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Division I
State of Washington

NO. 72514-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARCUS RUFFIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The Supreme Court has held that the language of WPIC 4.01 defining "reasonable doubt" provides an accurate statement of the law. Has Ruffin shown that the Court's decision is "incorrect and harmful," the standard required to be met in order to overturn precedence?

2. Prior to Ruffin's trial, co-defendant Jacob Mommer went to trial and was convicted of first-degree murder and first-degree assault. Thereafter, Mommer agreed to testify at Ruffin's trial. Ruffin claims the prosecutor engaged in misconduct by eliciting the fact that Mommer had agreed to testify "truthfully" and that he was previously convicted as an "accomplice." Is this accurate and has Ruffin shown that any misconduct occurred?

3. Ruffin sought to admit evidence about discussions he had with his trial counsel regarding an alibi defense that Ruffin disclosed on the last day of the State's case-in-chief. Did the trial court correctly rule that Ruffin could present his alibi defense but that he could not introduce the discussions he allegedly had with his trial counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Ruffin was charged with first-degree murder, second-degree assault, and first-degree unlawful possession of a firearm. CP 10-11. A firearm allegation was charged as to counts I and II. Id. A jury found Ruffin guilty as charged. CP 58-62. Ruffin received standard range sentences and a total term of confinement of 575.50 months. CP 73, 75, 78.

2. SUBSTANTIVE FACTS

On January 3rd, 2012, at 9:57 p.m., police were called to a shooting at a Subway Shop located at 9305 Rainier Avenue South in Seattle. 5RP¹ 9-26. There was a four-door Toyota Corolla parked in the parking lot. 5RP 14, 30; 6RP 112. In the Corolla was Ashton Reyes, a 22-year-old dental assistant student. 5RP 154; 6RP 105. Reyes was lying face down across the front seat, having been shot in the back. 5RP 82; 12RP 43. The shot proved fatal with the bullet piercing her liver, lung and heart. 5RP 82; 12RP 39, 43. Across the street in the McDonald's parking lot was Jason

¹ The verbatim report of proceedings is cited as follows: 1RP--6/2/14, 2RP--6/3/14, 3RP--6/4/14, 4RP--6/9/14, 5RP--6/11/14, 6RP--6/12/14, 7RP--6/16/14, 8RP--6/17/14, 9RP--6/23/14, 10RP--6/24/14, 11RP--6/25/14, 12RP--6/30/14, 13RP--7/1/14, 14RP--7/2/14, 15RP--7/7/14, and 16RP--11/19/14.

Rose, Reyes' boyfriend. 5RP 138-40. He had been shot once in the buttocks and survived. 5RP 139.

Rose testified that he sold marijuana to medical dispensaries and also to individuals via Craigslist. 6RP 106-07. On the afternoon of January 3rd, Rose received a call from a customer wanting to buy an ounce of marijuana for \$200. 6RP 109-10. Rose said he recognized either the voice or phone number as someone he had previously met as a customer. 6RP 110. The customer, who turned out to be co-defendant Jacob Mommer, asked Rose to meet him at a Jack-in-the-Box in the University District, to which Rose agreed. 6RP 111. Reyes decided to tag along. 6RP 109.

At approximately 7:00 p.m., Rose and Reyes drove to the Jack-in-the-Box but Mommer wasn't there. 6RP 113. Rose called Mommer, who told him that his car had broken down and asked if Rose could meet him at a Chevron Station on Rainier Avenue. 6RP 113-14. Due to a mix-up as to which Chevron Station each was referring to, they again failed to meet. 6RP 117. Again Rose and Mommer spoke, with Mommer giving Rose directions to a Safeway Store on Rainier. 6RP 117. When Rose got to the Safeway Store, he did not see Mommer. 6RP 118. By phone, Mommer told Rose that he was across the street at the Subway

Shop. 6RP 118. Rose looked over and could see Mommer standing on the corner waving to him. 6RP 118-19. Rose drove over to the Subway and parked out front. 6RP 121.

Mommer came over to the car and began having a conversation with Rose through the driver's side window. 6RP 124. Concerned about conducting a transaction in plain view, Reyes asked Mommer to get into the backseat, to which Mommer complied. 6RP 124-25. Reyes then handed Mommer the marijuana, but Mommer did not hand over any money. 6RP 125-26. Instead, Mommer appeared to be stalling for time. 6RP 126. Suddenly, Reyes started screaming as a Black male came to the driver's side window with a gun and said, "[d]o you want to die, motherfucker." 6RP 127, 129.

The Black male demanded money. 6RP 129. Rose tried to calm the man down and told him that he did not have any money. 6RP 129. In the meantime, Mommer was trying to get out of the car but he could not because the backseat doors had child safety locks so that the doors could only be opened from the outside.² 6RP 133-35; 7RP 126-27.

² Rose would later tell detectives that he knew the person in the back seat had handled the inside door latch. 6RP 24.

Rose then gave the Black male Reyes' purse, even though he knew there was no money in it. 6RP 137, 139. Thinking that he was going to die, Rose decided that when the Black male stepped back to go through the purse, he was going to jump out of the car and tackle him. 6RP 139-40. In what he described as the "worst mistake of my life," Rose stepped out of the car only to have the Black male turn and start shooting. 6RP 140. The first shot missed Rose. 6RP 140. The second shot hit Rose in the buttocks, puncturing his colon. 6RP 141, 153.³

Rose scrambled over to the Subway Shop but the front doors were locked. 6RP 140, 142. He then limped over to the McDonald's Restaurant across the street. 6RP 142. He could see the shooter and Mommer standing at the back of the car with what he believed was the marijuana and his and Reyes' cell phones that had been sitting in the center console. 6RP 144, 146.

Rose had never seen Ruffin before and he did not know Mommer's name. 5RP 132. Rose told responding officers that the last phone number called on his cell phone would be the number of the person who had been in the back seat. 5RP 128-29, 142, 146. Rose said he had met this person within the last month after the

³ It is unknown if the shot that missed Rose is the shot that hit Reyes. It is possible the shooter fired more than the two shots that Rose recalled.

person had called him and purchased a starter plant from him.

