 Wn.2d at 695.

The specific misconduct Fastrup alleges that he has waived for failure to properly object includes testimony:

- that he was "selfish." 6/23/14RP 129.
- that he was a "control freak." 7RP 61.
- that he was "a hateful little person." 7RP 65.
- that "he obviously did this," (counsel objected as non-responsive, not as improper misconduct evidence). 7RP 85.
- that he got both her and Grigsby addicted to drugs (counsel objected as non-responsive, not as improper misconduct evidence). 7RP 87.

Because Fastrup did not properly object to this testimony at trial on the basis of ER 404(b), he may not challenge it for the first time on appeal.

ii. Any error in admitting the remaining prior misconduct evidence does not warrant reversal.

During his cross-examination of Backstrom, Fastrup repeatedly questioned her about whether she was angry that he had left her for Grigsby. 6/23/14RP 92-93; 7RP 43-44, 62-63. Backstrom denied being angry at him about the breakup, pointing to his poor treatment of her as support. For example, when Fastrup asked her whether she was "mad" at him for leaving, she responded that she was mad at him because he stole from her constantly. 6/23/14RP 92-93.

Later, when Fastrup asked her whether she was mad at Grigsby for "taking her boyfriend," Backstrom responded that she was not: "Why would [she] want to keep him" when he "abused her for three years straight," and stole from her for years. 7RP 62. When Fastrup continued to question Backstrom about being angry that he had left her, she responded, "He would hold knives to me every day, almost," and "[h]e robbed by house repeatedly." Id. Fastrup interjected in these remarks by objecting, but Backstrom kept talking, saying that Fastrup had thrown gasoline on her house. 7RP 63. The court asked Backstrom to stop

talking and told Fastrup to be "very specific" with his questioning. Fastrup did not state a basis for his objection, did not ask the court to strike the comments, and did not ask the court for a mistrial.

Fastrup opened the door to Backstrom's testimony about the various ill deeds Fastrup had perpetrated upon her during their three-year relationship by repeatedly questioning her about why she was "mad" at Fastrup. Fastrup tried to get Backstrom to admit that she was jealous of Grigsby and angry with Fastrup for leaving her. Thus, her testimony about the abuse and stealing that Fastrup perpetrated was in direct response to Fastrup's questioning. He elicited the testimony, and cannot complain that it was erroneously admitted.

Indeed, Fastrup's entire defense was that Backstrom was very angry with him for leaving her for Grigsby, and that she killed Grigsby herself and framed Fastrup for the murder. 13RP 78-82. As such, he had an incentive to elicit Backstrom's animosity toward him, and could have easily made the tactical decision not to object to most of her testimony that made clear she was angry at Fastrup and no longer loved him.

Indeed, when asked why she had pled guilty to second-degree murder, Backstrom answered that because in addition to the fact that she risked a longer sentence after trial, she felt remorse. 7RP 84. Fastrup responded, "It wasn't because you were mad at Kenny?" Id. Backstrom

denied such a motivation, but Fastrup pressed her: "It wasn't because you were mad that he had gone off and run away with another girl?" Id. Backstrom denied it, and stated that it would have been a blessing if Fastrup had left her earlier, because she wouldn't have to worry about Fastrup stealing from her again. 7RP 84-86. Fastrup did not object to this statement, but continued to press her about her motivation to frame Fastrup for Grigsby's murder, asking her that "the best way" to have Fastrup stop stealing from her would be to "testify against Kenny and put him away for murder." 7RP 85. As such, the misconduct testimony complained of cut both ways. See 13RP 79-80 (During closing argument, Fastrup argued that the abuse in the relationship "went both ways," and that Backstrom is "a woman scorned," and was trying to "take Fastrup down with her.").

Fastrup also complains about Backstrom's comment that he liked to hit people on the nose and give women black eyes. 7RP 53. Fastrup did not object to this evidence, rather, he simply asked the court to instruct the witness to "answer the question." Id. After the court did so, Fastrup asked that the court instruct the jury to disregard the statements. 7RP 54. The court struck the statements and instructed the jury to disregard them. Id. Fastrup also complains about Backstrom's testimony that he had hung a noose in the garage for her to hang herself. 7RP 47. Her comment came

in response to Fastrup showing her an admitted exhibit – a photograph of her garage where the murder occurred. Backstrom pointed out the noose in the photograph and indicated that Fastrup had hung it for her to commit suicide. 7RP 47. Fastrup asked the court to strike the comment and instruct the jury to disregard it. The court did so. 7RP 47.

