No. 94300-1

Court of Appeals # 46705-4- II
Pierce County Superior Court No. 05-1-00143-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DEMARCUS D. GEORGE,
Petitioner.

ON REVIEW FROM
THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION TWO,
AND
THE PIERCE COUNTY SUPERIOR COURT

PETITION FOR REVIEW

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A. IDENTITY OF PARTY

Dmarcus D. George, appellant below, petitions this Court for review of the decision of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Petitioner Dmarcus George was convicted after retrial of second-degree murder (2 counts) for the death of Isaiah Clark and, on February 22, 2017, the court of appeals, Division Two, affirmed one conviction but reversed the other on double jeopardy grounds, in an unpublished opinion. State v. George, __ Wn. App. __ (2017 WL 700786).[1]

C. OVERVIEW OF ISSUES PRESENTED FOR REVIEW

The only issue at trial was whether Petitioner Demarcus George shot and killed Isaiah Clark in self-defense.

The prosecution's theory, emphasized in its PowerPoint display, was that George was acting "like a monster," so cold-blooded and used to being shot at that his claims of self-defense should not be believed.[2]

At George's first trial, the state succeeded in preventing George from raising self-defense. The court of appeals reversed the trial court's decision, remanding for a new trial. At that new trial, over objection and mistrial motions, the prosecutor repeatedly told jurors that George had not

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[1] A copy of the decision is attached as Appendix A.

[2] See 25RP 77-78, 171-72; CP 319-20. A copy of the display without two black pages which were apparently included is attached as Appendix B.

claimed self-defense at his first trial, that in "2009 his testimony was not self-defense," and that George had either lied in 2009 about what happened or "he's lying now." The prosecutor also faulted George for not having said or established certain relevant claims regarding self-defense at the first trial, implying George was manufacturing self-defense at the second trial. The prosecutor further told the jurors they should not "care" about why George said he had acted and that George had to show that Clark was armed with a gun in order to prove George had acted with self-defense.[3] The jurors were told by several witnesses, as well, that George was involved in a shooting of their friend the week before - an uncharged crime which Division Two recognized was "improper." App. A.

The court of appeals erred in affirming the conviction. The standard of self-defense is subjective and objective; telling the jury that George's state of mind was irrelevant was a misstatement of the law of self-defense. Further, it was a misstatement that George had to prove that Clark had a gun in order to claim self-defense.

It was also completely improper for the same prosecutor who successfully prevented Mr. George from raising self-defense and creating a full record on that claim at the first trial to "impeach" George at the second trial with the false "fact" that George had not raised self-defense at the first trial. Despite counsel's repeated objections and motions for

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[3] 25RP 169, 175-76.

mistrial, the court of appeals effectively dismissed the bulk of the misconduct. A reviewing court cannot affirm, however, unless there is no reasonable probability the misconduct and improper evidence below had no effect on the outcome of the trial. Where, as here, self-defense is the sole issue, the errors all directly affected the claim of self-defense and there is conflicting evidence, misconduct and improper statements which directly impact the jury's ability to decide the case based upon the proper legal standards deprive a defendant of his due process right to a fair trial. This Court should grant review under RAP 13.4(b)(4).

Review should also be granted under RAP 13.4(b)(1) and (3), to address whether this Court's holding in State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), applies to all cases pending on review under In re Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992) or whether Division Two was correct in depriving George of a possible sentence below the standard range because counsel had "waived" the issue below. O'Dell was not decided until after sentencing. At the time George was sentenced, a request for an exceptional sentence below the standard range based on youthfulness at the time of the crime could not be raised. Trial counsel's failure to predict in advance that this Court would issue O'Dell was not "ineffective" because counsel are not required to have a crystal ball. But Mr. George was deprived of the opportunity presented by O'Dell based on happenstance of timing, because O'Dell was decided after George was sentenced.

The court of appeals decision creates a circular trap which punishes an indigent defendant for failing to raise an issue below even *counsel* cannot be tasked with knowing to raise. In addition, the decision runs afoul of St. Pierre and similar cases. While in general a defendant may not appeal imposition of a standard range sentence where, as here, the parties and trial court had no idea that O'Dell would open up the opportunity for an exceptional sentence below the standard range, that is an error which may be addressed on review. Failing to allow such review results in an unfair, disproportional sentence for young adults who, by happenstance, ended up with bad timing for their case.

D. ISSUES PRESENTED

1. Is it improper to "impeach" a defendant on retrial who is claiming self-defense with having "failed" to establish self-defense at the initial trial when that "failure" was based on the trial court's ruling specifically precluding the defendant from raising that defense?

2. Is it a misstatement of law to tell jurors deciding a claim of self-defense that they should not consider what the defendant's state of mind was when he acted, despite the subjective and objective nature of self-defense? Is it a further misstatement of law to tell jurors that a person who shoots another cannot claim self-defense unless they can prove the person they shot had a gun?

3. Was it misconduct where the same prosecutor's office repeatedly put on notice against improper "PowerPoint" displays shows jurors a state-created montage of a "booking" picture of the defendant in jail garb, with the heading "**The look on the defendant's face:**" (emphasis in original) and words including "Menacing" and "Like a monster" displayed?

4. Where the only issue at trial is whether the defendant acted in self-defense, there is conflicting evidence on the issue and the jury hears improper ER 404(b) evidence that the defendant was believed to have shot someone else a week prior, did the court of appeals err in finding that the misstatements of law, the "monster slide" and the improper impeachment did not compel reversal?

5. Does this Court's decision in O'Dell, supra, apply to this case under In re Pierre, supra, because Mr. George's direct appeal was pending at the time O'Dell was decided and did the court of appeals err in holding to the contrary that George somehow "waived" the O'Dell issue because counsel failed to raise it in advance of O'Dell being decided?

E. STATEMENT OF RELEVANT FACTS

1. Procedural facts

Petitioner Dmarcus George was first convicted in 2009 in Pierce County superior court of two counts of murder for the death of Isaiah Clark, but was precluded from raising self-defense at that trial. See CP 9-10. The court of appeals, Division Two, reversed and remanded, holding that the trial court had erred in refusing to allow George to raise and present self-defense at the first trial. State v. George, 161 Wn. App. 86, 94, 249 P.3d 202, review denied, 172 Wn.2d 1007 (2001). George was retried on counts of second-degree intentional murder and second-degree felony murder with a first- or second-degree assault as the predicate crime, both with firearm enhancements. CP 107-108. After he was convicted, he filed an appeal and, on February 22, 2017, the court of appeals, Division Two, reversed one conviction on "double jeopardy" grounds but affirmed the other. See App. A. This Petition follows.

2. Facts relating to issues on review

In June 2004, Isaiah Clark was shot and killed at a gas station in Tacoma. There was no question that the person who shot Clark was Dmarcus George. George, only 20 at the time, had been asleep in the back of the car of Freddie McGrew, a friend, when McGrew's girlfriend shook George awake. 24RP 54-55. More frightened than he had ever seen her, the girlfriend told George some men were about to "do something" to McGrew. 24RP 55-60. One of the men, Rickie Millender, apparently believed that McGrew was involved in the violent street death of Millender's best friend and was aggressively confronting McGrew. 24RP 62. George saw Millender block McGrew from getting around here and hear Millender say, "you guys are not going to leave here, man," in a very aggressive tone. 24RP 110. George testified he was really scared and trying to get out of the back of the car to help his friend when suddenly a heavy set man who had been near McGrew and Millender was in the way. 24RP 66-67. That man, Isaiah Clark, started walking towards the smaller George, and George would testify that he saw the man make a gesture to his waistband which made George think the man had a weapon. 24RP 70, 72.

McGrew started trying to get into the car on the driver's side and George thought McGrew looked very scared. 24RP 75-76. Millender repeated his statement about them "not going to leave here," then physically tried to block McGrew, confrontational. 24RP 75-76. George

thought McGrew was going to get into the car and turned away, relieved, but suddenly Clark was behind George and George had been hit in the back of the head with something that felt like a piece of metal. 24RP 77-78. George fell into the vehicle and, feeling Clark's hand gripping on him as if to pull him out of the car, grabbed a gun under his coat and pointed it towards Clark, shooting four times in rapid succession. 24RP 84.

Clark died at the scene. 24RP 83. Despite lengthy testimony about the trajectory of the bullets, a forensic pathologist admitted the evidence did not show and the pathologist thus could not say whether the shots were fired in self-defense. 16RP 541. The pathologist also could not determine if Clark was involved in a fight at the time of the incident. 16RP 541.

Many witnesses at the scene confirmed various parts of George's version of events but some did not. It was confirmed that Clark was much bigger than George, build like a "linebacker" and so large he looked like he had football pads on, even when he did not. 21RP 88-107. Some witnesses heard argument, like a witness from the prosecutor's office who saw some men who looked like they were going to fight and saw people searching Clark's clothes after the fact. 18RP 622-27. Another witness saw argument and saw a man pumping gas seeming "mellow" with another man agitated and escalating things, then saw Clark get shot. 18RP 61.

Specific facts relating to misconduct, the Power Points and the ruling below are discussed *infra* to avoid repetition.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. REVIEW SHOULD BE GRANTED BECAUSE GEORGE WAS DEPRIVED OF A FAIR TRIAL AND THERE IS MORE THAN A REASONABLE PROBABILITY THE MISCONDUCT AND ERRORS BELOW AFFECTED THE VERDICT

While there is no right to a "perfect trial," the accused in a criminal case are entitled to a trial which comports with prevailing notions of fundamental fairness. See State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). Prosecutors are required to act as "quasi-judicial" officers and thus are supposed to seek justice, rather than acting to "win" a conviction at all costs. See State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011); Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960).

This Court should grant review in this case under RAP 13.4(b)(3) and (4), because this case involves misconduct and errors which not only compel reversal individually, as argued in the court of appeals, but also taken together deprived Mr. George of a fair trial.

The only issue at trial was whether George had acted in self-defense. The failure to allow George to raise that defense is what led to the retrial in the first place. But the retrial was so permeated with errors

which directly affected the self-defense issue that Mr. George is entitled to a new trial.

It is misconduct for a prosecutor to "intentionally introduce prejudicial, inadmissible evidence." State v. Montgomery, 163 Wn.2d 577, 593, 183 P.3d 167 (2008). The prosecutor here may have unintentionally elicited testimony about the unsubstantiated claim that George had shot someone the prior week, but he did not have to *rely* on it in closing. It is misconduct for a prosecutor to use the weight of his office to mislead the jury as to the relevant law, especially in ways which misstate the burden of proof at trial. State v. Davenport, 100 Wn.2d 757, 763, 675 P.3d 1213 (1984). It is not the law that jurors should not "care" why the defendant says he fired the gun, i.e., that the standard for self-defense is only what a reasonable person would objectively do, as the prosecutor here argued. 25RP 72. In fact, self-defense *requires* consideration of the defendant's subjective beliefs, as well as the objective facts of the situation. See State v. Werner, 170 Wn.2d 333, 337-38, 241 P.3d 410 (2011). And it is not the law, despite what the prosecutor declared below, that Mr. George could not claim self-defense unless and until he could prove that Clark had a gun in his hand - as Division One itself noted in George's original appeal - "so long as a reasonable person in the defendant's situation could have believed" that a threat of great bodily harm was present. State v. George, 161 Wn. App. 86, 97, 249 P.3d 202, review denied, 172 Wn.2d 1007 (2011).

This misconduct did not stand alone, however, and was coupled with the prosecutors repeatedly telling the jury that they should not believe George's claim of self-defense because he had failed to establish it at the first trial - the trial at which he was *prevented* from raising it by the motion of the state. It was a misstatement to declare that George's testimony was not of self-defense at the first trial. It was a misstatement to say that George was either "lying then or lying now."

And in fact, at the first trial, George did not "fail" to mention perceiving a gun, he said he felt a "powerful blow" on the back his head, so strong it made him fall down. 1RP 1071-72, 1093-94, 1224, 1226-27, 1233, 12878-92, 1324-25, 1327. In fact, he stated explicitly that he was sure Clark must have hit him "with something" because of how hard George was hit. 1RP 1288. While he testified he did not know *for sure* if Clark had a gun, he specifically said he thought Clark *might*. 1RP 1341-42.

Further, throughout the first trial, it was the prosecution which prevented George from developing the record on self-defense. Based n state's objections, George was prevented from saying he thought Clark was acting like he had a gun of his own. 1RP 1235. The state's objection to "speculation" was sustained when George tried to testify about how the men appeared to be there to confront McGrew for something "really serious." 1RP 1324. And the prosecutor repeatedly prevented George from expressing the full depth and scope of his fear of Clark at the first

trial, objecting again and agin. 1RP 1339 (George asked if he had seen a gun and George's perception that he "knew somebody had something" stricken; George precluded from answering if he thought someone was armed because it was "irrelevant and speculative what he's feeling"). George was precluded from testifying about what Clark had said to George while approaching which made George stop in his tracks - even though it would have shown whether he had reasonable fear. 1RP 1197-99.

