SUPREME COURT NO. 97537-0

COURT OF APPEALS NO. 35664-7-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
RESPONDENT,

v.

DAVID WESTON MCCRACKEN,
APPELLANT/PETITIONER.

ANSWER TO PETITION FOR REVIEW

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STATEMENT OF THE CASE

On December 24, 2016 Officer Robbins attempted to stop a small four door car for an equipment violation. RP 64, 86-87[1]. A high speed pursuit ensued northbound on Highway 97. RP 64-65, 87-88. During a detour through an orchard, Officer Robbins witnessed Heliodoro Xhuarape bail out of the rear passenger side door. RP 65, 88, 91-92, 101-102, 203. The pursuit continued northbound on Highway 97 and Okanogan County Sheriff's Department responded to assist. RP 66, 108-109, 138. Okanogan County Sheriff's Department successfully deployed a spike strip, causing the car to wreck. RP 66-67, 109, 139. The car came to rest in a snowy field between Hwy 97 and B&O Road. RP 67-68, 115-116. All three individuals seen fleeing the car were ultimately apprehended. RP 67-69, 90, 110-111, 117-121, 125-126, 139-142.

When securing the vehicle Officer Robbins observed a loaded rifle in plain sight in the front passenger seat, partially resting on the center console. RP 70, 85. One suspect, Ernesto Mendez Leon, gave a statement to Officer Robbins at his arrest. RP 69. He told Officer Robbins he was in

[1] Amy Brittingham initially transcribed a volume, filed on March 4, 2018, that contains pretrial hearings (5/30/17, 7/31/17, 8/30/17, 10/02/17 and 10/04/17), the trial (10/05/17 and 10/06/17) and sentencing (11/01/07). Since most references are to this volume, I refer to it as "RP". Amy Brittingham transcribed a second volume, filed on June 3, 2018, that contains pretrial hearings (6/13/17, 7/17/17, 8/14/17 and 9/18/17) and the hearing on the motions in limine and the jury voir dire (10/05/17). I refer to this volume as "RP Supp.".

the rear driver's side seat, Mr. Xhurape was in the rear passenger seat, Mr. Erickson was driving and Mr. McCracken was in the front passenger seat. RP 69, 194-195. He also told Officer Robbins that the gun in the front seat belonged to Mr. McCracken. RP 195.

Mr. McCracken was charged with Unlawful Possession of a Firearm in the First Degree, Obstructing a Law Enforcement Officer and four counts of Possession of a Controlled Substance other than Marijuana. CP 164, 172-175, 232-233.

Mr. Mendez Leon was also charged and later accepted a plea deal. RP 168, 177, RP Supp. 30-31, CP 138-139. Pursuant to that deal he agreed to testify at trial and gave a recorded interview. RP 178, RP Supp. 30, CP138-139. The recorded statement was consistent with the statement Mr. Mendez Leon gave at his arrest. RP 200-201. The plea agreement was withdrawn prior to Mr. McCracken's trial when Mr. Mendez Leon incurred new criminal charges. RP 169, RP Supp. 25-26, CP 138-139.

A stipulation – that Mr. McCracken had a prior serious offense – was not filed with the court prior to voir dire. RP 54-56. The trial judge, unaware of the stipulation read the Information per his usual practice, thus disclosing Mr. McCracken's Second Degree Assault conviction. RP 54-56, CP 144. Mr. McCracken's motion for a mistrial based on the disclosure was denied. RP 54, 58.

The State called Mr. Mendez Leon to testify at trial. RP 182. A contentious issue involving Mr. Mendez Leon's testimony was whether Appellant could introduce Mr. Mendez Leon's prior plea agreement as impeachment evidence. RP 165-181, RP Supp. 24-33, CP 138-139. The court noted that there was no current consideration for Mr. Mendez Leon's testimony. RP Supp. 26. Ultimately, the court disallowed evidence of the plea agreement finding it too speculative. RP 180-181.

Mr. Mendez Leon testified on direct that Mr. Erickson was driving, he was sitting in the backseat behind Mr. Erickson and Mr. McCracken was sitting in the backseat behind the front passenger. RP 184. He denied knowing there was a gun in the car. RP 184-185. He said he couldn't remember making prior statements that Mr. McCracken was sitting in the front passenger seat and Mr. Xhurape was sitting in the rear passenger side seat. RP 185-188. He admitted telling Officer Robbins that he thought the gun was Mr. McCracken's, but said he told Officer Robbins that because he "was just trying to get off of it" and felt pressured because the state was giving him an offer. RP 186, 189.