6RP 152. Rose was unable to identify Ruffin from a photo montage or at trial. 6RP 162, 164.

No weapons or shell casing were found at the scene.

5RP 169; 7RP 53. Rose and Reyes' cell phones were also not recovered. 7RP 67-68. Reyes' purse – empty -- was found in the parking lot along with Rose's keys. 7RP 67-68. Detectives determined that there were no eyewitnesses to the murder who could identify the shooter by name or face. 6RP 21.

Detectives obtained the phone records for Reyes and Rose's cell phones. 6RP 28. By obtaining the last number Rose's phone contacted, detectives were able to identify Mommer as the owner of the phone the call was placed. 6RP 38-48. In addition, fingerprints lifted from the inside door latch of the backseat of the Corolla were a match to Mommer. 7RP 116; 9RP 99.

On February 14, 2012, Mommer was placed under arrest and a search of his residence conducted. 6RP 48. A piece of paper in Mommer's wallet had Ruffin's name written on it with jail visiting hours. 7RP 152-54. Two cell phones were also recovered from Ruffin's bedroom. 7RP 137, 139-40, 143.

Prior to Ruffin's trial, Mommer was charged, tried and convicted for his role in the murder of Reyes and assault of Rose. 9RP 120-21. He was subsequently called as a State's witness at Ruffin's trial. 9RP 119.

Mommer testified that he had met Ruffin in school approximately five years prior, that Ruffin went by the street name Snap, and that the two of them would hang out all the time talking and smoking pot. 9RP 123. He confirmed that Ruffin's phone number was programmed into his cell phone under Ruffin's moniker "Snap" and that it had a 229 prefix. 9RP 124.⁴

Mommer testified that sometime around December 31, 2011, he had communicated with Rose via Craigslist and had met up with him. 9RP 127. He testified that on the day of the murder, he was communicating with both Ruffin and Rose using his cell phone, a number he confirmed as 206-883-5767. 9RP 120, 127. He said

⁴ The records of six particular cell phones were introduced into evidence in this case, with each playing a significant role in implicating Ruffin. Along with Reyes and Rose's cell phone records, the records and/or phones were admitted for two phones possessed by Mommer and two phones possessed by Ruffin. Mommer admitted that at the time of the murder he possessed a cell phone with number 206-883-5767 (hereinafter, the 883 phone). 6RP 59; 9RP 120. Just after the murder, Mommer obtained a second phone with number 425-343-3725 (hereinafter, the 343 phone). 6RP 58, 63-64; 9RP 179. For months before and at the time of the murder Ruffin possessed a cell phone with number 206-229-1428 (hereinafter, the 229 phone). 9RP 124; 11RP 163-64. Just a few days prior to the murder Ruffin obtained a second cell phone with the number 206-455-3072 (hereinafter, the 455 number). 6RP 53; 8RP 177; 11RP 178.

that around 6 or 7 p.m., he set up a meeting at a Jack-in-the-Box in the University District but that he did not make it because his car was acting up. 9RP 131-32. After another failed attempt to meet at a Chevron Station, Mommer instructed Rose to drive to the Safeway on Rainier Avenue. 9RP 132-36. During this time period, Mommer was also communicating with Ruffin, who he went to pick up at a Mini Mart on Rainier Avenue in Renton. 9RP 133-34.

Mommer and Ruffin arrived at the Subway Shop prior to Rose's arrival at the Safeway across the street. 9RP 136. Mommer parked his car on a side street (52nd Avenue S), and waited until Rose called him from the Safeway. 9RP 138-39. Mommer directed Rose to drive across the street to the Subway Shop. 9RP 139. Mommer testified that before he got out of the car Ruffin said to him, "should I rob the dude?" 9RP 139. Mommer claims he merely responded, "that's up to you." 9RP 139.

Mommer waited for a few minutes on the corner until Rose called again and said he was leaving the Safeway. 9RP 141-42. Asked if he then called Ruffin, Mommer testified that he may have "pocket" called him but that he did not speak to him. 9RP 142. After waving Rose into the parking lot, Mommer said that he went

up to the driver's side window and then got into the back seat as directed by Reyes. 9RP 142, 145.

Mommer testified that when he was handed the marijuana he did not give Rose any money because Ruffin came up to the window with a gun. 9RP 146. Mommer said that while Reyes was "freaking out," Rose gave Ruffin Reyes' purse. 9RP 147. When Ruffin stepped away, Rose jumped out of the car and chased after Ruffin. 9RP 147. Mommer says that he then "heard" a gunshot, that Reyes then jumped out of the car whereupon Mommer "heard" another gunshot. 9RP 148. Mommer then climbed over the seat and went back to his car. 9RP 148-49.⁵

Back at the car, Ruffin told Mommer that he shot the girl and she was dead or seriously injured, and that he also shot the guy. 9RP 151. After agreeing that they would not use their cell phones anymore, Mommer dropped Ruffin off at the same Mini Mart he had picked him up. 9RP 151, 155-56. Ruffin told Mommer that he already had another phone he could use. 9RP 156.

⁵ Quoc Tran was on a smoke break in the Safeway parking lot when he heard two gunshots. 11RP 24, 26-27. When he looked up, he saw one person running across the street from the Subway Shop to the McDonald's. 11RP 27-29. It appeared to Tran that he was being chased by a person who was still in the parking lot of the Subway Shop. 11RP 29. Tran believed this man fired the second shot. 11RP 30. Tran then saw this man, and another man, run up 52nd Street. 11RP 30-31. A K-9 unit was able to track from the Subway Shop up to the end of 52nd Street, where the track was lost. 11RP 18.

Mommer testified that he only told one person about what had happened, a friend, Marcus Neble, who he smoked pot with. 9RP 163-64. Sometime within the week before his arrest on February 14, 2012, when Mommer, Neble and Ruffin were all smoking pot in Mommer's car, Mommer dropped off Ruffin and then told Neble "that was the dude that went to rob the person I met up." 6RP 48; 9RP 166-67.