George was precluded from fully developing his claim of self-defense at the first trial, based on the prosecutor's own acts. The prosecutor then used that "failure" against George over defense objection and motions for mistrial. Coupled with that was the testimony of Monica Johnson, who first told police she had *not* seen the first shots being fired because the victim was standing in front of the shooter and blocking her view. 18RP 137. At the second trial, however, over defense objection, she would remember seeing George's face and describe it as showing "no fear," that he looked "menacing," "at ease" and "like a monster." 25RP 77-78. The prosecutor emphasized this description in closing to establish that George was not acting in self-defense but "a man who's murdering someone in cold blood." 25RP 77-78. Appendix B contains the PowerPoint slide the Pierce County prosecutor displayed at the same time included those descriptions of George and included a booking photo of George and a photo of the crime scene. CP 320.

This is not the first time this same prosecutor's office has used improper PowerPoint presentations in seeking to gain convictions based on improper grounds. See In re Glassman, 175 Wn.2d 696, 286 P.3d 673 (2012), cert. denied, __ U.S. __ (2013); State v. Hecht, 179 Wn. App. 497, 319 P.3d 836 (2014). And the visual impact of the prosecutor's self-created montage cannot be overstated in this case. Instead of addressing this issue, however, the court of appeals simply declared that there was no reason the "monster" comment was improperly admitted so the prosecutor could display it in this fashion at trial.

This Court should grant review under RAP 13.4(b)(3) and (4). The conduct of a criminal trial and the fairness of proceedings at which our citizens are condemned to serve prison time requires, at a minimum, that in a close case involving self-defense the prosecutor does not display a mug shot of the defendant looking angry along with comments about how he looked like a "monster" and a crime scene with blood. The only purpose of the display was to sway the jury to disbelieve self-defense - the only issue in the case. The court of appeals erred in finding that the individual misconduct of repeatedly misstating crucial law and facts and displaying the "monster" image did not compel reversal individually and because of the deprivation of Mr. George's rights to a fair trial. This Court should address the full weight of the misconduct on review and should reverse.

2. REVIEW SHOULD BE GRANTED TO ADDRESS WHETHER O'DELL APPLIES TO CASES PENDING ON REVIEW WHEN IT WAS ISSUED CONSISTENT WITH ST. PIERRE REGARDLESS WHETHER TRIAL COUNSEL FORESAW THE DECISION IN O'DELL AND CHALLENGED EXISTING LAW BELOW

Review should also be granted under RAP 13.4(b)(3) and (4) to address whether the court of appeals erred in holding that O'Dell does not apply to this case even though Mr. George's appeal was pending at the time O'Dell came down.

Mr. George was just 20 years old at the time of the crime. At the time of both sentencing after his first trial and his second, this Court's decision in State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997), was the law. In that case, this Court had held that "the age of the defendant does not relate to the crime" and could not be used as a mitigating factor to request an exceptional sentence, below the standard range. 132 Wn.2d at 847. Indeed, in Ha'mim, this Court had stated that it "borders on the absurd" to suggest that a defendant's youth might be a mitigating factor or have any effect on his culpability for the crime. 123 Wn.2d at 847.

In O'Dell, this Court recognized that the holding of Ha'mim and similar holdings from the courts of appeals appeared to have understood Ha'mim "as absolutely barring any exceptional downward departure sentence below the range on the basis of youth." 183 Wn.2d at 364, 366-67. The Court then expressly disavowed that holding, noting that it had been "thoroughly undermined by subsequent scientific developments"

about the unique vulnerabilities and transient qualities of youth. 183 Wn.2d at 366-67.

O'Dell was decided after the sentencing from both the first and second trials in this case. In refusing to order resentencing in light of O'Dell and George's youth at the time of the crime, Division Two simply declared that the issue was "waived" as a "challenge to his standard range sentence" because counsel had failed to ask for an exceptional sentence downward at the time of sentencing. App. A.

This Court should grant review of that ruling. Under St. Pierre, a "new rule for the conduct of criminal prosecution is to be applied retroactively to all cases, state or federal pending on direct review or not yet final." 118 Wn.2d at 325-26. Division Two's decision here denies Mr. *George* the application of O'Dell because *counsel* failed to argue for sentence which this Court has recognized would appear to have precluded under Ha'mim.

But paradoxically, counsel cannot be faulted as ineffective or not acting as "reasonably competent counsel" for failing to predict in advance such a change. State v. McFarland, 127 Wn.2d 322, 334-35, 889 P.2d 1251 (1995). The result of the decision here is that an indigent defendant whose youth at the time of the incident and the circumstances of the crime would clearly constitute mitigating factors and could have formed the basis for requesting a lesser sentence under O'Dell today is deprived of

that same opportunity by happenstance of timing. Yet that is not what St. Pierre appears to require.

This Court should grant review. It granted review to address a similar holding by Division Two in a similar situation, in State v. Robinson, 171 Wn.2d 292, 253 P.3d 84 (2011). In Robinson, this Court granted review after Division Two had issued decisions refusing to allow appellants relief based on a U.S. Supreme Court decision, Arizona v. Gant, 556 U.S. __, 129 S. Ct. 1710, 173 L Ed.2d 485 (2009), issued during the pendency of their appeals. Robinson, 171 Wn.2d at 296-97. Gant held that the "search incident to arrest" theory did not justify a full search of the car in which a person was arrested; instead, the search of the car must occur on some other ground. Robinson, 171 Wn.2d at 303.

In Francisco Millan's case, Division Two held that Gant "applied" under St. Pierre, but that Mr. Millan had "waived" the issue by failing to raise it below. State v. Millan, 151 Wn. App. 492, 494-95, 212 P.3d 603 (2009), review granted, 168 Wn.2d 1005 (2010), reversed sub nom State v. Robinson, supra. Division Two declared that Millan's "failure to file a motion to suppress the evidence" below or "object to its admissibility" on grounds of an illegal search of the car below "constitutes a waiver of any error associated with the admission of the evidence at trial." 151 Wn. App. at 499. Division Two also characterized the issue as involving a "rule barring defendants from raising a search and seizure claim for the first time on appeal[.]" 151 Wn. App. at 500. The court of appeals also

held that there was a lack of "record" on the issue because Millan had not moved to suppress below. Id.

Further, in Millan, Division Two used the same circular trap into which Mr. George has fallen here - that defense counsel would not be deemed "ineffective" for failing to anticipate a change or have a "crystal ball," but the defendant will still be deemed to have "waived" the issue by *having failing to raise the issue below*. In Milan, the court declared that Millan *could* raise counsel's ineffectiveness in failing to make a motion to suppress below, but the law would not support such a claim. 151 Wn. App. at 502-503. Just as here, Mr. Millan was precluded from relief to which he would be entitled to seek today, because of the happenstance of timing. 151 Wn. App. at 502. But because Gant had not yet been decided, the Millan Court held, counsel could not be faulted as not "reasonably competent" in failing to predict the future and raise the issue below. 151 Wn. App. at 502. Division Two thus concluded that Gant *applied* to Millan's case under this Court's precedent but that Millan had "waived any error" by failing to raise a challenge to the search of the car below. Millan, 151 Wn. App. at 496.

On review, this Court rejected Division Two's holding, noting that, at the time of trial, the argument that Gant now permitted was specifically foreclosed. Robinson, 171 Wn.2d at 305. The Court found that neither party had the opportunity to develop the factual record before the trial court, so that the appropriate remedy was reversal and remand for a new

suppression hearing. 171 Wn.2d at 306. For example, the Court noted, there could be additional facts justifying the search the state had no incentive to develop, given the understanding of the law at the time. 171 Wn.2d at 307.

Here, as in Robinson/Millan, there was no incentive for counsel - or the state - to look at the case in light of O'Dell because this Court had not yet decided O'Dell. And Mr. George - and others like him - are in a similar trap. Today, counsel would know that asking for an exceptional sentence below the standard range based on youthfulness at the time of the crime was possible under O'Dell. At the time of sentencing, it was not an option.

This Court should grant review. The decision of the court of appeals presents an issue of substantial public interest because it affects the sentencing of youthful adults who have committed crimes. This Court has recently reaffirmed its commitment to ensuring sentences commensurate with a defendant's actual culpability in light of the mitigating qualities of youth recognized in Miller v. Alabama, 542 U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). See State v. Houston-Sconiers, __ Wn.2d __, __ P.3d __ (2017). While Mr. George was not under the age of 18, in O'Dell this Court held that the youthfulness of the offender at the time of the offense may support an exceptional sentence below the standard range for people above that age.

Further, Mr. George is not alone. See, e.g., State v. Ho, 194 Wn. App. 1042, review denied (2016) (Division One, No. 72497-5-I), at Petition for Review, No. 93435-5.

At the first sentencing in 2009, George talked about having been "young" and how his acts were a mistake. S1RP 13. George's mom talked about how George had been "a child" and would not listen to her, and his family pastor talked about George was a youth who would get into situations with peers by just going "along" with things. S1RP 16-17. The pastor also talked about how young black youth like George were caught up on the east side of Tacoma at the time and the "lifetimes of tragedy" involved. S1RP 16. The judge declared that "young men have been making stupid choices since Cain killed Abel," dismissing George's youth. S1RP 19. At the second sentencing, after the second trial, Haghighi was still understood to be the law. S2RP 28-29, 41. While George's counsel argued for a low-end sentence based on the circumstances, the court said while "compassion" was a "real good thing," George's having a gun had led to the "completely senseless killing." S2RP 28-29, 41.

There was also some evidence already to show that George had change and matured as he aged - just as Miller predicted, which would support an exceptional sentence below the standard range based on youthfulness at the time of the crime. SRP 15-16, 33-34, 39 (George was a model prisoner, serving as mediator as honor at request of guards).

Notably, in imposing the sentence, the judge said all he could do was impose a standard range because there was no exceptional sentence for "young, dumb males who do stupid, terrible things." S2RP 55.

This Court should grant review. Division Two's decision runs afoul of St. Pierre and creates the same kind of trap this Court granted review to address in Robinson. There is no question that a sentence within the standard range is generally not appealable. See State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). But a sentencing court's error in failing to understand that it has "the discretion to impose a mitigated exceptional discretion for which [the defendant] may have been eligible" is a basis for review which is allowed. See In re Personal Rest. of Mulholland, 161 Wn.2d 322, 333, 166 P.3d 677 (2007).

The court of appeals effectively refused to apply O'Dell in refusing to grant Mr. George resentencing in this case. This Court should grant review to address whether that decision runs afoul of the mandates of St. Pierre. Having improperly long sentences imposed on youthful offenders based on a mistaken belief that the trial court has no discretion to mitigate such a term is an issue of substantial public interest upon which this Court should rule. This Court should grant review, hold that O'Dell applies and then reverse and remand for resentencing in light of O'Dell.

G. CONCLUSION

For the reasons stated herein, Mr. George respectfully asks this Court to grant review.

RESPECTFULLY SUBMITTED this 24th day of March, 2017:

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APPENDIX A

State v. George, __ Wn. App. __
(2017 WL 700786)

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NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

State of Washington, Respondent,
v.
Dmarcus D. **George**, Appellant.

No. 46705–4–II
|
February 22, 2017

Appeal from Pierce County Superior Court, Docket No: 05–1–00143–9, Honorable Ronald E. Culpepper, Judge.

Attorneys and Law Firms

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Kathleen Proctor, Pierce County Prosecuting Atty. Ofc., Tacoma, WA, for Respondent.

UNPUBLISHED OPINION

Sutton, J.

***1** A jury found Dmarcus **George** guilty of two counts of second degree murder for the death of Isaiah Clark. The trial court dismissed the jury's guilty verdict on the felony murder charge and sentenced **George** to a standard range sentence. **George** appeals, arguing that (1) repeated instances of evidentiary irregularities and prosecutorial misconduct deprived him of a fair trial, (2) the trial court violated double jeopardy by only dismissing the felony murder conviction conditionally, and (3) the case should be remanded to allow **George** to seek an exceptional sentence downward based on his youth at the time of the crime. We affirm **George's** conviction and sentence for second degree murder but remand to the trial court to strike the language in **George's** judgment and sentence which refers to the jury's guilty verdict on count II, the felony murder charge.

FACTS

I. BACKGROUND

On June 21, 2004, **George**, Fred McGrew, and Tamrah Dickson arrived at a gas station in Tacoma. **George** was asleep in the backseat of the car. While McGrew was trying to get gas, he was confronted by Rickie Millender. When Millender confronted McGrew, Dickson woke **George**. Millender's friend, Clark, was with Millender at the gas station. **George** shot Clark four times. Clark died of his injuries.