The State impeached Mr. Mendez Leon using his prior inconsistent statement via officer testimony and by playing some excerpts from the recorded statement. RP 194-195, 198-202. Appellant objected and requested that the court limit what was played for the jury, but could not

specify which portions he didn't want the jury to hear. RP 198. The court overruled Appellant's objection. RP 198. Appellant did not request a contemporaneous limiting instruction. RP 197-198. When finalizing instructions, Appellant did not request WPIC 5.30 (Evidence Limited as to Purpose) or propose any other limiting instructions. RP 207, CP 103-104.

During closing the State described actual and constructive possession and discussed the ability of others in the car to take actual possession as one of the factors of constructive possession. RP 237-239. The State raised concerns about Mr. Mendez Leon's credibility, noting that Mr. Mendez Leon winked at Mr. McCracken from the stand. RP 244. The State highlighted consistencies and inconsistencies in Mr. Mendez Leon's testimony and his prior statements noting that the consistent parts were the parts that didn't get Mr. McCracken in trouble. RP 244-245. The State cautioned the jury about Mr. Mendez Leon's testimony and warned them to not base their verdict on his testimony alone. RP 246.

At the close of the State's argument, Appellant moved for a curative instruction "with respect to the evidence of Mr. McCracken being in the front seat" claiming that the State had argued Mr. Mendez Leon's inconsistent statements as substantive evidence. RP 247-248. The court disagreed finding the State's argument was proper. RP 249.

The jury returned a verdict of Guilty on count 1, Unlawful Possession of a Firearm in the First Degree, and count 6, Obstruction of a Law Enforcement Officer, and returned a verdict of not guilty on counts 2-5, Possession of a Controlled Substance. RP 267-268, CP 53-54. Mr. McCracken appealed and Division III, upheld his convictions. Mr. McCracken now petitions this Court for review.

ARGUMENT

Review should be denied because the decision of the Court of Appeals is in accord with existing case law. There is no basis to grant review under RAP 13.4(b).

1a. There is sufficient substantive evidence to support Mr. McCracken's conviction for unlawful possession of a firearm without relying on Mr. Mendez Leon's impeachment testimony.

Evidence is sufficient if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Mr. McCracken alleges there is insufficient evidence to show he possessed a firearm without relying on Mr. Mendez Leon's impeachment testimony. An individual can actually possess something that is in their physical custody or constructively possess something that is not in their

physical custody but still within their "dominion or control". *State v. Davis*, 182 Wash.2d 222, 340 P.3d 820 (2014).

There is sufficient substantive evidence to support the jury's finding of guilty without relying on impeachment testimony. Mr. Mendez Leon's direct testimony placed all four individuals in the car. RP 183-184. Sergeant Davis testified that Mr. McCracken's shoe prints matched some found at the scene, providing further evidence that Mr. McCracken was in the vehicle. RP 120. (Contrary to Appellant's argument, the record does not specify that shoe prints leading from the driver's side door matched Mr. McCracken's shoes. RP. 120-121.) Mr. Mendez Leon testified that he was sitting behind the driver and Dewayne Erickson was driving. RP 184. This testimony was consistent with his prior statements and was not impeached. Officer Robbins testified that he witnessed Mr. Xhurape jump out of the rear passenger side seat. RP 203. When viewing the substantive evidence in the light most favorably for the State, any rational trier of fact could have found that Mr. McCracken was in the car and inferred that the only location left for him in the car was in the front passenger seat in actual possession of the firearm.

A rational trier of fact could also have found that Mr. McCracken had constructive possession. The gun, a rifle, was resting against the center console of the small compact car. RP 70, 76-77, EX 3. Even if Mr.

McCracken was in the back seat, the firearm was within easy reach and the jury could reasonably have found based on the car's small size, the large size of the firearm and the firearm's central location, that anyone in the car would have been aware of the firearm, could have reached it and exercised "dominion and control" over it.

1b. The trial court did not err when it refused to issue a curative instruction because the State did not argue the inconsistent statements as substantive testimony, therefore there was nothing to cure.

A trial court has broad discretion to make a variety of trial management decisions, ranging from "the mode and order of interrogating witnesses and presenting evidence," to the admissibility of evidence, to provisions for the order and security of the courtroom. *State v. Dye,* 178 Wash.2d 541, 547-548, 309 P.3d 1192 (2013). When a trial court's refusal to issue a requested instruction is based on a factual dispute, the trial court's decision is reviewed for an abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998).

