

70926-7

70926-7

NO. 70926-7-I

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

STATE OF WASHINGTON

Respondent

v.

WILLIAM T. NELSON,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court abuse its discretion when it admitted evidence to show the defendant lived at a particular location when it was relevant on the question of whether the drugs located at that location belonged to the defendant?

2. Was the limiting instruction adequate to limit consideration of the evidence for its relevant purpose?

3. Did the defendant waive any claim of error when the court did not give a second limiting instruction as to a group of three additional exhibits that depicted the same three exhibits for which the court did give a limiting instruction?

4. Did the trial court's limiting instruction as to that evidence constitute an impermissible comment on the evidence?

5. Does the cumulative error doctrine require a new trial?

II. STATEMENT OF THE CASE

A. THE SEARCH WARRANT.

On December 30, 2011 the Everett Police Department served a search warrant at 3902 Rucker in Everett. The defendant, William Nelson, was in the living room when police entered the residence. Zenda Hester and another male were in the kitchen.

Daniel Olds was upstairs in the bathroom. 1CP 147; 9/9 RP 40, 45; 9/10-11 RP 105¹.

The defendant agreed to talk to Detective Wantland after the officer read the defendant his rights. The defendant said he had been living in the residence for about one month. He was on unemployment, receiving \$140 per week. The defendant identified the room that he and Ms. Hester had been occupying. He admitted that there was likely drug paraphernalia in the house. When Detective Wantland asked the defendant about drugs, the defendant said he was "dry" meaning that he did not have any drugs for sale at that time. The defendant said he might be getting more drugs for sale that night from "Steve." 9/9 RP 47-51; 9/10-11 RP 17-18.

The defendant later admitted that he had one ounce of heroin in a pool cue case in the closet of the bedroom that he and Ms. Hester occupied. In Detective Wantland's experience one ounce of heroin was more consistent with the quantity a dealer would possess than what a user would possess. The street value of that heroin was between \$1,200 and \$1,500. The defendant then

¹ All hearing and trial dates occurred in 2013.

said that he was "quitting the dealing." 9/9 RP 53-56; 9/10-11RP 54-55.

Officer Uhden searched the room that the defendant identified as the one that he and Ms. Hester occupied. Based on the defendant's description the officer was able to immediately walk to the closet where the pool cue case was kept and found approximately one ounce of heroin. 9/10-11 RP 44-45.

In addition to the heroin the officer found four digital scales, straws commonly used to ingest drugs, packaging materials, and a bag of suspected marijuana. The scales had residue on them, indicating that they were used to weigh and distribute drugs. The cell phone also had suspected methamphetamine on it. Ex. 59; 9/10-11 RP 18-22, 24.

There were three purses and a cell phone on the bed. One of the purses, identified as belonging to Ms. Hester, was a larger brown purse with a Lego Man key fob attached. Ex. 63. The second purse was a small white Coach brand purse. Ex. 56, 57. It contained some money, gift cards, suspected methamphetamine, and paperwork. Gift cards are a common form of payment for drugs. The third purse was a small pink purse, containing over \$800 cash, a bag of suspected marijuana, and a bail receipt in the

defendant's name. A second bail receipt in the defendant's name was also found in one of the purses. Police also found a summons in the defendant's name from Everett Municipal Court in that room. The summons listed the address of the residence where the search was conducted as the defendant's address. One of the purses also contained a small amount of suspected heroin. Ex. 5A, 5B, 5C, 60, 61, 62, 64, 65; 9/10-11 RP 18-19, 22-27, 39, 85-86.

The suspected controlled substances were sent to the crime lab for testing. The tests indicated that substances found in the beige Coach purse were heroin and methamphetamine. The substance found in the pool cue case was positively identified as heroin. 9/10-11 RP 51-52.

Police also searched a room occupied by Mr. Olds. They found a bong for smoking marijuana, a torch and some small plastic baggies. Police also found a power bill in Mr. Olds' name and Mr. Olds' wallet in that room. There were no items associated with the defendant or Ms. Hester located in that room. 9/9 RP 63-66; 9/10-11 RP 103.

