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Supreme Court No. 97478-1

Court of Appeals No. 35349-4-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL HERBERT DUNBAR,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Daniel Dunbar, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision no. 35349-4-III, issued on May 2, 2019 pursuant to RAP 13.3 and RAP 13.4(b)(1),(2), and (3). The opinion is attached as Appendix A. Mr. Dunbar's motion for reconsideration was denied in this matter on June 25, 2019, a copy of which is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. After the State's key witness testified on direct-exam, the trial court allowed the witness to assert a blanket privilege against self-incrimination to avoid Mr. Dunbar's cross-examination, over his objection.

a. Should this Court grant review of this confrontation clause violation as a matter of first impression for this Court under RAP 13.4(b)(3)?

b. Did the trial court's failure to conduct an individualized inquiry into whether Mr. Dunbar's cross-examination questions were incriminating before allowing the State's witness to assert a privilege against self-incrimination conflict with this Court's case law requiring the court make this determination prior to allowing a witness to refuse to testify? RAP 13.4(b)(1), (2), and (3).

c. Mr. Dunbar objected to the State's key witness refusing to testify on cross-examination. Did the Court of Appeals misapply the invited error doctrine when it agreed the trial court incorrectly applied the Fifth Amendment and Mr. Dunbar objected to the State's witness refusing to testify on cross-examination? RAP 13.4(b)(1), (2), and (3).

2. Did the Court of Appeals' application of a unit of prosecution analysis rather than a factual inquiry to determine whether a *Petrich*[1] instruction was needed conflict with Division One's decision in *State v. Brown,* 159 Wn. App. 1, 13, 248, P.3d 518 (2010), warranting review under RAP 13.4(b)(2)and (3)?

3. Should this Court grant review where Mr. Dunbar's right to present a defense was impinged by the trial court's limitation of witness testimony that tended to negate Mr. Dunbar's guilt? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

1. After testifying for the State on direct-examination, the State's key witness asserted a blanket privilege against self-incrimination to avoid being impeached with a perjured diversion agreement on cross-examination.

When Victoria Enright's unsecured car was taken from a high crime area, she called police to report it stolen. RP 245, 322. Ms. Enright

[1] *State v. Petrich,* 101 Wn.2d 566, 683 P.2d 173 (1984).

and Mr. Dunbar were friends. RP 246, 255. She did not have any proof Mr. Dunbar took her car, but told police she thought he took it because they were not on the best of terms at the time. RP 245-246, 322. Over a week later, Ms. Enright called police to report she saw Mr. Dunbar in her car. RP 248, 250, 255, 257.

Police responded to where Mr. Dunbar was located and he identified himself and the car. RP 327, 328-329. Mr. Dunbar had been trying to contact Ms. Enright to tell her about the car prior to her finding him in the car earlier that day. RP 330-331.

The police attempted to contact Ms. Enright at least four times at the number she gave them. RP 345. The officer also had Mr. Dunbar try to reach her on his phone. RP 334. She did not respond to any of these calls. RP 334. They sent a deputy out to three gas stations near where she said she was calling from. RP 333, 345. Police looked, but were unable to locate her. RP 345. Ms. Enright later admitted she left because she wanted

to avoid law enforcement. RP 258. Unable to contact Ms. Enright, the car was towed away. RP 350.

Mr. Dunbar was charged with possessing Ms. Enright's stolen vehicle. CP 9. He was also charged with witness tampering for calls he made to Ms. Enright from the jail. CP 10.

Ms. Enright was held in custody on a material witness for Mr. Dunbar's trial. RP 27; RP 3/3/17 2; Supp. CP___ (Sub. no. 29). She testified on direct-examination about her belief that Mr. Dunbar took her car, what happened when she saw him with her car, and Mr. Dunbar's phone calls from the jail. RP 242-266.

Mr. Dunbar gave notice, prior to cross-examination of Ms. Enright, that he would seek to impeach her with a diversion agreement she signed under penalty of perjury stating that she had no pending felony charges. RP 267-268.[2] The court had appointed Ms. Enright an attorney when she was arrested on the material witness warrant. RP 268. The court called in Ms. Enright's attorney to consult with her prior to Mr. Dunbar's cross-examination. RP 272. Ms. Enright's attorney then advised the court she

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[2] The defense introduced this through ER 608(b) which provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness."

would be asserting her Fifth Amendment right against self-incrimination. RP 275. Mr. Dunbar moved to strike Ms. Enright's previous testimony on confrontation clause grounds. RP 277. The court denied Mr. Dunbar's motion to strike Ms. Enright's testimony, allowing Ms. Enright to refuse to answer any of Mr. Dunbar's questions on cross-examination. RP 298.

Mr. Dunbar asked Ms. Enright about forty-five questions about her allegations against him, nearly all of which she refused to answer. RP 309-314. Mr. Dunbar asked no question about the document containing Ms. Enright's perjured statements. RP 309-314. Mr. Dunbar was convicted of possession of a stolen motor vehicle and witness tampering, and acquitted of making or possessing a motor vehicle theft tool. CP 75-77.

2. Mr. Dunbar vigorously objected to the State's key witness avoiding cross-examination through a blanket assertion of the Fifth Amendment privilege.

The Court of Appeals affirmed Mr. Dunbar's conviction despite the trial court erroneously denying him the opportunity to cross-examine the State's primary witness, which he objected to on confrontation clause grounds.

The Court of Appeals cites to portions of the extended colloquy between the court and parties about this issue, which reveals the trial court's misunderstanding of how to proceed when a State's witness asserts a blanket Fifth Amendment privilege on cross-examination. Slip op. at 6-

9. Once Ms. Enright stated her intention to refuse to answer questions on cross-examination, Mr. Dunbar responded that this would deny him the right to confront the State's witness. Slip op. at 6-7. The Court of Appeals recognized that "Ms. Enright's unwarranted invocation of her Fifth Amendment right created a confrontation problem only because the trial court believed it could not order Ms. Enright to answer defense counsel's questions." Slip. op. at 13. The Court of Appeals found Mr. Dunbar invited this error when he "argued to the court that if Ms. Enright asserted privilege in response to every question, Mr. Dunbar would be deprived of the opportunity to cross-examine her." Slip op. at 14. The Court of Appeals does not explain further how this objection could be construed as invited error, but the result is that the Court failed to decide this important constitutional question that is a matter of first impression for Washington courts. Slip op. at 12-14.