Parties can request limiting instructions when evidence has been admitted for a limited purpose. ER 105. Such instructions are often called "limiting" or "cautionary" instructions. They are to be distinguished from so-called "curative" instructions. 5 Wash. Prac., Evidence Law and Practice § 105.1 (6th ed.). The trial court has no responsibility to give a

limiting instruction when one is not requested. *State v. Russell,* 171 Wash.2d 118, 124, 249 P.3d 604 (2011).

The record does not reflect that Appellant ever requested a limiting instruction. When the recorded statement was played for the jury, Appellant requested that the court limit what was played, but made no request for a contemporaneous limiting instruction. RP 197. When finalizing jury instructions, Appellant did not request WPIC 5.30 (Evidence Limited as to Purpose) or propose any other limiting instructions. RP 206-207.

During closing argument the State highlighted consistencies and inconsistencies between Mr. Mendez Leon's testimony and his prior statements introduced under ER 613 for impeachment, raising concerns about Mr. Mendez Leon's credibility and cautioning the jury when considering Mr. Mendez Leon's testimony: RP 244-245. At the conclusion of the State's closing argument, Appellant requested a curative instruction claiming that the State was arguing Mr. Mendez Leon's prior inconsistent statements as substantive evidence. RP 247. The trial court understood that the State was using the prior inconsistent statements to demonstrate Mr. Mendez Leon's lack of credibility and acted within its discretion when it denied Appellant's motion to "cure" what Appellant erroneously claimed to be State misconduct. RP 248.

Review is not merited under 13.4(b) because denial of the Appellant's motion to "cure" did not infringe on his right to a fair trial and Division III's decision does not conflict with either *State v. Redmond*, 150 Wn.2d 489, 78 P.3d 1001 (2003) or *State v. Aaron*, 57 Wn.App. 277, 787 P.2d 949 (1990). *Redmond* and *Aaron* involve a specific request for an instruction. Neither involve a request to "cure" an alleged improper argument in closing that was in fact appropriate.

1c. The trial court did not abuse its discretion or violate Mr. McCracken's rights to confrontation when it disallowed evidence of Mr. Mendez Leon's plea agreement that was no longer in effect.

The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. amends. VI. Cross-examination is the "principal 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). Cross examiners have traditionally been allowed to impeach – discredit – the witness by introducing evidence of prior criminal convictions or by revealing possible biases, prejudices or ulterior motives of the witness. *Davis,* 415 U.S.at 316. However, impeachment evidence sought to be elicited must be relevant to the matters sought to be proved. Courts may, within their sound discretion, deny cross-examination if the

evidence sought is vague, argumentative, or speculative. *State v. Jones*, 67 Wash.2d 506, 512, 408 P.2d 247 (1965).

Typically, evidence that a witness is testifying pursuant to a plea agreement is admissible to show bias. *State v. Jessup*, 31 Wash.App. 304, 316, 641 P.2d 1185 (1982). Here, Mr. Mendez Leon did not testify at trial pursuant to a plea agreement. CP 139, RP Supp. 26-28. Without a plea agreement, he had no motivation to tailor his testimony to benefit the State. Therefore, evidence of the prior plea agreement had no value to indicate bias of his trial testimony and was irrelevant.

Even if the trial court's exclusion of the plea agreement was error, it was harmless. Erroneous exclusion of evidence is not grounds for reversing a conviction unless the error prejudiced the defendant. *State v. Grenning*, 169 Wash.2d 47, 57, 234 P.3d 169 (2010). Courts have often held that an erroneous admission or exclusion of evidence was harmless where the evidence merely provided additional evidence of something already shown by overwhelming untainted evidence. *State v. Gonzalez Flores*, 164 Wash.2d 1, 19, 186 P.3d 1038 (2008).

Mr. Mendez Leon's testimony had already been discredited. The State impeached Mr. Mendez Leon testimony at trial with his prior inconsistent statements, thus discrediting his testimony. Evidence of the

plea agreement was cumulative merely discrediting testimony of a witness that had already been discredited.

Also, the plea agreement only applied to Mr. Mendez Leon's recorded statement. The plea agreement was not in effect when Mr. Mendez Leon gave a statement at his arrest. The two statements were consistent with each other and both were used to impeach. Therefore, although the plea agreement could raise the possibility of bias as to the recorded statement, it had no impact on the statement given at arrest, leaving the end result the same.

Finally, the jury heard evidence of possible bias when Mr. Mendez Leon testified he gave the recorded statement under pressure of the offer the State was giving him. RP 189.

Admission of the plea agreement would not have not made any appreciable difference and its exclusion was not prejudicial to Mr. McCracken.

2. The trial court acted within its discretion when it denied Appellant's request for a mistrial for an inadvertent disclosure of a predicate crime that was unrelated to and not prejudicial to the current charges.

