No. 99851-5

COA #52603-4-II
Cowlitz County No. 18-1-00326-08

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ERIC NEWMAN,

Petitioner.

---

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

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# PETITION FOR REVIEW

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A. IDENTITY OF PARTY

Mr. Eric Jacob Newman, appellant in the Court of Appeals and the accused in the trial court, is the Petitioner herein.

B. COURT OF APPEALS DECISION

Mr. Newman seeks review of a portion of the decision of the court of appeals, Division Two, in State v. Newman, __ Wn. App.2d ___ (unpublished) (2021 WL 1759226), issued May 4, 2021.[1]

C. ISSUES PRESENTED FOR REVIEW

1. In multiple counties across the state, trial judges are failing to properly apply the mandates of CrR 3.2, especially portions of the rule specifically amended as as result of this Court's Commission 1997 finding of unfairness and disproportionate impact on indigents and people of color under the old version of the rule.

   These failures have continued despite Division Two making mulitple efforts to remind trial courts of their obligations under the rule.

   Should this Court accept review to redress this ongoing, widespread issue, which is of a substantial and significant public interest, repeating but likely evading review, affecting fundamental rights like the presumption of innocence?

2. Did the prosecutor commit misconduct and was counsel prejudicially ineffective in failing to object when the State argued an improper presumption to prove an essential element of its case?

D. OVERVIEW OF RELEVANT FACTS

1. Accusations and trial

Petitioner Eric J. Newman was charged in Cowlitz County superior court with 1) possession with intent to deliver

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

methamphetamine (while armed with a firearm), 2) possession of heroin, 3) first-degree unlawful possession of a firearm, and 4) possessing a stolen firearm. CP 27-29, 62-65. He was convicted of all four counts but the jury explicitly found that he was *not* armed with a firearm for the "possession with intent" crime. CP 62-65.

The charges stemmed from items found in an apartment rented by Alexandro Delano and found by officers when they served a search warrant there for Mr. Newman and "controlled substances." RP 208-209. Once inside the home, the officers found a room which had some bandaging the police thought belonged to Mr. Newman, who had a recent leg injury. RP 201-204. An officer testified that there was also medical paperwork for Newman in the room but those papers were not seized nor recorded in any way. RP 275.

Next to the bed in that room was a locked safe. RP 205. Police asked Mr. Newman if he had a key or combination to the safe but he said he did not. RP 218-269. A detective then took the safe, which had been carried outside by officers, and slammed it onto the nearby sidewalk. RP 218-19. The detective admitted he had to drop the safe "again and again" to break it open. RP 218.

Inside the safe were found a .45 caliber Ruger later determined to have been stolen, bullets of various caliber, some pills, a digital scale with residue, a plastic bag which tested positive for the presence of methamphetamine and which weighed 5.9 grams, a coffee grinder with brown residue which appeared to be heroin and a package of "lactose." RP 219-20, 255. The State did not test the gun or other items for

fingerprints.

Kristen Celeski testified that the safe in the apartment was hers, as was the firearm, coffee grinder and other items inside. RP 344. She described the firearm as having engraving on it. RP 344. The key to the broken safe was later found in a common area of the house on the floor and an officer said the key was in an area he thought Mr. Newman had been standing at one point. RP 225, 270. Ryan Lorenzo testified that his truck had been rummaged through while parked at a relative's home and several items taken, including a custom engraved firearm. RP 188, 190-91.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. IT IS TIME FOR THE COURT TO TAKE REVIEW AND ADDRESS THE WIDESPREAD CONTINUING VIOLATIONS CRIMINAL RULE 3.2 REGARDING PRETRIAL RELEASE, INCLUDING THE FAILURE OF THE LOWER COURTS TO COMPLY WITH AMENDMENTS SPECIFICALLY MADE TO REDRESS RACIST AND UNFAIR PRETRIAL RELEASE PRACTICES

In 1997, this Court's Minority and Justice Commission raised serious concerns about racial and ethnic disparities and discriminatory practices in pre-trial release decisions. George Bridges, *A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-Trial Detention Practices in Washington*, Washington State Minority and Justice Commission (Oct. 1997).[2] Calls for change focused in large part on CrR 3.2, the superior court rule governing pretrial release. Id.; see also, *In the Matter of the Adoption of the Amendments to CrR 3.2, CrR 3.2.1, CrRLJ 3.2*

[2] *Available at* https://www.courts.wa.gov/committee/pdf/1997_ResearchStudy.pdf.

*and CrRLJ 3.2.1*, Order No. 25700-A-721 (WSR 02-01-025) (Dec. 6, 2001).

As a result of the concerns, the rule was quickly amended. See id. The amendments require superior courts to not only apply the presumption of pretrial release with *no* conditions but also to conduct a balancing analysis and impose the least restrictive release conditions possible. See id. Not only that, the rule now explicitly requires a court to consider all other possible conditions - and the defendant's specific financial condition - prior to imposing a financial condition or "bail" on the accused. See State v. Ingram, 9 Wn.App.2d 482, 447 P.3d 192 (2019), review denied, 194 Wn.2d 1024 (2020).

Across the state, however, trial courts are failing to follow the new provisions of the Rule. As the cases discussed herein show, it is now time for this Court to grant review in order to redress and correct these repeated, widespread failures. Even though "moot," the issues are of continuing and substantial public interest, arising again and again but evading review. CrR 3.2(a) provides:

> **Presumption of Release in Noncapital Cases**. Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance. . . be ordered released on the accused's personal recognizance pending trial unless
>
> (1) the court determines that such recognizance will not reasonably assure the accused's appearance, when required, or
>
> (2) there is shown a likely danger that the accused:
>
> (a) will commit a violent crime, or
>
> (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

Thus, under the rule, there is a presumption of pretrial release with *no* conditions, i.e., on "personal recognizance." State v. Rose, 146 Wn. App. 439, 450-51, 191 P.3d 83 (2008). The Court of Appeals has held that presumption is not overcome under subsection (2) based on the average "likely danger" presented by people accused of the crime but must instead be based on "available" information to prove a "substantial" danger in the specific case. See id; see also Butler v. Kato, 137 Wn. App. 515, 524, 154 P.3d 259 (2007). Further, the Rule sets forth a list of relevant facts the trial court is supposed to consider, including not just the record of the accused and nature of the charge but past evidence of compliance with pretrial release conditions and the willingness of members in the community to assist the accused in complying with release conditions. See CrR 3.2(b).

Even if the trial court finds that an accused presents a "likely danger" under (2) or is likely not to return without conditions under (1), the trial court does not have unlimited discretion regarding conditions it may impose for pretrial release. As amended in response to the concerns raised by the 1997 Report, CrR 3.2(d)(6) provides:

> [The court may] [r]equire the accused to post a secured or unsecured bond or deposit cash in lieu thereof, conditioned on compliance with all conditions of release. **This condition may be imposed only if no less restrictive conditions or combination of conditions would reasonably assure the safety of the community.** If the court determines under this section that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting bond that will reasonably assure the safety of the community and prevent the defendant from intimidating witnesses or otherwise unlawfully interfering with the administration of justice.

