

NO. 70838-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MIRANDA JENKINS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A trial court does not violate the Confrontation Clause by limiting cross-examination to relevant evidence, especially when the witness at issue played a limited role in the State's case. The trial court here denied the defendant's motion to cross-examine a detective regarding allegations of improper interrogation technique and unlawful seizure of a cell phone in an unrelated case. Since the detective neither interrogated the defendant here nor collected any of the evidence at the scene, and played a very limited role in the State's investigation, did the trial court properly exercise its discretion in denying the motion to cross-examine on these subjects?

2. A defendant who fails to object on specific grounds at trial may not, for the first time, claim error on those unspecified grounds on appeal. Further, it is not prejudicial to introduce evidence that someone other than the defendant, who was not involved with the crime, was lawfully carrying a weapon. The defendant objected on hearsay grounds to testimony that her boyfriend had a lawfully owned shotgun in his car. Did the defendant waive error on appeal on the grounds that the evidence was improper under ER 401 and 403? If not, was any error harmless?

3. To obtain reversal pursuant to the “cumulative error” doctrine, a defendant must establish the presence of multiple trial errors *and* show that the accumulated prejudice affected the verdict. Where errors have little or no effect on the trial’s outcome, the doctrine is inapplicable. The defendant has failed to establish either the existence of multiple errors or that any error affected the verdict. Is the cumulative error doctrine inapplicable?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Miranda Jenkins was charged by information with forgery. CP 1. Trial began on July 9, 2013. 1RP 7.¹ The jury found Jenkins guilty as charged. CP 120. The court imposed a standard range sentence of 3 months. CP 127-33.

2. SUBSTANTIVE FACTS.

On July 31, 2012, Jenkins entered a Wells Fargo bank in Seatac and tried to cash a check in the amount of \$1,830 with teller Lashanya Topps. 2RP 96, 99. Topps became doubtful of the

¹ The verbatim report of proceedings consists of three non-consecutively numbered volumes which will be referred to as follows: 1RP (March 12, 2013; July 9, 2013; July 10, 2013); 2RP (July 11, 2013; July 15, 2013); 3RP (July 16, 2013; July 17, 2013; August 30, 2013).

check's authenticity after observing Jenkins' suspicious behavior, referred to in bank parlance as "stop signs." 2RP 97-104. First, Jenkins gave Topps an "odd" story about how she had received the money, claiming she had earned it cleaning rental units. 2RP 100. Given the check's large amount, Topps found this improbable and inconsistent with checks she had seen for that type of work, which had never exceeded \$300. 2RP 100, 102-03. Despite being a business-size check, the check also bore only a personal name on top and a handwritten payee and amount rather than the usual typed information. 2RP 101-02. Further, Jenkins seemed unusually talkative to the point of appearing anxious and "just kind of shifty." 2RP 103.

After asking Jenkins to take a seat, Topps called the account owner and confirmed that the check was fake. RP 104-05. Neither of the account owners, Kimberly or David Smith, had ever met or communicated with Jenkins, mailed her a check, or given her permission to cash or possess any of their checks. 2RP 182-83, 196-97, 200. Nor had they ever owned property in Washington, hired anyone to perform cleanup or painting services there, or even visited the state more than once or twice. 2RP 182, 186, 195. The account number at issue belonged to one of their personal

accounts, but had been placed on a business check that bore someone else's handwriting. 2RP 184-85, 198-99.

After Topps called 911, King County Sheriff's Deputy Ryan Abbott responded to the report of the forgery in progress. 2RP 54-55, 106. Bank personnel directed him to Jenkins, who gave him a different story than the one she had given Topps, now claiming that she had received the check for painting a house after posting an ad for work on Craigslist and receiving an email from an unknown person. 2RP 57, 85. Despite claiming that she had just spent an entire week painting the house, she could not tell Abbott where the house was located or even what city, claiming someone had given her a ride every day using a GPS. 2RP 57-58, 85.