Additionally, the Court of Appeals applied a unit of prosecution analysis to determine a *Petrich* instruction was not required for the three phone calls the State alleged in support of one count of witness tampering charge, despite Division I rejecting this method of analysis in favor of a factual inquiry to determine whether the alleged acts constituted a continuing course of conduct. *Brown,* 159 Wn. App. at 13.

Finally, the Court of Appeals erred in prohibiting Mr. Dunbar from refusing to let him ask his own witness, Ms. Shelly, questions in support of his defense, deeming such evidence irrelevant even though it was central to Mr. Dunbar's defense at trial. Slip op. at 16.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1(a). Allowing a State's witness to testify on direct-examination and then avoid cross-examination through an unwarranted blanket assertion of a Fifth Amendment privilege is a confrontation clause violation that is a matter of first impression for this Court.

Mr. Dunbar was deprived of his right to cross-examine Ms. Enright when she asserted a blanket Fifth Amendment privilege against self-incrimination to the entirety of Mr. Dunbar's non-incriminating questions on cross-examination after testifying for the State. This is a constitutional question of first impression for this Court, necessitating review under RAP 13.4(b)(3).

Mr. Dunbar has a constitutional right to confront the witnesses against him. *State v. Hudlow,* 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); U.S. Const. amend. VI; Const. art. I, § 22. The accused's ability to cross-examine the State's witnesses is "the principle means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska,* 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). "The purpose is to test the perception, memory, and credibility of

witnesses." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). This right to confrontation must be zealously guarded. *Id.* (citing *State v. Kilgore,* 107 Wn. App. 160, 184-85, 26 P.3d 308 (2001)).

When a prosecution witness invokes the Fifth Amendment after testifying on direct examination, the privilege against self-incrimination conflicts with the defendant's Sixth Amendment confrontation rights. *United States v. Lyons*, 703 F.2d 815, 819 (5th Cir. 1983). Though a matter of first impression for this Court, the Fifth Circuit addressed the issue in *Lyons*. In *Lyons,* it was undisputed that the defendant was entitled to relief after the government's witness invoked her Fifth Amendment right on cross-examination after testifying for the government. *Lyons,* 703 F.2d at 819. When this happens, the only question is whether the court is required to strike the witness's testimony and provide a limiting instruction, or declare a mistrial. *Id.* In *Lyons*, the court determined it was sufficient to strike the witness's testimony rather than grant a mistrial because the witness's testimony was short and primarily cumulative. *Id.*

Here, Mr. Dunbar gave notice, prior to cross-examination of Ms. Enright, that he would be asking her about a diversion agreement Ms. Enright signed under penalty of perjury stating that she had no pending felony charges, which was not true. RP 267-268. Ms. Enright asserted a blanket privilege against self-incrimination that was based on a

misapprehension of the law. RP 305. When Ms. Enright informed the court that she would invoke her Fifth Amendment right and not answer defense questions on cross-examination after testifying on direct, the court erred in not striking her testimony as requested by Mr. Dunbar. RP 275-277. Though the Court of Appeals recognized this was error, it refused to rule on the issue, erroneously interpreting Mr. Dunbar's objection on confrontation clause grounds as an invitation to the court's erroneous ruling. Slip op. at 13-14.

A court's decision that affects the accused's right to cross-examination is of constitutional magnitude, and a court's erroneous ruling that affects this right must be reversed unless the State establishes the error was not harmless beyond a reasonable doubt. *Levy,* 156 Wn.2d at 732. Mr. Dunbar's inability to question Ms. Enright was most certainly not harmless, because Ms. Enright was the prosecution's primary witness against him. *See Lyons*, 703 F.2d at 819.

This Court should grant review to provide guidance on this constitutional issue that is a matter of first impression for this Court. RAP 13.4(b)(3).

1(b). The Court of Appeals relieved the trial court of its obligation to determine whether Mr. Dunbar's cross-examination questions were incriminating before allowing the State's witness to refuse to answer them.

The Court of Appeals decision that relieved the trial court of its duty to make an individualized determination about whether the cross-examination questions in fact elicited an incriminating response entitling the witness to assert her Fifth Amendment privilege against self-incrimination is contrary to governing case law, meriting review under RAP 13.4(b)(1),(2), and (3).

Unlike the defendant, a witness does not have the absolute right to remain silent when called to testify at trial. *State v. Lougin*, 50 Wn. App. 376, 381, 749 P.2d 173 (1988). In general, a witness who is called to testify is obligated to do so. *State v. Ruiz*, 176 Wn. App. 623, 635, 309 P.3d 700 (2013). However, a witness may invoke her Fifth Amendment privilege against self-incrimination if she "has 'reasonable cause to apprehend danger from a direct answer.'" *State v. Levy,* 156 Wn.2d 709, 731-32, 132 P.3d 1076 (2006) (quoting *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951)). The court must determine whether the privilege is applicable. *Levy*, 156 Wn.2d at 732.

Once the court sustains the witness' Fifth Amendment claim, the trial court must then determine the scope of the immunity. *Lougin*, 50 Wn. App. at 381. Generally, a claim of privilege can be raised in response to

specific questions, "not as a blanket foreclosure of testimony." *Id.* If the question does not "obviously and clearly incriminate the witness," the witness cannot claim a privilege unless the court determines, aided by "use of 'reasonable judicial imagination,'" that the questions creates a risk of self-incrimination. *Id.* (citing *Eastham v. Arndt,* 28 Wn. App. 524, 532, 624 P.2d 1159 (1981)).

The trial court must determine whether the witnesses' silence is justified based on the particular facts of the case. *Lougin*, 50 Wn. App. at 382. If the silence is not warranted, the trial court must require the witness to answer. *Id.* (citing *Hoffman,* 341 U.S. at 486–87). This decision will be reviewed for abuse of discretion. *Ruiz*, 176 Wn. App. at 636. A court's error is of constitutional magnitude because it impacts the accused's Sixth Amendment right to compel attendance by witnesses. *Lougin*, 50 Wn. App. at 382.