B. PROCEDURE AT TRIAL.

The defendant was charged with one count of Possession of a Controlled Substance with Intent to Manufacture or Deliver, to wit:

heroin. 1 CP 147-148. The defendant moved in limine to exclude the court summons and bail bond receipts found in the purses that related to the defendant on the basis that it suggested that the defendant had committed other criminal matters. 4/15 RP 55. The State objected arguing that the documents demonstrated a link between the defendant and the room in which the drugs were found. 4/15 RP 55-56.

The court considered the purpose for which the documents would be introduced, and whether their probative value was outweighed by any prejudice. The court believed the documents were relevant to rebut the claim that the defendant did not live at the house. They were particularly probative because they showed the defendant was making representations to authorities that he lived at that particular address. Thus, the documents were probative of the truthfulness of the other claims the defendant made that the drugs were not his. 4/15 RP 57-58. At the conclusion of that discussion the court reserved ruling on the motion. 4/15 RP 61.

The court then considered whether a statement made by Mr. Olds claiming ownership of the drugs would be admitted into evidence. Before trial Mr. Olds provided defense counsel with a

statement that he, and not the defendant, owned the drugs. 9/10-11 RP 108. Defense counsel sought to introduce Mr. Olds' statement to support his general denial defense. Mr. Olds, represented by counsel, initially stated that he would assert his Fifth Amendment right to not incriminate himself. 4/15 RP 4. Trial was recessed when the court concluded that it was possible that defense counsel was a necessary witness to authenticate Mr. Olds' statement. 4/15 RP 61-64.

When trial reconvened the court again considered whether the court summons and bail bonds were admissible. At this point the defense conceded that the documents were probative of the defendant's residence, but argued they were unfairly prejudicial because the summons listed the offense the defendant had been charged with. That information suggested that the defendant was a criminal since he had already been charged with something else. The defense did not object to testimony about the documents, only admission of the documents themselves. 9/9 RP 1-4.

The court found the nature of the documents and the location where they were found made them highly probative. It further found the prejudice from those documents did not outweigh their probative value. It ordered that the documents be redacted to

eliminate any reference to the charge and the notation "FTA jury trial." 9/9 RP 6-7, 11.

The court then discussed a limiting instruction. Defense counsel suggested that the court instruct the jury "[t]his evidence is being admitted for the limited purpose of establishing Mr. Nelson's connection to this residence. You are to use it for no other purpose." The State objected on the basis that the instruction then precluded the jury from considering the exhibits as relevant to the defendant's possession of the drugs and cash found in a bag in one of the bedrooms. 9/9 RP 7-8.

The court admitted exhibits 62, 64, and 65. Those exhibits consisted of photographs of a bail bond receipt dated December 8, 2011, and portions of an Everett Municipal Court summons issued to the defendant on December 8, 2011 listing the defendant's address as 3209 Rucker Ave. 9/10-11 RP 19, Ex. 62, 64, 65. During Officer Uhden's testimony regarding those exhibits the court gave the following limiting instruction:

Ladies and gentlemen, Exhibit number 62, this one here, Exhibit 64 and 65 have all been admitted. However, I'm going to give you what's called a limiting instruction on these. These exhibits and the documents they represent that are admitted relate to other court cases in regards to Mr. Nelson. These cases are not before you today and you should not

infer anything against Mr. Nelson nor should you make any assumptions about Mr. Nelson based upon these three exhibits being admitted. In other words, you are not to prejudice Mr. Nelson about the existence or content of these three documents in regards to other court cases. You're not to make any assumptions that because this reference other court cases, therefore it's more than likely he's doing something here.

Do you understand that? Do you understand that issue about no prejudice should be taken from these documents? All right, thank you.

9/10-11 RP 26.

Mr. Olds ultimately testified at trial. He recanted the statement he made to the defendant's first attorney. Mr. Olds explained that he had made the statement to defense counsel because he thought the defendant was looking at a long prison sentence and that he felt sorry for the defendant. Mr. Olds recanted his statement because he did not want a felony on his record. Although Mr. Olds initially testified that the defendant did not live at the residence, and only spent the night occasionally, he later testified that the defendant had been living at the residence for about one month before the search warrant was served. Mr. Olds also testified that the only other person who occupied Ms. Hester's bedroom was the defendant. He stated that the defendant stored his things in that room, and that the defendant could exclude Mr.

Olds from that room if the defendant did not want Mr. Olds to enter.