As payment, Jenkins said she had received a check through the mail for \$1,830, dated July 17, and drawn on the account of David and Kimberly Smith in Texas. 2RP 58, 84-85. When Jenkins presented a USPS shipping label to Deputy Abbott that supposedly came with the check, the tracking number he entered into his laptop came back as unverifiable. 2RP 58, 82. Deputy Abbott placed her under arrest. 3RP 10.

During Deputy Abbott's conversation inside the bank with Jenkins, she mentioned that her boyfriend, Tom Nist, was still in the

parking lot in his white Bronco. 2RP 59, 158. Deputy Hansen Hsu went to the parking lot to speak to Nist, joined by Deputies Allen Tag and William Mitchem. 2RP 148-49, 158; 3RP 11-12. Nist was released at the scene. 2RP 159; 3RP 12. Mitchem then took a telephonic statement from the Smiths. 3RP 13.

Deputy Abbott continued his investigation and took a statement from Topps and placed the forged check and Jenkins' cell phone into evidence. 2RP 59-60. He later collected a handwriting sample from Jenkins to be sent to the Washington State Patrol Crime Lab (WSPCL). 2RP 60, 76. He also followed up with WSPCL forensic scientist Andrew Szymanski, who analyzed the defendant's known handwriting samples (i.e., course of business documents and exemplars) and the signatures on the check. 2RP 76, 129-39. Szymanski concluded that Jenkins had signed the endorsement signature on the back of the check, that it was highly probable that she did not author the payee information on the front, and that he could neither identify nor eliminate her as the author of the payor signature. 2RP 137-39.

Detective Brian Taylor was later assigned to prepare the case for filing. 2RP 18. Because the majority of the investigation had already been completed by patrol officers, including the

collection of all the witnesses' statements and the evidence, his role was limited to "[n]ot much . . . basically prepared the documents." 2RP 22-23. He ordered a copy of the defendant's driver's license, wrote the Certification for Determination of Probable Cause (PC cert), and then referred the case to the prosecutor's office. 2RP 18-23. One or two days after he sent the case over, Jenkins and Nist came to the precinct to give Taylor a USPS Priority Mail envelope that Jenkins claimed had housed the check. 2RP 24-25. Because the envelope had no postal markings, addresses, postal slips or any actual signs showing that it had come through the mail, and was of the type usually placed in the public area of the post office for anyone to take, Taylor could not prove it had ever been used and did not place it into evidence. 2RP 24-25.²

Jenkins made a pretrial motion to cross-examine Taylor about a prior promoting prostitution case he had handled in which his captain filed a complaint regarding Taylor's interrogation technique of a suspect and his seizure of a cell phone outside proper search parameters. 2RP 4-12. Jenkins claimed that these subjects were relevant to the issue of how Taylor performed the

² Taylor testified that he had taken the envelope from Jenkins, while Detective Rick Bowen testified that he had taken it and placed it in Taylor's inbox. 2RP 23-25, 169-72.

investigative tasks of logging in Jenkins' blank USPS envelope and why Taylor had not looked for text messages on her phone, even though Jenkins had never told anyone that she had received any such text messages.³ 2RP 7-9, 37, 60, 73. She further argued that the prior case was critical because she assumed the State would be making an argument touting Taylor's credibility.⁴ 2RP 6-12. The court denied the motion, saying the allegations that Taylor had previously "overreach[ed]" his search and seize authority over a cell phone on an unrelated case were irrelevant to the issues presented in this case, where there were no similar allegations. 2RP 12-14. The trial court concluded that the evidence would be "confusing, prejudicial, and not relevant" and "a big distraction and very inappropriate." 2RP 14.

At trial, neither Jenkins nor Nist testified. The texts and emails allegedly written by Jenkins' "employer" were therefore never introduced to the jury (Jenkins had conceded they would be inadmissible without her testimony). 2RP 73-76. For this same

³ Although Jenkins had mentioned receiving an email from the person who had purportedly hired her for the painting job, there was no evidence that the cell phone was one capable of receiving emails. She also did bring any of the alleged emails when she went to the precinct to talk to Taylor. 2RP 15-50, 37, 74.