CrR 3.2(d)(6) (emphasis added).

In this case, the trial court made no findings of any specific, substantial danger that Mr. Newman would commit a violent crime if released, nor was there any evidence he would go try to intimidate a witness. At the preliminary hearing, with counsel just appointed moments before, the prosecutor talked about Newman's criminal history and the nature of the charge, asking for $50,000 bail on those grounds. RP 3-4. The prosecutor told the judge Mr. Newman had "six prior warrants" and "14 prior felony convictions," which the prosecutor described as "some aggravated criminal history," including several assault convictions, a residential burglary, 2 court-order violation felonies and a count of witness tampering in the past. RP 3-4.

The prosecutor also stated concern that there was a gun found in this case with a bunch of drugs and the gun was reported stolen. RP 3-4. Someone, apparently newly appointed counsel, pointed out that Mr. Newman had lived at the same address in the community for 7 years, had been on bail before and made court appearances, and had a leg injury for which he was receiving treatment. RP 4-5. The court was asked to "consider PR'ing him based primarily on his medical condition." RP 5. Without further discussion, the judge declared, "I'm going to set bail at $35,000." RP 7.

The judge thus violated CrR 3.2. There was no evidence of any specific, substantial danger Mr. Newman would commit a violent crime or of a witness he was believed likely to go try to affect. The decision depended only on a general concern for safety based on the prior

convictions and current charges. That was insufficient to show a "substantial danger" sufficient to rebut the strong presumption of pretrial release on personal recognizance.

More, however, the judge then went on to violate CrR 3.2(d)(6), by failing to consider all "less restrictive condition or combination of conditions" prior to imposing a financial condition of $35,000 on an indigent accused. There was no discussion of any other such conditions or how they might be used. Further, there was no discussion of Mr. Newman's financial situation prior to the judge imposing the $35,000 amount, so the court failed to follow the requirement that a court "shall consider" the specific financial resources of the accused in reaching an appropriate "bail."

Unfortunately, Mr. Newman is not alone. In courtrooms across the state, trial courts are failing to follow the requirements of CrR 3.2, especially the amendments requiring imposing financial "bail" only as a last resort and only then after conducting the new required analysis about the financial situation of the accused. See Ingram, supra (Clark County); see also State v. Garcia, 15 Wn. App.2d 1044 (2020) (unpublished) (Thurston County); State v. Ewing, 13 Wn. App.2d 1023 (2020) (unpublished) (Pierce County); State v. Comenout, Jr., 10 Wn. App.2d 1038 (2019) (unpublished) (Pierce County); State v. Cummings, 8 Wn.App.2d 1006 (2019) (unpublished) (Pierce County); State v. Wilson, 8 Wn. App.2d 1005 (2019) (unpublished) (Lewis County); State v. Huckins, 5 Wn. App.2d 457, 426 P.3d 797 (2018) (Clallam County); State v. Barnes, 4 Wn. App.2d 1079 (2018) (unpublished) (Pierce County).

Not only are these issues arising in multiple counties, they are also showing up in multiple courtrooms within a county. In Pierce County, for example, the Honorable Judges James Orlando, Frank Cuthbertson, and Stanley Rumbaugh all made the same or markedly similar mistakes in application of the amended CrR 3.2. See Ewing, supra (Judge Rumbaugh); Comenout, Jr., supra (Judge Cuthbertson), Cummings, supra (Judge Cuthbertson), Barnes, supra (Judge Orlando).

In Huckins, decided on September 25, 2018, Division Two issued a published decision cautioning against the failure to follow these mandates of the amended rule. First, the Court recognized the issue was technically "moot," because it involved pretrial "bail" and there was no longer any "effective relief" the Court could provide for the improper rulings. 5 Wn. App.2d at 463. The Court then addressed the CrR 3.2 bail issue anyway, because of its extreme importance and potential impact, as well as the lack of existing cases providing guidance:

> The issue in this case is of a public nature involving the setting of bail and concerning the interpretation of a court rule. The proper interpretation and application of the bail rule is relevant to all criminal cases and there is currently a dearth of cases on point. Deciding this issue would provide useful guidance and assistance to all judges who have a duty to set release conditions for criminal defendants. The setting of release conditions is likely to recur. Additionally, given the time constraints inherent in criminal cases, the issue might otherwise evade appellate review.

Huckins, 5 Wn. App.2d at 463-64.

The Huckins Court next recognized that the purpose of CrR 3.2 was to "alleviate the hardships associated with pretrial detentions and bail," noting that being held in custody pretrial has significant impacts on

the lives of the accused not just in preparing their defense and their criminal case but also in losing their jobs and ability to support their families. Huckins, 5 Wn. App.2d at 465.

Although it found there was sufficient evidence to assume a finding of "danger to the community" under the abuse of discretion standard of review, the Court then agreed with Mr. Huckins that the trial court had violated CrR 3.2(d) in imposing financial bail. 5 Wn. App.2d at 467-68. "The condition of monetary bail may only be imposed if no less restrictive condition or combination of conditions would reasonably assure the safety of the community," the Huckins Court explained. Id. The trial court had imposed travel and other pretrial restrictions, but made no "oral or written finding that these or other conditions" would not be sufficient to "reasonably assure the safety of the community," absent imposition of pretrial bail. 5 Wn. App.2d at 469.

The published opinion concluded that the trial court had "abused its discretion by requiring monetary bail without considering less restrictive conditions as required by the law." Huckins, 5 Wn. App. 2d at 469. The Court further used its opinion to "emphasize that courts must comply with the criminal rules when setting bail." 5 Wn. App.2d at 470.

After Huckins, Division Two again noted the problem of trial courts failng to follow the rule in Cummings, supra. In Cummings, an unpublished case, the Court declared, "[a]s in Huckins, we again emphasize that trial courts must comply with the requirements of CrR 3.2 when imposing monetary bail as a condition of pretrial release." 8 Wn. App.2d 1006 (unpublished). Because it was unpublished, the

Cummings decision had no precedential value, however, only such "persuasive" value as courts chose to give it.

A year after Huckins, Dvision Two felt the need to address the issue in a published case yet again, with Ingram. Like in Huckins, in Ingram Division Two found the issue to be a matter of continuing and substantial public interest upon which the court needed to pass. Ingram, 9 Wn. App.2d at 490. The Court also recognized the public importance of bail issues, then declared it would review the issue, even though "moot," because of the need for further guidance for lower courts:

> Deciding this case would provide a useful reminder to the trial courts of the requirements of setting bail and release conditions for criminal defendants - issues that are likely to recur. . . and otherwise evade appellate review.

Ingram, 9 Wn. App.2d at 490. In Ingram, the court of appeals held that CrR 3.2 does not require oral or written findings that the presumption of pretrial release has been "overcome." 9 Wn. App.2d at 493. The Court also disagreed with Mr. Ingram about whether the presumption was sufficiently rebutted. 9 Wn. App.2d at 495-96.