9/10-11 RP 104-119.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED REDACTED COURT DOCUMENTS THAT WERE RELEVANT TO WHETHER THE DEFENDANT POSSESSED DRUGS LOCATED NEAR THOSE DOCUMENTS.

The defendant argues the trial court erred in admitting the Everett Municipal Court summons and the two bail bond receipts. He claims that they were not properly admitted under ER 404(b).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that person acted in conformity therewith. ER 404(b). It may be admissible for other purposes. Id. The rule includes any evidence offered to prove a person acted in conformity with a particular character trait. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The rule is designed to prevent the suggestion that the defendant is a criminal type person who would be likely to commit the crime charged; it is not meant to prevent the State from presenting relevant evidence. Id.

While prior acts evidence is not admissible to prove the defendant likely committed the charged crime, it is admissible for

other purposes. State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012). The list of proper purposes for that kind of evidence set out in ER 404(b) is illustrative. Id.

To admit evidence of other crimes, wrongs, or acts the court must (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove any element of the charged crime, and (3) weigh the probative value of the evidence against its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). Relevant evidence need not be excluded pursuant to this rule simply because it may also tend to show that the defendant committed another crime unrelated to the charged crime. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). A decision to admit evidence pursuant to ER 404(b) is reviewed for a manifest abuse of discretion “such that no reasonable judge would have ruled as the trial court did.” State v. Mason, 160 Wn.2d 910, 934, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035 (2008).

Evidence of prior acts is properly admitted if it is offered to rebut the defendant’s defense. Thus, in a murder prosecution the Court held it was proper to admit testimony that two days after the victim was sexually assaulted and killed the defendant raped a

second woman and tried to kill her by slitting her throat. State v. Brown, 132 Wn.2d 529, 573-575, 940 P.2d 546 (1997), cert denied, 523 U.S. 1007 (1998). The Court reasoned in part that the evidence was relevant to rebut the defendant's claim that his killing the first victim was not premeditated, but an impulsive "spur of the moment act." Id. at 574. It was also admissible to rebut the defendant's claim that his sexual contact with the first victim had been consensual. Id.

Here it is clear from the court's questions to counsel that it found the documents were relevant to rebut the defendant's claim that he did not live at the address and that the drugs found there were not his. The trial court reasoned that the probative value of those documents derived from the nature of the documents and the location where they were found; a person was more likely to keep court documents with him than any other kind of document. Evidence showing those documents were kept in a bag containing a large amount of money and drugs tied that money and the drugs to the defendant. 4/15 RP 58; 9/9 RP 5-6.

Although the court did not specifically discuss this basis, the evidence was also probative of which one of Mr. Olds's statements regarding the heroin was credible. Mr. Olds's affidavit in which he

claimed ownership of the drugs, and testimony that he did not own the drugs, were each sworn statements. Some physical evidence tying the defendant to the drugs and money was relevant to weigh the credibility of each of these statements. If the drugs and money was not Mr. Olds' then under the circumstances they were more likely the defendant's. If those items belonged to the defendant, then it was more likely that it was possessed for the purpose of selling it.

The bail receipts were also probative of whether the defendant possessed the heroin with intent to sell it. The receipts indicated that the defendant had paid the bail personally. They showed that the defendant paid a total of \$500 in a two day period. Like the \$800 found in the purse, evidence that the defendant was able to post that amount of money was circumstantial evidence that the defendant supplemented his legitimate income of \$140 per week by selling drugs. Thus, considering all the reasons the bond receipts were relevant, they were highly probative of the elements of the charge.

The defendant argues that the court admitted the evidence on the issue of identity. He argues that this was improper because his identity was not at issue. This argument should be rejected for

two reasons. First because the court was not limited to the purposes other acts evidence is admissible as listed in the rule. Gresham, 173 Wn.2d at 421. Second, as discussed, the court did not admit the evidence for identity but because it directly related to the asserted defense.

The defendant also argues that the court erred when it failed to balance the probative value of the evidence against its prejudicial nature. He argues that the court focused solely on the probative value of the evidence. The record does not support this argument.