An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270, 280-81 (1993). The court instructed the jury to disregard the statements about giving women black eyes and hanging the noose in the garage. Courts generally presume that jurors follow instructions to disregard improper evidence. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Given the nature of the evidence that was properly admitted (that Fastrup had pistol-whipped and threatened Backstrom), the fact that the jury was instructed to disregard the testimony that Fastrup asked the court to strike, Fastrup's attempt to evade capture, and Fastrup's own contradictory and incredible statements to police, there is no reasonable probability that Backstrom's testimony affected the outcome of the trial.

3. THE INVITED ERROR DOCTRINE PRECLUDES FASTRUP FROM CHALLENGING THE LIMITING INSTRUCTIONS THAT HE PROPOSED.

Fastrup alleges that the limiting instructions he proposed regarding Backstrom's act of breaking Grigsby's car window and his own mid-trial threat toward Backstrom improperly conveyed the judge's opinion on the value of the evidence. The State does not concede that the limiting instructions improperly commented on the evidence or that any error in them would warrant reversal.[6] Regardless, Fastrup's claim fails. He proposed the limiting instructions and is thus precluded by the invited error doctrine from challenging them on appeal.

A defendant who invites error – even constitutional error – may not claim on appeal that the error requires a new trial. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). "A party may not request an instruction and later complain on appeal that the requested instruction was given." State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979). The invited error doctrine seeks to prevent parties from misleading trial courts

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[6] The jury was instructed that:

> It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

CP 39. It is presumed that the jury followed this instruction. State v. Willis, 67 Wn.2d 681, 688, 409 P.2d 669 (1966).

and then receiving the windfall of a new trial. State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In determining whether the invited error doctrine precludes a defendant's claim on review, courts consider whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it. Id. at 154.

Here, Fastrup created the error of which he now complains by proposing that the court instruct the jury that:

> You are about to be shown State's Exhibit 58. This exhibit is admitted for the limited purpose of corroborating Ms. Backstrom's description of the incident involving Ms. Backstrom breaking Denise Grigsby's windshield with a hatchet. You are to consider it for no other purpose.

CP 26. The court read the instruction as proposed. 7RP 123. Fastrup also proposed a limiting instruction which read:

> You are about to hear testimony regarding a statement the defendant made to this witness. This statement is being admitted for the limited purpose of allowing the State to refute the defendant's prior statements regarding his fear of Ms. Backstrom. You are to consider it for no other purpose.

CP 29. The court gave Fastrup's proposed instruction, with the addition of the words, "and his inability to defend himself" inserted after "regarding his fear of Ms. Backstrom." 11RP 68-69. Fastrup objected to insertion of the words "and his inability to defend himself." 11RP 4-6.

Admitting that he proposed the instructions he challenges, Fastrup claims that the court had a duty to alter them to "correctly" instruct the jury. The only case he cites in support of this contention is inapposite. In State v. Gresham, 173 Wn.2d 405, 423-25, 269 P.3d 207 (2012), the court did not give a limiting instruction at all, finding that defense counsel's proposed instruction incorrectly stated the law. The Washington Supreme Court held that because the defendant had requested a limiting instruction, the trial court had a duty to provide one that correctly stated the law, and it was error for the court to not give one at all. Gresham, 173 Wn.2d at 425. That is not the scenario here, where the court gave limiting instructions, as requested by Fastrup.

Because Fastrup proposed the limiting instructions of which he now complains[7], he is precluded from claiming reversible error. See State v. Stubbs, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (applying the "strict rule" of invited error and rejecting the defendants' claim arising from a "clearly erroneous jury instruction" because the defendants proposed it).