Neble was a reluctant State's witness. 11RP 78. Asked if he had ever met a man through Mommer that went by the nickname Snap, Neble responded, "probably." 11RP 52. According to Neble, it was on a day close to when Mommer was arrested that he was smoking weed in Mommer's Cadillac with a person who "coulda been" the person who went by the nickname "Snap." 11RP 53-54. Neble testified that Mommer told him that this was the person involved in something bad that had recently happened. 11RP 55, 58. Neble admitted that he was at Mommer's house the morning Mommer was arrested, that he told the detective about this Snap person, and that he picked a person out of a photo montage shown to him by the detective. 11RP 59, 61, 75-76. Asked to identify "Snap" in court, Neble referred to Ruffin and said, "could be him, could not be him," "my best guess." 11RP 82.

Detective Rolf Norton testified that in interviewing Neble, Neble had picked Ruffin from a photo montage and said that Mommer had told him, "that's the homeboy that wanted to rob the dude." 11RP 154, 157, 159. In a subsequent interview, Neble told Detective Norton that he would refuse to testify, saying, "that little shit [Mommer] should have known what was up." 11RP 160.

Phone records corroborated the testimony of Rose and Mommer. First, although Ruffin would deny he possessed the phone used at the time of the murder (the 229 phone), substantial evidence supported Mommer's testimony that the 229 phone belonged to Ruffin. Angela Cunningham, a friend of Ruffin's, disclosed to Detective Norton that the 229 number belonged to Ruffin. 11RP 163-64. Phone records in the months just before the murder showed that Cunningham and Ruffin communicated with each other via the 229 phone. 7RP 27-30. Phone records show that when Ruffin obtained his new phone (the 455 phone) on December 27, 2011, he listed the 229 phone as his other phone. 6RP 53; 11RP 179; 13RP 32-33. And finally, call records from when Ruffin was in jail prior to November of 2011, and phone records for the 229 phone after he was released from jail and prior to the murder show that Ruffin was calling the same numbers.

11RP 165-68, 170. Ruffin was released from jail around November 9, 2011. 11RP 169. Phone service on the 229 phone began on November 14, 2011. 11RP 170.

Detectives created a number of exhibits showing the communications between Rose and Mommer, the communications between Mommer and Ruffin, and the locations of the cell towers used, in the hours leading up to the murder.

In summary, in the midafternoon, Ruffin's phone (his 229 phone) was hitting off cell towers in the Renton area, while Rose's cell phone was hitting off cell towers in Edmonds. 13RP 14-15. Around 4:00 p.m., Mommer's cell (his 883 phone) moved progressively south from North Seattle down to Skyway. 13RP 15.

Around 8:45, Mommer is shown to be in the Skyway area and he was communicating with Ruffin, who was initially in the Renton area and then began to travel up to the Skyway area. 13RP 16-17. At the same time, Mommer was also communicating with Rose, who is shown to still be in the Edmonds area. 13RP 16-17.

Around 9:00, the records show that Rose was in the University District while communicating with Mommer, and at the same time Mommer and Ruffin's phones were getting closer in

proximity to each other. 13RP 18-19. By 9:30, Rose was shown to be in the Tukwila area while Mommer and Ruffin's phones were both using towers within a few hundred meters of the Subway Shop. 13RP 19, 22-23. Communications continue between all three phones until just prior to the murder. 13RP 22-23. Records showed that Mommer called Ruffin at 9:52, just minutes before the murder, and then immediately called Rose. 6RP 81.

Subsequent to the murder, at around 10:30 p.m., Ruffin's phone returned to Renton near his home, and Mommer's phone traveled to Maple Valley where he lives. 11RP 190; 13RP 26-27.

There were no subsequent contacts between Mommer and Ruffin's phones after the murder. 5RP 197-98; 6RP 81-82.

Records show Mommer then obtained a new phone (the 343 phone) and Ruffin began using his 455 phone that he obtained on December 27, 2011. 6RP 53, 58, 63-64; 6RP 74; 11RP 179.

On the morning Mommer was arrested and his house searched (February 14, 2012), records show Ruffin called Mommer multiple times but the calls were not answered. 11RP 187.

The Defense Case

Trial commenced on June 2, 2014. 1RP. On June 30, 2014, the prosecutor informed the court that over the weekend, for the

first time, defense counsel had provided notice that the defense intended to call two alibi witnesses, Monica King and Danielle Phillips, King as an alibi witness for January 3 (the date of the murder) and Phillips for February 13 and 14 (the dates the defense alleged Mommer told Neble about a person they were with having been involved in the robbery/murder). "This comes as quite a surprise to the State since the State probably would have rested today." 12RP 4. The State sought a recess to interview the two witnesses and to determine how to deal with this new situation. "This is revolutionary information that I need time to deal with, and certainly Detective Norton and I need time to work on it." 12RP 4-6.

Defense counsel admitted that he had not previously disclosed that he was raising an alibi defense. 12RP 10. The court noted that CrR 4.7 required the defense to disclose whether it was raising an alibi defense, and to provide witness names, addresses and statements, not later than the omnibus hearing. 12RP 15. The court also noted that the court rule provides as a remedy the possible barring of the witnesses' testimony. 12RP 15; 14RP 18. The State's request for a recess was denied. 12RP 15.

King was interviewed after the trial day. 14RP 4. King admitted during the interview that she had spoken with Ruffin in jail

the prior week before going to meet Ruffin's trial counsel. 14RP 7.

During the interview, the prosecutor also asked King if Ruffin had ever asked her to lie for him or to take the rap for something he had done. To both questions, King said "no." 14RP 4-5.

Apparently unbeknownst to King, the State possessed two recorded jail phone calls from June 7, 2013, wherein Ruffin asked, and King agreed, to take the rap for a drug charge Ruffin had pending. 12RP 6-7. During the calls, Ruffin told King that she needed to go talk to his lawyer. 14RP 7. The court ruled that King's agreement to lie for Ruffin was admissible evidence that was relevant to King's credibility and bias in this case. 14RP 25.

At trial, King testified that she was Ruffin's girlfriend and alibi witness. 14RP 28. She asserted that on January 1, 2012, she was with Ruffin most of the day at a family barbecue, that on January 2, 2012, she was with Ruffin all afternoon, and that on January 3, 2012, she met Ruffin in the afternoon and was with him all night long. 14RP 36-37. King said that she met with Ruffin the prior week before meeting with Ruffin's trial counsel, however, King swore she and Ruffin did not discuss her potential testimony. 14RP 30, 42. In fact, King claimed that she had never before told

anyone that she was with Ruffin at the time of the murder and that she had never discussed the situation with Ruffin. 14RP 50, 61.