In Mr. Dunbar's case, the court abused its discretion in failing to make an individualized determination that the questions posed to Ms. Enright in fact created a risk of self-incrimination. *Lougin*, 50 Wn. App. at 381. When Mr. Dunbar first notified the court that it intended to impeach Ms. Enright with her perjured statement, Ms. Enright's counsel was called into court to advise her. RP 272. After consultation, Ms. Enright apprised the court that she would be asserting her Fifth Amendment right against

self-incrimination. RP 275. At first the court appeared to recognize the need for an individualized determination of each question before allowing Ms. Enright to invoke her privilege:

> I mean, I have decided that since Ms. Enright has started to testify; she is going to continue until cross-examination and redirect, if any, or done. And in the course of that, if there are things that legitimately are, would incriminate her, then she can invoke her Fifth Amendment.

RP 303.

Ms. Enright's attorney objected to this procedure, stating that unless the court limited the questions Mr. Dunbar could ask, he would advise his client to assert her Fifth Amendment right against self-incrimination to all questions asked or refuse to testify further. RP 304. The court asked Ms. Enright's counsel if he had any legal support that Ms. Enright could assert a blanket claim Fifth Amendment claim and not testify. RP 304. Ms. Enright's counsel replied with an incorrect statement of the law:

> My understanding is that once a defendant has invoked the Fifth Amendment, they are not allowed to do it…once they asserted the Fifth, they are not allowed to then selectively use it, which IS [sic] to say I will answer what my name is, but I won't answer what, you know, the other possible questions. That's been my understanding of it, Your Honor. I have not briefed it for today's purposes. That is just, I understood it was not a selective right. It was more of a you testify or you do not. But that is just based on my anecdotal understanding of the Fifth Amendment.

RP 305. The court noted it had a "dearth of authority" about Ms. Enright's claim. RP 305.

The court then summarized its ruling: "You ask your questions. If she wants to invoke her Fifth Amendment, she can." RP 307.

Mr. Dunbar then attempted to cross-examine Ms. Enright, asking her more than 40 questions, none of which related to the perjured diversion agreement. RP 309-314. The court failed to make a finding as to whether the questions "obviously and clearly" incriminated her as the court initially determined it would, and as it was required to do. *Lougin*, 50 Wn. App. at 381; RP 303; 309-314. The Court of Appeals recognized the trial court erred, noting the trial court wrongly believed "it could not order Ms. Enright to answer defense counsel's questions." Slip op. at 13. The Court of Appeals then wrongly faulted Mr. Dunbar for this error rather than requiring the court to "determine whether the privilege is applicable" as required by this Court.[3] *Levy*, 156 Wn.2d at 732.

Because this Court of Appeals decision affects Mr. Dunbar's constitutional rights and is in conflict with a decision of this Court and the

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[3] Mr. Dunbar subsequently moved for a new trial based on the court allowing Ms. Enright's refusal to testify on cross-examination, which the trial court denied. CP 78; 402.

Court of Appeals, review by this Court is warranted under RAP 13.4(b)(1), (2), and (3).

<u>1(c).</u> The Court of Appeals' misapplication of the invited error doctrine conflicts with this Court's case law requiring the State to establish the defendant affirmatively and knowingly set up the error, which cannot apply here where Mr. Dunbar plainly objected.

As argued in Mr. Dunbar's motion to reconsider, Mr. Dunbar's objection to the trial court's erroneous ruling that denied him the right to cross-examine the State's primary witness can in no way be construed as invited error. Slip op. at 12-14.

In determining whether the invited error doctrine applies, a court considers "whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it." *State v. Hood*, 196 Wn. App. 127, 135, 382 P.3d 710 (2016) (*In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014)). "The doctrine appears to require affirmative actions by the defendant." *Id. (citing In re Pers. Restraint of Thompson,* 141 Wn.2d 712, 724, 10 P.3d 380 (2000)). It applies when a defendant took knowing and voluntary actions to set up the error. *Id.*

Mr. Dunbar's objection to Ms. Enright refusing to testify on cross-examination was multifaceted, and evolved as both the prosecutor, Ms. Enright's counsel, and the court made various arguments about how to

proceed once Ms. Enright expressed an intent to invoke her Fifth Amendment privilege against self-incrimination. RP 267-309.

Mr. Dunbar's first objection and request for relief argued below and litigated on appeal, was Mr. Dunbar's motion to strike Ms. Enright's direct examination testimony if she refused to testify on cross-examination. RP 277-278. This was a clearly stated objection under *Crawford v. Washington.*[4] RP 277.

The Court of Appeals appears to agree that the trial court erred in allowing Ms. Enright to refuse to answer cross-examination questions after testifying for the State. Slip op. at 13. Yet the Court applied the invited error doctrine, refusing to review this important constitutional issue because Mr. Dunbar argued below that if the State's witness "asserted privilege in response to every question, Mr. Dunbar would be deprived of his opportunity to cross-examine her." Slip op. at 14. On its face, this is a confrontation clause objection in response to Ms. Enright's assertion of her Fifth Amendment privilege against self-incrimination, not invited error. RP 277-278.

Mr. Dunbar cannot be deemed to have invited this violation of his confrontation right that he objected to. *See Hood*, 196 Wn. App. at 135.

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[4] *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004).

Mr. Dunbar seeks review by this Court of this heavily litigated constitutional claim that is a matter of first impression for this Court that was central to the outcome of Mr. Dunbar's trial. RAP 13.4(b)(1), (2) and (3).

2. In determining the need for a unanimity instruction for one charge based on three different acts, the Court of Appeals applied a "unit of prosecution" inquiry to decide whether the separate acts were a "continuing course of conduct." This conflicts with a published Court of Appeals opinion that rejects this analysis in favor of a factual inquiry.

The Court of Appeals applied a unit of prosecution analysis to determine whether the three separate phone calls were a single course of conduct requiting a *Petrich* unanimity instruction, which conflicts with the factual inquiry applied by Division I in *Brown,* meriting review by this Court under RAP 13.4(b)(2) and (3). *Brown*, 159 Wn. App. at 13.