George fled the state. Four years later, **George** was arrested and extradited to Washington. The State charged **George** with one count of first degree premeditated murder and one count of second degree felony murder. Both counts included a firearm enhancement. At **George's** first trial, the trial court denied his motion to instruct the jury on self-defense. *State v. **George***, 161 Wn. App. 86, 92–93, 249 P.3d 202 (2011). A jury found **George** guilty of the lesser included offense of first degree manslaughter and second degree felony murder. ***George***, 161 Wn. App. at 94. **George** appealed. ***George***, 161 Wn. App. at 94. This court reversed the trial court's ruling to not instruct the jury on self-defense and remanded the case for a new trial. ***George***, 161 Wn. App. at 101–02.

On September 6, 2012, the State filed an amended information charging **George** with one count of second degree intentional murder (count I) and one count of second degree felony murder (count II). Both counts included a firearm enhancement. Prior to **George's** second trial, the trial court also ruled that **George's** first trial would be referred to as a "prior hearing" rather than a "prior trial." Verbatim Report of Proceedings (VRP) (Aug. 19, 2014) at 5.

II. CURRENT JURY TRIAL

George's second trial began in August 2014. Laura Devereaux, who witnessed the shooting, testified that when she arrived at the gas station she observed McGrew and Millender being loud, but she was not concerned. The verbal confrontation began to escalate, but there was no physical altercation. Then Devereaux heard a gunshot and saw a man later identified as Clark "hit the ground." VRP (Aug. 14, 2014) at 623. Devereaux ran into the gas station to tell the attendant to call the police. When she came back outside, a man and woman were standing over Clark's body going through his pockets. Devereaux did not see either of them take anything from the pockets.

***2** Monica Johnson, who witnessed the shooting, testified that when she arrived at the gas station, she could hear individuals arguing near a Cutlass. As Johnson was walking into the store, she walked by a man, later identified as Clark, standing off to the side and she asked what was happening. Clark just shrugged. Johnson walked into the store to pay for her gas and noticed that the arguing was escalating. As the arguing got louder, Johnson saw a man get out of the Cutlass and pull a gun. Johnson identified **George** as the man she saw exit the Cutlass. Almost immediately after exiting the car, **George** began shooting Clark.

Johnson testified that she would never forget the look on **George's** face when he shot Clark. The State asked what the look was and the following exchange took place:

[JOHNSON]: It was a very menacing, very—

Ms. Corey: Objection, Your Honor, to that opinion, conclusion.

The Court: Well, overruled.

Ms. Corey: It's improper demeanor testimony.

Court: Overruled.

So, the question again was?

[STATE]: You said the look on the defendant's face was menacing?

[JOHNSON]: Yes.

Ms. Corey: Your Honor, I'm going to object. This is testimony that is outside of case law.

[STATE]: You're Honor, I'm going to—

Court: Overruled. So, the question is what, Mr. Williams?

[STATE]: You said you saw the defendant's face and he had a menacing look on his face?

[JOHNSON]: Yes.

[STATE]: Can you help us understand what you mean by that?

[JOHNSON]: There was no fear on the face. It was more—it was just a nonchalant. It was—it was a monster. It was nonchalant, like it was nothing to it. I'll never forget it.

Ms. Corey: Objection, Your Honor. I ask that these descriptions be stricken.

Court: Well, overruled. You can certainly cross-examine her about this.

VRP (Aug. 19, 2014) at 63–64. Johnson also testified that, right before Clark was shot, he was not doing anything except standing near the car.

At the trial court's next recess, **George** moved for a mistrial based on Johnson's comments, specifically that Johnson called **George** a "monster." VRP (Aug.19, 2014) at 80. Although the trial court noted that the specific use of the word "monster" was unfortunate, the trial court also ruled that the answer was not responsive to the question. The trial court denied **George's** motion for a mistrial.

Later during Johnson's testimony, the State asked Johnson to refresh her memory with transcripts from an interview she gave in the original investigation. Specifically, the State asked Johnson to review a page of the transcript to refresh her memory as to what was said by a man she saw rummaging through Clark's pockets after he was shot. Johnson responded:

I recall, after reading the statement I gave the next day, that he had also said, "This is the same guys who shot my home boys a certain time ago, a week ago," or to that effect.

VRP (Aug. 19, 2014) at 94. The trial court immediately dismissed the jury. The trial court clarified that the statement the witness gave was actually on a different page than the State had asked Johnson to review.

George moved for another mistrial arguing that the statement was improper ER 404(b) evidence that was too prejudicial to be cured without a new trial. The State responded that it would agree to a stipulation that there was no evidence that **George** had participated in any shooting before June 21, 2004. The trial court denied **George's** motion for a mistrial. Instead, the trial court gave the jury the following curative instruction:

> Now, you are to disregard the last statement of Ms. Johnson. Statements made by others in the presence of a witness and repeated by that witness may be inaccurate. There is no evidence that Dmarcus **George** participated in any shooting that occurred prior to June 21st, 2004.

***3** VRP (Aug. 19, 2014) at 116.

Michael Clark,[1] Isaiah Clark's older brother, testified that, on the day of the shooting, Clark's friend Millender came to his mother's house and told him that Clark had been shot. During cross-examination, **George** asked what Millender's demeanor was when he arrived at the house. Michael responded, "He was upset, saying that he shot him like their other friend who had been shot before." VRP (Aug. 19, 2014) at 163. The State objected and asked the trial court to strike the response. The trial court agreed and instructed the jury to disregard the statement.

1 We refer to Michael Clark by his first name for clarity. We intend no disrespect.

At trial, **George** testified that, when Dickson woke him up, she was scared and concerned Millender was going to do something to McGrew. **George** saw Millender confront McGrew and began exiting the car. **George** intended to try to diffuse the situation, but Clark began approaching the car. **George** testified that Clark made "a gesture with his hand around his waist and at the time I perceived he had a weapon, so I stopped." VRP (Aug. 28, 2014) at 70. Then, when **George** saw McGrew

start to get in the car, **George** turned around to get in the backseat. As **George** bent down to get in the car, Clark hit him in the back of the head. **George** testified that "[i]t felt like he hit me with a piece of metal." VRP (Aug. 28, 2014) at 78. And, because he already believed that Clark had a weapon, **George** believed Clark had hit him with a gun. At that point, **George** testified that he believed he was going to die, so he reached for his firearm and shot Clark multiple times.

During cross-examination, the State had **George** read portions of his testimony from the first trial.[2] Before introducing the specific statements **George** made, the State asked if **George** understood how serious the stakes were at the time he made the statements. **George** objected and the State asked to be heard outside the presence of the jury. The State informed the trial court that it wanted to inform the jury that **George** had testified at a prior trial so that the jury would understand that the stakes were just as high when **George** made his original statement as they were at the current trial. **George** objected. The trial court sustained the objection and explained that the prior trial would be referred to as a proceeding or hearing, and that the rules for how to refer to the prior trial would not be changed at this late stage of the trial.

2 The testimony was admitted as a statement of party opponent.

The State questioned **George** about whether he had made previous statements about seeing Clark with a gun and the following exchange took place:

> [STATE]: I'm going to read the question [from the 2009 transcript]. Please read the answer you gave. "And you don't see a gun or any weapon in [Clark's] hand?" Your response, please?
>
> [**GEORGE**]: "I didn't see one, but I did—like I wasn't trying to look. I didn't know if he had one. I didn't know."
>
> [STATE]: So, again, this would have been another opportune time for you to say that you saw him making a motion with his waistband or that when he punched you, you though it was a gun that he clubbed you with or that when you were in the car struggling, you thought you saw a gun?
>
> ***4** [**GEORGE**]: I believe I did say that he hit m[e] with a hard object, but I left out everything about—I never said that I seen (sic) a gun. It appeared to me that he had a gun.
>
> [STATE]: Is that what you said there?
>
> [**GEORGE**]: No. This is what I've always said. I never said that I seen (sic) a gun. It appeared that he had a gun.
>
> [STATE]: And, again, going back to your answer from 2009—
>
> [**GEORGE**]: I understand—
>
> [STATE]: —when you were asked if you saw a gun or any weapon in [Clark's] hand, your response was: "I didn't see one, but I didn't, like I wasn't trying to look. I didn't know if he had one. I didn't know."
>
> That's your response, correct?
>
> [**GEORGE**]: That's what it—that's what it says, sir.

VRP (Aug. 28, 2014) at 126–27.

Later, when **George** testified that he reached for his weapon because it appeared to him that Clark had a gun, the State asked, "[T]his is the weapon you didn't mention at the prior trial, right?" VRP (Aug. 28, 2014) at 129–30. The trial court asked the State to rephrase the question. The State then asked, "The weapon you're saying he had, now that you're saying he had, you didn't say that at the prior trial?" VRP (Aug. 28, 2014) at 130. **George** objected and asked to make a motion outside the presence of the jury based on "deliberate misconduct." VRP (Aug. 28, 2014) at 130. The trial court overruled the objection and informed **George** that it would hear the motion later.

The State's cross-examination of **George** concluded without further incident and the trial court excused the jury to hear **George's** motion. **George** moved for a mistrial and sanctions against the State based on the State's reference to the prior trial. The State apologized for using the word "trial" and claimed it was "a slip of the tongue in the heat of questioning." VRP (Aug, 28, 2014) at 143. The trial court determined that the prosecutor's reference to the prior trial did not constitute deliberate misconduct and asked **George** for a proposed remedy. **George** responded that the only remedy was a mistrial because the entire trial strategy would have been different if he had known that the jury was going to be informed that there was a prior trial.

The trial court denied the motion for a mistrial because it did not believe the prosecutor's statement constituted deliberate misconduct. However, the trial court invited **George** to propose any curative instructions that he believed would be helpful. **George** suggested that the trial court provide the jury with "a list of all the witnesses and a list of—they've heard many references to transcripts and statements—is that we give them a list, with regard to the transcripts, the date of the transcripts, whether the questions were asked on direct or cross or redirect or recross so that they know." VRP (Aug. 28, 2014) at 150. The trial court declined to give the instruction because it would be "extraordinarily difficult to draft and would be extremely confusing to the jury." VRP (Aug. 28, 2014) at 152. **George** declined to propose any other remedy short of a mistrial, which the trial court again denied.

III. CLOSING ARGUMENT

During closing argument, the prosecutor focused on the differences between **George's** 2009 trial testimony and his current testimony—specifically, the prosecutor focused on **George's** current testimony that Clarke was armed with a gun. **George** objected to these references twice during the prosecutor's argument, and the trial court held a sidebar on each occasion. After the prosecutor finished his closing argument, the trial court excused the jury. **George** again moved for a mistrial based on his prior objections made during the prosecutor's closing argument.

***5 George** argued that the prosecutor's arguments, that **George** did not raise self-defense in the prior court hearing, constituted deliberate misconduct. The trial court stated:

> I did not understand [the prosecutor] to say self-defense wasn't raised as an issue before. [W]hat he said was very important things were at stake in 2009 and there was no testimony about Clark having a gun. That's what I understood him to say.

VRP (Sept. 2, 2014) at 105. The trial court denied the motion for a mistrial. After obtaining a transcript and the prosecutor's PowerPoint, **George** renewed the motion because he argued that the prosecutor had falsely argued to the jury that **George** had left out "the most important fact" in his 2009 testimony and that his 2009 testimony "was not self-defense." VRP (Sept. 2, 2014) at 113. The trial court reiterated its understanding of the State's argument:

> Well, I don't think he was stating that [**George** did not claim self-defense in 2009]. He was stating that the facts in 2009 didn't establish self-defense and he's saying he thinks your client then fabricated a story about the gun to try to get a better claim in self-defense. That's my understanding of his argument. Maybe I'm wrong. Whether the jury believes that, it's up to them.

VRP (Sept. 2, 2014) at 109–10. The trial court did not change its ruling on the motion for a mistrial. However, the trial court explicitly told **George's** counsel that she could tell the jury that **George** had testified in 2009 that he acted in self-defense. But the trial court also told defense counsel that she could not inform the jury that the prior conviction had been reversed because the prior trial court had denied **George's** instruction on self-defense and thus, the jury had not considered the claim of self-defense at the prior trial.

George also objected several times during the prosecutor's rebuttal closing argument. First, he objected because the prosecutor improperly argued about **George's** prior behavior with violence and being armed, which **George** argued was improper ER 404(b) evidence. Second, he objected because he believed that the prosecutor misstated evidence regarding **George's** testimony at trial. Third, **George** objected because he believed the prosecutor misstated the law on self-defense.

Fourth, **George** objected based on the prosecutor's misstatement of the evidence. The trial court overruled all these objections.