Evidence that is likely to arouse an emotional response rather than a rational decision by jurors is unfairly prejudicial. State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). When the court first considered the motion to exclude the documents it recognized that they would be prejudicial, but asked if the probative value of the documents would be outweighed by their prejudicial nature. It then considered additional argument concerning the nature of the documents and their relevance to the defense before taking the issue under advisement. 4/15 RP 58-61. In doing so the court was effectively considering whether the probative value of the evidence might be outweighed by the danger of any unfair prejudice to the defendant.

When the court reconvened it revisited that issue. Defense counsel argued that while the documents were probative of whether the defendant lived at the address where the warrant was served, it was nevertheless unfairly prejudicial to admit the actual documents because they indicated the defendant was charged with assault 4 domestic violence. The prosecutor argued the court could mitigate the prejudice by redacting that information from the face of the summons. The court considered the arguments of both counsel, and admitted the bond receipts and the redacted summons. In doing so the court specifically found that the probative value of the evidence outweighed its prejudicial nature. 9/9 RP 2-7. This decision was not an abuse of discretion.

Without an indication of the charge or the defendant's failure to appear the summons simply indicated that the defendant had some kind of court hearing in the same month that the search warrant had been served. This evidence was not so inflammatory that a jury was likely to abandon rational thought and not evaluate the evidence objectively.

Nor were the bail receipts inherently inflammatory. The receipts contained the same case number as the summons, indicating that the court had set bail in that case. They did not

contain any information about the nature of the charge. Because they did not refer to a charge, the probative value was not outweighed by the danger of unfair prejudice.

The record in this case is similar to that in State v. Hughes, 118 Wn. App. 713, 725, 77 P.3d 681 (2003), review denied, 151 Wn.2d 1039 (2004). There the defendant was charged with second degree murder and second degree assault. The State argued to admit evidence of an uncharged burglary and uncharged weapons violation under the res gestae exception. The defense argued the evidence was irrelevant and prejudicial. The record reflected that the trial court adopted the State's argument and considered the prejudice versus probative argument raised by the defense. Under those circumstances the court found no error in failing to completely articulate its reasoning. Id. at 725, n. 8. Here, similar to Hughes, the court appears to have adopted the State's arguments regarding the probative value of the evidence. It considered the defense arguments regarding unfair prejudice, but adopted the State's proposal to mitigate the prejudice so that it would not be unfairly prejudicial.

Alternatively, any failure to specifically weigh the prejudice from admission of those documents against their probative value

was harmless. Error in failing to evaluate the prejudicial impact of proposed evidence under ER 404(b) is harmless in at least two circumstances. State v. Carlton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996). “The first occurs when the record is sufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence.” Id. “The second circumstance is when, considering the untainted evidence, the appellate court concludes the result would have been the same even if the trial court had not admitted the evidence.” Id. at 868-867.

Here the record is sufficient to conclude that the trial court would have admitted the redacted summons and the bail bond receipts even if it had specifically weighed the prejudice from those documents against their probative value on the record. First, the court specifically stated “I believe that the probative value outweighs their prejudicial nature.” 9/9 RP 6. Second, the court’s discussion with counsel demonstrates the court did the required analysis to justify that conclusion. It is clear from the court’s questions to counsel it believed the documents were highly probative. The court inquired whether it was not more likely than not that the bag containing legal documents indicated that the other

contents of the bag belonged to the defendant as well. The judge stated "I mean, court documents is (sic) what tips the balance, in my view, of the importance of these documents. Somebody is more likely to keep court documents with them than any other documents or a birth certificate or something like that, right?" 9/9 RP 5-6. By adopting the prosecutor's suggestion to redact the summons the court clearly considered the prejudicial nature of the documents and acted to mitigate the prejudice to tip the balance in favor of admitting the evidence.

Finally, the court instructed that the jury may not consider the contents of the exhibits as evidence that he must have committed the charged crime. 9/10-11 RP 26. Juries are presumed to follow the court's instructions. State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). This instruction, along with the redactions made by the court, eliminated any possibility of unfair prejudice to the defendant as a result of admitting those exhibits.

B. THE COURT INSTRUCTED THE JURY ON THE LIMITED PURPOSE FOR WHICH THE BAIL BOND RECEPITS AND SUMMONS WAS ADMITTED. FAILURE TO GIVE A SPECIFIC INSTRUCTION AS TO EACH EXHIBIT DEPECITING THOSE DOCUMENTS WAS HARMLESS.