People accused of crimes in Washington have a right to a unanimous jury verdict. Const. art. I, § 21; *State v. Ortega–Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the prosecution presents evidence of multiple acts of misconduct, any of which could be relied on to find the defendant committed the charged crime, the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009) (citing *Petrich,* 101 Wn.2d at 572). An exception is when the allegations constitute a "continuing course of

conduct." *State v. McNearney*, 193 Wn. App. 136, 141, 373 P.3d 265 (2016).

The prosecutor charged Mr. Dunbar with witness tampering for two separate phone calls he made to Ms. Enright from the jail. CP 9-10. The jury was instructed that it could convict Mr. Dunbar for both or either of the charges, without being provided a unanimity instruction. CP 72 (to-convict instruction); 56-74 (jury instructions). The jury was also presented with evidence of a voicemail that the prosecutor relied on to support its charge of witness tampering, but which was not charged in the Information, or included in the "to convict" instruction. CP 9-10; 72; RP 259-263, 368, 451, 453.

The Court of Appeals applied the unit of prosecution analysis for double jeopardy in determining no *Petrich* instruction was necessary. Slip op. at 18 (citing *State v. Hall*, 168 Wn.2d 726, 730, 230 P.3d 1048 (2010)). This conflicts with *Brown*, which rejects a unit of prosecution analysis, because it involves a "pure question of legislative intent, while the continuing course of conduct analysis "is a factual inquiry undertaken by the trial court." *Brown,* 159 Wn. App. at 13.

This Court should accept review to decide this Division split. RAP 13.4(b)(2) and (3).

3. Mr. Dunbar's right to present a defense was impinged by the erroneous exclusion of witness testimony that tended to negate his guilt.

Mr. Dunbar's right to present a defense is guaranteed by the state and federal constitution. Const. art. I, sec. 22; U.S. Const. amend. VI; XIV. This right entitles the accused to present his "version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *State v. Lizarraga*, 191 Wn. App. 530, 552, 364 P.3d 810 (2015) (citing *Taylor v. Illinois,* 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed.2d 798 (1988)). This right is a fundamental element of due process of law. *Id.*

If the evidence the accused seeks to introduce has at least minimal relevance the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Darden,* 145 Wn.2d at 622). The court must properly consider "the integrity of the truthfinding process and a defendant's right to a fair trial." *Jones*, 168 Wn.2d at 720 (citing *Hudlow,* 99 Wn.2d at 14).

The Court of Appeals determined that Mr. Dunbar's proffered witness testimony that supported his version of the facts was not relevant, which was error. Slip op. at 16. Mr. Dunbar argued that Ms. Shelly's testimony was relevant because it would help establish that Ms. Enright

might have changed the plates on her own vehicle, not Mr. Dunbar, as insinuated by the prosecutor. RP 410-411. And Ms. Shelly's testimony that she asked Mr. Dunbar to assist in retrieving Ms. Enright's car was certainly relevant to Mr. Dunbar's lack of intent. RP 413. The defense reiterated that it was unable to elicit this testimony from Ms. Enright on both of these points during cross-examination, because Ms. Enright refused to testify. RP 411, 414. The Court of Appeals cited to Mr. Dunbar's inability to cross-examine Ms. Enright about this issue as further basis for excluding her testimony, but this deprivation only exacerbated the court's ruling that denied him the ability to elicit testimony on cross-examination. Slip op. at 16.

This violation of Mr. Dunbar's right to present a defense based on the Court's erroneous determination that his proffered witness testimony was not relevant was constitutional error, meriting review by this Court. RAP 13.4(b)(3).

E. CONCLUSION

Based on the foregoing, Mr. Dunbar respectfully seeks review of this decision under RAP 13.4(b)(1),(2) and (3).

Respectfully submitted this the 22nd day of July 2019.

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APPENDIX A

FILED
MAY 2, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 35349-4-III
Respondent,	)	
	)	
v.	)	
	)	
DANIEL HERBERT DUNBAR,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — Daniel Dunbar appeals his convictions for possession of a stolen motor vehicle and witness tampering. He contends his inability to obtain answers in cross-examining a critical witness deprived him of his Sixth Amendment[1] right of confrontation, but we conclude it was his own argument that invited the court's mistaken belief that it could not compel answers. We find no abuse of discretion in two evidentiary rulings that are challenged, and conclude that given the unit of prosecution in witness tampering cases, no unanimity instruction was required. The convictions are affirmed.

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[1] U.S. CONST. amend VI.

FACTS AND PROCEDURAL BACKGROUND

Victoria Enright owned a white 2001 Pontiac Grand Am that she reported stolen on December 13, 2016. She told a responding officer that it had to have been stolen between 3:00 a.m., when she went to bed, and 1:00 p.m., when she noticed it missing. Although she had no proof that Daniel Dunbar stole the car, she told the deputy she suspected him of taking it. She described Mr. Dunbar as a former friend, but suspected him "[b]ecause he was the only one that I felt had a problem with me at the time." Report of Proceedings (RP) at 245.

For days, Ms. Enright communicated by text and phone calls with Mr. Dunbar, accusing him of having taken her car. He denied stealing it, but told Ms. Enright he knew who had it.

A week after the car went missing, Ms. Enright, who had been provided with a rental car by her insurer, drove around areas familiar to Mr. Dunbar. She came across her Pontiac parked on the side of the road with Mr. Dunbar asleep inside. Its valid license plates had been replaced with others. She approached the car, told Mr. Dunbar to get out, and punched him in the face. She then drove her rental car to a nearby gas station and called the police to report having located her car.

Her report was referred to Spokane County Sheriff's Deputy Wade Nelson, who traveled to where Ms. Enright reported having seen the car. He saw both the car and Mr.

Dunbar, who was walking away from it. The deputy called out to Mr. Dunbar, who returned and spoke to him. Mr. Dunbar provided his name and admitted having heard "through a grapevine" that Ms. Enright suspected him of taking her car. RP at 329. He told the deputy it was actually "Cody" who took the Pontiac, not him. *Id.* Mr. Dunbar claimed he found Ms. Enright's car and decided to drive it to a friend's house but had run out of gas. He claimed he tried to contact Ms. Enright that morning to return the car to her.

Deputy Nelson arrested Mr. Dunbar for possessing a stolen vehicle. In a search incident to arrest, he found Mr. Dunbar to be carrying a shaved key. Mr. Dunbar was charged with possession of a stolen motor vehicle and making or possessing a motor vehicle theft tool.