King testified that she had not wanted to get involved in the case because she had been surrounded by the system all her life and that it was stressful and draining. 14RP 65. She said that Ruffin was aware of her concerns and tried to protect her.

14RP 66. King asserted that when she would try to bring the alibi issue up with Ruffin he would tell her that he did not want her to get involved and that this was because of his concern for her issues. 14RP 61, 73.

On cross, King admitted that Ruffin uses the moniker Snap. 14RP 46. She also admitted that when she gave a statement to Ruffin's trial counsel the week prior, she told him that in December of 2011 she would communicate with Ruffin using his 455 phone number. 14RP 46. However, phone records showed that Ruffin did not obtain his 455 phone number until December 27, 2011. 6RP 53.

King also admitted that she lied multiple times when interviewed by the prosecutor, including telling the prosecutor that she was with Ruffin the entire time from January 1 through January 3 instead of just portions of that time period as she testified, that

Ruffin had never asked her to take the rap for a crime he had committed, and that Ruffin had never asked her to lie for him. 14RP 51-54, 57-58. She admitted that in June of 2013, she agreed to lie for Ruffin and to take the rap for a drug charge Ruffin had pending. 14RP 53. King tried to downplay the issue by claiming that she never followed through with the plan to take the rap for Ruffin. 14RP 78. However, she was forced to admit that the other case had not yet gone to trial.⁶ 14RP 78.

Danielle Phillips, the other another alibi witness, claimed that Ruffin was with her the entire night of February 13 through February 14 of 2012. 14RP 88-89. Although she had known for two years that Ruffin was charged with murder, Phillips claimed that the first time she ever said anything about being with Ruffin on February 13 and 14 was just the prior week when contacted by defense counsel. 14RP 92-93. On cross, Phillips, like King, claimed that in November and December of 2011, she communicated with Ruffin using his 455 number. 14RP 92.

Ruffin testified that he was not at the Subway Shop on the day of the shooting. 14RP 103. He claimed that in the months leading up to the murder he did not even own a phone, that the

⁶ Ruffin's other case was to be tried sometime after his murder trial was complete. 14RP 16.

phone he used at times was his brother's phone, and that he ultimately gave that phone to Mommer in exchange for another phone. 14RP 108-09. He claimed that when he opened up the account for the phone, the phone number he gave them was not really his, it was his brother's number – a number he said he used because he knew his brother always paid his bills on time. 14RP 109-10.

Ruffin admitted that he previously had asked King to lie for him in his drug case but he claimed that he did not ask her to lie for him in this case or to provide an alibi. 14RP 112-14. Ruffin testified that he did not want her to even testify in this case due to her emotional state and that "I know her, I know about her background, I know how she thinks." 14RP 113-14. Ruffin said that he went into "protection mode" regarding King. 14RP 114.

On cross, Ruffin admitted that he used the moniker Snap and that he had met with or communicated with King hundreds of times since he had been charged with murder. 14RP 120-22. During all those meetings and conversations, Ruffin claimed that he had never said anything to King about her being an alibi witness for him. 14RP 124, 130.

On redirect, defense counsel asked Ruffin about one of their earliest meetings and whether Ruffin remembered him telling Ruffin about possible defenses that were available in his case. 14RP 131. Ruffin said that he did. 14RP 131. Counsel then tried to ask about what specifically counsel discussed with him, to which the prosecutor raised a hearsay objection that was sustained. 14RP 133-35.

Defense counsel asserted that Ruffin would testify that he told counsel he had an alibi but that he would not tell him because he did not want to put her through the process. 14RP 138. Defense counsel asserted that this testimony, hearsay or not, was admissible because of the assertion by the State that Ruffin had withheld information. 14RP 135-38. Counsel said that there was no witness, other than himself, when Ruffin first made these statements but that at other meetings the two had, a defense investigator was present. 14RP 138-39, 146. Counsel also asserted that he (counsel) could testify as a witness as long as he did not argue his own credibility, and that Ruffin would waive his attorney-client privilege to a limited degree. 14RP 145-46.

The State responded that the issue raised was whether King and Ruffin had discussed his alibi defense, not whether Ruffin

had or had not told anybody else, including his attorney, about his alibi. 14RP 140. In addition, the State argued effective cross-examination was impossible and there were questions of delay and discovery. 14RP 140-41.

The court had several concerns. The court stated that for trial counsel to be a witness likely would require substitution of counsel and briefing about the scope of any attorney-client waiver. 14RP 155. The court was concerned about having to have a mini trial on a collateral issue and that the relevance of proposed testimony was minimal considering King and Ruffin already had testified about why King had not come forward with the fact that she could provide Ruffin with an alibi. 14RP 154-55. Under ER 403, the minimal relevance did not outweigh the delay, waste of time and confusion of the issues. Id. Further, the statements did not fall under ER 801(d)(1)(ii) as prior consistent statements because the motive to fabricate already existed at the time Ruffin and his trial counsel met. Id. The defense then rested its case.

Additional facts are included in the sections below they pertain.

C. ARGUMENT

**1. THE WPIC JURY INSTRUCTION DEFINING
“REASONABLE DOUBT” IS A CORRECT
STATEMENT OF THE LAW**

Ruffin asserts that the language of WPIC 4.01 defining “reasonable doubt” as “one for which a reason exists,” is a misstatement of the law and therefore his conviction must be reversed. This argument has no merit and has been waived. Ruffin has failed to show that the plethora of cases that have upheld WPIC 4.01, and the language used therein, are “incorrect and harmful,” the standard required to overturn precedent.

a. The Relevant Facts

Prior to trial, Ruffin requested that he be allowed to submit proposed jury instructions only after the State had submitted its proposed jury instructions. 2RP 70. Permission was granted. Id. The State proposed the standard WPIC 4.01 “reasonable doubt” instruction that reads as follows:

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your

deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP ____, sub # 42A (emphasis added) (Ruffin's case). Ruffin did not propose an alternative "reasonable doubt" instruction. Asked if they had an objection to the State's proposed instruction, Ruffin said that he did not. 14RP 162. Thus, the court gave the proposed instruction. CP 29. It is the highlighted language to which Ruffin complains.

b. The Alleged Error Is Not Manifest Allowing For Appellate Review Absent An Objection

An instructional error not objected to below may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to provide an instruction defining the *mens rea* "knowledge" was not manifest error). To obtain review, a defendant must show that the claimed error is of constitutional magnitude and that it resulted in actual prejudice.