After the prosecutor finished his rebuttal closing argument, **George** moved for a fifth mistrial based on his prior objections to the rebuttal closing argument. The trial court made the following ruling:

> I do not think that [the State] intentionally ... or negligently misstated the law. The law is in the instructions. The jurors are told that. There are different inferences that could be made. [The State] is entitled to argue the inferences she thinks are made. You're entitled to argue the inferences you think can be made from the evidence. There may be more than one potential inference. So, again, I'm going to deny the motion for a mistrial.

VRP (Sept. 3, 2014) at 183. The trial court also reminded **George** that the jury was instructed that the law was given to them in the written instructions, not in the attorney's argument.

IV. VERDICT AND SENTENCING

***6** The jury found **George** guilty of both counts of second degree murder. The jury also found that **George** was armed with a firearm at the time of the commission of the crime. The trial court entered judgment on the jury's verdict for count I. The judgment and sentence also states:

> The court DISMISSES without prejudice Count II, the guilty verdict for Murder 2 [degree] w/FASE, on double jeopardy grounds given the conviction for Count I.

Clerk's Papers at 380. The State recommended a sentence at the high-end of the standard sentencing range. **George** asked that the trial court impose a low-end sentence. The trial court imposed a mid-range sentence of 175 months and the 60–month firearm sentencing enhancement. **George** appeals.

ANALYSIS

First, **George** appeals his conviction for second degree murder arguing that he was denied a fair trial based on repeated instances of prosecutorial misconduct and improperly admitted prejudicial evidence. Second, **George** argues that the trial court violated double jeopardy by entering judgment on both counts of second degree murder. Third, **George** argues that he is entitled to a new sentencing hearing so that he can ask the trial court for an exceptional sentence downward based on his youth at the time of the shooting.[3]

[3] **George** also argues that the trial court improperly instructed the jury as to the standard for self-defense as it relates to count II—felony murder. But **George** does not contend that the trial court improperly instructed the jury on the standard for self-defense on count I—intentional murder. Because we hold that **George's** conviction on count II must be dismissed, we do not address **George's** claim that the jury instructions for count II were erroneous.

We affirm **George's** conviction because **George** has failed to establish any prejudicial error that deprived him of a fair trial. And **George** waived his challenge to his sentence by failing to request an exceptional sentence downward at his sentencing hearing. However, the trial court violated double jeopardy by referencing the verdict for count II in the judgment and sentence. Accordingly, we affirm **George's** conviction and sentence, but remand to the trial court to strike the reference to the jury's verdict on count II in the judgment and sentence.

I. FAIR TRIAL

George claims that

> the scope, magnitude and complete pervasiveness of all of the misconduct and prejudicial evidence was so corrosive and complete that it ensured that no jurors could possibly have fairly determined the only real issue in the case—whether the prosecution met its burden of proving, beyond a reasonable doubt, that **George** did not act with self-defense.

Br. of Appellant at 24–25. Essentially, **George** argues that the cumulative error doctrine requires a reversal of his conviction. However, he does so without individually analyzing the merit of each individual alleged error. Contrary to **George's** assertion that, "[t]he facts regarding these issues are woven throughout trial and do not summarize neatly into categories, so the entire trial and all those errors must be reviewed at once," the alleged errors in this case are readily ascertainable and can be analyzed individually. Br. of Appellant at 10.

The errors here are either evidentiary irregularities or alleged instances of prosecutorial misconduct. Before turning to **George's** allegation of cumulative error, we address the merits of each alleged error individually to determine whether an error or misconduct occurred and the extent of the prejudice caused by the error or misconduct. Such an inquiry is necessary to determine whether the cumulative error doctrine applies and whether the cumulative errors in this case, if any, require reversal.

II. TRIAL IRREGULARITIES

*7 During trial, **George** made several motions for a mistrial based on trial irregularities that occurred during testimony. Specifically, **George** argues that three specific trial irregularities support his cumulative error argument: (1) Johnson's testimony that **George** looked like a "monster" when he shot Clarke; (2) Johnson's testimony that someone at the gas station stated **George** and McGrew were the "same guys who shot my home boys"; and (3) Michael's testimony Millender told him Clark was shot "like their other friend who had been shot before." Johnson's testimony that **George** looked like a monster was not an error; however, the other two comments were errors and will be considered when evaluating his cumulative error argument.

A. "MONSTER" DESCRIPTION

George argues that Johnson's description of **George** as a "monster" was an evidentiary error. **George** objected to the comment and asked that it be stricken from the record, but the trial court overruled the objection. **George** argues that the comment was prejudicial within the context of the entire trial. Because **George** has not established that the trial court improperly overruled his objection to the "monster" comment, he has failed to demonstrate an error that supports his cumulative error argument.

B. "SAME GUYS WHO SHOT MY HOME BOYS"

George also argues that Johnson's testimony that someone stated, "This is the same guys who shot my home boys a certain time ago, a week ago," supports his argument that there was cumulative error. VRP (Aug. 19, 2014) at 94. Here, there is no dispute that the trial court properly determined that the comment was improper. Although the individual prejudice caused by this error was cured by an instruction to the jury; because the statement was improper we will consider it when evaluating **George's** cumulative error argument.

C. "Shot Him Like Their Other Friend Who Had Been Shot Before"

George also argues that Michael's testimony that Millender told him Clark was shot "like their other friend who had been shot before," was improper and prejudicial. VRP (Aug. 19, 2014) at 163. The statement was improper because the State objected to Michael's testimony and the trial court sustained the objection. Because the statement was improper, we will consider it when evaluating **George's** cumulative error argument.

III. PROSECUTORIAL MISCONDUCT

George also relies on seven alleged incidents of prosecutorial misconduct to support his cumulative error argument. A defendant alleging prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). We will reverse for prosecutorial misconduct when there is a substantial likelihood that the misconduct affected the jury's verdict. *Emery*, 174 Wn.2d at 760. If a defendant fails to object to improper comments at trial, fails to request a curative instruction, or fails to move for a mistrial, we will not reverse unless the misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice engendered by the misconduct. *Emery*, 174 Wn.2d at 760–61. Before determining whether any of the alleged incidents of prosecutorial misconduct support **George's** cumulative error argument, we must determine which, if any, alleged incidents were actually improper.

A. REFERENCE TO PRIOR TRIAL

George alleges that the prosecutor engaged in misconduct by referring to the prior trial as a trial during **George's** testimony rather than a prior hearing. We agree. The trial court expressly instructed the attorneys to refer to the prior trial as a prior hearing. And the trial court reminded the prosecutor of this ruling during **George's** cross-examination. Despite this, the prosecutor referred to the prior trial as a trial two more times, directly violating the trial court's order. Although the trial court found that the prosecutor did not act deliberately, the prosecutor's reference to the prior trial as a trial, in direct violation of the trial court's order, was improper. Accordingly, the prosecutor's reference to the prior trial as a trial is an error that we will consider when evaluating **George's** cumulative error argument.

B. CLOSING ARGUMENT REGARDING CONFLICTS WITH 2009 TESTIMONY

***8 George** also argues that the prosecutor committed misconduct during closing argument by misstating the facts regarding **George's** 2009 testimony. During closing argument, prosecutors have wide latitude to argue all reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Here, the prosecutor's arguments were based on the properly admitted statements that **George** made in 2009. The prosecutor did not misstate the evidence presented at trial, therefore, the argument was not improper. Accordingly, the prosecutor's argument regarding the differences between **George's** current testimony and his 2009 testimony is not an error that supports **George's** cumulative error argument.

C. STATEMENT/SLIDE THAT **GEORGE** DID NOT ARGUE SELF–DEFENSE IN 2009

Similarly, **George** argues that the prosecutor improperly stated that **George** did not argue self-defense in 2009 by using a slide which stated "2009 ≠ self-defense." Br. of Appellant at 20. However, the prosecutor was not stating that **George** never raised self-defense in 2009. Instead, the prosecutor was arguing that **George's** testimony in 2009 was insufficient to establish a claim of self-defense. This was a reasonable argument based on the evidence that was admitted at trial and was not improper. Accordingly, the prosecutor's slide and corresponding statement, that **George's** testimony in 2009 did not equal self-defense, is not an error that supports **George's** cumulative error argument.

D. STATEMENT THAT "WE DON'T CARE WHAT THE DEFENDANT SAYS"

George argues that the prosecutor misstated the law regarding self-defense when he argued that "we don't care what the defendant says." Br. of Appellant at 26. Because self-defense has both an objective and subjective element, the prosecutor did not misstate the law in his closing argument. Self-defense has both subjective and objective components. ***George***, 161 Wn. App. at 96. The subjective component requires viewing the facts from the defendant's point of view. ***George***, 161 Wn. App. at 96. The objective component requires determining what a reasonably prudent person would have done in the circumstances. ***George***, 161 Wn. App. at 96. Because both components must be satisfied, the subjective component is immaterial if the objective component is not satisfied. *See* ***George***, 161 Wn. App. at 96.

Here, the prosecutor was arguing that, because a reasonable person would not have used deadly force in this situation, the jury did not need to consider whether **George** subjectively believed deadly force was appropriate. In other words, the prosecutor was arguing that because **George** failed to prove one component of self-defense, the jury did not need to consider the other component. This argument was reasonable within the context of the evidence presented at trial and was not improper. Accordingly, there was no error that supports **George's** cumulative error argument.

E. ARGUMENT THAT CLARK MUST HAVE HAD A GUN TO ESTABLISH SELF–DEFENSE

George also argues that the prosecutor misstated the law in rebuttal argument by arguing to the jury that **George** could not establish a self-defense claim unless Clark had a gun at the time of the shooting. Although **George** is correct in stating that the law does not require **George** to prove that Clark had a gun in order to establish a self-defense claim, the prosecutor was not arguing that the law required **George** to prove Clark had a gun. Rather the prosecutor was arguing that, based on the specific facts of the case, the facts would not support a self-defense claim unless Clarke had a gun. This argument is based on reasonable inferences drawn from the evidence presented at trial, therefore, it was not improper. The prosecutor's rebuttal argument that **George** could not establish a self-defense claim without proving Clark had a gun was not an error and this portion of the prosecutor's rebuttal argument does not support **George's** cumulative error argument.

F. ARGUMENT THAT **GEORGE** WAS USED TO GETTING SHOT AT

***9 George** argues that the prosecutor improperly presented ER 404(b) propensity evidence to the jury during rebuttal argument. Specifically, **George** argues that the prosecutor told the jury that **George** had been in several dangerous situations with McGrew and was used to being shot at. It is improper for a prosecutor to urge to jury to decide a case based on evidence outside the record. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012), *remanded*, 2016 WL 7104032 (2016). However, this was not new propensity evidence that the prosecutor was trying to present during closing argument. Instead, it was argument based on evidence that was properly admitted during trial. Accordingly, the prosecutor's argument was not improper and this portion of the prosecutor's rebuttal argument does not support **George's** cumulative error argument.

G. USE OF "MONSTER" COMMENT IN CLOSING

Finally, **George** argues that the prosecutor committed misconduct by referring to Johnson's "monster" comment in closing argument, and by highlighting the comment on a slide during the argument. But this evidence was admitted at trial. And as explained above, **George** has provided no basis for establishing that the "monster" comment was improperly admitted evidence. The prosecutor referred to a specific piece of evidence in closing argument which is not improper. **George** has provided no alternative explanation for why the prosecutor's argument based on evidence admitted at trial would be improper. Accordingly, the prosecutor's references to Johnson's "monster" comment were not improper and this is not an error that can support **George's** cumulative error argument.

IV. CUMULATIVE ERROR

George alleges that the combined effect of the alleged prosecutor misconduct and improper evidence deprived him of a fair trial under the cumulative error doctrine. "The cumulative error doctrine applies where a combination of trial errors denies

the accused of a fair trial, even where any one of the errors, taken individually, would be harmless." *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *cert. denied*, 135 S.Ct. 1702 (2015). To support a cumulative error claim, the appellant must demonstrate multiple errors. *Cross*, 180 Wn.2d at 690–91.

After reviewing all of **George's** alleged evidentiary errors and instances of prosecutorial misconduct, we have determined that he has only identified three errors that will be considered in his cumulative error argument: (1) Johnson's spontaneous and nonresponsive statement that someone stated Clark was shot by the "same guys who shot my home boys;" (2) Michael's spontaneous and nonresponsive statement that "they shot him like their other friend who was shot before;" and (3) the prosecutor's reference to the prior trial. Even considered together, these three errors did not deprive **George** of his right to a fair trial.

The prejudice caused by the two spontaneous, nonresponsive witness statements resulted in the implication that **George** had been involved with other shootings. However, in addition to being instructed to disregard the improper statements, the jury was specifically instructed that there was no evidence that **George** had participated in shootings prior to shooting Clark. While multiple evidentiary errors may cause cumulative error because collectively the prejudice is too great for the jury to disregard, here, the specific prejudice caused by the errors was cured by an explicit jury instruction. Accordingly, the two comments, even when taken together, did not cause an enduring prejudice that denied **George** a fair trial.