The charges were later amended to include a charge of witness tampering, based on Mr. Dunbar's contacts with Ms. Enright between December 20, 2016 and January 29, 2017. The first was a phone call from the county jail on the night of Mr. Dunbar's arrest. During the call, he asked Ms. Enright if she was pressing charges, told her she shouldn't, and claimed he did not steal her car but had only been trying to get it back for her at the request of her aunt. In the second contact, a rambling voicemail message left for Ms. Enright on January 4, 2017, he accused her of giving him permission to recover her car and implied he could make trouble for her with her insurer. He focused on whether she would appear at trial:

> Alls you have to do is not show up for trial. I am not telling you what to do. I am not asking you what to do. I am asking you are you coming or not? I need to know. Trial is on the 13th of next month. And it's your choice. . . . You know that I dealt with your insurance company before, so we can go two ways with this. You could lose your truck or I can just get out and call to thank you for being . . . (inaudible) even if you testify, and be friends, maybe, I hope. Maybe not but here's the deal. Are you coming to testify or not? I need to know now. Bye.

Ex. P-14. In the third call, made on January 29, Mr. Dunbar was apologetic and again asked Ms. Enright if she was coming to trial. When she answered that she didn't know and asked him why, Mr. Dunbar, who faced prosecution on other pending charges, answered:

> Because if you don't come then that one will each get dismissed. They offered me 114 months. They want to run, they want to run two of them back to back on me; that is what they want to do. I told them no, let's go to trial, because I am off the scale on points. You know what I mean?

Ex. P-13 (some capitalization omitted).

The State's efforts to subpoena Ms. Enright to appear at trial were unsuccessful, and as the trial date approached, the State planned to rely on the doctrine of forfeiture by wrongdoing to offer her prior statements in lieu of live testimony. Approximately a week before trial, however, the State learned of Ms. Enright's whereabouts, obtained a material witness warrant, and was successful in locating and detaining her in the Spokane County Jail. Upon return of the warrant on the Friday before trial, Scott Mason was appointed to serve as her counsel and Ms. Enright was released based on her assurance to the court that she would appear for trial the next week.

The State called Ms. Enright as its first witness on Wednesday, March 8. During her direct testimony, Ms. Enright testified to why she suspected Mr. Dunbar of stealing her car, their communications after it went missing, and her finding him in her car on December 20 and reporting her discovery to police. She identified photographs of the car taken on December 20, and testified that she never gave Mr. Dunbar permission to take her car on December 13 and never asked for his help in recovering it. She identified Mr. Dunbar's voice on the telephone recordings offered by the State and testified that she was known by the name "Tory," the name Mr. Dunbar used in the calls.

Defense counsel asked for a break before cross-examining Ms. Enright. Outside the presence of the jury, she made an offer of proof that Ms. Enright had signed a diversion agreement under penalty of perjury in which she represented, falsely, that she had no felony charges pending in Washington or elsewhere. The defense wished to use the information to challenge Ms. Enright's credibility under ER 608(b).

The State objected to what it characterized as an "ambush" but also suggested that "perhaps Mr. Mason should be here, Your Honor," observing that "we have law enforcement sitting here, and if [Ms. Enright] commits perjury or submits she commits perjury, she is subject to being arrested." RP at 268-69. The trial court recessed for the morning and directed the lawyers to contact either Mr. Mason or public defender Jeremy

Schmidt, whom defense counsel believed might be representing Ms. Enright at that point. The court wanted Mr. Mason or Mr. Schmidt to confer with Ms. Enright and provide input to the court.

During the recess, Mr. Schmidt arrived and conferred with Ms. Enright. At the outset of the afternoon session he informed the trial court of the advice he had given her:

> MR. SCHMIDT: . . . What I have advised my client AND what we respectfully ask is that she would invoke her right to remain silent at this time so as not to make any potentially incriminating statements. That would be our position, that she would exercise her right at this time. And I have advised both parties of that.
>
> THE COURT: Very well.
>
> MR. SCHMIDT: If you have any questions at this point, Your Honor, my preference would be that she not be subjected to any more questioning as to not potentially get into this area that is being discussed. So my preference would be to not have her testify further. I have explained to her her obligations under the subpoena and her obligations under the contempt and other statutes, obviously comply with the Court's instruction, but my preference now would be to have questioning cease as it may lead into this incriminating area.

RP at 275-76.

When invited to address the issue, the State suggested that the court avoid the issue by excluding any questioning about the diversion agreement, proposing several bases for exclusion. The court then invited defense counsel to weigh in, and the defense

raised the confrontation clause and asked the court to strike Ms. Enright's direct testimony on the basis of the Sixth Amendment and *Crawford v. Washington*.[2] After hearing further from the lawyers, the trial court took a recess and on returning to the courtroom ruled on the confrontation objection. It announced its decision that Ms. Enright "continue on." RP at 299. It added,

> And if she decides she needs to assert the Fifth Amendment,[3] she can. *I think it would be inappropriate to strike all of her testimony given that the way the defense laid on this, one, knowing that the defense was going to assert that document and assert this tack of alleged perjury.*

RP at 299 (emphasis added).

The trial court "invite[d] from the State any other suggestions the State might have." *Id.* The State continued to argue that if the court ruled that the diversion agreement was excluded, it would solve the problem. When the court granted defense counsel's request to address the court, she introduced the notion that if Mr. Schmidt advised Ms. Enright to invoke the Fifth Amendment in response to all of her questions, Mr. Dunbar would be denied his ability to confront her:

> [DEFENSE COUNSEL]: It's my understanding that Mr. Schmidt already indicated that he is advising his counsel to no longer provide any sort of testimony. I think that changes the picture, then, if the court just limits me in my ability to cross her as to the Diversion Agreement. *If his*

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[2] *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[3] U.S. CONST. amend. V.

> *advi*[*c*]*e is to no longer testify and to plead the Fifth on any further questioning, that puts us in a different place than pretending like I have the opportunity to cross-examine her if she gets up on the stand and I get to ask her things that aren't of consequence.*
>
> THE COURT: *I don't have any control over that.*
>
> [DEFENSE COUNSEL]: I'm just asking if we clarify, if his intention is she is not going to testify at all, I think then we need to address that issue versus she is going to get up on the stand and she will talk a little bit. Those are two different scenarios, and I am hoping we can inquire of Mr. Schmidt.