The trial court admitted the summons and bail bond receipts in six related exhibits. Exhibit 5A was a copy of the redacted

summons. Exhibits 64 and 65 were photographs of portions of the summons. Exhibit 5B and 5C depicted two bail bond receipts. Exhibit 62 was a photograph of Exhibit 5B. Prior to admitting exhibits 62, 64, and 65 the court gave a limiting instruction. 9/10-11 RP 26. It did not repeat the limiting instruction when it admitted Exhibits 5A, 5B, and 5C approximately 25 minutes later.² 9/10-11 RP 39.

The defendant argues that the trial court erred because it did not give a limiting instruction when it admitted Exhibits 5A, 5B, and 5C. However the substance of each of these exhibits was identical to the substance of Exhibits 62, 64, and 65. Each referred to the same court case. The court specifically stated that the documents were related to some other court case, and that the jury was not to consider that fact to conclude that he was likely guilty in this case. 9/10-11 RP 26. The court in effect did instruct the jury on the limited purpose for which all of those exhibits was to be considered.

The defense did not request a second instruction related specifically the Exhibits 5A, 5B, and 5C. 9/10-11 RP 39. The court is not required to give a limiting instruction sua sponte. State v.

² The time estimate is based on the time stamp on the right hand side of the transcript of the report of proceedings.

Russell, 171 Wn.2d 118, 239 P.3d 604 (2011). Thus, if it was error not to give a second limiting instruction, it was waived.

Alternatively, if the court finds that a second limiting instruction should have been given to the second group of exhibits depicting those documents, and error in not providing a second instruction was not waived, the error was harmless. A trial court's failure to give an ER 404(b) limiting instruction is harmless "unless within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Gresham, 173 Wn.2d at 425, quoting, State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986), quoting, State v. Cunningham, 93 Wn.2d 832, 831, 613 P.2d 1139 (1980).

Failure to give a requested limiting instruction was harmless where there was overwhelming evidence of the defendant's guilt. Gresham, 173 Wn.2d at 425. Here the evidence strongly supported the conclusion that the defendant possessed heroin with the intent to deliver it. The defendant admitted that he had been living in the residence for about one month before the search warrant was served. The defendant indicated that he resided in a specific room with Ms. Hester. Although Mr. Olds' testimony concerning the defendant's residency status at the home was

somewhat equivocal, Mr. Olds was clear that the defendant kept his possessions in the room that the defendant and Ms. Hester occupied and where the drugs were found and the defendant had the authority to exclude Mr. Olds from that room. The defendant directed the police to the exact hiding spot where the heroin was located and accurately described the amount of heroin police would find there.

Further, the defendant admitted that he was “quitting the dealing” suggesting that he had not stopped dealing yet. The street value of the heroin and the cash located in that room far exceeded the defendant’s monthly income of \$540. While the wholesale price of the heroin was between \$1,200 and \$1,500, the evidence also showed the resale value of the heroin was about \$2,500. 9/9 RP 56-58; 9/10-11 RP 56. The reasonable inference from that evidence would be that those items were not from the defendant’s legitimate income, but were the proceeds from his illegitimate drug dealing income.

Failure to give a limiting instruction as to exhibits 5A, 5B, and 5C was also harmless because they were simply copies of exhibits 62, 64, and 65. The court’s instructions on the latter three documents focused on the substance of the exhibits, not the form in

which the exhibits were introduced. The court said “these exhibits, and the documents they represent...” 9/10-11 RP 26 A jury would understand from the court’s instructions that the limiting instruction related to the contents of the documents, not just the numerical exhibits themselves. Given that instruction jurors would have no reason to think that they were prohibited from using exhibits 62, 64, and 65 as propensity evidence, but were allowed to use the same evidence depicted in three other exhibits for that purpose.

Finally, the defendant was not prejudiced when a second limiting instruction was not given because the prosecutor argued only permissible inferences from each of the exhibits. The prosecutor argued that the bail receipts were important documents a person would keep with their possessions, and the proximity of those receipts to the money suggested that the money belonged to the defendant. She further argued that the summons tacked to the wall of the bedroom was evidence the defendant resided at the house. 9/10-11 RP 144-145, 166. Although the arguments did not include an admonition not to use the documents to infer a criminal propensity as evidence he was guilty of the charged offense, nothing about the argument suggested that the jury was permitted to use the evidence for that purpose.