In contrast to the evidentiary errors, the prosecutor's improper reference to the prior trial allegedly prejudiced **George's** trial strategy and preparation rather than directly prejudicing the jury. However, **George** has not explained, either at trial or on appeal, what specific prejudice was caused by the prosecutor's reference to the prior trial. Therefore, even though the prosecutor's direct violation of a court order was improper, it did not cause prejudice that requires reversal.

***10** Based on the three alleged instances that we have determined were errors, **George** was not denied a fair trial. Accordingly, his cumulative error argument fails and we affirm his second degree murder conviction for count I—intentional murder.

V. DOUBLE JEOPARDY

George argues that the trial court violated double jeopardy by entering judgment on both count I—intentional murder and count II—felony murder. We review double jeopardy claims de novo. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). Double jeopardy protects a defendant from receiving multiple punishments for the same offense. U.S. CONST. amend. V; *State v. Trujillo*, 112 Wn. App. 390, 409, 49 P.3d 935 (2002). "Therefore, where the jury returns a verdict of guilty on each alternative charge, the court should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense." *Trujillo*, 112 Wn. App. at 411.

Further, a trial court may violate double jeopardy by "conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid." *State v. Turner*, 169 Wn.2d 448, 464, 238 P.3d 461 (2010). In *Turner*, our Supreme Court specifically directed:

> To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction-nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.

169 Wn.2d at 464–65.

Here, the trial court violated the directive in *Turner* by referring to the guilty verdict on count II in **George's** judgment and sentence. Accordingly, we remand to the trial court to strike the language in **George's** judgment and sentence which refers to the jury's guilty verdict on count II.[4]

[4] **George** also notes that the State mentioned both jury verdicts in its sentencing recommendations. In *Turner*, in addition to ordering

the trial court to enter a corrected judgment and sentence, our Supreme Court ordered the trial court to "redact all references to any validity or import attributable to the vacated lesser conviction." 169 Wn.2d at 466. Because we remand to the trial court to remove the references to the jury's verdict on count II, we do not address this argument further.

VI. SENTENCING

Finally, **George** argues that, if we decline to reverse his conviction, we should remand to the trial court for resentencing to allow **George** to seek an exceptional sentence downward based on his youth at the time of the shooting. **George** relies on *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), to argue that **George** is now entitled to use his youth at the time of the shooting to request an exceptional sentence downward. In *O'Dell*, our Supreme Court held that the trial court erred by refusing to consider an exceptional sentence downward based on its belief that it was prohibited from considering whether youth diminished the defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. 183 Wn.2d at 696. Although **George** argues that his youth should be a factor to consider in evaluating his culpability, he has waived his challenge to his standard range sentence by failing to request an exceptional sentence downward at the time of sentencing. Therefore, we affirm **George's** standard range sentence.

***11** Generally, a sentence within the standard sentence range for an offense may not be appealed. RCW 9.94A.585. Our courts have recognized an exception to this general rule in cases in which a defendant has requested an exceptional sentence, but the trial court imposed a standard range sentence based on its belief that it did not have the authority to grant an exceptional sentence. *See* *O'Dell*, 183 Wn.2d at 697. However, unlike the counsel in *O'Dell*, **George** did not ask the trial court to impose an exceptional sentence downward at sentencing. Therefore, **George** has failed to demonstrate that his standard range sentence is appealable.

We affirm **George's** conviction and sentence for second degree murder but remand to the trial court to strike the language in **George's** judgment and sentence which refers to the jury's guilty verdict on count II, the felony murder charge.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Bjorgen, C.J.

Maxa, J.

All Citations

Not Reported in P.3d, 2017 WL 700786

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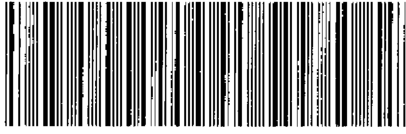
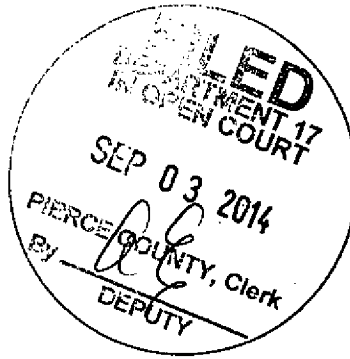
APPENDIX B

PowerPoint used by prosecution at trial





SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. DMARCUS DEWITT GEORGE, Defendant.	CAUSE NO. 05-1-00143-9 STATE'S POWERPOINT PRESENTATION USED IN CLOSING ARGUMENT

On September 2, 2014, the State gave its closing argument in this matter. The State's closing argument included a PowerPoint presentation. Attached to this cover sheet is a true and correct copy of the slides using during that presentation.

Dated this 2nd day of September, 2014.

MARK LINDQUIST
Pierce County Prosecuting Attorney

JESSE WILLIAMS
Deputy Prosecuting Attorney
WSB # 35543

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

9/9/2014 2847 0123

Lesser Crime for Count I:

Manslaughter 1

Count II: Murder 2 (Felony Murder)

Did the defendant commit Assault 1 or Assault 2, and did Isaiah Clark die?

Assault 2: Assault w/firearm

Assault 1: Assault w/firearm + intent for great bodily harm

Special Verdict Forms:

Use of a Firearm

Self Defense

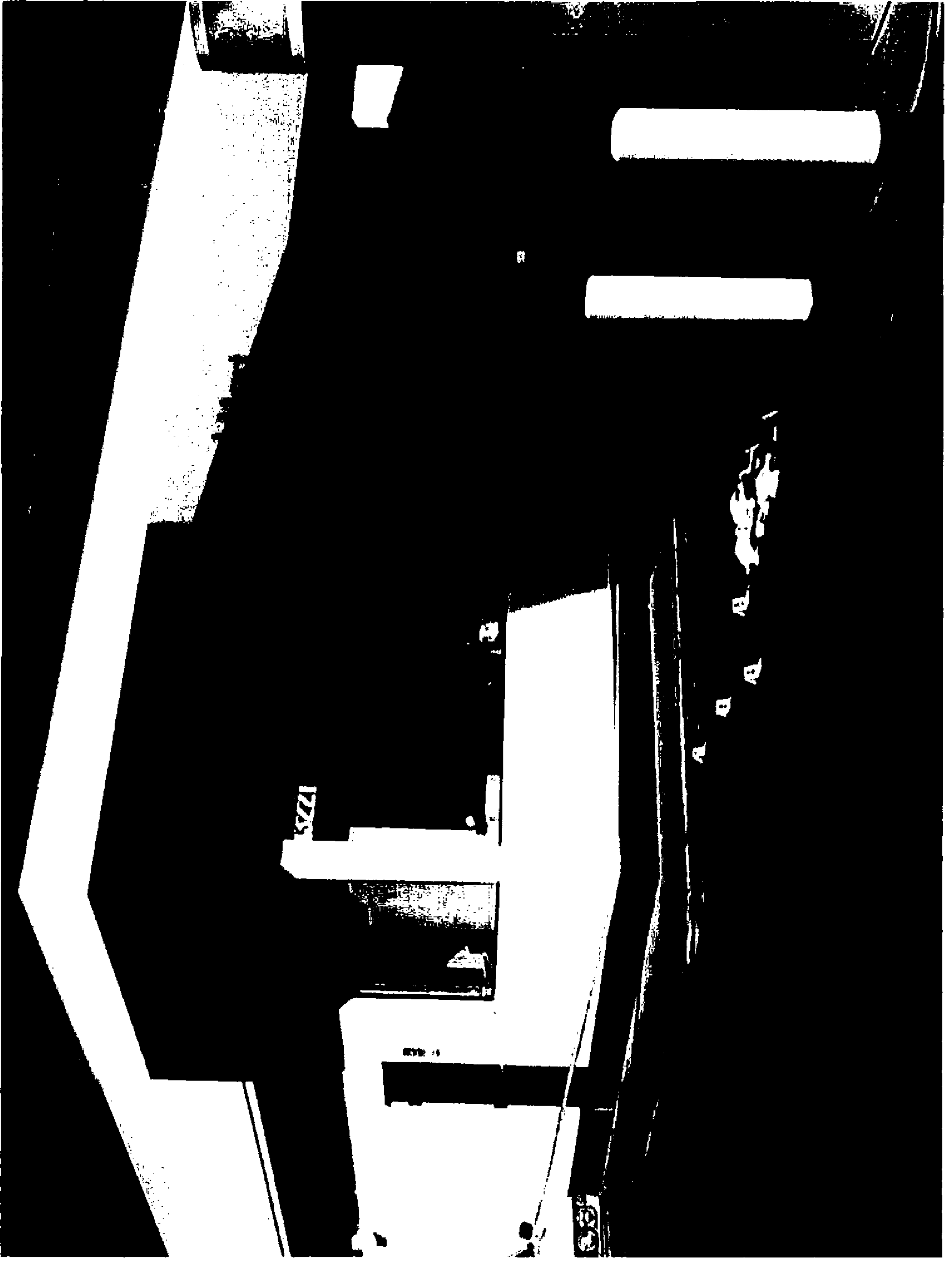
Self Defense:

- What would a reasonably prudent person do?
  - Look at all the circumstances
  - Was it necessary?
  - Was the amount of force used proportional?

    i.e., death or great personal injury

This was not Self Defense

- Monica Johnson

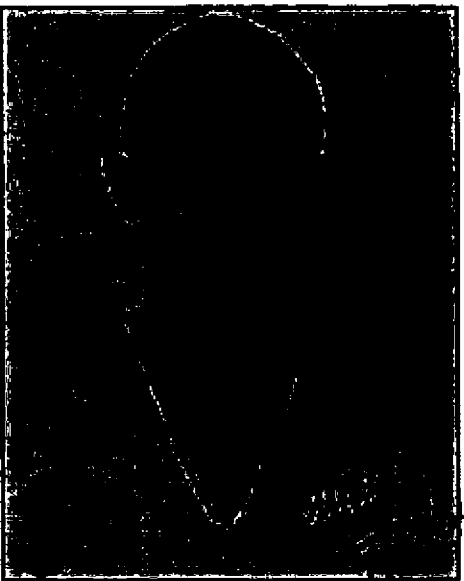


Pierce County Sheriff's Dept

Lineup ID: 27734 06 Jul 200

1 ______

2 ______



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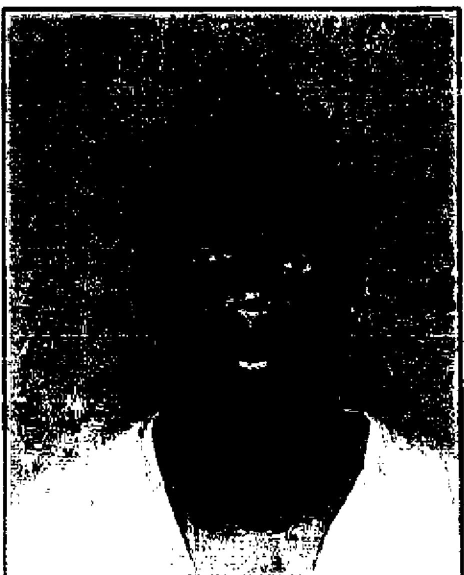