⁴ The prosecutor did not make any such argument in closing argument. 3RP 110-32.

reason, Jenkins ultimately presented no evidence that the USPS envelope had been in plain sight in Nist's Bronco when she was arrested, which she contended at pretrial that she would argue as evidence of poor investigation. 1RP 22-25.

At trial, defense investigator Russ Williams acknowledged that the envelope had no post markings, return address, "marathons" (stamps showing that the package has gone through the Postal Service), or tracking numbers typically found on items that have been processed through the mail. 3RP 36-39. Nor was the USPS tracking slip in this case typical of a regular tracking slip, which is usually printed on a different type of paper. 3RP 39-40.

During its case-in-chief, the State preemptively asked Deputy Tag during trial whether he was aware of the Bronco being searched, in anticipation of Jenkins' contention at pretrial that the envelope was in the car; Tag answered that Deputy Hsu had mentioned Nist's comment that he carried a shotgun in his Bronco. 2RP 151. Defense counsel objected only on the grounds of hearsay, but not to the actual content of the testimony:

[Tag]: Other than Deputy Hsu mentioning to me that --
MR. ARALICA: Objection; hearsay.
THE COURT: I'll permit it, again just an explanation for what the officer did next. You can go ahead.

- A. He mentioned to me that the subject had told him there was a shotgun in the car that he carries in the Blazer and other than that I didn't know how Deputy Hsu came to that information, so.
- Q. Now, when you -- did you write a report as part of this incident?

2RP 150-51.

At trial, when asked what contact he had had with Nist, Deputy Hsu said he did a sweep of Nist's Bronco because Nist had mentioned he had a shotgun inside. 2RP 159. Again, defense counsel's objection was based solely on hearsay. Id. Deputy Hsu said he ran the serial number and confirmed that it was legally owned by Nist. Id. During cross-examination, defense counsel circled back to the subject of the sweep, asking for more clarification:

- Q. You mentioned that you did a sweep of the white Bronco. Could you please explain what a sweep means.
- A. Yes, just to make sure before that I released any -- essentially released any involved parties from the scene to basically locate any weapons, so I have information as far as I know exactly where that weapon is in the vehicle, so made a sweep.
- Q. So you went inside the vehicle?
- A. Yeah.
- Q. You looked in the door panels?
- A. Yes.
- Q. Did you look in the back like in the trunk if there was one?

- A. There's no trunk on the Bronco. You could see clearly back to the -- yeah, but the bed of the Bronco, yes.

2RP 162. Following the witnesses' testimony, defense counsel made no further objections nor requested any limiting instructions.

C. ARGUMENT

- 1. THE TRIAL COURT DID NOT VIOLATE JENKINS' RIGHT TO CONFRONTATION.

Jenkins contends that the trial court violated his right to confrontation when it prevented him from cross-examining Taylor on an unrelated case. This argument has no merit and should be rejected. The details of the unrelated case were irrelevant to the issues presented here and were properly excluded.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Abuse of discretion occurs when the trial court's ruling is manifestly unreasonable or based upon untenable grounds or reasons. State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014). This standard of review applies to challenges invoking violation of the Confrontation Clause as a result of restricted cross-examination, because the ultimate

question encompasses an evidentiary ruling.⁵ Darden, 145 Wn.2d at 619.

The Sixth Amendment and Const. art. I, § 22 grant criminal defendants the right to confront and cross-examine witnesses. Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1005, 39 L. Ed. 2d 347 (1974); Darden, 145 Wn. 2d at 620. However, “[l]ike any constitutional right, these rights have limits” and are “not absolute.” State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); Darden, 145 Wn.2d at 620. “The right to confrontation and associated right to cross-examine adverse witnesses are limited by general considerations of *relevance*.” State v. O’Connor, 155 Wn.2d 335, 348-49, 119 P.3d 806 (2005) (italics in original). A defendant has no constitutional right to admit irrelevant evidence. Id. at 349.