State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). A reviewing court will not assume that an error is of constitutional magnitude. Id. The court will look to the asserted claim and assess whether it implicates a constitutional interest as compared to another form of trial error. Id. If the claimed error is of constitutional magnitude, the court will determine whether the error is manifest. An error is manifest if it is "so obvious on the record that the error warrants appellate review." O'Hara, 167 Wn.2d at 99-100. Manifest also requires a showing of "actual prejudice." Id. To demonstrate actual prejudice there must be a "plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case." Id.

Ruffin never objected to the instruction given here. This bars review unless Ruffin can prove the error is manifest constitutional error with identifiable consequences. See State v. Jacobson, 74 Wn. App. 715, 724, 876 P.2d 916 (1994); State v. Lynn, 67 Wn. App. 339, 342-44, 835 P.2d 251 (1992). Here, there can be nothing more than pure speculation that the alleged error -- the inclusion of the disputed language in the jury instructions -- had identifiable consequences. This is insufficient to allow for appellate review. State v. Donald, 178 Wn. App. 250, 271, 316 P.3d 1081

(2013) (this Court refused to hear Donald's argument regarding the "to convict" jury instructions because Donald failed to object below and failed to demonstrate prejudice as required under RAP 2.5.), rev. denied, 180 Wn.2d 1010 (2014).

c. WPIC 4.01 Correctly States The Law

Ruffin claims that the highlighted language shifts the burden of proof and requires that the jurors be able to articulate a specific reason before they can return a verdict of not guilty. The Supreme Court has found otherwise.

Jury instructions must be read as a whole and in a commonsense manner. State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008). In defining "reasonable doubt," the jury instructions must convey to the jury that the State bears the burden of proving every essential element of the crime beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

The latest Supreme Court case to hold that the language of WPIC 4.01 is an accurate statement of the law is State v. Kalebaugh, ___ P.3d ___, 2015 WL 4136540 (July 9, 2015). In Kalebaugh, the trial judge gave erroneous oral instructions when trying to further define “reasonable doubt” beyond the WPIC 4.01 instruction. The Supreme Court found that the trial judge’s erroneous oral instruction was harmless for the very reason that WPIC 4.01 was provided to the jury and it is a correct statement of the law. Id.⁷

⁷ Accord, State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (holding that the prosecutor committed misconduct by telling the jury that it had to be able to articulate a specific reason for having reasonable doubt, but that the prosecutor had also “properly describ[ed] reasonable doubt as a ‘doubt for which a reason exists’”); State v. Bennett, 161 Wn.2d at 317-18 (“[w]e have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government’s burden to prove every element of the charged crime beyond a reasonable doubt”); State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959) (in upholding an instruction that stated that the doubt which entitles a defendant to an acquittal “must be a doubt for which a reason exists,” the Court stated that “[t]his instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error] without merit”); State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901) (in upholding instruction defining reasonable doubt as “a doubt for which a good reason exists, a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance,” the Court stated that “[t]his instruction is according to the great weight of authority, and is not error”); State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (“the particular phrase, [the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists] when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary. A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years”).

The doctrine of stare decisis requires a “clear showing that an established rule is incorrect and harmful” before precedent is abandoned. In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). “The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law.” State v. Brown, 29 Wn. App. 11, 18, 627 P.2d 132 (1981). Ruffin has failed to meet this burden.

2. RUFFIN HAS FAILED TO SHOW THAT THE PROSECUTOR COMMITTED MISCONDUCT

Ruffin claims that the prosecutor committed misconduct by (1) eliciting testimony from co-defendant Jacob Mommer that he had already gone to trial and been convicted of murder as an “accomplice,” and (2) that after being convicted he had made a deal to testify “truthfully” with the potential of obtaining a reduced sentence. This claim is without merit. In neither instance did the prosecutor commit misconduct, and in any event, there could have been no prejudice.

a. Relevant Facts – Mommer’s Trial And His Agreement To Testify

Mommer and Ruffin were charged separately with the murder of Reyes and the assault of Rose. CP 1-8; CP ____, sub # 1

& 72 (Mommer's case).⁸ Mommer went to trial first.⁹ Both the State and Mommer's trial briefs indicated that the evidence that would be presented at his trial would show that Mommer was not the shooter, that he was in the backseat of the victims' car when the shooter appeared at the car window. CP ____, sub # 78 & 80 (Mommer's case). The State's closing argument PowerPoint exhibit also highlighted the fact that Mommer did not need to be the shooter, i.e., the person who caused Reyes' death, to be convicted of first-degree murder. CP ____, sub # 84B (Mommer's case).

The jury was provided with accomplice liability jury instructions. CP 128-59 (Instructions 9, 11, 18, 19 and 24). On May 1, 2013, the jury found Mommer guilty of first-degree murder and second-degree assault, each count with a firearm enhancement. CP 160-61; CP ____, sub # 88, 90 (Mommer's case).

Post-trial, Mommer approached the State, said that he had evidence to provide, i.e., the identity of the shooter, and requested

⁸ Mommer was charged on February 16, 2012. CP ____, sub # 1 (Mommer's case). The charging documents in his case did not list Mommer as the shooter but as the person who had been in the back seat when the shooter approached the window of the car. Id. Ruffin was charged on August 16, 2013. CP 1-8. The charging documents in his case described him as the shooter. Id.