The Ingram Court agreed, however, that the trial court had failed to follow the mandates of the rule before imposing monetary "bail," just as in Huckins. 9 Wn. App.2d at 496. In Ingram, the trial court had erred in failing to "impose the least restrictive of several enumerated conditions," failing to determine that "no less restrictive condition or combination of conditions would not suffice before imposing the financial "bail," and failing to "consider the defendant's financial resources" in determining the amount. 9 Wn. App.2d at 496. Division

Two concluded that the trial court erred by imposing a $60,000 "bail" on an indigent but noted "there is no relief that we can offer." 9 Wn. App.2d at 497.

Huckins and Ingram have now been relied on in multiple cases where the same issues have arisen, not to provide relief but to avoid discussing the issues, finding them "moot." See, e.g., Garcia, supra (declining to address the issues because of Ingram and Huckins); Ewing, supra (Ingram and Huckins provide controlling authority and were decided after the bail decision was made in Ewing); Comenout, Jr., supra (declining to address the issue because Huckins provided the "authoritative determination for future guidance" on the issue); Cummings, supra (declining to address the issue because of Huckins but declaring, "we again emphasize that trial courts must comply with the requirements of CrR 3.2 when imposing monetary bail as a condition of pretrial release").

This Court should grant review on this important issue of continuing and substantial public interest. The circumstances surrounding pretrial release and "bail" decisions are by definition short-lived and likely to evade review. See, e.g., Yakima v. Mollett, 115 Wn. App. 604, 63 P.3d 177 (2003). Further, this Court has held that "the proper form of bail is a matter of continuing and substantial public interest, overcoming any claim of mootness." State v. Barton, 181 Wn.2d 148, 152, 331 P.3d 50 (2014). CrR 3.2 was originally drafted "to overhaul the monetary bail system" and provide for greater release of the pretrial accused in order to "alleviate some of the burdens imposed

upon an accused individual awaiting trial in jail." Harris v. Charles, 171 Wash.2d 455, 468, 256 P.3d 328 (2011). The amendments to CrR 3.2 made after the 1997 Report were intended to try to diminish the disparate, unfair and often racist practices the Commission observed. The repeated failure of trial courts to follow the mandates of the rule prior to imposing financial conditions of "bail" has a serious impact on the accused. As the drafters of CrR 3.2 noted years ago,

when the accused is held in pretrial detention by the state, he "is severely handicapped in his defense preparation" and "is often unable to retain his job and support his family, and is made to suffer the public stigma of incarceration even though he may later be found not guilty." CRIMINAL RULES TASK FORCE, WASHINGTON PROPOSED RULES OF CRIMINAL PROCEDURE Rule 3.2, cmt. at 22 (West Publ'g Co.1971).

The U.S. Supreme Court itself has held:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.

Barker v. Wingo, 407 U.S. 514, 532-33, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972).

By definition, the continuing failure by lower courts to follow the mandates of CrR 3.2 prior to imposing financial conditions of "bail" is aggravating the very goals this Court's Minority and Justice Commission sought to further in amending the rule. These failures do not just implicate the rule but also important constitutional rights. The Eighth Amendment and Article 1, section 14, prohibit "excessive bail." See

Barton, 181 Wn.2d at 152; State v. Heslin, 63 Wn.2d 957, 959-60, 389 P.3d 892 (1964); United States v. Salerno, 481 U.D. 739, 742, 107 S. Ct. 2095, 96 L. Ed.2d 697 (1987). Article 1, section 20, goes further by ensuring a right to bail "by sufficient sureties" in all cases except a very few, while due process mandates a presumption of innocence pretrial and principles of equal protection require that court decisions regarding pretrial release must not discriminate against the accused based on race or indigency. See Barton, supra; Tate v. Short, 401 U.S. 395, 398, 91 s. Ct. 668, 28 L. Ed. 2d 130 (1971); Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S. Ct. 2016, 76 L. Ed.2d 221 (1983).

The constitutional implications of keeping someone in government custody before they are proven guilty are many and, as this Court has noted, pretrial release and liberty is supposed to be the norm. Barton, 181 Wn.2d at 150; see also, Salerno, 481 U.S. at 742. Further, it is an essential part of pretrial due process - even "implicit in the concept of ordered liberty" - that every person is presumed innocent unless and until proven guilty by the state, beyond a reasonable doubt. See Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 368 (1970). As a result, being a pretrial detainee is far different and due process provides far greater protection for such detainees as compared with those being detained *after* conviction, either in custody or on parole. See Bell v. Wolfish, 441 U.S. 520, 535 n. 16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1997); State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981).

There is also strong evidence that pretrial detention correlates to increased likelihood of conviction and higher sentence. *See* Andrew D.

Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1165 (2005); Christopher T. Lowenkamp et. al, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Arnold Foundation (Nov. 2013).[3] There can be no question that a person still cloaked with the presumption of innocence suffers significant negative impact on their lives - and their case - when deprived of the presumption of release on personal recognizance set forth in CrR 3.2. The existence of a separate "second class" system of accused in jail despite the presumption of innocence, based on inability to post monetary bail has been discussed with concern for years. See, e.g., John S. Goldkamp, *Two Classes of the Accused: A Study of Bail and Detention in American Justice* (Ballinger Publishing Co., 1979) (Cambridge, Ma); see also, Ram Subramanian et al, *Incarceration's Front Door: The Misuse of Jails in America,* Vera Institute of Justice) (Feb. 2015).[4]

Exacerbating this issue, the private "bail bonds" industry, outlawed in all but one other country in the world, has enjoyed staggering growth. See Subramanian et al, supra. The average length of pretrial stay also increased during this time, from 14 to 23 days, but in Washington state it is usually far, far longer. *See*, *e.g.*, Caseloads of the Courts, Superior Courts, Criminal Case Management (2016).[5]

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[3]Available at https://csgjusticecenter.org/courts/publications/investigating-the-impact-of-pretrial-detention-on-sentencing-outcomes/

[4]Available at https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america.

[5]Available at http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=trend&fileID=Crimcm.

Over this same time, there has been a stark increase in the use of "financial" conditions upon people presumed innocent, awaiting trial. From 1990 to 1998, "non-financial" release in state courts dropped from 40% of all those released to 28%. *See* Thomas H. Cohen and Brian A. Reaves, Bureau of Justice Statistics, Special Report, *Pretrial Release of Felony Defendants in State Courts* (Nov. 2007).[6]

There has been a concurrent rise in costs not only to the accused and his or her family but to society itself. Just a few years ago, then-U.S. Attorney General Eric Holder acknowledged that the cost of increased pretrial detention of the accused was an estimated $9 billion taxpayer dollars. Eric Holder, Attorney General of the United States, Speech at the National Symposium on Pretrial Justice (June 1, 2011).[7] Closer to home, the Honorable Theresa Doyle of King County Superior Court in our state has noted, "[s]ociety bears the non-economic costs of lost employment, housing, family support, public benefits, and financial and emotional security for the children of the incarcerated person." Hon. Theresa Doyle, *Fixing the Money Bail System*, KING COUNTY BAR BULL. (KCBA, Seattle, WA) (April 2016).

Today, it is estimated that, like Mr. Newman, pretrial, three out of five people sitting in jail in our country are legally presumed innocent, awaiting trial or plea resolution, too poor to afford bail. See Timothy R. Schnacke, *Fundamentals of Bail: a Resource Guide for Pretrial Practitioners*

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[6] Available at https://www.bjs.gov/content/pub/pdf/prfdsc.pdf.