[7] Although Fastrup objected to insertion of the words "and his inability to defend himself" on one of the instructions, his claim on appeal is that by the use of the word "*refute,*" the court improperly conveyed its belief that "the value of this threat was a settled matter and gave to the jury the court's opinion that the threat undercut Mr. Fastrup's credibility." Brf. of Appellant at 28-29. Whether the threat refuted Fastrup's claim of fear alone, or his claims of fear and inability to defend himself is irrelevant to the claim on appeal and does not preclude application of the invited error doctrine.

4. THE COURT PROPERLY EXERCISED ITS DISCRETION TO ADMIT BACKSTROM'S PRIOR CONSISTENT STATEMENTS.

Fastrup alleges that the court erred by allowing the State to introduce out-of-court statements made by Backstrom on the day of her arrest as "prior consistent statements." He argues that it was inadmissible hearsay because at the time she made the statements, she had a motive to fabricate and shift blame. Fastrup is wrong. The trial court properly exercised its discretion to admit the prior consistent statements after Fastrup accused Backstrom on cross-examination of fabricating her testimony to receive a favorable plea agreement, and accused her of having "two years to concoct a story."

A trial court's decision to admit evidence pursuant to ER 801(d)(1)(ii) will not be reversed absent a showing of manifest abuse of discretion. State v. Makela, 66 Wn. App. 164, 168, 831 P.2d 1109 (1992) (citing State v. Dictado, 102 Wn.2d 277, 290, 687 P.2d 172 (1984)). To constitute an abuse of discretion, a trial court's decision must be manifestly unreasonable or based on untenable grounds or for untenable reasons. State v. Athan, 160 Wn.2d 354, 382, 158 P.3d 27 (2007).

An out-of-court statement offered to prove the truth of the matter asserted is hearsay, and is inadmissible absent a specific exception. ER 801(c); ER 802. A statement is not hearsay if the declarant testifies at

trial and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. ER 801(d)(1). Cross-examination that merely points to inconsistencies in the witness's testimony does not raise an inference of recent fabrication. State v. Bargas, 52 Wn. App. 700, 702-03, 763 P.2d 470 (1988).

However, if cross-examination implies that the witness changed her story in response to an external pressure, then whether that witness gave a consistent statement prior to the onset of the external pressure becomes highly probative of the witness's veracity. State v. McWilliams, 177 Wn. App. 139, 148, 311 P.3d 584 (2013) (citing State v. Thomas, 150 Wn.2d 821, 866, 83 P.3d 970 (2004), abrogated on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). A plea bargain can constitute such external pressure. Cross-examination designed to show that the witness has the motive to change his story in order to receive a favorable plea agreement triggers the rule. McWilliams, 177 Wn. App. at 148.

Although he cross-examined Backstrom regarding all the inconsistencies between her original statement to police the day of her arrest and her testimony (6/23/14RP 103-08, 112-16, 121-26, 132-36,

139-41; 7RP 50, 57, 63, 65-68, 72, 77), he did not stop at pointing out mere inconsistencies in her testimony. He offered Backstrom's plea bargain as a motive to testify falsely about Fastrup's involvement in the murder, questioning her about how she faced a substantially longer prison sentence had she not agreed to testify against him. 7RP 83-84.

Moreover, he repeatedly accused Backstrom of spending the last two years (from the time of her original statement to police and her subsequent plea bargain and trial testimony) seething about the fact Fastrup broke up with her and concocting a story to "take him down." For example, he pointed to the fact that she did not tell anyone that she had hit Grigsby's hand with the meat cleaver until she had agreed to testify against Fastrup as part of her plea, asking her, "that was about two years after the initial incident . . . [s]o you had time to think about what you were going to say, correct? . . . [I]t had been two years, correct?" 7RP 39-40. Indeed, Fastrup's suggestion that Backstrom had spent two years thinking up a story was a common theme in his cross-examination. See 7RP 61 ("Because you have had – because you have had two years to create your story?"); 7RP 88 (after questioning Backstrom about her original statement to the police that she loved Fastrup, and Backstrom answering that she did not love him anymore, Fastrup asked, "Because you have had two years to think about it?").

In response to Fastrup's cross-examination, the State questioned both Backstrom and Detective Mellis about prior consistent statements that Backstrom had made the day of her arrest, just one week after the murder. 7RP 118-19, 121, 125-32; 10RP 94-102; 11RP 21-26, 37-41. The court admitted the evidence as prior consistent statements. 10RP 98, 103-04; 11RP 22-23.

