

NO. 36379-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

CLINTON THORNTON,

Appellant.

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DIVISION II
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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-01690-2

BRIEF OF RESPONDENT

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DATED April 15, 2008, Port Orchard, WA [Signature]
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly rejected Thornton's proposed "other suspect" evidence that the driver of the car in which Thornton was riding when he was arrested was subsequently stopped and drugs were again found, particularly where Thornton was again in the car during the second stop?

2. Whether Thornton failed meet the foundational requirements for admission of testimony from his mother that he had a reputation for sobriety?

3. Whether Thornton fails to show manifest constitutional error occurred when one of the officers allegedly commented on his guilt in response to defense examination regarding her failure to collect fingerprints?

4. Whether Thornton has shown that any part of his trial was closed to the public?

5. Whether Thornton fails to show that the trial court abused its discretion when it refused to excuse the entire panel when two jurors commented on Thornton's appearance during voir dire?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Clinton Thornton was charged by information filed in Kitsap County

Superior Court with third-degree assault and possession of methamphetamine. CP 12. After trial, the jury found Thornton guilty as charged. CP 60.

B. FACTS

The State will discuss the specific facts pertaining to the exclusion of Thornton's proffered evidence, the alleged comment on guilt, and the voir dire issues in the argument portion of this brief. The following evidence was adduced at trial.

Port Orchard Police Officer George Counselman testified that he was on patrol the evening of November 18, 2006. 3RP 264. Officers Walker and Deatherage stopped a car belonging to Dill. 3RP 266. Counselman proceeded to the scene to assist. 3RP 266.

Dill had been arrested due to a license violation and the car was going to be impounded. 3RP 266. They therefore asked the two passengers to exit the vehicle. 3RP 267. One of the passengers, King, was arrested on an outstanding warrant for DUI. 3RP 267-68. Thornton, the other passenger, became upset when they arrested King. 3RP 268. He began yelling that it was a scam. 3RP 269. Thornton went from calm to angry very quickly, which made Counselman suspect he was under the influence of something. 3RP 269.

Thornton had originally been free to go, until they found open containers of alcohol in the vehicle. At that point he was detained to identify him. 3RP 277. Counselman ran Thornton's ID, which came back clear. 3RP 270. Thornton nevertheless continued to shout that King's arrest was a scam. 3RP 270. Walker told him he needed to calm down. 3RP 271.

When Thornton got out of the car, he was carrying a bottle of juice and Dill's backpack. 3RP 271. At some point the bottle was opened and a scuffle ensued between Walker and Thornton. 3RP 271. Thornton pushed Walker in the chest with both hands, hard enough to push Walker back. 3RP 271. The juice bottle went flying when Thornton pushed Walker, and the juice dumped out. 3RP 272. Walker informed Thornton that "that was an assault on a police officer," and attempted to handcuff him. 3RP 271.

Thornton struggled and they ended up in the grassy area on the other side of the sidewalk. 3RP 271. Counselman followed to help handcuff him. 3RP 271. Thornton eventually became calmed down after he was put in the back of Counselman's car. 3RP 272.

At Counselman's request, Thornton waived his rights, but denied knowing anything about the drugs or paraphernalia found in the car. 3RP 273. Thornton was then taken to the jail. 3RP 274.

David Walker, who had nine years experience as a police officer in

New Orleans, testified that he was training as a new officer in Port Orchard in November 2006. 3RP 281, 283. On November 18, he was riding with Officer Deatherage. 3RP 283-84.

They stopped Dill's car due to a license plate violation. 3RP 284. They ran Dill's license and determined it was suspended, whereupon he was arrested. 3RP 285.

Deatherage suspected the passenger, King, whom she knew, had a warrant. 3RP 285. They confirmed that he did, and arrested him as well. 3RP 285. They noticed that there were some open malt beverage cans in the car, so they asked the rear passenger, Thornton, to exit the car. 3RP 287. They asked Thornton to stand by at the rear of Dill's car while they searched it. 3RP 288.

Thornton kept telling them that they did not have probable cause to stop the car, that they did not know what they were doing and that they had no reason to stop them. 3RP 288. Thornton had a juice bottle. 3RP 289.