[7] Available at http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice.

*and a Framework for American Pretrial Reform*, U.S. Dept. Of Justice, Nat'l Inst. of Corrections (2014).[8]

This Court has recently renewed its concerns about not only discrimination against those without resources pretrial but also about the heavy reliance on prior criminal history to determine "risk" pretrial as exacerbating racism and bias within our criminal justice systems. *See Pretrial Reform Task Force: Final Recommendations Report* (Feb. 2019) at 29.[9] CrR 3.2 was specifically amended to require trial courts to not only apply the presumption of pretrial release with *no* conditions but to mandate that the least restrictive conditions be imposed, and to require that financial conditions are only imposed as a last resort and even then with consideration of the indigency of the accused. Despite the plain language of the amended rule, judges in Pierce, Thurston, Clark, Clallam and Lewis counties are imposing financial "bail" conditions in violation of the mandates of the rule. These failures implicate not only respect for the rule but the integrity of this Court and its ongoing commitment to fairness and equity for the accused. This Court should grant review, should find the issue not "moot" and should address the ongoing failure of courts across the state to follow the mandates of CrR 3.2 and the resulting inequities those failures are causing the indigent accused.

[8]Available at http://www.pretrial.org/download/research/Fundamentals%20of%20Bail%20-%20NIC%202014.pdf.

[9]https://www.courts.wa.gov/subsite/mjc/docs/PretrialReformTaskForceReport.pdf.

2. THE COURT OF APPEALS ERRED IN HOLDING THAT THE MISCONDUCT DID NOT COMPEL REVERSAL AND COUNSEL WAS NOT EFFECTIVE RELATIVE TO THE USE OF AN IMPROPER EVIDENTIARY PRESUMPTION TO ESTABLISH THE ESSENTIAL KNOWLEDGE ELEMENT OF THE STOLEN FIREARM CRIME

The Court should also grant review on the issue of the improper evidentiary presumption argued by the prosecutor in closing. This issue involves not only the misconduct of the prosecutor in making the argument but also counsel's constitutionally ineffective performance in failing to object. Both the state and federal constitutions guarantee the right to effective assistance of appointed counsel. Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

Further, prosecutors shoulder a special duty as "quasi-judicial" officers, which requires them to seek justice without committing misconduct. See In re Glassman, 175 Wn.2d 696, 712-13, 286 P.3d 673 (2012).

Mr. Newman was accused of, *inter alia*, possession of a stolen firearm, defined in RCW 9A.56.310. That statute makes it a crime when someone "possesses, delivers, sells, or is in control of a stolen firearm." RCW 9A.56.310(1). The statute does not define a strict liability crime, however, so the state must meet the burden of more than mere possession and must also prove that the possession was "knowing." State v. Khlee, 106 Wn. App. 21, 23-24, 22 P.3d 1264 (2001).

As a result, to meet its due process burden of proof, the State had to establish either that Mr. Newman knew or should have known that the

firearm was stolen. State v. Rockett, 6 Wn. App. 399, 402, 493 P.3d 321 (1972).

In closing, in arguing that the State had met its burden of proving the required "knowledge" element of the crime of possessing a stolen firearm, the prosecutor declared:

> So how do we know that he knew that the gun was stolen? First of all, he's a convicted felon who's not allowed to possess firearms, so he can't go into a gunshop and buy a gun.
>
> So if he is obtaining a gun, he has to go through back channels. Back channels frequently include stolen firearms. We also know that this particular gun in fairly unique. . . with the custom engravings[.]
>
> . . . So this is a very specific firearm that a typical person would wonder about these custom engravings and think this gun belongs to somebody.
>
> So we know that the defendant can't obtain a firearm in the usual way. We know that this is a very distinctive firearm and a reasonable person would conclude under those circumstances that this firearm is stolen[.]

RP 366.

In affirming, Division Two agreed that the prosecutor's comments were not based on the evidence at trial and that "[t]he State . . . engage[d] in inappropriate 'pyramiding' of inferences to argue that the jury should infer that the firearm was stolen because '[b]ack channels frequently include stolen firearms.'" App. A at 6-7. The Court concluded that this statement not only went beyond the evidence and common sense but also "assumes a fact that is unsupported by evidence at trial" and "invited the jury to draw an impermissible inference[.]" App. A at 7.

Division Two found the comment could have been cured, however, but that counsel's failure to object was not "ineffective

assistance" - even though there was no other evidence of essential "knowing" element of the crime. This Court should grant review to address whether Division Two erred in so holding. The gun was found in a safe over which the State said Mr. Newman had "dominion and control." Other than that, there was no evidence regarding that gun - no link between the accused and the gun's theft, no evidence how the gun got into the safe, no evidence that Newman had done anything to indicate he was aware the gun was stolen. Instead, the State urged jurors to find the essential element of the stolen firearm possession offense by improperly stacking inferences, as the Court of Appeals here properly held. RP 366. A prosecutor commits misconduct in misstating the law, especially when the misstatements minimize the burden of proof. See State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 168 (2015).

Although in general it is a "tactical" decision not to object, here there could be no tactical reason to fail to correct such an egregious misstatement of the law - one which allowed the accused to be convicted based on an effective presumption in a very thin case. Counsel's failure to object fell below an objective standard of reasonableness. Further, given the lack of evidence from the State to prove the required element of "knowing," there is more than a reasonable probability that counsel's failure to object affected the outcome of the trial on the stolen firearm count. This Court should grant review on this issue, as well.

F. CONCLUSION

This Court should take review under its crucial oversight role and should condemn the chronic failure of trial courts to comply with the mandates of CrR 3.2. In addition, review should be granted to address whether the prosecutor committed misconduct and counsel was prejudicially ineffective in relation to the argument made in closing.

DATED this 3rd day of June, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at County Prosecutor's Office via the Court's upload service and caused a true and correct copy of the same to be sent to appellant by depositing in U.S. mail, with first-class postage prepaid at the following address: Mr. Eric Newman, DOC 308797, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 3rd day of June, 2021.

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NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

UNPUBLISHED OPINION
Court of Appeals of Washington, Division 2.

STATE OF WASHINGTON, Respondent,
v.
ERIC JACOB NEWMAN, Appellant.
In the Matter of the Personal Restraint Petition
of ERIC JACOB NEWMAN, Petitioner.

No. 52603-4-II
|
Consolidated With No. 53963-2-II
|
May 4, 2021

**Opinion**

Worswick, J.