6 ______

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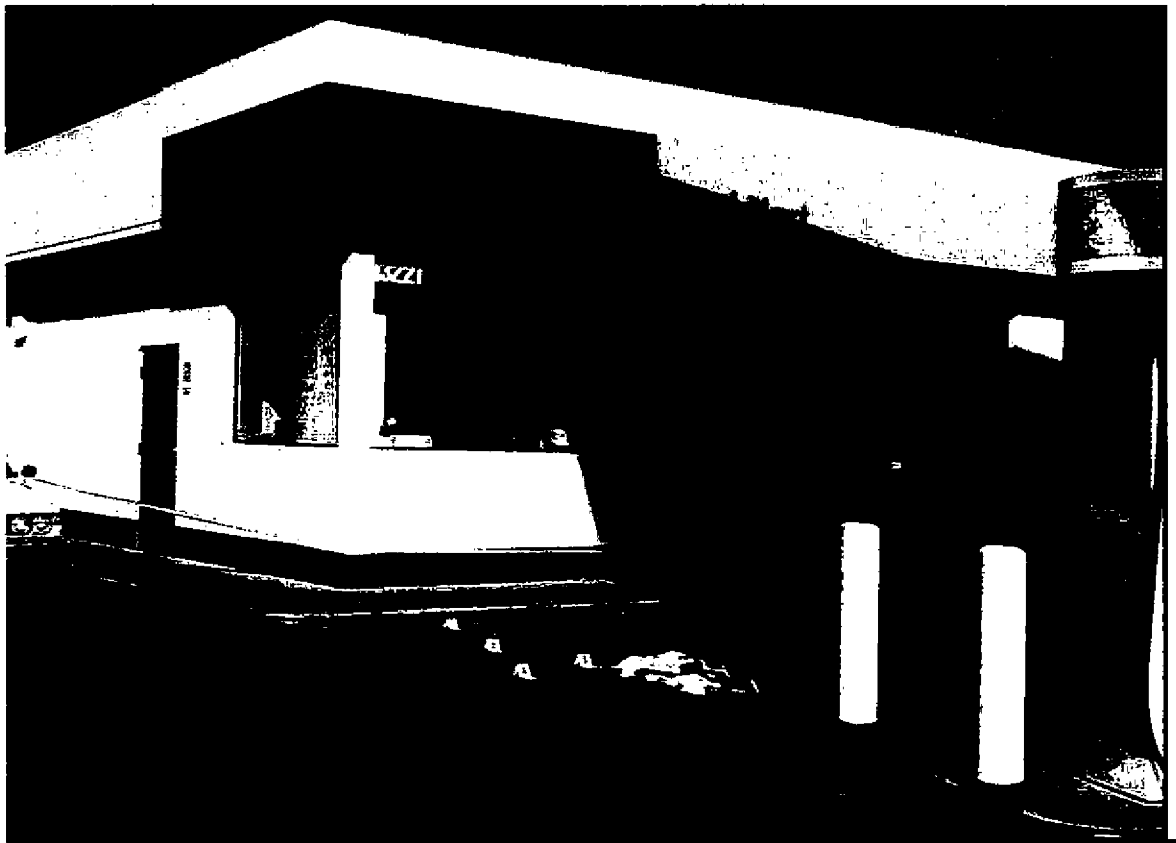
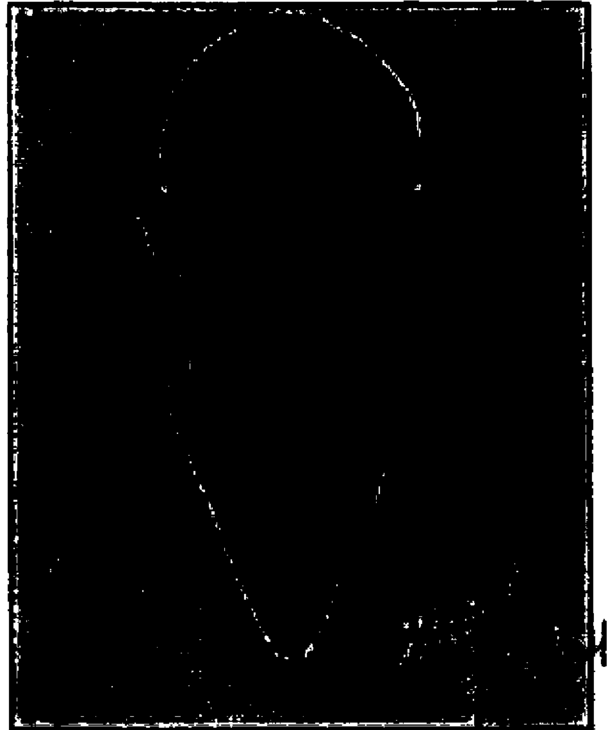
Monica Johnson

- Isaiah just standing there
- Isaiah shrugs when asked what's going on
- Defendant in backseat
- She's in store for only seconds when:
  - Commotion gets louder
  - Defendant comes out of car w/gun in hand
- Isaiah not doing anything when he is shot
- Isaiah does not touch or act aggressively to anyone
- Isaiah shot & fell forward from where he was standing
- The look on defendant's face as he comes out of the car to shoot





3

The look on the defendant's face:

"No fear" "At ease"

"Like a monster"

"Nothing to it" "Menacing"

This was not Self Defense

- Monica Johnson
- Laura Devereaux

Laura Devereaux

- Confrontation did not appear serious:
  - Thought they were joking and goofing around at first
  - Not concerned for her safety until shots
- Isaiah standing to left of store doors

- Never saw Isaiah:
  - make an aggressive move
  - say anything
  - have anything in his hands
- Isaiah fell forward from where he was standing
- Male (McGrew): "Dog, what did you just do?"

This was not Self Defense

- Monica Johnson
- Laura Devereaux
- Dan Brooks

Dan Brooks

- Memory not entirely accurate
- The confrontation:
  - "nothing to draw my senses"
  - "nothing to draw my attention"
- Isaiah Clark standing at trunk of car doing nothing when defendant comes out of backseat w/gun
- Hears female (Tamrah Dickman): "don't shoot him, don't shoot him"
- Isaiah never took any aggressive acts
- Sees Isaiah hit by 4 shots

This was not Self Defense

- Monica Johnson
- Laura Devereaux
- Dan Brooks
- Rickie Millender

Rickie Millender

- Isaiah standing towards back of car, standing by himself, not talking to anyone
- Isaiah not involved. This was not his "beef."
- Defendant reaching for a gun under the seat while he is confronting McGrew
- Sees defendant standing over Isaiah with gun

This was not Self Defense

- Monica Johnson
- Laura Devereaux
- Dan Brooks
- Rickie Millender
- Defendant flees the state

Consistent Points

- No one but defendant had weapon
- Confrontation between McGrew/Millender not alarming
- At worst, this was a fistfight between McGrew/Millender
- Isaiah a bystander
- Isaiah Clark:
  - never touched anyone
  - never an aggressive act
  - never said anything
- Defendant inexplicably comes out of backseat with gun
- Shooting immediate

Defense Case

- Dave Moore
- Tamrah Dickman
- Defendant

Dave Moore

- Never sees Defendant or Dickman outside car
- Never sees Clark touch Defendant or Dickman
- Isaiah not involved in confrontation
- Best he can say:
  - Isaiah appears angry at some point
  - Walks around backside of car
  - Leans into passenger side and shots ring out

Tamrah Dickman

June 23, 2004		2009 testimony		2014 testimony
Car w/2 black men. One confronted Fred.	→		→	Car filled w/black men looking to "jump" Fred
Isaiah just standing there	→	Isaiah just standing there	→	Isaiah aggressively posturing
Isaiah did not punch Defendant	→	Isaiah punches Defendant	→	Isaiah punches Defendant

Tamrah Dickman

- Story constantly evolves to benefit Defendant
- Her story v. Defendant's story
- Interview on June 23, 2004

Defendant

- 10 years to rehearse
- 5+ years to try again
- 2009 testimony v. Now

Defendant's Testimony In 2009 ≠ Self Defense

Defendant

- 10 years to rehearse
- 5+ years to try again
- 2009 testimony v. Now
- No one sees punch
- Clark standing over him when shots fired???
- Time to unjam gun
- No blood inside car

- Tamrah: "Don't shoot him"
- Fred: "Dog what did you just do?"
- Defendant has no injuries
- Defendant flees
- Defendant gets rid of evidence

APPENDIX C

Decision reversing after first trial

State v. George, 146 Wn. App. 906, 193 P.3d 693 (2008)

146 Wash.App. 906
Court of Appeals of Washington,
Division 1.

STATE of Washington, Respondent,
v.
Graeme A. GEORGE, Petitioner.

No. 59624–1–I.
|
Oct. 13, 2008.

Synopsis
Background: Defendant was convicted, in the District Court, Whatcom County, of misdemeanor possession of marijuana and misdemeanor possession of drug paraphernalia. Defendant appealed. The Superior Court, Whatcom County, Steven J. Mura, J., affirmed. Review was granted.

Holdings: The Court of Appeals, Becker, J., held that:

[1] evidence warranted instruction on affirmative defense of unwitting possession;

[2] citation issued by state trooper, by which defendant was charged with misdemeanor possession of drug paraphernalia, did not include all of the essential elements of the charged offense; and

[3] evidence did not establish defendant's dominion and control over vehicle, as basis for constructive possession of pipe with burned marijuana, which was found in vehicle.

Reversed and remanded.

Dwyer, A.C.J., filed an opinion concurring in part and dissenting in part.

Attorneys and Law Firms

****695** Joseph L. Broadbent, Attorney at Law, Mount Vernon, WA, for Petitioner.

Ann Lindsay Stodola, Whatcom County Prosecutors Office, Bellingham, WA, for Respondent.

Opinion

BECKER, J.

***912** ¶ 1 Appellant Graeme George was convicted of possession of marijuana and possession of drug paraphernalia. The superior court affirmed. We granted discretionary review, and now reverse and remand for dismissal with prejudice. The citation for possession of drug paraphernalia contained insufficient notice of the elements of the crime; the trial judge improperly refused to give an unwitting possession instruction unless George testified; and the evidence was insufficient to show that George had dominion and control over the pipe and its contents.

FACTS

¶ 2 One evening in March 2005, Washington State Patrol Trooper Brian Thompson stopped a two-door Ford Explorer in Bellingham for driving 43 miles per hour in a 25 mile-per-hour zone. When he walked up to the driver's side of the vehicle and the driver rolled the window down, Trooper Thompson immediately smelled the strong odor of burnt marijuana wafting from the vehicle. There were three men in the vehicle: the driver; the vehicle's registered owner in the front passenger seat; and George. George was in the back seat behind the driver. Trooper Thompson asked whether there was any marijuana in the vehicle. All three denied that there was.

¶ 3 Trooper Thompson placed the occupants under arrest "for the odor of marijuana in the vehicle." He had each of the men step out of the vehicle one at a time, patting them down as he did so. He placed the driver and the registered owner in the back of his patrol car. He handcuffed George and had him stand in front of the vehicle while he searched it.

¶ 4 Trooper Thompson found an eight-inch long, six-and-a-half-inch wide blue glass water pipe among empty beer ***913** cans and bottles on the floorboard behind the driver's seat, next to where George had been sitting. There was burned marijuana in the pipe. Trooper Thompson asked the occupants if "somebody wanted to own up" to the pipe. All three denied owning it. Trooper Thompson then took the pipe for entry into evidence, cited all three occupants for possession of marijuana and possession of drug paraphernalia, and booked them into jail. George's citation read that he was charged with:

****696** RCW 69.50.412(i)[1]

[1] We liberally construe the subsection reference as "i" even though the officer's handwriting makes it appear to be an "L" on first glance. Our analysis does not depend on a resolution of whether this figure is an "L" or an "i."

Possession of drug paraphernalia
RCW 69.50.401

Possession of marijuana less than 40g.

¶ 5 George was tried in the Whatcom County District Court for both misdemeanor possession of marijuana and misdemeanor possession of drug paraphernalia. He wanted to argue that if found to have possession, it was unwitting. To this end, he sought to have the jury instructed consistent with the pattern unwitting possession instruction, WPIC 52.01. The court refused to give the instruction.

¶ 6 George was convicted on both counts. The superior court affirmed. We granted discretionary review of all three issues raised by George in his appeal to the superior court.

UNWITTING POSSESSION INSTRUCTION

¶ 7 George contends that he was entitled to have the jury instructed on the defense of unwitting possession with respect to the possession of marijuana charge.

¶ 8 The trial court accepted the State's argument that there was insufficient evidence to warrant the instruction unless George testified:

> ***914** THE COURT: Well counsel the instruction says the possession of a controlled substance is unwitting if the person .... didn't know what the substance was or did not know the nature of the substance, and we are not going to allow his

> testimony on this instruction through the trooper. I mean if he is going to get up and testify to that then I will give the instruction.
>
> [DEFENSE COUNSEL]:.... I don't think it matters where the evidence comes from—
>
> THE COURT: How does the trooper know what your client knows?....
>
> ....
>
> [PROSECUTOR]:.... I don't see how defense can try to shoehorn an affirmative defense the State's witness [sic]. I think it's clearly inappropriate.
>
> THE COURT [to defense counsel]: And I am not going to give the instruction unless your client testifies.

At the conclusion of the State's case in chief, George again asked the court to give the unwitting possession instruction. The trial court again refused to do so unless George testified.

¶ 9 George had previously been convicted of making a false statement to a public official. The prosecutor indicated that he planned to introduce the prior conviction to impeach George's credibility should George testify.

¶ 10 George did not testify in his own defense and he did not call any other witnesses. The jury was instructed that George was not required to testify, but was not instructed on his proposed defense of unwitting possession. In closing, the prosecutor argued that it was immaterial whether George knew there was marijuana in the pipe:

> [PROSECUTOR]:.... I just want to talk to you about ... things that defense is arguing that don't matter .... you won't find in the jury instructions ... anything about knowledge.... So I would ask you to disregard that argument because it is not in the jury instructions; it is not in evidence.