As a result, the three-step test established by the supreme court governing this issue requires a primary showing of relevance as its threshold requirement; only once the defendant establishes relevance does a reviewing court examine whether the evidence is

⁵ Although Jenkins contends that the standard of review is de novo, a confrontation clause challenge is reviewed under that standard only when the issue before the reviewing court is whether a statement qualifies, as a matter of law, as testimonial. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

so prejudicial as to disrupt the fairness of the fact-finding process at trial, and then balance any prejudice against the defendant's need for the information sought. Darden, 145 Wn.2d at 622. "[I]f the evidence . . . is not relevant under ER 401 standards, there is no problem under the Sixth Amendment or Const. art 1, § 22." Hudlow, 99 Wn.2d at 16.

Evidence is relevant if it has a tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. On these grounds, courts should exclude evidence that is too remote, vague, argumentative or merely speculative to avoid "greatly confusing the issue[s] and delaying the trial." State v. Kilgore, 107 Wn. App. 160, 185, 26 P.3d 308 (2001) (citing State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); see also State v. Fisher, 165 Wn.2d 727, 752, 202 P.3d 937 (2009) (holding trial court may set boundaries on cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues" or evidence that is "repetitive or only marginally relevant.")). Trial courts have properly excluded

cross-examination regarding a witness's prior "misconduct" on such grounds.⁶

In O'Connor, the supreme court held that the trial court properly limited cross-examination concerning a malicious mischief victim's retention of excess insurance money following the crime because it was "simply too attenuated" from the actual incident charged. 155 Wn.2d at 813-15. The court cautioned that "not every instance of a witness's (even a key witness's) misconduct is probative of a witness's truthfulness or untruthfulness under ER 608(b)"; rather, the court should consider whether "the instance of misconduct is relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial." Id. at 349-50. The court concluded that "the retention of the excess \$300 was not germane to the key factual issue to which [the victim]

⁶ See e.g., State v. Gregory, 158 Wn.2d 759, 789-90, 147 P.3d 1201 (2006) (holding that a rape victim's unrelated prostitution activity the prior year was "too remote" to be relevant to the issue of motive of financial revenge); Hudlow, 99 Wn.2d at 17 (approving trial court's limitation of rape victims' past sexual activities because no factual similarities existed between claims of general promiscuity and charged rapes); State v. Knapp, 14 Wn. App. 101, 108-09, 540 P.2d 898 (1975) (excluding cross-examination on a witness' past attempts to recruit the defendant in other crimes as "too remote . . . vague, argumentative and speculative" to show current motive to entrap defendant); Kilgore, 107 Wn. App. at 186 (excluding evidence of a witness' DUI because it was "too speculative" to allege that her general bitterness over not being able to drive her grandchildren around prompted her to accuse their father of molestation); State v. Schlichtmann, 114 Wn. App. 162, 169, 58 P.3d 901 (2002) (rejecting the relevance of a witness's prior unrelated assault charge and child welfare investigation to any alleged motive to deprive the defendant of custody).

testified, namely the fact that O'Connor was outside her house on the night her tires were slashed . . . [or] the ultimate question of whether O'Connor slashed the tires." Id. at 350.

Courts have found constitutional violations of the right to cross-examine only when the evidence actually implicated relevant issues. In State v. Reed, for example, the sole surveillance officer in a "see-pop" drug operation testified to certain deficiencies in his ability to see details like facial characteristics and the denominations of bills. 101 Wn. App. 704, 715, 6 P.3d 43 (2000). The court held that "where there are *reasonable grounds* to question whether an observing officer has misperceived critical events or misidentified a defendant," the State should disclose the undercover officer's surveillance location to allow the defendant to further cross-examine on this issue. Id. at 713-15 (*italics added*).