⁹ Mommer's trial began on April 8, 2013. CP ____, sub # 78, 80 (Mommer's case). Ruffin's trial did not begin until June 2, 2014. 1RP.

a meeting. 2RP 62. This first meeting, held on May 7, 2013, was simply a meeting to determine whether Mommer actually had any useful information to provide. Id. The meeting was audio and video recorded. Exhibit 155 (the CD); Exhibit 151 (a transcript of the CD). A second meeting was held on August 13, 2013, wherein Mommer entered into a formal written agreement¹⁰ that included a provision that he testify in Ruffin's trial. This meeting was audio and video recorded. Exhibit 156 (the CD); Exhibit 152 (a transcript of the CD). Ruffin's defense counsel conducted a recorded interview of Mommer on March 15, 2014. Exhibit 157 (the CD); Exhibit 153 (a transcript of the CD). Then on March 16, 2014, a recorded meeting occurred where Mommer was introduced to the trial prosecutor, Adrienne McCoy. Exhibit 154 (the CD) (no transcript was made of the CD).

b. Ruffin's Trial And Mommer's Prior Statements

Ruffin's trial counsel knew that Mommer would be testifying at Ruffin's trial and that Mommer would testify that Ruffin was the shooter. 2RP 63; CP 82-127. In regards to the admissibility – or lack thereof – of Mommer's prior recorded statements, on June 24,

¹⁰ The written agreement was provided to the sentencing court in Mommer's case. CP ____, sub # 105 (Mommer's case). The agreement was not provided to the jury in Ruffin's case.

2014, the prosecutor informed the court that “normally, of course, these entire interviews would not be necessarily admissible into evidence. However, toward the beginning of the trial, Mr. Peale [Ruffin's trial counsel] made the suggestion to me that he would like them played in their entirety. The State has agreed to that.” 10RP 4-5. Peale confirmed that this was being done for “strategic reasons.” 10RP 6.

In regards to the August 13, 2013 meeting, the meeting where Mommer entered into the written agreement to testify, the prosecutor informed the court that “[t]his is primarily a recitation of the agreement between the State and Mr. Mommer for his testimony. **The State would not have offered it**, but Mr. Peale does wish it played, and the State agreed. I just wanted to put on the record that Mr. Peale does wish the entirety of the agreement as recited in this interview to be in front of the jury.” 10RP 6 (emphasis added). Peale confirmed that this was accurate. 10RP 6.

As a result of defense counsel's request, all four CD's were played for the jury. 10RP 12-18, 22-23. During the August 13, 2013 meeting the following discussion occurred:

Baird: Alright, now, um, you are seeking to enter into an agreement with the prosecution, uh, in exchange for some leniency at the time of sentencing, is that right?

Mommer: Yeah.

.....

Baird: The...the cooperation includes, but it's not limited to, but it includes your attendance at and participation in any meetings or interviews with law enforcement or defense attorneys, right; including a defense attorney of anybody that's charged subsequently. Do you understand that?

Mommer: Yeah.

Baird: Okay, um, you certainly have the right to have an attorney represent you at these meetings if you wish. You understand that?

Mommer: Mm-hmm.

Baird: Okay, but the participation in the interviews is ... is part of what you're promising to do.

Mommer: Yeah.

Baird: Okay, the um, cooperation also includes eh, most importantly telling the whole truth and the complete truth about the events for which you've been convicted. Do you understand that?

Mommer: Yeah.

Baird: And that would be in any pretrial interviews and certainly at any hearings or at trial. Do you understand that?

Mommer: Yeah.

Baird: Okay, the other uh, thing you must ... must promise is that if you're subpoenaed to testify by the prosecution or you're subpoenaed to testify by the defendant in any future trial for these crimes right you must testify and you must testify truthfully. Do you understand state that?

Mommer: Yeah.

.....

Baird: Okay, now, I wanna explain and make sure you understand a couple things, you ... if ... if I don't keep my end of the bargain or you don't keep your end of the bargain this agreement is void. You understand that?

Mommer: Yeah.

Baird: For example, if you refuse to testify or you don't testify truthfully then I'm not gonna make a motion to dismiss the firearm enhancements and I'm not gonna make a motion to seek an exceptional sentence below the standard range. You understand that?

Mommer: Yeah.

Baird: Alright, um, this agreement is dependent most importantly on being truthful. Do you understand that?

Mommer: Mm-hmm.

Exhibit 152, pp 4-8.

c. The Alleged Misconduct

The defendant contends that two exchanges between the prosecutor and Mommer constitute blatant misconduct. In discussing Mommer's agreement, the following exchange took place:

Q: In this meeting on August 13th, did you all talk about the agreement?

A: Yeah.

Q: Was there also a written agreement?

A: Yeah.

Q: Did you sign it?

A: Yeah.

Q: Do you remember the terms of your agreement with the prosecutor?

A: Yeah.

Q: And did you go over them on this interview on August 13th?

A: Yeah.

Q: Was part of the agreement that you agreed to come and testify at trial?

A: Yeah. Truthfully.

9RP 187. Ruffin did not raise an objection.

In addition, in discussing the fact that Mommer had already gone to trial, the prosecutor asked Mommer if he was "convicted of being an accomplice to murder in the first degree and assault in the second degree?" 9RP 121. Without objection, Mommer responded that he had been. Id. When asked if he knew what it means to be an accomplice, defense counsel objected on the basis that this

called for a legal conclusion and that it was not relevant. Id. Upon the objection being overruled, Mommer answered, "I was convicted of it as being an accomplice. Somebody that aids somebody in a crime." Id.

d. The Prosecutor Did Not Engage In Misconduct

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Once a defendant establishes that a prosecutor's statements are improper, the reviewing court determines whether the defendant was prejudiced under one of two standards of review. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant objected at trial, he must show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. Id. If the defendant did not object, he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Id. at 760-61.

Here, Ruffin relies on State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010) in arguing that when Mommer testified that he agreed to “testify truthfully,” this amounted to misconduct. Such is not the case.

In Ish, the State intended to call Ish’s cellmate to testify about inculpatory statements Ish had made to him while awaiting trial. Prior to trial, the defense moved to preclude the State from admitting the cellmate’s agreement to provide “a complete and truthful statement,” and to “testify truthfully.” The trial court allowed the State, in its case in chief, to ask the cellmate what type of testimony he agreed to provide, to which the cellmate responded, “[t]ruthful testimony.” Ish, at 194.