***1** WORSWICK, J. — In this consolidated appeal and personal restraint petition (PRP), Eric Newman contests his convictions for unlawful possession of a controlled substance with intent to deliver—methamphetamine, unlawful possession of a controlled substance—heroin, unlawful possession of a firearm, and unlawful possession of a stolen firearm. He also claims the trial court failed to follow CrR 3.2 and violated constitutional guarantees by requiring him to post bail in the amount at $35,000. In his direct appeal, Newman challenges only his conviction for unlawful possession of a stolen firearm, arguing (1) the prosecutor committed misconduct during closing argument by asking the jury to presume an essential element, (2) his attorney provided ineffective assistance, and (3) the trial court violated Newman's constitutional rights when it failed to follow CrR 3.2 in setting his bail at $35,000. Newman also filed a Statement of Additional Grounds (SAG) for Review. Additionally, the trial court transferred Newman's CrR 7.8 motion to us as a PRP. Finally, Newman filed a supplemental brief arguing that his conviction for unlawful possession of heroin must be dismissed because the statute has been struck down as unconstitutional. We reverse Newman's conviction for unlawful possession of a controlled substance—heroin, and remand to the trial court for resentencing. We affirm his convictions for unlawful possession of a controlled substance with intent to deliver—methamphetamine and unlawful possession of a stolen firearm. We further hold that his pretrial release arguments are moot. Finally, we deny Newman's PRP.

  

## FACTS

### I. UNDERLYING FACTS

In February 2018, the Longview Police Department served a search warrant at an apartment in Longview. Newman was observed in the apartment, standing in the space between the living room and the kitchen. Newman and other people present were detained. Police searched a room they believed was Newman's because it contained medical supplies and medical paperwork belonging to him. On the side of the bed, police found a small safe, but could not locate a key. Police forced the safe open. Inside the safe, police found a customized Ruger 1911 .45 caliber semiautomatic pistol without a magazine, a scale with drug residue, various pills, drugs, and drug paraphernalia. A key was later found inside the apartment, near where Newman had been standing. Police also found a glass pipe containing methamphetamine in the room believed to be Newman's. Newman was arrested and transported to the Cowlitz County jail. Because Newman was recovering from a preexisting gunshot wound to his leg, Newman had to be transported to the King County jail system.

A check of Newman's criminal history showed that he had multiple prior felony convictions, which precluded him from lawfully possessing a firearm. The pistol located in the safe found in the apartment had been reported stolen the month before in the neighboring town of Kelso. The lawful owner of that firearm was a veteran of the armed forces and had custom-engraved the pistol as a platoon memorial piece. There were only 36 of their kind produced. In March, Newman was taken back into Cowlitz County. The State charged Newman with unlawful possession of a controlled substance with intent to deliver—methamphetamine[1] with a firearm enhancement, unlawful possession of a controlled substance—heroin,[2] first degree unlawful possession of a firearm,[3] and possession of a stolen firearm.[4]

1 RCW 69.50.401(1), .401(2)(b).

2 RCW 69.50.4013(1).

3 RCW 9.41.040(1)(a).

4 RCW 9A.56.310(1), .140(1).

  

## II. PRETRIAL

***2** Newman attended a preliminary hearing on March 9. At the hearing, Newman was still recovering from the gunshot wound to his leg that required medical attention. The State sought bail in the amount of $50,000 based on Newman's extensive criminal history, including 6 prior warrants, 7 prior misdemeanor convictions, and 14 prior felony convictions. Defense counsel asked the court to release Newman on his personal recognizance, arguing that Newman had a medical appointment to meet with a surgeon regarding his leg wound. The court set bail at $35,000.

At an April 17 omnibus hearing, Newman again asked the court to consider release on personal recognizance or to reduce his bail due to his ongoing medical complications and doctor appointments related to his gunshot wounds. The State argued that Newman should not be released because his prior criminal history and pending firearm charges made him a danger to the community if released. The court agreed with the State and denied Newman's request. Nonetheless, the record suggests, and the State's brief says, that Newman was released from custody at some point between April 17 and August 20. [5]

[5] The State's brief says Newman posted bail.

## III. THE TRIAL

Newman's trial commenced on August 29. The State called the lawful owner of the firearm found in the safe, who testified that his pistol was stolen in January and that Newman did not have permission to possess the pistol. The State called the investigating officers from the February arrest, who each testified about the arrest, and the circumstances surrounding finding the safe and gun in what was believed to be Newman's room of the apartment. Detective Benjamin Mortensen testified that when he entered the apartment to conduct the search, Newman was standing "in the living room/kitchen or the space between the two." Report of Proceedings (RP) at 200. Mortensen testified that he believed the bedroom that contained the safe was Newman's room because of the presence of medical supplies and medical discharge paperwork bearing Newman's name. Mortensen testified that the key to the safe was eventually found "right where the defendant was standing when the door initially opened." RP at 270.

Detective Jordan Sanders testified that the key to the safe was eventually located inside the apartment in the middle of the living room between the living room and the kitchen floor. The Court read a factual stipulation to the jury, that Newman was a convicted felon and was on notice on the date of his arrest that he could not lawfully possess or control a firearm due to his conviction.

  

Newman called Kristen Celeski, who testified that the safe in question was hers, and that she put the safe in that apartment because she was in a "domestic violence situation at [her] house." RP at 344. In her testimony, Celeski accurately described the contents of the safe. She testified that she had left the key on top of the refrigerator at the apartment. Newman did not testify, and there was no direct evidence that Newman knew the firearm in the safe was stolen.

The trial court's instructions to the jury included an instruction that "the lawyers' statements are not evidence," and that the jury must "disregard any remark, statement, or argument that is not supported by the evidence or law in [the court's] instructions." RP at 289. The instructions described the equal value of direct and circumstantial evidence in a criminal trial, defining circumstantial evidence as "evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case." RP at 293. The instructions included a definition of "knowledge," explaining that "[i]f a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact." RP at 296-97.

***3** During closing arguments, the prosecutor argued that the jury should find that Newman had knowledge that the firearm was stolen based on the evidence:

> The second element is that the defendant acted with knowledge that the firearm had been stolen. So how do we know that he knew that the gun was stolen? First of all, he's a convicted felon who's not allowed to possess firearms, so he can't go into a gun shop and buy a gun.
>
> So if he is obtaining a gun, he has to go through back channels. Back channels frequently include stolen firearms. We also know that this particular gun is fairly unique. I believe Mr. Lorenzo testified that there are only 35 or 36 of this particular firearm with these particular engravings. His platoon essentially ordered them up with the custom engravings and got them when he came back to the States from their tour.
>
> So when you go back into the jury room, this will be with you for your deliberations. Look at these distinctive markings. Look at the engravings. It says Operation Enduring Freedom 13. So this is a very specific firearm that a typical person would wonder about these custom engravings and think this gun belongs to somebody.
>
> So we know that the defendant can't obtain a firearm in the usual way. We know that this is a very distinctive firearm and a reasonable person would conclude under those circumstances that this firearm is stolen, and the jury can infer that if a reasonable person would know something the defendant also can [UNINTELLIGIBLE] to know that.

RP at 365-66 (alteration in original).

  

Newman did not object to the State's closing arguments at trial. Newman was found guilty of all charged offenses, but the jury did not find evidence to support the firearm enhancement.

Newman appeals his convictions. Newman also filed a motion for relief from judgment under CrR 7.8, which was transferred and accepted by this court as a PRP and consolidated with this case.