The amount of latitude granted to a defendant on cross-examination also depends on how essential that witness is to the State's case. Darden, 145 Wn.2d at 619. In Darden, the court held that the trial court should have allowed the defendant to cross-examine an officer on the details of his covert surveillance location, since the officer was the sole witness to the crime, his visual acuity was directly at issue given the existence of two similar-looking

suspects at the scene, and the defendant's conviction for drug delivery was thus "utterly dependent on [the officer's] eyewitness testimony."⁷ Darden, 145 Wn.2d at 619-25.

The information Jenkins sought to introduce during cross-examination of Det. Taylor was, as correctly pointed out by the trial court, "confusing, prejudicial and not relevant." 2RP 13. The pending misconduct finding against Taylor involved an allegation of improper interrogation techniques and the unlawful seizure of a cell phone. Those issues had no relevance to the case at hand, in which Taylor performed no interrogation of anyone, did not seize any evidence belonging to Jenkins, and in fact was never at the scene and had very little contact with Jenkins herself. Deputy Abbott, the primary scene officer, performed these tasks, as well as the majority of the investigation.

Jenkins argues that the evidence was relevant because "law enforcement's investigation was central to the defense's theory at trial that Jenkins did not know that the check was forged." App. Br.

⁷ Greater leeway has similarly been granted when examining the witnesses who, as in Darden, "formed the principal evidence in the State's case." 145 Wn.2d at 622. See Reed, 101 Wn. App. at 713 (holding that defendant should have been allowed to cross-examine on the location of the sole eyewitness who was "critical to the State's proof that Reed actually delivered the drugs"); Garcia, 179 Wn.2d at 845 (holding that court should have allowed cross-examination of female kidnapping victim on the defendant's statements of intent because "the only witnesses to his state of mind were himself and [the victim]").

9-10. This contention is without merit. Jenkins cannot provide any link as to how Taylor's interrogation technique against a suspect in a prior case and his seizure of that person's cell phone would tend to make it more or less probable that Jenkins knew the check in this case was forged. Her claim that Taylor was responsible for the decision to collect additional evidence, obtain search warrants or submit the check for handwriting analysis, as well as writing the PC cert, is of no moment because she cannot explain how those tasks relate to allegations of improper interrogation or warrantless search, neither of which occurred in this case. App. Br. 9.

Furthermore, the record reflects legitimate reasons behind the investigatory deficiencies claimed by Jenkins: she never told anyone about any exculpatory text messages on her cell phone, neither officer knew whether the phone had email capabilities, and the phone was not necessary to link Jenkins physically to the check. 2RP 26-27, 37, 47. Because she ultimately admitted no actual evidence at trial of texts or emails, cross-examination on improper interrogation and search techniques on an unrelated case became even less relevant. Jenkins simply cannot make the "particularized factual showing" required in Hudlow that would establish the necessary similarity between the internal investigation

of Det. Taylor and her forgery case and render the pending misconduct finding relevant. 99 Wn.2d at 11, 17.

At most, Jenkins attempts a general propensity argument by saying that the alleged misconduct is “probative to the quality of the investigation” in this case, but goes no further. App. Br. 10. This is far too speculative a basis to support relevance. Jenkins was in fact allowed to explore the theory of poor investigation on *relevant* grounds at trial when cross-examining Taylor on his decision not to log in the envelope, and arguing the inconsistency between Taylor’s claim and Det. Bowen’s testimony about who had taken possession of it. 2RP 41-43.

Nor does the record support Jenkins’ contention that Taylor’s investigation formed the touchstone of her case. Counsel’s closing argument touched only briefly on Taylor’s investigation. 3RP 134-49. This can be attributed more to Jenkins’ decision not to introduce the content of the text and email messages that purportedly exonerated her than to any limitation placed by the court on cross-examination, since the messages were the fulcrum of her argument regarding faulty investigation. The sole evidence in Jenkins’ favor, the USPS tracking slip and envelope, returned as unverifiable and, according to the testimony of both Taylor and her

own defense investigator, bore no evidence of ever having been through the mail. 2RP 23-25, 48; 3RP 35-39. Without evidence to support a plausible exculpatory theory, Jenkins could not persuasively fault Taylor for not finding one.