While the four justices in the lead opinion could not agree whether to analyze the issue as a claim of misconduct, or as an evidentiary error under ER 403, the four justices did agree that such evidence “*may*” amount to a mild form of vouching under certain circumstances,¹¹ that generally such evidence should not be admitted in the State’s case-in-chief before the witness’s credibility

¹¹ “Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness’s testimony.” Ish, at 196.

has been attacked by the defense, but that in Ish's case, any error was harmless. Ish, at 197-200.

The four justice concurrence believed that the issue was solely one of a balancing test under ER 403, that under certain circumstances the evidence would be admissible in the State's case-in-chief, and that the questions asked of Ish's cellmate did not amount to improper vouching. Ish, at 201-06.¹² What both the lead opinion and concurring opinion agreed was that the State may introduce such evidence in its case-in-chief to "pull the sting" out of an anticipated defense attack. Ish, at 199 n.10, 203 (citing State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997)).¹³

Here, whether considered an issue under ER 403, or an issue of misconduct, the result is the same – there was no error or misconduct here because three things are apparent from the record.

First, the State did not elicit the fact that Mommer agreed to testify "truthfully." In a very direct and in a very concise question,

¹² Justice Sanders was the lone dissenter, concurring with the lead opinion's analysis but believing the error was not harmless. Ish, at 206-09.

¹³ The four justice concurrence believed this is exactly what the prosecution was doing in Ish's case, "blunting" the impact of Ish's argument that the cellmate was lying to secure the benefit of the agreement to testify. Ish, at 203. The four justice lead opinion did not directly address the issue because the trial judge's ruling was not based on a finding that the State could anticipate that the defense would impeach the witness with the agreement to testify. Id. at 199 n.10.

the prosecutor asked Mommer, "was part of the agreement that you agreed to come and testify at trial?" 9RP 187. The question called for a "yes" or "no" answer. Instead of simply answering yes or no, Mommer answered "[y]eah. Truthfully." 9RP 187. This answer could have been objected to as non-responsive and stricken, with a curative instruction, if Ruffin had felt the answer was not admissible.¹⁴ Equally important is the fact that unlike the situation in Ish, the prosecutor did not elicit Mommer's additional statement about truthfulness. In fact, the prosecutor never questioned Mommer about his agreement to testify "truthfully," and the prosecutor never mentioned this fact in closing argument.

Second, Ruffin fails to explain how he can allege error based on this single statement that Mommer agreed to testify truthfully when at the same time, he played for the jury the entire CD of the meeting wherein Mommer entered into the agreement to testify and he repeatedly agreed to testify truthfully. It certainly cannot be error for the State to discuss the same evidence admitted by a defendant. Moreover, if the prosecution had in fact solicited Mommer's answer about testifying truthfully, this is exactly the type

¹⁴ A failure to object to the admission of evidence waives any challenge on appeal. State v. Perez-Cervantes, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000).

of situation approved of in Ish and Bourgeois, the “blunting” of the defense attack on the credibility of the witness where it can be “anticipated” that the witness will be impeached. Here, it was not just anticipated, it was a certainty.¹⁵

Ruffin’s second claim of misconduct, that the prosecutor interjected “unsubstantiated speculation” that Mommer was convicted as an accomplice, is equally unavailing. The prosecutor did not interject anything. The prosecutor asked Mommer if he had been convicted as an accomplice.¹⁶ Certainly Mommer knew (as did Ruffin’s trial counsel) that the State’s theory at his trial, and the evidence that was produced at the trial, was that he was not the shooter.¹⁷ A witness is permitted to testify to evidence to which he or she has personal knowledge. See ER 602. The defendant’s argument that somehow Mommer’s testimony amounted to the

¹⁵ While the State believes this Court need not address this claim further because no misconduct occurred, clearly where the defense has admitted the same evidence that their claim of misconduct is based, there can be no prejudice.

¹⁶ A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she solicits, commands, encourages, or requests another person to commit the crime; or aids or agrees to aid another person in planning or committing the crime. RCW 9A.08.020(3)(a)(i), (ii).

¹⁷ Had the prosecutor proceeded on inconsistent theories against Mommer and Ruffin, this could have amounted to a due process violation. See State v. Davila, 183 Wn. App. 154, 174, 333 P.3d 459 (2014) (“The use of inconsistent theories to obtain convictions against separate defendants in prosecutions for the same crime violates the due process clause if the prosecutor uses false evidence or acts in bad faith”).

prosecutor "vouching" for the credibility of the witness or that the prosecutor was asking the jury to render a verdict on facts not in evidence is simply not supported by the evidence and is not supported by any case law.

3. RUFFIN'S DUE PROCESS RIGHT TO PUT ON A DEFENSE WAS NOT VIOLATED

Despite the rules of evidence, Ruffin contends that when the trial court ruled against him in regards to presenting testimony about discussions he had with his trial counsel about an alibi defense, his right to present a defense under the Due Process Clause was violated. This is not the case. Ruffin was never prevented from putting on a defense, he was merely prevented from presenting inadmissible evidence in a situation that likely would have caused a substantial delay of trial, if not an outright mistrial of his case.

a. The Constitutional Claim

Ruffin's argument boils down to a claim that his constitutional right to put on a defense trumps well-established rules of evidence and allows for the admission of any evidence so long as it is relevant. This argument fails.

The Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution have been interpreted to include the right to present a defense. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). It is well settled, however, that the right to present a defense is not absolute. Montana v. Egelhoff, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996); Maupin, at 924. For example, the right to present a defense does not extend to evidence that is only minimally relevant. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

The Court has been circumspect when assessing whether the exclusion of certain evidence amounts to a constitutional violation. Crane v. Kentucky, 476 U.S. 683, 689-90, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). Even where Confrontation Clause rights are implicated, a trial judge still retains wide latitude and may exclude prejudicial evidence or evidence that may confuse the issues. Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); see also Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 798 (1988) (an accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence -- court properly excluded defense witness for a willful discovery violation);

United States v. Scheffer, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) (rules excluding evidence do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve -- rule excluding polygraph evidence proper exercise of legitimate State interest in ensuring that only reliable evidence is presented at trial).