In closing argument, Fastrup used the implications of his cross-examination to blatantly accuse Backstrom of agreeing to testify against Fastrup to receive a reduced sentence, and spending the two years between the murder and the trial "concocting" a story:

> Michelle Backstrom is a pathological liar that has told a story that she had had two years to think about . . . . Michelle Backstrom is testifying against Mr. Fastrup as part of a deal that she made with the State. The State has made a deal with the devil.
>
> . . .
>
> Now the State wants you to believe that she is just testifying just because it is the right thing to do, because it is eating at her conscience and she wants Mr. Fastrup to be held accountable. But the matter of the fact is that Michelle pled, and had she taken this case to trial, she would be sitting in the exact same seat as Mr. Fastrup being charged with murder in the first degree."
>
> . . .
>
> Michelle has had two years to think of her story. She has had to years to think of how she can pull Kenny down

> with her. She has had two years to think of how she wants to do this.

13RP 78, 80, 82.

The trial court properly exercised its discretion to admit Backstrom's prior consistent statements after vigorous cross-examination implying that she fabricated her testimony in order to receive a plea agreement, and that she had spent the previous two years concocting a story to frame Fastrup for a murder she committed.

Fastrup alleges that at the time of Backstrom's arrest (and statement to police) she already had a motive to fabricate. However, the fact that the witness may have had a motive to lie at the time of the prior statement "is insufficient to prevent their admission." Makela, 66 Wn. App. at 173. The relevant question is whether the proffered motive to fabricate "rises to the level necessary to exclude the prior consistent statement." Id. That question depends on whether "the witness was unlikely to have foreseen the legal consequences" of her statements. McWilliams, 177 Wn. App. at 149 (quoting Makela, 66 Wn. App. at 169)).

Fastrup simply concludes that Backstrom "knew there were legal consequences from participating in the killing," and thus her statements were inadmissible. Brf. of Appellant at 32. Certainly Backstrom was aware that she was implicating herself (and Fastrup) in a crime for which there could be legal consequences. However, the question is whether she foresaw *the relevant* legal consequence, not just any legal consequence. Even if she thought Fastrup could be charged based on her statements, she did not know whether he would plead guilty or choose to go to trial, or that the State would ultimately offer her a plea bargain in exchange for her testimony against him. The relevant legal consequence here is the plea bargain the State offered Backstrom, which she could not have foreseen when she originally spoke to the police.

This Court cannot say that no reasonable judge would have allowed the testimony. The court's decision to admit Backstrom's prior consistent statements was a proper exercise of discretion.

5. FASTRUP DID NOT RECEIVE A FUNDAMENTALLY UNFAIR TRIAL.

Fastrup argues that the cumulative error doctrine warrants reversal. His claim must be rejected because he was not denied a fair trial.

The cumulative error doctrine applies where several trial errors occurred which, standing alone, may not be sufficient to justify reversal,

but when combined, may deny the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004) (citing State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)). To seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors, and show that accumulated prejudice affected the verdict. The doctrine does not apply to cases where the defendant has failed to establish multiple errors, or where the errors that have occurred have "had little or no effect on the outcome at trial." Greiff, 141 Wn.2d at 929; see also State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (errors included discovery violations, three types of bad acts evidence being improperly admitted, the impermissible use of hypnotized witnesses, and improper cross examination of the defendant); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (errors included improper hearsay about the details of child sex abuse and the abuser's identity, the court challenging defense counsel's integrity in front of the jury, a counselor vouching for the victim's credibility, and prosecutorial misconduct). Here, Fastrup has failed to establish any error. Thus, he cannot obtain reversal based on the cumulative error doctrine.

D. CONCLUSION

For all of the above reasons, the State respectfully requests that this Court affirm Fastrup's convictions.

DATED this 28th day of August, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nancy Collins, the attorney for the appellant, at Nancy@washapp.org, containing a copy of the Brief of Respondent, in State v. Kennon Gregory Fastrup, Cause No. 72405-3, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 28th day of August, 2015.

LBrame

Name:
Done in Seattle, Washington