Evidence of prior criminal convictions is not admissible as character evidence, but may be admissible for other purposes (ER 404(b)), such as when necessary to prove an essential element of crime for which a defendant is presently charged. See *State v. Mayes*, 20 Wash.App. 184,

191, 579 P.2d 999 (1978). When a prior conviction is an element of the crime charged, a defendant may offer to stipulate to the existence of the prior conviction in order to avoid having the details presented to the jury. *Old Chief v. United States*, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997). In *Old Chief,* the Court held that a district court abuses its discretion if it denies a defendant's offer to stipulate and admits the full judgement record over the defendant's objection "when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction." *Id.* at 172. The *Old Chief* rule was applied in *State v. Young*, 129 Wn.App. 468, 470-471, 119 P.3d 870 (2005). Young, who was charged with several violent offenses and Unlawful Possession of a Firearm, stipulated that he had been convicted of a serious offense to satisfy the predicate conviction element of Unlawful Possession of a Firearm; thereby avoiding the jury receiving evidence of his prior Second Degree Assault conviction. *Id.* at 472. The court inadvertently disclosed the Second Degree Assault conviction to the jury venire, but denied Young's request for a mistrial. *Id.* On appeal, Division One held that the trial court erred in refusing to grant a mistrial, finding that the trial court's disclosure was inherently prejudicial. *Young*, 129 Wn.App. at 475. Because Young was charged with violent offenses, the disclosure of his

prior violent offense raised the risk that the jury's verdict was based on Young's propensity to commit violent crimes. *Id.* at 476.

A denial of a motion for a mistrial is reviewed for an abuse of discretion and will be overturned only when there is a substantial likelihood the prejudice affected the jury's verdict. *Id.* at 472–473. When a trial court makes an improper comment during venire, that irregularity is subject to harmless error analysis. *Young,* 129 Wash.App. at 478.

Mr. McCracken was not charged with violent offenses and his prior conviction was unrelated to his current charges. The trial court's disclosure of his prior offense caused no harm to Mr. McCracken because the disclosure did not raise the risk that the jury's verdict would be improperly based on his propensity to commit the crimes charged.

3. The State's closing argument was proper.

A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. Hughes*, 106 Wash.2d 176, 195, 721 P.2d 902 (1986). Resolution of the issue is within the sound discretion of the trial court. *Id.* Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *State v. Sublett*, 156 Wash.App. 160, 185, 231

P.3d 231 (2010). In reviewing a prosecutorial misconduct claim, the court generally gives the State great latitude in making arguments to the jury. *Id.*

3a. Highlighting the inconsistencies in Mr. Mendez Leon's testimony to question credibility was proper use of impeachment evidence.

During closing the State questioned Mr. Mendez Leon's credibility by highlighting inconsistencies between Mr. Mendez Leon's testimony and his prior statements. RP 244-245. The State never argued that the prior inconsistent statements were substantive evidence. The State merely used those statements to raise concerns about Mr. Mendez Leon's credibility. The trial court recognized that the State was using the prior statements properly to question Mr. Mendez Leon's credibility and found the argument was proper. RP 248-249.

3b. The State's reference to Mr. Mendez Leon's "wink" in its closing argument is a proper comment about witness demeanor.

Appellant did not object to the State's reference to Mr. Mendez Leon's "wink" during closing argument. If a defendant fails to object at the time the misconduct occurred, he must establish that no curative instruction would have obviated any prejudicial effect on the jury and he must establish that prejudice resulted that had a substantial likelihood of affecting the jury verdict. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

The Washington Practice Series contains a list of objectionable comments that a prosecutor should avoid in closing arguments. 13 Wash. Prac. Criminal Practice & Procedure § 4503 (3d ed.). Item 8 on the list states that a prosecutor may not comment on matters outside the evidence. *Id.* The cases cited to support this rule list examples of prosecutors referring to evidence from outside the court room, but none involve an incident that occurred in the courtroom in the jury's presence, albeit an incident, a "wink", that cannot be recorded on audio.

It is not prosecutorial misconduct to refer to a witness's demeanor on the stand during closing argument. *State v. Israel,* 113 Wash.App. 243, 272, 54 P.3d 1218 (2002). The jury is the sole judge of a witness's credibility and are instructed that one of the factors to consider is a witness's manner while testifying. CP. 58, WPIC 1.02.

The State's reference to Mr. Leon Mendez's "wink" was a proper comment on his demeanor while testifying. If Appellant disagreed the wink occurred, he could have objected and requested a curative instruction or taken issue with the statement during his closing argument. The fact that he did not respond to the State's arguments suggests the "wink" did occur and was readily apparent to those in the court room.