RP at 302-03 (emphasis added).

Asked to clarify his position, Mr. Schmidt told the court that he would advise his client to generally invoke her right against incrimination, although repeating "we'll do whatever the court orders." RP at 304. The court responded:

> THE COURT: *I can't order her forgo her Fifth Amendment right. She is going to invoke it where she invokes it.*
>
> MR. SCHMIDT: The only issue within that is if the court were to determine she's not protected by that, about questions that have nothing to do with incrimination. My concern is without a limiting on what's going to be asked, I've got to advise her generally that we would not testify at this time further or that she would specifically assert her right.
>
> THE COURT: Do you have authority that you just blanket assert the Fifth Amendment and don't testify at all? I mean, the day of the week is Wednesday, the 8th. Fifth Amendment.
>
> MR. SCHMIDT: My understanding is that once a defendant has invoked the Fifth Amendment, they are not allowed to do it. . . . That's been my understanding of it, Your Honor. I have not briefed it for today's purposes. That is just, I understood it was not a selective right. It was more of a ["]you testify or you do not.["] But that is just based on my anecdotal understanding of the Fifth Amendment.
>
> THE COURT: All right.

RP at 304-05 (emphasis added).

As the colloquy continued, defense counsel stated:

> [DEFENSE COUNSEL]: What I'm hearing Mr. Schmidt saying is that his client is seeking to invoke her Fifth Amendment right, a blanket assertion. That's my understanding as defense attorney, as well. So it's not that she can get up and I ask can [sic] her [a] specific question and she can respond to it, but when she feels uncomfortable with, she can seek her Fifth Amendment right.

RP at 306.

The State never disagreed. Asked if the State had "[a]nything further," the prosecutor answered, "No, Your Honor." RP at 307. At that point the court stated:

> THE COURT: I'm going forward with my ruling, then. Ms. Enright can take the stand. We'll bring the jury back. You ask your questions. If she wants to invoke her Fifth Amendment, she can.

Id.

Ms. Enright answered the first three questions posed in cross-examination: she acknowledged her name, said she remembered promising to tell the truth, and said she owned the Grand Am. RP at 309-10. Beginning with defense counsel's next question—"Where did you buy it?"—she answered, "I invoke my Fifth Amendment right." RP at 310. She provided the same answer to defense counsel's next 43 questions, which we include in an appendix. Thirty-two of the questions appear related to the possession of a stolen vehicle charge. Eleven appear related to the witness tampering charge. Neither party asked the trial court to order Ms. Enright to respond to any of the questions.

The State's remaining witnesses included the city of Spokane police officer who responded to Ms. Enright's December 13 report of vehicle theft. On cross-examination, he agreed that the neighborhood from which the Pontiac was stolen was a high crime area and stated it is a matter of common knowledge that Spokane has a high rate of stolen motor vehicles.

The State also called Deputy Sheriff Nelson, who testified to his actions and contacts in recovering the car and questioning Mr. Dunbar.

The defense called only one witness: Leanne Shelly, who owned the house in which Ms. Enright was staying on December 13, where the Pontiac was parked when stolen. Before she testified, the trial court granted a request by the State for an in limine ruling foreclosing two areas of questioning: questioning about whether Ms. Shelly asked Mr. Dunbar to help Ms. Enright recover her car, and whether she saw Ms. Enright change the license plates on the Pontiac after it had been recovered.

Ms. Shelly testified that not only was Ms. Enright staying at her home on December 13, but Mr. Dunbar was staying there as well. She described both Ms. Enright and Mr. Dunbar as friends, stating she had known Ms. Enright for about a year and Mr. Dunbar for two or three years. She testified she had seen Mr. Dunbar drive Ms. Enright's car in the past, with or without Ms. Enright accompanying him. She testified that Mr. Dunbar did not drive Ms. Enright's car a lot, but she believed he had driven it a few times within the month before it went missing on December 13—although not the day before.

She described Ms. Enright's Pontiac as "[n]ice on the outside, not so nice on the inside." RP at 430. She testified that even before December 13, it had a damaged ignition that hung from the dashboard and a driver's side window that did not fully close and, if pushed, would fall into the door. She characterized the neighborhood in which her home was located as "[n]ot good." RP at 428.

The jury found Mr. Dunbar guilty of possession of a stolen motor vehicle and guilty of witness tampering, but not guilty of making or possessing a motor vehicle theft tool. Mr. Dunbar's motion for a new trial on grounds related to Ms. Enright's testimony was denied. He appeals.

ANALYSIS

Mr. Dunbar assigns error to (1) the trial court's refusal to strike the testimony provided in Ms. Enright's direct examination, (2) its order limiting the questioning of Ms. Shelly, which he argues denied his right to present a defense, and (3) its failure to give a *Petrich*[4] instruction on the witness tampering charge. We address the assignments of error in the order stated.[5]

---

[4] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

[5] A fourth assignment of error challenged the trial court's sentencing decision to run one count of a separate sentence consecutively to the sentence imposed in this case. Sentencing in both cases happened on the same day. Mr. Dunbar raises the same issue in the appeal of the other case, and now concedes that the asserted error should be addressed in that appeal, not this one.

I. THE TRIAL COURT'S MISTAKEN BELIEF THAT IT COULD NOT ORDER MS. ENRIGHT TO TESTIFY WAS INVITED ERROR

Both parties' arguments on appeal proceed on the basis that the trial court believed, and had made clear, that it would not entertain a motion to order Ms. Enright to answer questions that did not implicate her Fifth Amendment privilege.[6] This was error. The State argues it was invited error.

Washington recognizes an obligation of a witness to testify. *State v. Ruiz*, 176 Wn. App. 623, 635, 309 P.3d 700 (2013) (citing *State v. Parker*, 79 Wn.2d 326, 331, 485 P.2d 60 (1971)); *State v. Green*, 71 Wn.2d 372, 378, 428 P.2d 540 (1967). Statutes confirm the obligation. *Ruiz*, 176 Wn. App. at 635; RCW 5.56.010; RCW 7.21.010(1)(c); RCW 10.52.040. Courts typically use the contempt power to address a refusal to testify. *Ruiz*, 176 Wn. App. at 635; RCW 5.56.061; ch. 7.21 RCW.