## ANALYSIS

## I. DIRECT APPEAL

### A. *Prosecutorial Misconduct*

Newman argues that the prosecutor committed misconduct during her closing arguments at trial when she urged jurors to draw an impermissible inference, thereby relieving the State of its burden of proof beyond a reasonable doubt for all the elements of the crime of unlawful possession of a stolen firearm. Newman argues that the prosecutor committed misconduct by arguing to the jury that they could assume Newman knew the firearm was stolen because he was a felon who could not lawfully obtain a firearm, and because the firearm was uniquely customized. The State argues that this argument was merely a permissible, reasonable inference drawn from the evidence. We hold that Newman's argument was waived under *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

#### 1. *Legal Principles and Standards of Review*

When claiming prosecutorial misconduct, a defendant must demonstrate that the prosecutor's conduct was both improper and prejudicial. *State v. Sakellis*, 164 Wn. App. 170, 183, 269 P.3d 1029 (2011). When reviewing an allegation of an improper prosecutorial argument, we review the contested statements "in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." *Sakellis*, 164 Wn. App. at 185. When a defendant fails to object to prosecutorial misconduct at trial, we consider the claim waived unless the misconduct is so flagrant and ill-intentioned that any resulting prejudice could not have been neutralized by a curative instruction. *Matter of Phelps*, 190 Wn.2d 155, 165-66, 410 P.3d 1142, 1147 (2018). Such a defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.' " *Emery*, 174 Wn.2d 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

#### 2. *Discussion*

a. Inviting an Inference Not Premised by Evidence and Fact is Improper

***4** In her closing argument, the prosecutor stated:

> First of all, he's a convicted felon who's not allowed to possess firearms, so he can't go into a gunshop [sic] and buy a gun.
>
> So if he is obtaining a gun, he has to go through back channels. Back channels frequently include stolen firearms.

RP at 365.

Newman must first show that these statements were improper. *Sakellis*, 164 Wn. App. at 183. Newman argues that these statements were improper because the State asked the jury to make an impermissible inference. Specifically, Newman argues that the State cannot ask the jury to infer Newman had knowledge the firearm was stolen based on Newman's status as a felon because "the [S]tate presented no evidence that felons can only get guns which are stolen, or that the majority of guns on the secondary markets are stolen, or anything similar." Br. of Appellant at 10. We agree that the statement "[b]ack channels frequently include stolen firearms" was improper.

The State has wide latitude during closing arguments to argue reasonable inferences from the evidence. *Thorgerson*, 172 Wn.2d at 448. "Prosecutors are free to argue their characterization of the facts presented at trial and what inferences these facts suggest in closing argument." *Matter of Phelps*, 190 Wn.2d 155, 166-67, 410 P.3d 1142, 1147-48 (2018). But a "[p]resumption may not be pyramided upon presumption, nor inference upon inference." *State v. Willis*, 40 Wn.2d 909, 914, 246 P.2d 827 (1952). In *Willis*, our Supreme Court held that an inference of one fact may be raised from *proof* of another, but that an inference of guilt could not be based on the inference of an *inference*. 40 Wn.2d at 914 (emphasis added).

The State points to *State v. Rockett*, 6 Wn. App. 399, 402, 493 P.2d 321 (1972), and *State v. Ehrhard*, 167 Wn. App. 934, 943, 276 P.3d 332 (2012) to support their argument that the State can argue a valid inference from recent possession of stolen goods as evidence of guilt. But these cases involved only one inference the State asked the jury to make and so these cases offer little support to the State. The State also cites *State v. Ford*, 33 Wn. App. 788, 790, 658 P.2d 36 (1983) for the proposition that slight corroboration or inculpatory circumstances can support a conviction by establishing knowledge in possession of stolen goods. But in that case, the inference Ford knew the car was stolen was supported by evidence in the trial, not an inference the prosecutor invited the jury to draw from another substantiated inference. 33 Wn. App. at 790.

Here, there was no evidence at trial regarding methods used by convicted felons to obtain firearms. The State argued that because Newman is a felon, he could not obtain a firearm lawfully. This fact

was stipulated to by the parties. The State then argued that based on his ineligibility to possess a firearm, the jury could infer that Newman obtained the firearm unlawfully through the black market. This is an appropriate inference based on the evidence presented at trial. However, the State then went on to engage in inappropriate "pyramiding" of inferences to argue that the jury should infer that the firearm was stolen because "[b]ack channels frequently include stolen firearms." RP at 365. Because the State invited the jury to make an inference upon an inference, this comment amounts to misconduct.

***5** The prosecutor's statement that "[b]ack channels frequently include stolen firearms" goes beyond the evidence and common sense, and assumes a fact that is unsupported by evidence in the trial. RP at 365. Because the State invited the jury to draw an impermissible inference, we hold that this amounted to improper conduct.

b. Prosecutor's Conduct Was Not Flagrant and Ill-Intentioned

Newman failed to object to the prosecutor's argument in the trial court. Thus, his claim is waived unless he can show that the conduct was flagrant and ill-intentioned. To do this, he is required to show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.' " *Emery*, 174 Wn.2d 741 (quoting *Thorgerson*, 172 Wn.2d at 455). He fails to meet this burden. A prosecutor's statement is incurable if it engenders "such a feeling of prejudice" in the minds of the jury "as to prevent a defendant from having a fair trial." *Emery*, 174 Wn.2d at 762 (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932)). "[R]emarks are not per se incurable simply because they touch upon a defendant's constitutional rights." *Emery*, Wn.2d at 763. To "rise to such level," the prosecutor's comments must be more than confusing; they must be inflammatory. *Emery*, 174 Wn.2d at 763.

Newman offers no argument for why the misconduct could not have been cured by a jury instruction. He makes no effort to explain how the improper inference was flagrant and ill-intentioned. We hold that the argument here does not rise to the level of being incurable. The State's pyramided inference may have been confusing to the jury in light of the court's other instructions regarding what evidence and inferences they could consider, but the comments were not inflammatory comments that caused an incurable prejudice in the minds of the jury. We hold that a curative instruction would have obviated any prejudicial effect on the jury and, thus, Newman's argument is waived.

B. *Ineffective Assistance of Counsel*

Newman alternatively argues that his counsel was ineffective in failing to object to the prosecutor's argument and seek a curative instruction. We disagree.

  

1. *Legal Principles*

To establish a claim of ineffective assistance of counsel, a defendant is required to show both deficient performance and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). A defendant's failure to establish either element of the test defeats his ineffective assistance of counsel claim. *State v. Rafay*, 168 Wn. App. 734, 775, 285 P.3d 83 (2012).

There is a strong presumption that counsel's representation was competent. *State v. Hassan*, 151 Wn. App. 209, 217, 211 P.3d 441 (2009). Legitimate trial strategy or tactics cannot be the basis for an ineffective assistance of counsel claim. *Rafay*, 168 Wn. App. at 840. We do not consider matters outside of the trial record when considering a claim of ineffective assistance of counsel on direct appeal. *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018). A defendant alleging ineffective assistance of counsel must show deficient representation based on the record before us. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

***6** A defendant must affirmatively prove prejudice by showing that there is a reasonable probability that the proceedings would have been different but for counsel's deficient performance. *State v. Crawford*, 159 Wn.2d 86, 100, 147 P.3d 1288 (2006). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

2. *Discussion*

Defense counsel's failure to object during a prosecutor's closing argument will generally not constitute deficient performance because lawyers do not commonly object during closing argument absent egregious misstatements. *State v. Blockman*, 198 Wn. App. 34, 42, 392 P.3d 1094 (2017), *aff'd* 190 Wn.2d 651 (2018). "Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions." *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007).