[1] [2] ¶ 11 The law regarding the defense of unwitting possession is well-established. The State has the burden of ***915** proving the elements of unlawful possession of a controlled substance as defined in the statute—the nature of the substance and the fact of possession. Defendants then can prove the affirmative defense of unwitting possession. This affirmative defense ameliorates the harshness of a strict liability crime. *State v. Bradshaw,* 152 Wash.2d 528, 538, 98 P.3d 1190 (2004). Unwitting possession must be proved by a preponderance of the evidence. *State v. Balzer,* 91 Wash.App. 44, 67, 954 P.2d 931 (1998).

****697** [3] [4] [5] [6] ¶ 12 A defendant in a criminal case is "entitled to have the trial court instruct upon its theory of the case if there is evidence to support the theory." *State v. Hughes,* 106 Wash.2d 176, 191, 721 P.2d 902 (1986). A trial court errs by not instructing the jury on the defense of unwitting possession when evidence supporting the defense is adduced at trial. *State v. May,* 100 Wash.App. 478, 482–83, 997 P.2d 956 (2000). "In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury." *May,* 100 Wash.App. at 482, 997 P.2d 956. The affirmative defense of unwitting possession "must be considered in light of all the evidence presented at trial, *without regard to which party presented it.*" *State v. Olinger,* 130 Wash.App. 22, 26, 121 P.3d 724 (2005) (emphasis added).

[7] ¶ 13 Here, the testimony of the only witness—Trooper Thompson—provided a wealth of evidence that justified the jury being instructed on the defense of unwitting possession. Trooper Thompson testified that all three vehicle occupants denied knowing anything about any marijuana being present. He testified that George denied knowledge of any marijuana in the vehicle and denied ownership of the pipe. He testified that George was not driving the vehicle and did not own the vehicle; the vehicle owner was present in the front passenger seat. He testified that there was no fingerprint evidence linking George to the pipe. He testified that it was at least theoretically possible ***916** that someone in the front seat could have placed the pipe in the back seat after the vehicle was stopped. He testified that he did not know when the pipe had last been used, who placed it on the floorboard, or when it was placed there.

¶ 14 In view of Trooper Thompson's testimony, the trial court erred by concluding that George was required to testify in order to have the jury instructed on his requested defense. Trooper Thompson's testimony provided a sufficient evidentiary

basis to warrant the requested instruction. The error was not harmless. This error alone warrants reversal of George's conviction for misdemeanor possession of marijuana.

ESSENTIAL ELEMENTS RULE

[8] ¶ 15 George contends that his conviction for possession of drug paraphernalia must also be reversed because the citation by which he was charged did not state the elements of the offense of which he was charged.

[9] [10] [11] ¶ 16 A person may not be convicted of a crime with which he or she was not charged. *Auburn v. Brooke,* 119 Wash.2d 623, 627, 836 P.2d 212 (1992). In order to meet this requirement, all of the essential elements of the charged offense, statutory or otherwise, must be included in a charging document in order to afford to the accused the constitutional requirement of notice. *State v. Kjorsvik,* 117 Wash.2d 93, 97, 812 P.2d 86 (1991). An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. *State v. Ward,* 148 Wash.2d 803, 811, 64 P.3d 640 (2003).

¶ 17 In *Brooke,* two defendants were charged by citations issued by police officers—one for "9.40.010(A)(2) Disorderly Conduct," and one for "11.56.420 Hit/Run; Attended." *Brooke,* 119 Wash.2d at 625–26, 836 P.2d 212. For the first time on appeal, both defendants challenged the constitutional sufficiency of their citations as charging documents. The Supreme Court accepted review of both cases, describing the issue presented ***917** as: "Does a misdemeanor or gross misdemeanor citation used as the final charging document in a criminal prosecution satisfy the 'essential elements' rule if it states only a numerical code section and the name of a criminal offense?" *Brooke,* 119 Wash.2d at 627, 836 P.2d 212.

¶ 18 The Supreme Court answered the question in the negative, holding that the essential elements rule applies to all charging documents, including citations used as final charging documents. The recitation of no more than a numerical code section and the title of an offense does not satisfy that rule "unless such abbreviated form contains all essential elements of the crime(s) charged." ****698** *Brooke,* 119 Wash.2d at 627, 836 P.2d 212. Criminal defendants should not "have the burden of locating the relevant code ... and determining the elements of the offense from the proper code section." *Brooke,* 119 Wash.2d at 635, 836 P.2d 212. It is "an unfair burden to place on an accused," especially in misdemeanor and gross misdemeanor cases where defendants are often unrepresented by counsel. *Brooke,* 119 Wash.2d at 635, 836 P.2d 212. Based on this conclusion, and the absence of necessary elements from the misdemeanor citations issued to the defendants, the court reversed both defendants' convictions, and remanded their causes for dismissal of the charges against them without prejudice. *Brooke,* 119 Wash.2d at 639–40, 836 P.2d 212.

¶ 19 The State does not directly address *Brooke.* The State relies on the rule that citations issued by officers need not be as detailed as complaints issued by prosecutors. *State v. Leach,* 113 Wash.2d 679, 698, 782 P.2d 552 (1989). What the State's argument ignores, however, is that the court in *Brooke* specifically examined and rejected the contention that *Leach* stands for the proposition that citations need not state all of the essential elements of a charged misdemeanor offense. *See Brooke,* 119 Wash.2d at 638–39, 836 P.2d 212. In a post conviction challenge, charging documents are liberally construed. *Kjorsvik,* 117 Wash.2d at 102, 812 P.2d 86. But even under the most liberal interpretation of the standard, "*all* essential elements of an alleged crime must be included" in the charging document in some form. ***918** *Kjorsvik,* 117 Wash.2d at 101 and 105, 812 P.2d 86. *Kjorsvik* does not allow the State to charge by citation to a code section and the common name of an offense without stating all of the elements necessary to sustain a conviction. *See Brooke,* 119 Wash.2d at 636, 836 P.2d 212.

¶ 20 The State's reliance on *State v. Grant,* 104 Wash.App. 715, 17 P.3d 674 (2001), is also unavailing. In that case, we recognized that the shorthand phrase "DWI" sufficiently charged the crime of "driving while intoxicated," or, more properly, "driving under the influence of or affected by intoxicating liquor.... RCW 46.61.502(1)(b)." *Grant,* 104 Wash.App. at 719–20, 17 P.3d 674. This shorthand was sufficient because it contained the "necessary facts of the offense." *Grant,* 104 Wash.App. at 717, 17 P.3d 674.

¶ 21 Here, the citation at issue alleged that George was guilty of "possession of drug paraphernalia." But no Washington statute criminalizes "possession of drug paraphernalia." *See, e.g., State v. Neeley,* 113 Wash.App. 100, 107, 52 P.3d 539 (2002) ("bare possession of drug paraphernalia is not a crime"); *State v. McKenna,* 91 Wash.App. 554, 563, 958 P.2d 1017

(1998) ("mere possession of drug paraphernalia is not a crime"); *State v. Lowrimore,* 67 Wash.App. 949, 959, 841 P.2d 779 (1992) ("RCW 69.50.412 does not, ipso facto, make possession of drug paraphernalia a crime").

¶ 22 For possession of drug paraphernalia to be a crime, a defendant must either "use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance," RCW 69.50.412(1), or "deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance." RCW 69.50.412(2).

***919** ¶ 23 Even under the most liberal construction of the citation issued by Trooper Thompson, none of the possible circumstances under which George's possession of the pipe could have been found to be criminal were alleged in the citation. This error alone requires reversal of George's conviction for possession of drug paraphernalia.

SUFFICIENCY OF THE EVIDENCE

¶ 24 If our reversal of the two convictions were based only on the instructional error and the charging defect, the State would be permitted to cure the charging defect and try ****699** George again on both counts. But we agree with George that both convictions must also be reversed for insufficiency of the evidence. As a result, both convictions must be dismissed with prejudice.

¶ 25 Sufficient evidence supports a jury's determination of guilt if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wash.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant. *State v. Gentry,* 125 Wash.2d 570, 597, 888 P.2d 1105 (1995).

[12] [13] ¶ 26 Possession of a controlled substance is a strict liability crime. *See Bradshaw,* 152 Wash.2d at 538, 98 P.3d 1190. Possession of drug residue in a pipe can appropriately be charged as possession of a controlled substance because there is no minimum amount of drug which must be possessed in order to sustain a conviction. *State v. Williams,* 62 Wash.App. 748, 751, 815 P.2d 825 (1991). To prove possession of drug paraphernalia, the State had to prove not only that George possessed the pipe but also that he used it in a drug-related activity. RCW 69.50.412(1).

[14] [15] ¶ 27 Possession may be either actual or constructive. The State argued in closing that George had both. But actual possession requires physical custody. *State v.* ***920** *Callahan,* 77 Wash.2d 27, 29, 459 P.2d 400 (1969). Because George did not have physical custody of the pipe, the question is whether the State proved that he had constructive possession of the pipe and its contents.

[16] [17] [18] ¶ 28 "Constructive possession is proved when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs were found." *State v. Mathews,* 4 Wash.App. 653, 656, 484 P.2d 942 (1971) (citing *Callahan*). An automobile may be considered a "premises." *State v. Potts,* 1 Wash.App. 614, 617, 464 P.2d 742 (1969). Here, there was insufficient evidence to support a finding that George exercised dominion and control over the vehicle. He was a mere backseat passenger, not the driver or the owner.

¶ 29 The State argued George had constructive possession of the pipe and its contents. "It's at his feet, he's the only one in the back seat and it is sitting right there on the floorboard."

[19] [20] ¶ 30 Exclusive control by the defendant is not required to establish possession; more than one defendant may be in possession of the same prohibited item. *State v. Turner,* 103 Wash.App. 515, 522, 13 P.3d 234 (2000). However, a defendant's mere proximity to drugs is insufficient to prove constructive possession. This is so even where there is evidence that the defendant handled the drugs, because "possession entails actual control, not a passing control which is only a momentary handling." *Callahan,* 77 Wash.2d at 29, 459 P.2d 400. As established by *Callahan,* the rule is that "where the

evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession." State v. Spruell, 57 Wash.App. 383, 388, 788 P.2d 21 (1990). *See also* State v. Cote, 123 Wash.App. 546, 548–50, 96 P.3d 410 (2004).

¶ 31 Constructive possession cases are fact-sensitive. For guidance, we look not only to the rule as established by *Callahan,* but also to the results reached in decisions on comparable facts. In *Spruell,* police entered a room and ***921** found appellant Hill and another individual near a table on which there was cocaine residue, a scale, vials and a razor blade. The defendant's conviction for possession of the cocaine was reversed for insufficient evidence:

> There is no evidence in this case involving Hill other than the testimony of his presence in the kitchen when the officers entered and the testimony of the conditions there described by Detective Greenbaum and Detective Sergeant McClure. There is no evidence relating to why Hill was in the house, how long he had been there, or whether he had ever been there on days previous to his arrest. There is no ****700** evidence of any activity by Hill in the house. So far as the record shows, he had no connection with the house or the cocaine, other than being present and having a fingerprint on a dish which appeared to have contained cocaine immediately prior to the forced entry of the police. Neither of the police officers testified to anything that was inconsistent with Hill being a mere visitor in the house. There is no basis for finding that Hill had dominion and control over the drugs. Our case law makes it clear that presence and proximity to the drugs is not enough. There must be some evidence from which a trier of fact can infer dominion and control over the drugs themselves. That evidence being absent, Hill's conviction must be reversed and dismissed on double jeopardy grounds.

Spruell, 57 Wash.App. at 388–89, 788 P.2d 21. In *Cote,* the evidence was held insufficient to prove constructive possession where the defendant was a passenger in a truck containing components of a methamphetamine lab, and his fingerprints were found on Mason jars containing chemicals in the back of the truck. *Cote,* 123 Wash.App. at 550, 96 P.3d 410.

¶ 32 The State relies on *Mathews,* where evidence of proximity coupled with "other circumstances linking him to the heroin" was held sufficient to justify a finding that a back seat passenger had constructive possession of drugs found near his feet. *Mathews,* 4 Wash.App. at 658, 484 P.2d 942. In *Mathews,* the defendant and three other individuals were in a car stopped by the police. A small package of heroin was found underneath the carpet near the right back seat where the defendant had been sitting since the foursome ***922** left Portland. While recognizing that the defendant's proximity to the heroin was not enough to prove constructive possession, the court identified other evidence that established the necessary link. The defendant was a known heroin user with a three-bag-a-day habit. He had purchased and used heroin before starting out for Longview. Paraphernalia used by heroin addicts was found not only in his coat but also underneath the right back seat where he was sitting. The occupants of the front seat, also heroin addicts, testified that the heroin in the back seat was not theirs and they did not know it was there. The Court noted that the jury could have found that experienced heroin users, such as the front seat occupants, would not hide their heroin within ready access of a known heroin user. The other back seat passenger was not a heroin user.