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999) is particularly relevant. Finch was convicted of capital murder for the killing of a friend of his estranged wife and a police officer. During the State's case-in-chief, a friend of the defendant testified that Finch told him that he deliberately shot the police officer. Finch sought to rebut this evidence with testimony from another person who would testify that, in a separate conversation, Finch told her that he did not intend to kill the officer. The trial court excluded the testimony as self-serving hearsay and Finch appealed.

First, the Supreme Court noted that the out-of-court statement of Finch was hearsay and inadmissible under the rules of evidence. Finch, 137 Wn.2d at 824. The Court noted that:

The problem with allowing such testimony is that it places the defendant's version of the facts before the jury without subjecting the defendant to cross-

examination. This deprives the State of the benefit of testing the credibility of the statements and also denies the jury an objective basis for weighing the probative value of the evidence.

Id. at 825. Still, Finch argued that the exclusion of the evidence denied him his right to compulsory process. But the Court stated the firmly established rule that “[a] defendant’s right to admit evidence pursuant to his right to compulsory process is subject to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” Id. (citing Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). The Court held that the right to compulsory process did not trump the rules of evidence and allow the defendant to tell his story and escape cross-examination. Thus, the trial court did not abuse its discretion in excluding the testimony. Id.

Here, Ruffin was not prevented from putting on his alibi witness and his alibi defense, even though the trial court possessed the discretion to bar the testimony under CrR 4.7(h)(7) for the clear and admitted late disclosure in violation of CrR 4.7(b)(1) and (b)(2)(xii). The defense was denied admission of but a single piece

of evidence under firmly rooted rules of evidence. There was no constitutional issue at stake and no constitutional violation.

b. Applying The Rules Of Evidence

To begin, Ruffin's focus on the conversations he had with his attorney miss the focus of the issue before the jury and the trial court's ruling. Ruffin was not the alibi witness, King was. It is King's testimony, and the timing of her disclosure, that was the focus of the trial court's actions.

Despite being Ruffin's girlfriend and despite knowing Ruffin faced a murder charge, King testified that she never mentioned to **anyone** that she could provide an alibi for Ruffin until his trial was nearly complete. She did not contact the police. She did not contact the prosecutor. She did not contact Ruffin's counsel. She told no one. And King was allowed to testify why. She testified that she did not tell anyone because she did not want to get involved in the system because it would be emotionally difficult for her.

The timing of Ruffin's claim that he was not present at the murder scene was not an issue before the jury. The timing of defense counsel's disclosure of an alibi defense was not an issue before the jury.

If King had made prior consistent statements they might have been admissible under ER 801(d)(1)(ii). ER 801(d)(1)(ii) provides that a prior statement by a witness who testifies at trial and is subject to cross examination is admissible if the prior statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." No such statement of King was offered and since King testified that she never told anyone about being an alibi witness, no such statement is known to exist.

Similarly, if the State had cross examined Ruffin with a claim that he never told his trial counsel about the fact that he had an alibi until near the end of trial, then Ruffin could potentially argue that prior consistent statements of his might be admissible under ER 801(d)(1)(ii). This, however, did not occur. The jury was not informed when Ruffin allegedly told his attorney about the fact that he had an alibi for the night of the crime.¹⁸

¹⁸ In front of the jury, defense counsel did ask Ruffin if he had wanted King to testify in his case, but the timing of Ruffin's disclosure to counsel was not an issue raised in front of the jury. 14RP 114. It should also be noted that it is not apparent, even from trial counsel's offer of proof, that Ruffin ever provided trial counsel with King's name until the end of trial. See 14RP 137-38. Counsel's offer of proof suggests that, at best, Ruffin indicated he had an alibi witness. This is supported by the fact that if counsel knew King was an alibi witness, it

In short, Ruffin's claim of relevance is limited at best. To be "relevant," evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Here, at best, the conversations between Ruffin and his trial counsel would explain why trial counsel did not look for King earlier. However, again, this was not an issue before the jury.

Finally, even where evidence is deemed relevant, it is not necessarily admissible. The right to put on a defense and admit evidence is still limited by the general rules of evidence, including ER 403. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Under ER 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Here, Ruffin attempts to minimize the situation that existed and posits unrealistic solutions. For example, he suggests that instead of his trial counsel testifying – as he suggested at trial, he

would have been incumbent on him to contact her and to disclose this information to the State – regardless of Ruffin's wishes.

suggests the defense investigator testify. This “remedy” fails. First, the defense investigator was not present when Ruffin purportedly first suggested to his trial counsel that he had an alibi. 14RP 138. Second, the State would have a right to, at a minimum, have the defense file subject in *in camera* review and to fully interview both the defense investigator and trial attorney because what specifically Ruffin said would be critical to full cross examination, as would anything he said that conflicted with his purported alibi defense. For example, if he told trial counsel that he was present but was not the shooter, this would be subject to full discovery. As the trial court noted, the scope of the attorney client privilege would have to be briefed and litigated. In addition, the State knows of no basis in which trial counsel could continue representing Ruffin at trial because he would be making himself a witness – whether by Ruffin or the State. Thus, either a lengthy recess would be necessary or a mistrial declared.

A trial court’s decision to exclude evidence is reviewed for abuse of discretion. State v. Luvene, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). While reasonable minds might disagree with the trial court’s evidentiary ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). An abuse of

discretion is shown when the reviewing court is satisfied that “no reasonable judge would have reached the same conclusion.”

State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). The trial court did not abuse its discretion here.

In any event, considering that Ruffin was allowed to present his alibi defense, the exclusion of whatever minimal relevance Ruffin’s conversations with his trial counsel could have provided, was harmless. An error is grounds for reversal only if it has prejudiced the defendant. State v. Gower, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014). To be prejudicial, the court must find that there is a reasonable probability that the outcome of the trial would have been materially affected absent the error. Id.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant’s conviction.

DATED this 7 day of August, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the respondent, Dana Nelson at Nielsen, Broman & Koch, containing a copy of the Brief of Respondent, in STATE V. RUFFIN, Cause No. 72514-9-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

08-07-15

Date