Walker smelled alcohol on Thornton, but the malt cans were not near him. 3RP 289. Walker suspected the juice bottle might contain alcohol. 3RP 289. Walker took the juice bottle and poured some of it out, to see if there was alcohol in it. 3RP 290. Some of it accidentally splashed on both Walker and Thornton. 3RP 290. Thornton became angry and shoved Walker

back with both hands. 3RP 291. Walker took half a step back as a result. 3RP 291. Walker told Thornton that he had assaulted a police officer, and arrested him. 3RP 292.

In the process they went backwards over the curb and landed in the grass. 3RP 292. Counselman had to assist. 3RP 292. They handcuffed Thornton and placed him in the back of Counselman's vehicle. 3RP 293.

Deatherage then continued to search Dill's car. 3RP 293. Walker assisted her by shining his flashlight and holding bags to put evidence in. 3RP 294. She found an eyeglass case that had some suspected methamphetamine crystals in it. 3RP 294. They also found some scales and a pipe. 3RP 294.

Officer Beth Deatherage testified that she was acting as a training officer with Walker the night of the stop. 3RP 306. Walker was driving and they were focusing on traffic enforcement that evening. 3RP 306. They ran the license plate on Dill's car and it came back cancelled. 3RP 307. They pulled the car over. 3RP 307.

Walker contacted the driver and Deatherage stayed on the passenger side of the car to keep an eye on the passengers. 3RP 307. Dill's license was suspended, so they took him into custody for driving with a suspended license. 3RP 308. Once Dill was secured in the back of their police vehicle,

Deatherage contacted the passengers. 3RP 308. She initially explained to them that they were free to leave because they had to deal with the driver and with the car. 3RP 309. But then when King got out, she saw an open can of beer in the floorboard. 3RP 309. It was on the floor between where King's legs would have been. 3RP 309. Then she saw a second partially-crushed can wedged between the front seat and the B-pillar. 3RP 310. It appeared to have been within the reach of the rear passenger. 3RP 310. Both cans were a quarter to half full. 3RP 310.

Once Deatherage saw the beer, the situation changed and she decided to identify both the passengers. 3RP 311. She announced this loudly so that Walker would know the passengers were no longer free to leave. 3RP 311. Walker dealt with Thornton and Deatherage dealt with King. 3RP 312. King was arrested on an outstanding warrant. 3RP 312. As she was handcuffing King, Thornton protested that it was a scam. 3RP 312. Deatherage informed Thornton that there was a warrant for King's arrest. 3RP 312.

While Deatherage continued to deal with King, searching his person incident to his arrest, Thornton continued to be argumentative. 3RP 313. At one point she glanced over and saw a bottle flip up in the air and then heard Walker say "You shoved me. That's an assault." 3RP 313.

Once King and Thornton were secured, they searched the car incident

to arrest. 3RP 314. Walker took the driver's side and Deatherage took the passenger side. 3RP 314. Under the front passenger seat, she found a silver pouch that contained two pipes and a small baggie with methamphetamine in it. 3RP 316.

In the back seat, she found a hard sunglass case "jammed into the seat crack ... where the seat back and the seat bottom meet." 3RP 319. She would not characterize it as "pulling apart" the rear seat. 3RP 331. She pried the cushions apart just enough to insert her little flashlight. 3RP 331. It would have been in the middle of the passenger's back. 3RP 320. She located it by pulling the two parts of the seat apart and then shining her flashlight into the crack. 3RP 321. When she saw the case, she pulled the seat bottom up and pulled the case out. 3RP 321. The case contained more methamphetamine. 3RP 321.

The crime lab technician identified the drugs as methamphetamine. 3RP 342.

Thornton testified and claimed that he flinched and smacked the bottle away when Walker poured the juice on his leg and shoe. 3RP 350. He denied shoving or hitting him. 3RP 350.

The car was cramped and full of trash and stuff. 3RP 350. Thornton asserted that the only thing of his in the car was his laptop, which was in

Dill's bag. 3RP 351. He did not know there were any drugs in the car: "If I would have known, I wouldn't have gone along for the ride." 3RP 352.

On cross, Thornton admitted to being kind of loud and mouthy, but denied saying it was a scam. 3RP 353. He knew about the beer, but it was Dill and King who were drinking it. 3RP 354. He bought the juice when they bought the beer because he did not drink alcohol. 3RP 355. He asserted that he never used methamphetamine. 3RP 357. He did not know if King or Dill used it. 3RP 358.