C. THE LIMITING INSTRUCTION WAS NOT AN IMPROPER COMMENT ON THE EVIDENCE. ALTERNATIVELY, THE DEFENDANT WAS NOT PREJUDICED BY THE INSTRUCTION.

The defendant argues that the trial court's limiting instruction was an unconstitutional comment on the evidence. He argues that when the court referred to the exhibits as relating to "other court cases in regards to Mr. Nelson," that it withdrew from the jury's consideration the identity of the person associated with those documents.

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Washington Constitution Art IV, §16. The prohibition is designed to prevent the jury from being influenced by the court's expression of its opinion of the evidence submitted. State v. Stearns, 61 Wn. App. 224, 231, 810 P.2d 41, review denied, 117 Wn.2d 1012 (1991). Whether a remark is improper depends on the facts and circumstances of the case. Id.

The constitutional prohibition against judicial comments on the evidence does not include comments regarding undisputed peripheral facts. State v. Louie, 68 Wn.2d 304, 314, 413 P.2d 7, cert. denied, 386 U.S. 1042 (1967). It was not an improper

comment on the evidence to confirm that the record reflected a testifying officer had identified the defendant as the person that the officer had stopped on the night in question. State v. Jones, 171 Wn. App. 52, 55, 286 P.3d 83 (2012). Similarly, the judge's instruction regarding the exhibits as documents that "relate to other court cases in regards to Mr. Nelson" was not a comment on the evidence because whether the defendant was the William Thomas Nelson listed on those documents was not contested. Whether the defendant had been summoned to court on another case, and whether he posted bail on those cases was peripheral to the issues in this case.

A trial court may make an improper comment on the evidence when its comment conveys the trial judge's personal attitude toward the merits of the case. State v. Miller, 179 Wn. App. 91, 107, 316 P.3d 1143 (2014). Such was the case in State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995). There the State produced statements the defendants' made in custody through another inmate who was serving a 6 month sentence at the time the statements were made. After police learned about those statements the witness' sentence was reduced to 3 months. There was a dispute as to the reason for the sentence reduction which

bore on whether or not the witness had motive to testify in the manner in which he did. When the court instructed the jury on the limited purpose for which that witness's testimony was to be considered it also stated that it accepted the State's explanation for the sentence reduction. In doing so the court conveyed its opinion regarding the evidence testified to by the witness. Id. at 837-839.

Unlike the court's instruction in Lane, nothing about the court's instruction in this case conveyed whether the court believed that the documents constituted proof as to any disputed issue. The court did not say that the documents constituted proof that the defendant possessed the drugs and drug paraphernalia found in the room. Rather the court's instruction had the exact opposite effect; the court specifically instructed the jury that it was not to infer that because the defendant had other court cases that he was likely guilty of the charged offense.

A court may also make an improper comment on the evidence when it makes a remark that potentially suggests that the jury does not have to consider an element of the charged offense. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). A court violates the prohibition against judicial comments on the evidence in this manner when it instructs a jury that a matter of fact has been

established as a matter of law. State v. Boss, 167 Wn.2d 710, 720, 223 P.3d 506 (2009).

Some of the jury instructions constituted judicial comments on the evidence while others did not in Levy. There the defendant had been charged with robbery, burglary, and unlawful possession of a firearm stemming from a home invasion robbery. The “to convict” instruction for the burglary count constituted an improper comment on the evidence because it described the victim’s apartment as a building, which was an issue for the jury to resolve. Levy, 156 Wn.2d at 721.

In contrast, the “to convict” instruction for robbery was not an improper comment on the evidence when it described personal property as jewelry. The court reasoned that because there was no dispute that jewelry constituted personal property, it was not improper for the court to instruct the jury that jewelry was personal property. Id at 722. Nor was it an improper comment when it named the victim as the one from whom the personal property was taken “in the person or in the presence of another.” Because the victim’s name was not an element of the offense, and because the instruction did not suggest that the jury need not find the property was taken from another, the instruction did not constitute error. Id.