The prosecutor's statement was not so egregious to rule out that counsel made the tactical decision not to object. Counsel's closing argument focused on dominion and control of the safe in the bedroom. Counsel had a strong argument that Newman did not have dominion and control over the safe because he was not in the room where it was found, the safe was locked, Newman was not in possession of the key, and Celeski testified that the safe in question was hers. Moreover, the jury was instructed that argument of the attorneys was not evidence. Newman has not shown on this record that counsel's strategy to not call attention to the prosecutor's brief statement and instead focus on dominion and control, was not tactical. Thus, Newman has not overcome the strong presumption of competency.

  

Newman has not shown on this record that his counsel's performance was deficient. We hold that Newman has not shown that his counsel performed deficiently when he failed to object during closing argument

C. *Pretrial Release Issue Moot*

Newman argues, for the first time on appeal, that the trial court failed to follow CRr 3.2, and violated his due process rights and the equal protection clause when setting the terms of his pretrial release. The State argues that this was not preserved, is not a manifest error affecting a constitutional right, and is moot. We hold that the issue is moot.

Newman concedes that his pretrial release issue is moot. However, he invites us to decide the issue as a matter of "continuing and substantial public interest." Br. of App. at 27. We decline to decide this issue.

An issue that is moot will not be considered unless it involves "matters of continuing and substantial public interest." *In re Eaton*, 110 Wn.2d 892, 895, 757 P.3d 961 (1988). We consider three factors in determining whether a case satisfies this exception: first, we examine whether the nature of the question is public or private; second, we determine whether there is a need for an authoritative determination of the question for the future guidance of public officers; and third, we consider the likelihood of future recurrence of the question. *State v.* Cruz, 189 Wn.2d 588, 598, 404 P.3d 70 (2017).

Taking these considerations into account, first, the parties do not dispute that the matter involves a public question. Second, recent cases on this issue obviate the need for additional determination for future guidance. *See State v. Huckins*, 5 Wn. App. 2d 457, 468, 426 P.3d 797 (2018) (holding that the trial court erred when it failed to make a required finding that less restrictive conditions would assure safety of community). Third, there is no evidence before us concerning the likelihood of future recurrence of this issue. Thus, this issue does not present a continuing and substantial public interest. Thus, this issue is moot. We decline to engage in review of Newman's moot claims because they do not present issues of continuing and substantial public interest.

## II. SUPPLEMENTAL BRIEF

***7** Newman also filed a supplemental brief, arguing that in light of our Supreme Court's holding in *State v. Blake*,[6] we should vacate his conviction for unlawful possession of a controlled substance —heroin, and remand for resentencing. The State concedes that Newman's drug possession conviction must be vacated. We accept the State's concession. Accordingly, we reverse Newman's conviction for unlawful possession of a controlled substance—heroin.

  

6 197 Wn.2d 170, 174, 481 P.3d 521 (2021). There, our Supreme Court held that RCW 69.50.4013(1)—the simple drug possession statute—violates due process.

## III. SAG

Newman filed a SAG which raises several points challenging his conviction. RAP 10.10 does not require an appellant to refer to the record or authority in his SAG. RAP 10.10(c). However, we limit our review of issues raised in a SAG to those statements that inform us of the nature and occurrence of the alleged errors. *State v. Calvin*, 176 Wn. App. 1, 26, 316 P.3d 496 (2013). We do not address issues involving facts or evidence not in the record, as those are properly brought in a personal restraint petition and not in a statement of additional grounds. *Calvin*, 176 Wn. App. at 26.

### A. *Arguments Based on Evidence Not in the Record on Appeal*

Newman makes several arguments involving facts and evidence not in our record on appeal. He argues (1) that a key, a safe, and discharge paperwork were never "logged as evidence," and that the bedroom was not listed on the search warrant; (2) the police failed to make a full investigation, including interviewing potential witnesses and collecting DNA (deoxyribonucleic acid) evidence or fingerprint evidence in violation of his "[p]resumption of guilt"; (3) the State misled the jury about the safe and his medical paperwork; (4) the trial court erred by allowing him to be arrest[ed] "in view of jury," and that uniform police stood by him during the trial; and (5) his attorney was ineffective for failing to meet deadlines, consult with Newman, and pursue other legal theories and arguments. SAG at 1, 2, 3. These claims all involve facts and evidence not in our record, and we do not review them. *Calvin*, 176 Wn. App. at 26.

### B. *Statements Too Vague To Merit Consideration*

Newman makes two claims that do not inform us of the nature and occurrence of the alleged errors. He argues that the State asked leading questions, citing three examples where the State conducted direct and redirect examination of a witness during the trial. Newman also states that his "[p]roof of residency [was] not established." SAG at 2. These statements are too vague to properly inform us of the errors, and we are unable to consider them.

### C. *Abuse of Discretion*

Newman appears to argue that the trial court abused its discretion by permitting the State to recall a witness, and allowing repeated questions for cumulative testimony. This argument fails.

"The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." ER 611(a). Our review of the record shows the trial court did not abuse its discretion by either allowing the State to recall a witness or by allowing attorney questions. Thus, this argument fails.

## IV. PERSONAL RESTRAINT PETITION

***8** Newman also filed a motion to modify or relief of sentence and judgment and arrest of judgment and new trial, which the trial court transferred to us as a PRP under CrR 7.8.[7] Newman offers numerous claims of error in his petition with little or no reference to facts or evidence, supporting authorities or analysis. He did not file any declaration or additional evidence in support of his PRP. The State argues that we should decline to review Newman's arguments because they fail to meet the bare minimum standards. Although many claims in the petition are conclusory allegations and unsupported assertions, or are based on facts not included in the record, we are able to review some of his arguments. Those arguments with sufficient form are "insufficiency of proof of a material element of the crime," "presumption of guilt," and "ineffective assistance of counsel." Although these arguments are reviewable, Newman fails to meet his burden to prevail on these arguments. We therefore deny Newman's PRP.

[7] Because Newman's motion was referred to us as a petition, we refer to this motion as a PRP.

### A. *Legal Principles*

A petitioner who believes he is under unlawful restraint may seek relief through a PRP. RAP 16.4. The petitioner must demonstrate both error and prejudice. *In re Pers. Restraint of Sandoval*, 189 Wn.2d. 811, 821, 408 P.3d 675 (2018). Errors that are constitutional must be accompanied by actual and substantial prejudice. 189 Wn.2d. at 821. Errors not of constitutional magnitude must represent a " 'fundamental defect ... that inherently resulted in a complete miscarriage of justice.' " 189 Wn.2d. at 821 (quoting *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 506, 301 P.3d 450 (2013)).