King testified that he had never seen Thornton with any of the contraband admitted at trial. 3RP 368-69. He stated that Walker dumped the bottle on Thornton's shoes and Thornton knocked it out of his hand. 3RP 371. Walker then grabbed Thornton and took him to the ground. 3RP 372.

On cross, King asserted that he told Deatherage he did not know anything about the methamphetamine and pipes. 3RP 374. He did not recall telling her he knew nothing about the beer. 3RP 374. One of the beers was his and he told her that. 3RP 375. Would not have been able to see Thornton stuff the glass case into the seat from where he was sitting. 3RP 376. The floor of the car was covered with garbage. 3RP 377.

Thornton's final substantive witness was Dill. Dill asserted that Walker poured the soda on Thornton's pants and shoes. 3RP 387. Thornton

then knocked the bottle out of his hand. 3RP 386. Walker slammed Thornton on the trunk of the car and then onto the ground. 3RP 387. It allegedly damaged Dill's antenna. 3RP 387. Dill had never seen the contraband before. 3RP 389. His car was a mess because he was constantly giving other people rides and they frequently left trash in it. 3RP 390.

On cross, Dill claimed that he had bought the car the previous July, and had no idea that the plate was invalid. 3RP 391. He had no idea there was any methamphetamine in the car. 3RP 391. Dill asserted his Fifth Amendment rights, however, when asked if he had ever used methamphetamine. 3RP 392. His backpack, the one containing Thornton's laptop also contained a small scale of the type used for weighing drugs, which Dill characterized as a "teener scale." 3RP 393. He then clarified that it was a "teeter" scale. 3RP 394. He stated that it was his scale. 3RP 394. He had never found methamphetamine or paraphernalia in his car after giving someone a ride. 3RP 395. The beer was King's. 3RP 395. He denied that they stopped at the store to buy beer on the way back from Bremerton. 3RP 395. He also testified that it was possible that Thornton could have stuffed the glass case into the seat. 3RP 396.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY REJECTED THORNTON'S PROPOSED "OTHER SUSPECT" EVIDENCE THAT THE DRIVER OF THE CAR IN WHICH THORNTON WAS RIDING WHEN HE WAS ARRESTED WAS SUBSEQUENTLY STOPPED AND DRUGS WERE AGAIN FOUND, PARTICULARLY WHERE THORNTON WAS AGAIN IN THE CAR DURING THE SECOND STOP.

Thornton argues that the trial court erred in excluding "other suspect" evidence. Because the record does not support the factual basis on which Thornton's argument rests, it cannot be said that the trial court abused its discretion in excluding the evidence.

The admission and exclusion of evidence are within the sound discretion of the trial court and, thus, are reviewed for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A decision to admit or exclude evidence, therefore, will be upheld absent an abuse of discretion, which may be found only when no reasonable person would have decided the same way. *Thomas*, 150 Wn.2d at 869.

Thornton's theory is that it would have been relevant for the jury to know that "Dill was arrested with methamphetamine in his pocket and other drug paraphernalia hidden in the same seat, it might not have drawn the inference that Thornton must have exercised dominion and control over the

eyeglasses case.” *Brief of Appellant* at 9-10. He further asserts that Dill “had drug paraphernalia secreted in the same place in his car where the police found the drugs” Thornton was charged with possessing. *Brief of Appellant* at 12. This argument is factually flawed.

The cases that consider other-suspect evidence require a train of facts or circumstances that tend clearly to point to someone besides the one charged as the guilty party. *State v. Lord*, 128 Wn. App. 216, ¶ 128, 114 P.3d 1241 (2005), *aff’d*, 161 Wn.2d 276 (2007). The reason for requiring such a connection is to avoid situations where a defendant points to other suspects simply to divert suspicion from himself, where there is no real evidence to support the inference. *Id.*, (citing *State v. Mak*, 105 Wn.2d 692, 716-17, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986)). “[A] great many trial days might be consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion.” *Id.* (quoting *Mak*, 105 Wn.2d at 717). The facts presented below simply did not meet these standards.

In November, Thornton was arrested and charged with possessing methamphetamine that was found wedged in between the cushions of the car seat in which he was seated in the rear of Dill’s car. Dill was driving when the police stopped the car. The police also found two glass pipes and some additional meth beneath the front passenger seat occupied by King at the time of the stop. Thornton was not charged with possession of these latter items.

In December, Dill was again stopped, and Thornton was again in the car. This time the, the police located a glass bong in the rear *floorboard* and some methamphetamine in Dill's pocket. The paraphernalia was found behind the seat in which Thornton was seated.