The challenged instruction here is more like the instructions in Levy that were not found to be improper judicial comments, than those instructions that were improper comments. As noted, no one contested that the documents found in the bedroom where the drugs and drug paraphernalia was found were the defendant's documents. Whether he had been charged with other offenses or whether he was the William Nelson named in those documents was not an element of the offense. Those documents constituted circumstantial evidence that the defendant had constructive possession of the drugs found in the same room that the documents were located in. Instructing the jury that the documents related to other cases relating to the defendant therefore did not resolve any factual issue for the jury to decide. Thus the court's instruction was not an improper comment on the evidence.

Even if the court concludes that the instruction was a comment on the evidence, it was harmless. An instruction that amounts to a judicial comment on the evidence is presumed prejudicial. Levy, 156 Wn.2d at 723. The presumption may be rebutted when the record affirmatively shows that no prejudice resulted. "The State makes this showing when, without the

erroneous comment, no one could realistically conclude that the element was not met.” Id.

In Levy the Court considered whether the judicial comment on the evidence could have reasonably affected the jury’s determination of a fact in issue. Because no rational jury would conclude that the facts in issue were anything other than what the court had instructed they were, the judicial comments on the evidence were harmless. Levy, 156 Wn.2d at 726-727.

Alternatively, in Lane the Court applied the overwhelming untainted evidence standard to find that the trial court’s erroneous comment on the evidence was harmless. The Court looked at all the other evidence that was unrelated to the evidence addressed by the court’s improper comment. Lane, 125 Wn.2d 837-840.

Under either approach the instruction at issue here was harmless. While the documents were circumstantial evidence that the defendant possessed the drugs and drug paraphernalia in the room where they were located, there was a significant amount other evidence establishing the defendant possessed the heroin found in that room with intent to deliver. The defendant told the officers the location and quantity of the heroin before the officers found it. The quantity was consistent with dealing rather than

using. There were packaging and weighing materials in close proximity to the drugs. A large sum of money that was inconsistent with the defendant's minimal income was also in close proximity to the drugs. It was not disputed that the defendant's girlfriend, Ms. Hester, occupied that room and that the defendant at least sometimes stayed the night with her. Further Mr. Olds testified that although Mr. Olds' name was on the lease, the defendant kept his property in that room, and the defendant could exclude Mr. Olds' from that room anytime he wanted to. Lastly, there was no evidence that there was any other William Thomas Nelson associated with that house other than the defendant. Thus, no juror would rationally conclude that the documents belonged to anyone but the defendant.

D. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL UNDER THE CUMULATIVE ERROR DOCTRINE.

Lastly, the defendant argues that he is entitled to a new trial under the cumulative error doctrine. That doctrine applies when there are several trial errors which standing alone do not require reversal, but when combined may deprive the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). That doctrine does not warrant a new trial even when the court

determines there are few errors which had little or no effect on the trial. Id.

Here the court did not abuse its discretion when it admitted the redacted summons and bail receipts followed by an admonition to not use those for an improper purpose. Although the court did not give a separate limiting instruction for three of the six exhibits, the defendant did not ask for a further limiting instruction as to those exhibits. Because all six exhibits represented the same three documents, and the court specifically referenced the documents represented in the three exhibits for which the court did give a limiting instruction, any failure to give an additional limiting instruction was harmless. The limiting instruction did not convey the court's opinion regarding the evidence, nor did it instruct the jury that a fact supporting an element of the offense had been proved. Thus there was only one arguable error, which had no practical effect on the outcome of the case. The cumulative error doctrine does not justify a new trial in this case.

The defendant compares the alleged errors in this case to those in State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992). The errors in Alexander, and their effect on the jury's assessment of that case, were completely different from the errors

alleged here. There the defendant was charged with rape of a child. The victim's credibility was a major issue at trial. This court found that several trial errors were committed, each of which could have affected the jury's assessment on that issue. Under those circumstances this court concluded the cumulative error doctrine justified a new trial. Id. at 154.

Unlike the errors found to have occurred in Alexander, only one possible error occurred here. The defendant's statements, testimony from police and Mr. Olds', and other physical evidence provided a strong case that the defendant possessed heroin with intent to sell it. The possible error in not providing a second limiting instruction had little if any effect on the outcome of the trial.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on June 24, 2014.

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