Even if the State's reference to the "wink" in closing arguments was objectionable, Appellant has failed to meet his burden

that reference to the "wink" prejudiced him. The State's reference to Mr. Mendez Leon's "wink", even if objectionable, simply added to other evidence discrediting Mr. Mendez Leon's testimony and therefore did not prejudice Mr. McCracken.

3c. The State's argument on constructive possession was not improper because it was consistent with the jury instruction on possession.

Any statements as to the law in closing argument are to be confined to the law set forth in the instructions. *State v. Huckins*, 66 Wn.App. 213, 217, 836 P.2d 230 (1992)[2]. In *Huckins*, the court found that an argument that stopped short of making a complete statement of the law did not go beyond the scope of the jury instructions and held that Huckins was not deprived of a fair trial. *Id. at* 218-220.

During closing, the State discussed actual and constructive possession and discussed the ability of others in the car to take actual possession as one of the factors of constructive possession. RP 238. Appellant did not object to the State's argument on possession or request a curative instruction. The State's argument to the jury on constructive possession was consistent with the instruction on possession given to the jury. CP 66. Even if the State's argument did not fully state the entire law on possession, it was not beyond the scope of the jury instruction. The jury

[2] Originally published at 831 P.2d 1116, but then withdrawn from bound volume and republished at 836 P.2d 230.

was given the full law on possession in the jury instructions. CP 66. Furthermore, the court instructed the jury that the lawyers could discuss specific instructions, but during deliberations, the jury must consider the instructions as a whole. CP 58. The court also charged the jury to disregard the lawyer's remarks if they were not supported by the evidence or the law in the jury instructions. CP 58. Even if the State's argument was improper, it was not so flagrant or ill-intentioned that an instruction could not have cured the prejudice and when taken in context and combined with the full jury instructions it was not prejudicial to Mr. McCracken.

4. Appellant is not entitled to reversal pursuant to the doctrine of cumulative error because errors, if any, are few and had no effect on the outcome of the trial.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when the trial court's multiple errors combine to deny the defendant a fair trial. *State v. Lazcano*, 188 Wash.App. 338, 370, 354 P.3d 233 (2015). The defendant bears the burden of proving an accumulation of error of sufficient magnitude to warrant a new trial. *Id.* The cumulative doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Weber,* 159 Wash.2d 252, 279, 149 P.3d 646 (2006).

Mr. McCracken was not denied a fair trial. Errors, if any, did not affect the outcome of trial. Appellant never requested a limiting

instruction and there was no basis to "cure" the State's proper closing argument regarding Mr. Mendez Leon's lack of credibility. RP 197-198, 244-245.

The trial court acted within its discretion when it excluded evidence of Mr. Mendez Leon's prior plea agreement that had no bearing on Mr. Mendez Leon's trial testimony. RP Supp. 26-28. Even if the plea agreement's exclusion was error, it was not prejudicial to Mr. McCracken because Mr. Mendez Leon's testimony was already discredited. Additional discrediting of his testimony would not have changed the outcome.

The alleged prosecutorial misconduct during closing argument, if misconduct at all, was not prejudicial to Mr. McCracken. The State properly used Mr. Mendez Leon's prior inconsistent statements to question his credibility. RP 244-245. Appellant did not object to the State's reference to Mr. Mendez Leon's "wink" or to his argument on possession. RP 244. The reference to the "wink" was a permissible comment on witness demeanor and went to Mr. Mendez Leon's credibility. The State's argument on possession was consistent with the instructions and not erroneous when taken in context. Even if found to be erroneous, it was not prejudicial to Mr. McCracken because the jury was given the full law on possession in the jury instructions and also instructed

to disregard the lawyer's remarks if not supported by the evidence or the law given in the instructions.

CONCLUSION

The decision of the Court of Appeals is not in conflict with any decision of this Court. There is no basis to grant review under RAP 13.4(b). Therefore, Respondent respectfully requests this Court deny review.

Dated this 3rd day of September, 2019

Respectfully Submitted:

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SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/Respondent, v. DAVID WESTON MCCRACKEN, Defendant/Appellant.	COA No. 975370 CERTIFICATE OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 3rd day of September, 2019, I caused the original Answer to Petition for Review to be filed in the Supreme Court and a true copy of the same to be served on the following in the manner indicated below:

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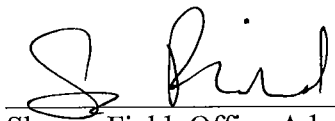
Signed in Okanogan, Washington this 3rd day of September, 2019.



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