Given Taylor's minimal role in the case, the trial court correctly chose not to grant the latitude that might be appropriate with a critical witness. Taylor was far from the type of crucial witness described in Darden, Reed or Garcia, all of which involved single eyewitnesses upon which the convictions solely relied. 145 Wn.2d at 619-25; 101 Wn. App at 713; 179 Wn.2d at 845. Taylor was not even present at the actual incident and spoke to none of the participants until Jenkins came in a few days later. By the time he received the case, most of the investigation had already been completed in the field, as is common with property crimes cases, including the witness statements and the collection of all the evidence by Abbott. 2RP 46-47. Taylor's involvement essentially pared down to ordering Jenkins' driver's license and writing the PC cert. 2RP 18-23.

Because Taylor's pending misconduct on an unrelated case was irrelevant, it ends the three-prong inquiry. However, even if this Court finds the barest relevance, it is easily outweighed by the

State's interest in prohibiting the "prejudice to the factfinding process itself," where the introduction of such distracting evidence "may confuse issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis." Hudlow, 99 Wn.2d at 13-14, 16. The trial court reflected this concern when it found that the information would be "highly prejudicial" and "confusing." 2RP 13, 177.

Finally, should this Court find that the trial court incorrectly limited cross-examination, any error was still harmless. A violation of the Confrontation Clause is presumed prejudicial unless the State can establish beyond a reasonable doubt that the error did not contribute to the verdict. State v. Dickenson, 48 Wn. App. 457, 470, 740 P.2d 312 (1987). Under the "overwhelming untainted evidence" test, the reviewing court will look only at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. Id. Here, the evidence presented at trial of Jenkins' odd behavior, her multiple incongruous stories, and unverifiable USPS slip and unmarked Priority envelope, overwhelmingly favored a finding of guilt.

Jenkins cannot establish either a Confrontation Clause violation or error requiring reversal. This Court should reject her claims.

2. JENKINS CANNOT ESTABLISH PREJUDICE FROM TESTIMONY REGARDING HER BOYFRIEND'S POSSESSION OF A LAWFULLY OWNED GUN.

Jenkins argues that she was prejudiced by testimony regarding her boyfriend's possession of a gun. This Court should reject this claim. Because she made an objection only on the grounds of hearsay, she waived a claim of error under ER 402 or 403. Furthermore, she cannot establish prejudice because the gun was attributed to someone else unconnected to her crime.

a. Jenkins' Failure To Object On The Grounds Now Specified In Her Appeal Waives Any Claim Of Error On Appeal.

Appellate courts generally will not consider an issue raised for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A party may assign evidentiary error on appeal only on the specific ground made at trial. State v. Powell, 166 Wn.2d 73, 83, 206 P.3d 321 (2009). This requirement gives a

trial court the opportunity to prevent or cure error by, for example, striking testimony or providing a curative instruction to the jury. Kirkman, 159 Wn.2d at 926. The supreme court has adopted a “strict approach” to preservation of error because the failure to properly object robs the trial court of the opportunity to correct the error and avoid a retrial. Powell, 166 Wn.2d at 82.

Jenkins failed to preserve error in this case because she objected only on hearsay grounds when Deputies Tag and Hsu mentioned that Jenkins’ boyfriend, Tom Nist, had told Hsu that he had a shotgun in his car. 2RP 150-51, 162. In fact, Jenkins circled back to the issue of the car sweep with Hsu during cross-examination, giving him another opportunity to discuss the discovery of the weapon. She has therefore waived a claim of error on the separate grounds of relevance under ER 402 and 403. Furthermore, she failed to request any curative instructions, either at the time of the testimony or for inclusion in the written instructions. Id.; 3RP 61-64; CP 70, 72-74. She therefore cannot raise the issue now.