A petitioner must establish error and prejudice by a preponderance of evidence. *In re Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004); *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). A petitioner may not rely on "[bald] assertions and conclusory allegations." *In re Lord*, 152 Wn.2d at 188 (quoting *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

A PRP must include, at a bare minimum, "[a] statement of (i) the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations, (ii) why other remedies are inadequate, and (iii) why the petitioner's restraint is unlawful." *In re Griffin*, 181 Wn. App. 99, 104, 325 P.3d 322 (2014), *remanded*, 182 Wn.2d 1022, 349 P.3d 819 (2015); RAP 16.7(a)(2). A PRP that does not meet the bare minimum must be denied. *See Id*.

B. *Discussion*

1. *Conclusory Allegations and Unsupported Assertions Not Considered*

In his PRP, Newman makes the following conclusory allegations and unsupported assertions without the proper form that merit denial of review under *In re Griffin*, 181 Wn. App. 99. Newman's petition states:

1. Insufficiency of proof of a material element of the crime.

   Search warrant did not include safe.

   No key as evidence yet stated as evidence.

   No possession/control of safe established.

2. Inadequate law library access.

3. New evidence.

4. New supporting case law.

5. Irregularities in the proceeding.

   Restraint without a restraint order.

   Two officers within 5 feet on 3rd day of trial.

   Prosecutor rested then recalled witness for jury question without any jury question.

   DOC arrested him in front of jury without a warrant.

6. Error of law.

   Testimony of recalled witness stating a "key" yet no key presented as evidence.

7. Decision and verdict contrary to evidence.

  

Witness stated on stand it was her safe not the defendants.

8. Ineffective counsel.

Not prepared for trial.

No evidentiary hearing.

No *Franks v. Delaware* hearing. 438 U.S. 154, 98 S. Ct. 57 L. Ed. 2d 667 (1978).

No cross-examination of any witnesses prior to trial.

No argument for same criminal conduct or concurrent sentence.

No *State v. Knapstad* hearing. 107 Wn.2d 346, 729 P2d (1986).

9. Due to no jury instruction for exceptional sentence, an exceptional sentence is barred by RCW 9.94A.535(3) considered by jury.

***9** Petition, No. 53963-2, at 3-5 (Wash. Ct. App. Oct. 23, 2019) (Mot. to Modify or Relief of Sentence and Judgment 7.8 and Arrest of Judgment 7.4 and New Trial 7.5).

This list of complaints is inadequate to meet Newman's burden to state with particularity the facts that entitle him to relief, thus we do not consider them.

2. *Allegations Failing To Meet Burden for Relief*

a. Insufficiency of Proof of a Material Element of the Crime

Newman argues that there is insufficient evidence to support a conviction. Specifically, Newman appears to argue that because the key and the safe were not entered as evidence at trial, that the testimony of the arresting officers about the key and the safe alone do not support a charge. Newman appears to argue that the State did not carry its burden of proof with respect to the element of possession. Newman offers no authority to support his argument. Newman does not challenge the jury instructions on the law of possession. This argument fails.

In reviewing the sufficiency of the evidence, we determine whether, in a light most favorable to the prosecution, the evidence could lead a fact finder to find beyond a reasonable doubt that Newman was guilty. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 368, 256 P.3d 277 (2011).

Newman was convicted on charges stemming from his possession of the safe and its contents: drugs and a firearm. The jury was instructed on possession, including constructive possession. The

jury was instructed that they could find Newman was in constructive possession if Newman had dominion and control over the items. The jury was instructed that they could consider as factors that Newman had dominion and control if he had the "immediate ability to take actual possession" and "the capacity to exclude others from possession." CP at 45

At trial, witnesses testified that they found a safe containing drugs and a stolen firearm in a bedroom where Newman's possessions were found. Witnesses also testified that they found a key to the safe "right where [Newman] was standing when the door initially opened." RP at 270. This evidence could lead a fact finder to conclude that Newman had dominion and control over the safe because the safe was in Newman's room that he could control access to. Moreover, the evidence could lead a fact finder to conclude that Newman had actual possession of the key to the safe because of his proximity to where the key was discovered by law enforcement. We hold that, viewed in a light most favorable to the State, the evidence could lead a fact finder to find beyond a reasonable doubt that Newman had possession over the safe and its contents.

Newman has failed to carry his burden of proof. Consequently, this argument fails.

b. Presumption of Guilt

Newman claims that because law enforcement did not conduct what he argues was an adequate investigation, his constitutional right to a presumption of innocence was violated. Specifically, Newman argues that the police did not perform a DNA test, collect fingerprints, or interview other witnesses at the scene of the crime. Newman's argument appears to challenge the sufficiency of the evidence to prove his identity. This argument fails.

***10** An eye witness at trial identified Newman as the suspect of the investigation. That witness testified that it was Newman's room where the safe was located. We hold that, in a light most favorable to the prosecution, the evidence could lead a fact finder to find beyond a reasonable doubt that State proved that Newman had committed the crimes. Thus, this argument fails.

c. Ineffective Assistance of Counsel

Newman argues that he received ineffective assistance of counsel. Newman makes numerous summary allegations: his lawyer failed to interview witnesses prior to trial, his lawyer failed to meet court deadlines, his lawyer made ineffectual arguments, his lawyer asked for continuances, his lawyer was not prepared for trial, his lawyer failed to prepare a defense, his lawyer failed to conduct a thorough investigation, his lawyer failed to object to improper forms of the question, his lawyer failed to object to leading questions, his lawyer failed to conduct adequate cross examination, his lawyer failed to move to suppress purportedly inadmissible evidence, and that his lawyer failed to challenge a purportedly faulty search warrant, among other arguments. Newman

  

seems to argue that these allegations amount to cumulative error that denied him a fair trial. This argument fails.

The cumulative error doctrine applies only when several errors not justifying reversal on their own, when combined, may deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). For the doctrine to apply, a defendant must still identify the errors it relies on. *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003).

We do not consider conclusory arguments unsupported by citation to authority. *In re Matter of D.J.S.*, 12 Wn. App. 2d 1, 42, 465 P.3d 820 (2020).

Here, Newman has cited no authority for any of his allegations. Additionally, many of his allegations refer to evidence and facts that are not available for review because they are outside of the trial record, and not contained in a declaration or other competent form. Because Newman has not carried his burden to establish that his lawyer erred, the doctrine of cumulative error cannot apply. We hold that this argument is without merit.

## CONCLUSION

We hold that although the prosecutor engaged in misconduct at closing argument, Newman waved his right to object for the first time on appeal because the misconduct was curable. We hold that Newman has failed to show that he was provided ineffective assistance of counsel. We hold that Newman's claims regarding the conditions of his pretrial release are moot and we decline to review them because they do not present issues of continuing and substantial public interest. We hold that Newman's SAG fails. We deny Newman's PRP. We affirm his convictions for unlawful possession of a controlled substance with intent to deliver—methamphetamine and unlawful possession of a stolen firearm. We reverse and remand to the trial court to vacate Newman's conviction of unlawful possession of a controlled substance—heroin, and for resentencing.

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:

Maxa, J.

Glasgow, A.C.J.

  

## All Citations

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| **Appellate Court Case Title:** | State of Washington, Respondent v. Eric J. Newman, Appellant |
| **Superior Court Case Number:** | 18-1-00326-9 |

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