The primary exception to the obligation to testify is the Fifth Amendment's privilege against compulsory self-incrimination. *Ruiz*, 176 Wn. App. at 635. It can be asserted on a blanket basis by a criminal defendant but in most other cases, must be asserted on a question by question basis. *Id.* at 635-36. "[A] witness must explicitly claim his Fifth Amendment guarantee or it will be deemed waived," but "[t]he court, not

[6] The validity of this impression is affirmed by a statement by the trial court to defense counsel later in the trial. It said, "The fact that you weren't able to cross-examine Ms. Enright further is not anything that any of us can do anything about. Ms. Enright elected to assert the Fifth Amendment." RP at 415.

the witness, is the final judge of the validity of the claim." *Parker*, 79 Wn.2d at 332 (citing *United States v. Murdock*, 284 U.S. 141, 52 S. Ct. 63, 76 L. Ed. 210 (1931) and *Hoffman v. United States*, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951)).

Ms. Enright's unwarranted invocation of her Fifth Amendment right should not have created a confrontation problem. She was present. The record would suggest that she could have been ordered by the court to answer virtually all of the questions posed by defense counsel. When a witness appears and is available for cross-examination at trial, the confrontation clause is not implicated. *See Crawford*, 541 U.S. at 59, n.9 (citing *California v. Green*, 399 U.S. 149, 162, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id.* "'[T]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."'" *State v. Price*, 158 Wn.2d 630, 648, 146 P.3d 1183 (2006) (alteration in original) (quoting *United States v. Owens*, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988)).

Ms. Enright's unwarranted invocation of her Fifth Amendment right created a confrontation problem only because the trial court believed it could not order Ms. Enright to answer defense counsel's questions. We agree with the State that this error was invited by defense counsel. The invitation to error was made even before defense counsel

seconded Mr. Schmidt's understanding that Ms. Enright was entitled to make a blanket assertion of her Fifth Amendment right. It was first made when defense counsel argued to the court that if Ms. Enright asserted privilege in response to every question, Mr. Dunbar would be deprived of the opportunity to cross-examine her.

The goal of the invited error doctrine is to prevent a party from setting up an error at trial and then complaining of it on appeal. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). It does not require that a party *intentionally* invite error; it applies "even in cases where the error resulted from neither negligence nor bad faith." *Id.* The trial court struggled with the notion that Ms. Enright could unilaterally decide which questions to answer, but Mr. Dunbar's argument that protection of his confrontation right required striking her direct testimony *depended* on that notion. "[A] party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal." *Ames v. Ames*, 184 Wn. App. 826, 849, 340 P.3d 232 (2014) (citing *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995)).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING MS. SHELLY'S TESTIMONY

Mr. Dunbar next argues he was deprived of his right to present a defense when the trial court limited his questioning of Ms. Shelly.

Under both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a defendant has the right to obtain witnesses

and present a defense. *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380, 208 P.3d 1107 (2009). The right does not mean that a defendant may introduce whatever evidence he wishes, however. *State v. Sanchez*, 171 Wn. App. 518, 554, 288 P.3d 351 (2012). When the application of evidence rules is at issue, the right to present a defense means only that "state-law evidentiary restrictions cannot be 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Wynne v. Renico*, 606 F.3d 867, 870 (6th Cir. 2010) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)). We review a trial court's evidentiary rulings for an abuse of discretion, but review a denial of Sixth Amendment rights de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

The first evidence that the trial court foreclosed was testimony by Ms. Shelly that she had asked Mr. Dunbar to help recover Ms. Enright's car. The trial court provided the following explanation of its ruling:

> [W]hether Ms. Shelly asked Mr. Dunbar to help Ms. Enright get her car back, it isn't probative of whether or not Ms. Enright gave Mr. Dunbar permission to drive her car. And to the degree she would have to say she had authority on behalf of Ms. Enright, then she would be relying on hearsay and it all becomes too confusing and potentially unfairly prejudicial.

RP at 415. Mr. Dunbar argues that the evidence was relevant to Mr. Dunbar's intent, and especially important given his inability to cross-examine Ms. Enright.

Mr. Dunbar's inability to cross-examine Ms. Enright does not weigh in his favor in light of our finding of invited error, and his argument that Ms. Shelly's testimony could substitute for Ms. Enright's underscores the court's concern about relevance and confusion. The jury was instructed that the intent required for possession of a stolen vehicle was knowingly possessing such a vehicle, knowing it was stolen. Whether Mr. Dunbar believed he was performing a good deed or responding to a mutual friend's request was not relevant to any fact the jury was instructed to decide. The trial court did not abuse its discretion in making the evidentiary ruling. Since the evidence was not relevant, its exclusion does not violate Mr. Dunbar's right to present a defense. Defendants have a constitutional right to present only relevant evidence. *Jones*, 168 Wn.2d at 720.

The second piece of excluded testimony was Ms. Shelly's testimony that she saw Ms. Enright switching the license plates on her car after her car was recovered by law enforcement. The State had emphasized evidence that when Mr. Dunbar was found with the car, it bore different license plates than the validly-issued plates that it bore when stolen. Mr. Dunbar conceded that this supported an inference that he had changed the plates. He argued that evidence that Ms. Enright changed the plates at a later time supported an inference that she, rather than he, might have changed the plates between December 13 and 20.

The court was told that Ms. Shelly saw Ms. Enright change the plates, but it was not known whether, if that was true, Ms. Enright was performing a criminal act or simply reinstalling valid plates returned to her by law enforcement. Defense counsel represented that Ms. Shelly "thinks . . . they weren't the plates that were supposed to be on the vehicle" but when asked the basis for that belief, defense counsel's only explanation was that Ms. Shelly was sitting in the car when Ms. Enright replaced the plates. RP at 410. The trial court excluded the evidence as more prejudicial than probative. Again, we find no abuse of discretion in the evidentiary ruling. Its exclusion on the basis of ER 403 was not arbitrary or disproportionate to that rule's purpose.