The trial court specifically rejected, as a factual matter, the contention that the drugs in the November stop were in the "same place." 2RP 57. Moreover, Thornton was present both times and on the second occasion, was seated directly in front of the paraphernalia located on the floorboard of the car. Thornton has not assigned error to these factual findings, and they are therefore verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

The only commonalities between the two incidents were that both Thornton and Dill were in Dill's car and that drugs were found. Moreover, the paraphernalia found in December was located directly behind Thornton and could easily have been deemed to be in his dominion and control. The December incident was thus at best probatively neutral and did not make it any more or less likely that Thornton possessed the methamphetamine in November. It therefore failed the basic test of relevance, and the trial court did not abuse its discretion in excluding it.

Further even if this evidence could be deemed to have some slight

probative value, the trial court correctly determined that under ER 403, the evidence would take the trial too far afield and was thus more prejudicial than probative. 2RP 57, 61.

Finally, with regard to the constitutional aspect of Thornton's claim, the defendant's right to present evidence in support of his case is limited by the requirement that the proffered evidence not be "otherwise inadmissible." *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). This is because "a criminal defendant has no constitutional right to have irrelevant evidence admitted." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Since the evidence Thornton proffered was not relevant, the trial court's ruling did not violate his constitutional right to present a defense.

B. THORNTON FAILED MEET THE FOUNDATIONAL REQUIREMENTS FOR ADMISSION OF TESTIMONY FROM HIS MOTHER THAT HE HAD A REPUTATION FOR SOBRIETY.

Thornton next claims that the trial court erred in excluding evidence of Thornton's reputation for sobriety. While it is apparent that the trial court misread the controlling authority, this claim is nevertheless without merit because the record fails to show that the any admissible evidence was excluded.

In *Kennewick v. Day*, 142 Wn.2d 1, 15, 11 P.3d 304 (2000), the Supreme Court held that evidence of the defendant's reputation for sobriety was admissible in simple possession cases where the defense of unwitting possession was raised. Both the State and the trial court below misread *Day's* holding as not applying in any simple possession case, regardless of whether unwitting possession was raised. 3RP 252-53. The trial court was thus in error as to the grounds for excluding the evidence.

Nevertheless, the record does not support Thornton's claim that the trial court committed reversible error. An appellate court may affirm a trial court's decision on any theory supported by the record and the law. *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998). The appellate court may therefore affirm on other grounds even after rejecting a trial court's reasoning. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993). Here, the record fails to show that an abuse of discretion in excluding the proffered evidence.

The admission of reputation evidence is governed by ER 405(a). As this Court recently observed, Second, ER 405(a) does not permit proof of character in the form of an opinion. *State v. Mercer-Drummer*, 128 Wn. App. 625, ¶ 20, 116 P.3d 454 (2005). The rule requires, therefore, the proof be by evidence of reputation in the community. The Court noted that the comment

to ER 405 specifically states:

This section differs from Federal Rule 405 in that the *Washington rule does not permit proof of character by testimony in the form of an opinion*. Previous Washington law has not permitted the introduction of opinion testimony to prove a person's character. The drafters of the Washington rule felt that the policy established by decisional law was preferable to that of the federal rule.

Id. (emphasis the Court's).

This testimony can only be made through a character witness who is knowledgeable about the defendant's reputation in the community for the character trait at issue. *State v. Callahan*, 87 Wn. App. 925, 934, 943 P.2d 676 (1997). The community from which the opinion is sought must be neutral and general. *See State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993).

Therefore, in order to admit such reputation testimony, a defendant must establish both that the character witness is familiar with the defendant's community and that the witness's testimony is based on the community's perception of that person with regard to the character trait. *Callahan*, 87 Wn. App. at 935. This Court reviews the trial court's decision regarding the adequacy of the foundation necessary to admit evidence for an abuse of discretion. *Callahan*, 87 Wn. App. at 934. On appeal, the party offering the evidence must prove the trial court abused its discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d

538 (1983).

Here, the offer of proof was very brief and does not come close to meeting these requirements:

The one other issue I have, Your Honor, is, as you know, with our jury fiasco yesterday, comments were made about Mr. Thornton's appearance. Mr. Thornton's mother would like to testify regarding, traditionally, Mr. Thornton's appearance since he was a child. ... and her understanding of the reputation that Mr. Thornton did not use methamphetamine.