¶ 33 Sufficient evidence in addition to proximity was also found in *State v. Ibarra–Raya,* 145 Wash.App. 516, 187 P.3d 301, 306 (2008) where the defendant, who was observed standing near a freshly-dropped bindle of cocaine, said "If you saw me drop it, then I'll admit it's mine." This admission was sufficient to take the issue of constructive possession to the jury.

¶ 34 Here there was no evidence about George's past use or ownership of marijuana or paraphernalia. No drugs or paraphernalia were found on his person. There was no evidence such as dilated pupils, odor on his person, matches, or a lighter to suggest that George had been smoking marijuana with or without the pipe. There was no testimony tending to rule out the other occupants of the vehicle as having possession of the pipe. There was no testimony establishing when George got into the vehicle or how long he had been riding in it. There was no fingerprint evidence linking George to the pipe. And George made no statements or admissions probative of guilt.

¶ 35 The trooper could not remember whether he first spotted the pipe before or after the occupants stepped out of the car. For safety purposes, he did an initial scan inside the car with his flashlight to see what the occupants had in ***923** their hands and whether there were guns, but he did not recall seeing the pipe at this time. "I'll just say the first time I seen it was after they stepped out but at least while they were stepping out." The trooper acknowledged that he was not sure how long the pipe

had been on the floorboard or how recently it was used. "Based on the strong odor of it, that it was fairly recent it could have been there days but it had been used before days had gone by.... As strong as it was to me, I would have been really surprised if it would have been more than three hours." Thus, ****701** the trooper's testimony does not support an inference that George had been using the pipe and then tried to hide it by putting it at his feet.

¶ 36 The State contends it was sufficient that the pipe was found on the floorboard behind the driver's seat, and that while sitting behind the driver George could have easily reduced the pipe to his actual possession. This is not enough to distinguish the facts from *Callahan* and *Spruell,* where the drugs were likewise found close enough to the defendants that they could easily have been reduced to actual possession. The State cites no cases holding that proximity plus knowledge of a drug's presence establishes dominion and control over the drug. We have held that knowledge of the presence of marijuana is insufficient to prove dominion and control. *State v. Davis,* 16 Wash.App. 657, 659, 558 P.2d 263 (1977).

¶ 37 On the spectrum of cases with *Callahan* and *Spruell* at one end and *Mathews* at the other, these facts are closer to *Callahan* and *Spruell.* The State's evidence boils down to mere proximity. While there is evidence that a crime was committed, the State did not succeed in clearly associating the crime with George. *Cf. State v. Grande,* 164 Wash.2d 135, 187 P.3d 248 (2008). We hold the evidence insufficient to sustain a finding that George either used the pipe to smoke marijuana or that he constructively possessed the pipe and its contents.

***924** ¶ 38 The convictions are reversed and remanded for dismissal with prejudice.

I CONCUR: JAU, J.

DWYER, A.C.J. (concurring and dissenting).

¶ 39 I concur in both the majority's reasoning and its holdings with respect to the question of the sufficiency of the charging document and as to whether the trial court erred by refusing to instruct the jury on the defense of unwitting possession. I would reverse the judgment and remand the cause for retrial. However, I part company with the majority on the question of whether any jury could reasonably have concluded that George had constructive possession of the marijuana pipe and its contents. The majority's holding on this issue is contrary to both the law and common sense, and from it I dissent.

¶ 40 Sufficient evidence supports a jury's determination of guilt if, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Zunker,* 112 Wash.App. 130, 135, 48 P.3d 344 (2002) (citing *State v. Green,* 94 Wash.2d 216, 221, 616 P.2d 628 (1980)). All reasonable inferences must be drawn in favor of the verdict and interpreted most strongly against the defendant. *Zunker,* 112 Wash.App. at 135, 48 P.3d 344 (citing *State v. Gentry,* 125 Wash.2d 570, 597, 888 P.2d 1105 (1995)). These are long-standing principles.

¶ 41 Several different standards of review are pertinent to this appeal. With regard to George's claim of error on the instructional issue, he gets the benefit of the evidence and the inferences therefrom. Indeed, all factual inferences with respect to whether a requested jury instruction is warranted are drawn *in favor* of the defendant. To the contrary, however, all factual inferences with respect to whether the evidence presented at trial is sufficient to support a jury's verdict of guilt, under the instructions that were actually given, are drawn *against* the defendant. ***925** Thus, based on a given set of facts, reversal may be warranted due to the trial court's failure to properly instruct the jury, yet *not* be warranted when premised upon an assertion by the defendant that insufficient evidence was adduced to support a conviction, under the instructions that the trial court actually gave.

¶ 42 Here, it is true that insufficient evidence exists to support a finding that George exercised dominion and control over the pipe and its contents by virtue of exercising dominion and control over the premises in which they were located—the vehicle. George was not the registered owner of the vehicle. That person was present in the front passenger seat. Nor was George the driver of the vehicle. Accordingly, in order for the State to have adduced sufficient evidence at trial to support George's convictions, it was required to demonstrate that George, from his position in the rear passenger ****702** seat, exercised dominion and control over the pipe *itself,* and thus the burned marijuana contained therein.

¶ 43 The majority holds that no reasonable jury could have concluded that the State made this showing. To reach this holding, the majority misapplies the applicable standard of review. Moreover, given where the pipe was found and the circumstances under which Trooper Thompson found it, the holding strains credulity. The holding stems from the mistaken notion that appellate cases reviewing findings of constructive possession present a "spectrum" of factual scenarios from which we are to choose, and that this case falls in some ill-defined area of that spectrum in which insufficient evidence exists to support the finding.

¶ 44 Determining whether sufficient facts to support a finding of constructive possession were adduced at trial is simpler than that. This court explained how to determine whether the State did so in *State v. Mathews,* 4 Wash.App. 653, 484 P.2d 942 (1971). In *Mathews,* as in this case, drugs were found on the floor of a vehicle next to where a back-seat passenger was sitting. 4 Wash.App. at 655, 484 P.2d 942. Also as in this case, other evidence was presented by the State that tended ***926** to show that the passenger had dominion and control over the drugs—for example, that the persons in the front seats of the car stated that the bag of drugs in the back seat "did not belong to them and they did not know that it was there." *Mathews,* 4 Wash.App. at 656–57, 484 P.2d 942. It was made clear in *Mathews* that sufficient evidence exists to support a jury's finding that a vehicle passenger exercised dominion and control over controlled substances present in the vehicle, and thus that the passenger constructively possessed the drugs, where the State proves "proximity" of the defendant to the controlled substances, "coupled with other circumstances linking" the defendant to them. *Mathews,* 4 Wash.App. at 658, 484 P.2d 942.

¶ 45 Once such evidence is presented, whether the circumstantial evidence of constructive possession " 'excludes every reasonable hypothesis consistent with the [defendant's] innocence is *a determination properly made by the trier of the facts.* This court's only function on appeal is to determine if there is substantial evidence in the record tending to establish circumstances upon which a finding of guilt can be predicated.' " *Mathews,* 4 Wash.App. at 657–58, 484 P.2d 942 (quoting *State v. Green,* 2 Wash.App. 57, 70, 466 P.2d 193 (1970)) (emphasis added). Accordingly, in order to determine whether the State adduced sufficient evidence at trial to support George's convictions, the *only* inquiry that we should make is whether evidence was presented from which the jury could find that (1) George was located sufficiently near the pipe to exercise dominion and control over it, and (2) factors other than George's proximity to the pipe and its contents linked George to them.

¶ 46 The majority in effect concedes that the first part of the *Mathews* test was met, but glosses over the direct and circumstantial evidence, and the inferences to be drawn therefrom, that tend to prove that the second part of the *Mathews* test was met as well:

¶ 47 (1) When the vehicle's driver rolled the window down to speak with Trooper Thompson, the strong odor of recently burned marijuana vented into Trooper Thompson's ***927** face. From this, the jury reasonably could have inferred that marijuana had been smoked in the vehicle not long before the traffic stop occurred.

¶ 48 (2) Neither another pipe, nor rolling papers, nor any other item of paraphernalia was found in the vehicle. From this, the jury reasonably could have inferred that the pipe was used to smoke the marijuana that Trooper Thompson smelled.

¶ 49 (3) There was partially burned marijuana in the pipe when it was found in the search. No other marijuana was found in the vehicle. None of the men was found to be in physical possession of other marijuana. From this, the jury reasonably could have inferred that the marijuana residue was the source of the marijuana odor that had been sensed by Trooper Thompson and, thus, that the marijuana in the pipe had been smoked not long before the traffic stop occurred.

****703** ¶ 50 (4) George was in the vehicle at the time of the traffic stop. From this, combined with the presence of the odor of marijuana still in the vehicle, the jury reasonably could have inferred that George was in the vehicle at the time marijuana was smoked therein.

¶ 51 (5) Three men were present in the vehicle when it was stopped by Trooper Thompson. From this, the jury reasonably could have inferred that at least one of the men in the vehicle was a person who smoked the marijuana that Trooper Thompson smelled.

¶ 52 (6) Trooper Thompson found the pipe on the floorboard in the back seat, next to where George's feet had been prior to his removal from the vehicle. From this, the jury reasonably could have inferred that George was the last person to handle the pipe.

¶ 53 (7) Trooper Thompson did not see the pipe on the floorboard of the vehicle when he initially looked into it using his flashlight. However, after he separately removed both the vehicle's driver and its registered owner and placed them in his patrol car, patting them down as he did ***928** so, and after he separately removed George from the vehicle, he found the pipe on the vehicle's back seat floorboard. From this, the jury reasonably could have concluded that George had secreted the pipe on his person at the outset of the traffic stop but, upon seeing that he was going to be searched upon his removal from the vehicle, placed the pipe on the floorboard while either the driver or the registered owner were being secured in Trooper Thompson's patrol car.

¶ 54 (8) From all this evidence, the jury reasonably could infer that George had been handling the pipe and the marijuana residue therein for the purpose of smoking marijuana, and that the odor of burned marijuana in the vehicle was the result of him doing so.[1]

1 It is the above-recited sequence of reasonable inferences that distinguishes this case from our decision in *State v. Cote,* 123 Wash.App. 546, 96 P.3d 410 (2004). In that case, we found that the defendant's *former* presence as a passenger in a stolen truck, combined with his fingerprints on a mason jar containing chemicals used to manufacture methamphetamine found in the truck, provided insufficient evidence to sustain a conviction for constructively possessing controlled substances. *Cote,* 123 Wash.App. at 550, 96 P.3d 410. As we pointed out, "Mr. Cote was not in or near the truck at the time of his arrest," and "the fingerprint on the jar proves only that Mr. Cote touched it." *Cote,* 123 Wash.App. at 550, 96 P.3d 410. Moreover, the evidence at issue in *Cote* was in the "back of the stolen pickup," not in the passenger area where the defendant had previously been present. *Cote,* 123 Wash.App. at 550, 96 P.3d 410.

The facts in *Cote* are very different from the facts of this case, in that George was within the vehicle and was in close physical proximity to the contraband at the time the search of the vehicle was initiated, and given that the evidence suggests that marijuana was burned in the vehicle not long before the seizure occurred.

¶ 55 Thus, in addition to evidence offered to show George's physical proximity to the pipe and its contents, the State adduced significant evidence demonstrating George's temporal proximity to an event—the recent burning of marijuana within the confined space of the vehicle—from which the jury reasonably could have concluded that George knew that marijuana was being smoked in his presence immediately prior to the traffic stop initiated by Trooper Thompson, had handled the pipe containing the marijuana, had done so for the purpose of ingesting marijuana, and had been the last person in the vehicle to ingest marijuana using the pipe prior to Trooper Thompson stopping ***929** the vehicle. Notwithstanding all of this, the majority holds that "[t]he State's evidence boils down to mere proximity." If our task was to draw all inferences in George's favor, this might be so. But, of course, drawing inferences in such a manner is precisely what we *do not* do.

¶ 56 On the other hand, drawing all reasonable inferences in favor of the verdict, as should be done, *Zunker,* 112 Wash.App. at 135, 48 P.3d 344, leads to the common-sense conclusion that the evidence presented by the State was sufficient to support the jury's conclusion that George had participated in the smoking of the marijuana and, thus, had exercised dominion and control over the pipe and its contents.[2] Thus, the jury rationally ****704** could have concluded that George was both in constructive possession of the marijuana residue contained in the pipe and had been using the pipe to smoke marijuana not long before Trooper Thompson stopped the vehicle. Accordingly, sufficient evidence was adduced at trial to support George's convictions. I dissent from the majority's holding to the contrary.

2 To reiterate, and make absolutely clear, the law does not require exclusive possession of a controlled substance in order for a conviction for its possession to be sustained. *State v. Turner,* 103 Wash.App. 515, 522, 13 P.3d 234 (2000). Thus, the State was not required to prove that *only* George had smoked marijuana out of the pipe, or to *disprove* that either the vehicle's driver or its owner-passenger had done so.

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