III. NO *PETRICH* INSTRUCTION WAS REQUIRED

For the first time on appeal, Mr. Dunbar argues that because the State's witness-tampering evidence consisted of his conduct on three different occasions, the trial court should have given a unanimity instruction.

A jury must unanimously agree on the act that supports a conviction. *Petrich*, 101 Wn.2d at 569; *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Where multiple acts could constitute the crime charged, the State must either elect which act it will rely on for conviction or the trial court must give a unanimity, or *Petrich*, instruction informing the jury that it must agree on the same criminal act. *State v. Vander Houwen*, 163 Wn.2d 25, 38, 177 P.3d 93 (2008); *Kitchen*, 110 Wn.2d at 409. A failure to give a

unanimity instruction where one is required may be raised for the first time on appeal because it is manifest constitutional error. *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997), *review denied*, 134 Wn.2d 1002, 953 P.2d 95 (1998).

If separate acts amount to a continuing course of conduct, then a multiple acts case is not presented and a unanimity instruction is not required. *State v. McNearney*, 193 Wn. App. 136, 141, 373 P.3d 265 (2016). The State argues that Mr. Dunbar's three calls to Ms. Enright constituted a continuing course of conduct.

The legislature can itself decide that it is a *course of conduct* that is criminal, by creating a unit of prosecution for continuing conduct. In *State v. Hall*, 168 Wn.2d 726, 734, 230 P.3d 1048 (2010), the Washington Supreme Court determined that the unit of prosecution for the crime of witness tampering is "the ongoing attempt to persuade a witness not to testify in a proceeding." As a result, it found a double jeopardy violation where Hall was convicted of three counts of witness tampering that involved a single witness in a single trial. While the *Hall* court allowed for the possibility of a different result if a defendant's efforts "are interrupted by a substantial period of time, employ new and different methods of communications, involve intermediaries," or otherwise demonstrate a different course of conduct, *id.* at 737-38, those facts were not before the court in *Hall*. They are not present here. It was Mr. Dunbar's course of conduct between December 20 and January 29 that amounted to a single count of witness tampering. The jury was properly instructed.

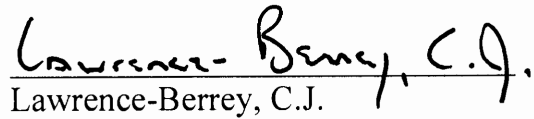
No. 35349-4-III
State v. Dunbar

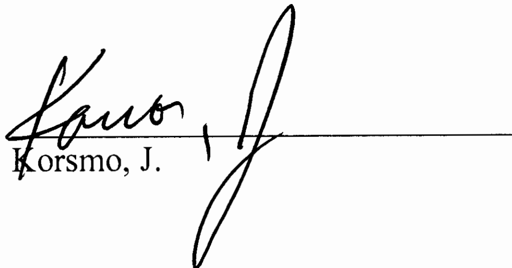
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:


Lawrence-Berrey, C.J.


Korsmo, J.

APPENDIX

Ms. Enright responded to the following questions posed in cross-examination by asserting her Fifth Amendment privilege:

Where did you buy it?

On December 13, where were you staying?

Did you have a permanent address at DeSmet?

And you noticed your car was missing on the 13th between 6:00 a.m. and 1:45?

Were you the last one to drive your car and park it at the DeSmet address?

Can you tell me who did drive your car parked at the DeSmet address?

Who else was staying at the DeSmet address?

Whose house was it?

Was anyone else staying there?

What was your relationship with Mr. Dunbar?

How long had you known him?

Did you continue to stay at the DeSmet address after December 13?

You called law enforcement on December 13?

Do you remember what you told law enforcement when he arrived?

You told the 911 caller that you thought Mr. Dunbar had your vehicle?

Did you tell law enforcement that the ignition to your car did not require a key?

Did you tell law enforcement that the car could be opened through the window that was also broken?

Did you see Mr. Dunbar take your car?

Did you see Mr. Dunbar drive your vehicle that morning?

And you texted with Mr. Dunbar?

Did the law enforcement officer ask you for Mr. Dunbar's contact information when he was there?

Did you volunteer Mr. Dunbar's information?

How long did you speak with law enforcement?

What were you doing in Spokane Valley the morning of December 20th?

When you found Mr. Dunbar in your car, you punched him in the face?

You told him to get out?

You didn't take the car from him at the time you saw him?

And you left the scene to call law enforcement?

And when law enforcement called you that morning, you didn't answer?

When Mr. Dunbar called you that morning, you didn't answer?

Had you received any additional phone calls from Mr. Dunbar that morning of the 20th?

You didn't stay at the scene of the gas station for law enforcement to respond to your area, did you?

But that morning you answered his phone call from the jail?

Mr. Dunbar was upset?

And you answered another phone call from Mr. Dunbar; is that right?

And it was a choice to answer those phone calls?

And you indicate that you received a voice message?

And did you notify law enforcement that Mr. Dunbar was calling you while he was incarcerated?

Mr. Dunbar had helped you out on previous occasions; is that right?

And those phone calls that Mr. Dunbar was making, did he tell you it was your choice to appear?

Did he tell you he can't tell you what to do?

Do you know somebody by the name of Cody?

Did you tell Mr. Dunbar that he could or did you ask Mr. Dunbar to recover your vehicle?

APPENDIX B

FILED
June 25, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

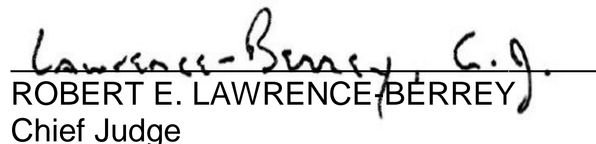
STATE OF WASHINGTON, Respondent, v. DANIEL HERBERT DUNBAR, Appellant.	)))))))))	No. 35349-4-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 2, 2019, is hereby denied.

PANEL: Judges Siddoway, Korsmo, Lawrence-Berrey

FOR THE COURT:



ROBERT E. LAWRENCE-BERREY
Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT, v. DANIEL DUNBAR, PETITIONER.	)))))))))	COA NO. 35349-4-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF JULY, 2019, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	GRETCHEN VERHOEF [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X]	DANIEL DUNBAR 813308 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY ____________

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF JULY, 2019.

X________________________

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