Nor can Jenkins claim that the court abused its discretion. App. Br. 13-16. The issue of the shotgun was never addressed pretrial by either party, either orally or in briefing; the trial court therefore never had an opportunity to exercise its discretion, much less abuse it. CP 50-71; Supp. CP __ (sub 56, State's Trial Memorandum); 1RP 3-86. Jenkins' argument regarding the trial court's decision to admit the evidence and its weighing of the interests under ER 403 is therefore inapplicable.

b. Even If This Court Reaches The Merits Of The Claim, Any Error Was Harmless.

Even if this Court finds that Jenkins properly preserved a claim of error, she cannot establish any actual prejudice, as the shotgun was clearly attributed to her boyfriend, not to her. As she herself notes, "[T]here was no indication that Ms. Jenkins was aware that there was a firearm in the vehicle." App. Br. 14. This correctly reflects the evidence admitted at trial. Tag testified that Jenkins' boyfriend, Nist, told Hsu that "there was a shotgun in the car that *he* carries in the Blazer." 2RP 151 (*italics added*). Hsu

testified that he “did a sweep of *his* Bronco, as he mentioned that *he* had a shotgun in there.” 2RP 159 (italics added). Furthermore, Hsu confirmed in open court that Nist legally owned the weapon. 2RP 159.

Nevertheless, Jenkins cites several cases to support her contention that the admission of testimony regarding weapons unrelated to the charge constitutes error. These cases are all distinguishable for two reasons: counsel clearly objected in each case, and the courts found prejudice because the weapons were found on or attributed to the *defendant*. See United States v. Reid, 410 F.2d 1223, 1225-26 (7th Cir.1969) (defense counsel objected several times to admission of testimony regarding a weapon found under the pillow in defendant’s jail cell); United States v. Warledo, 557 F.2d 721, 724-26 (10th Cir.1977) (defense counsel objected to introduction of rifle found in one defendant’s car trunk, where all defendants were charged as co-conspirators); State v. Freeburg, 105 Wn. App. 492, 496, 501-02, 20 P.2d 984 (2001) (trial court denied limiting instruction and admitted evidence “[o]ver strenuous objection” that defendant had a handgun in his boot when

arrested); Moody v. United States, 376 F.2d 525, 530-32 (9th Cir.1967) (defense counsel objected to testimony that defendant was hiding a loaded revolver in his car when arrested for drug smuggling, emphasized by prosecutor in closing argument as relevant because “it shows what type of people we are dealing with”).

Here, the evidence unequivocally showed that the shotgun belonged solely to Jenkins’ boyfriend, who was released from the scene because he had no connection to the crime at hand. Officers even verified that Nist legally owned it. Furthermore, no argument was ever made by the prosecutor that the gun somehow amplified Jenkins’ culpability in the forgery; on the contrary, it was never mentioned again during the rest of the trial.

Under the nonconstitutional harmless error standard, an error is harmless unless there is a reasonable probability that, absent the error, the outcome of the trial would have been materially affected. State v. Gower, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014). As noted above, the evidence of guilt absent mention of Nist’s gun was overwhelming. This Court should therefore reject

Jenkins' argument that the witness' testimony regarding the shotgun constituted reversible error.

3. CUMULATIVE ERROR DID NOT DENY JENKINS A FAIR TRIAL.

Jenkins also argues that, if none of the alleged errors she has claimed warrants reversal of her conviction on its own, the conviction should nevertheless be reversed based on the combined effect of these errors. This argument fails.

The cumulative error doctrine applies only where several trial errors occurred that, standing alone, may not be sufficient to justify reversal, but when combined, may deny the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003) (citing State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000), review denied, 151 Wn.2d 1031 (2004)). It is axiomatic, however, that to seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors *and* must show that the accumulated prejudice affected the verdict. Where errors have little or no effect on the outcome of trial, the doctrine is inapplicable. Greiff, 141 Wn.2d at 929. Here, as explained above, Jenkins has failed to satisfy this burden.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Jenkins' conviction.

DATED this 23 day of June, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to WHITNEY RIVERA, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MIRANDA JENKINS, Cause No. 70838-4-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

06/23/14
Date

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