3RP 249-50. Neither the community in question nor the basis of the mother's knowledge of that reputation is identified.

Moreover, family members are likely neither neutral nor sufficiently generalized to constitute a community for the purposes of reputation evidence. This is because "the inherent nature of familial relationships often precludes family members from providing an unbiased and reliable evaluation of one another." *State v. Gregory*, 158 Wn.2d 759, 805, 147 P.3d 1201 (2006). Since Thornton made no offer of proof that established that his mother was neutral or that she had any knowledge of Thornton's reputation in the community, he has not met his burden of showing that the trial abused its discretion. This claim should be rejected.

C. THORNTON FAILS TO SHOW MANIFEST CONSTITUTIONAL ERROR OCCURRED WHEN ONE OF THE OFFICERS ALLEGEDLY COMMENTED ON HIS GUILT IN RESPONSE TO DEFENSE EXAMINATION REGARDING HER FAILURE TO COLLECT FINGERPRINTS.

Thornton next claims for the first time on appeal that one of the officers improperly commented on his guilt in response to defense examination regarding her failure to collect fingerprints. This claim is without merit because.

Generally, this Court will not consider an evidentiary issue raised for the first time on appeal, any error is deemed waived. RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, ¶ 20, 155 P.3d 125 (2007). The reason for this rule is that This objection gives a trial court the opportunity to prevent or cure error. *Kirkman*, 159 Wn.2d at ¶ 17. For example, a trial court may strike testimony or provide a curative instruction to the jury. *Id.*

A narrow exception exists, however, for “manifest error[s] affecting a constitutional right.” RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at ¶ 20. “Impermissible opinion testimony regarding [a] defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury.” *Kirkman*, 159 Wn.2d at ¶ 22.

However, the Court on appeal “will not approve a party’s failure to

object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction),” because [f]ailure to object deprives the trial court of this opportunity to prevent or cure the error. *Kirkman*, 159 Wn.2d at ¶ 53. The decision not to object is often tactical. *Id.* If raised on appeal only after losing at trial, a retrial may be required with substantial consequences. *Id.* The defendant therefore must show the error is “manifest,” meaning, in the present context, that the testimony included an explicit or nearly explicit opinion of guilt that resulted in actual prejudice. *Kirkman*, 159 Wn.2d at ¶ 21, 23.

Citing *Demery*, *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003), and *State v. Barr*, 123 Wn. App. 373, 98 P.3d 518 (2004), Thornton suggests that it is *per se* manifest constitutional error whenever a witness expresses an opinion on an ultimate issue of fact. Brief of Appellant, at 14. In *Kirkman*, however, the Court specifically disapproved *Demery* and *Dolan* to the extent that they concluded that such testimony was necessarily manifest constitutional error. *Kirkman*, 159 Wn.2d at ¶ 56-58. *Barr*, on the other hand applies the same analysis as *Kirkman*, requiring both improper testimony and prejudice. It thus does not support any contention that such comments are *per se* manifest error.

In determining whether statements are in fact impermissible opinion testimony, the court will generally consider the circumstances of the case,

including the following factors:

- (1) “the type of witness involved,”
- (2) “the specific nature of the testimony,”
- (3) “the nature of the charges,”
- (4) “the type of defense, and”
- (5) “the other evidence before the trier of fact.”

State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). (quoting *Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

In *Heatley*, even though an officer testified about ultimate factual issues, the Court held that the testimony did not constitute an opinion on guilt. In that case, the defendant was charged with reckless driving and DUI. At trial, a police officer who had observed Heatley shortly after the incident testified that Heatley was “obviously intoxicated” and “could not drive a motor vehicle in a safe manner.” *Heatley*, 70 Wn. App. at 576. This Court upheld the ruling admitting the officer’s testimony, concluding that it “contained no direct opinion on Heatley’s guilt” and was only an opinion on an ultimate factual issue that supports the conclusion that the defendant is guilty, not an opinion on guilt per se. *Heatley*, 70 Wn. App. at 579.

Here, Officer Deatherage was repeatedly questioned on cross-examination about whether various items had been fingerprinted. On re-direct, the prosecutor asked her why she had not attempted to take any fingerprints. Deatherage responded:

Oh, number one, again, I didn't have my patrol car with me and didn't have the capability of taking any sort of fingerprints only for the glass pipes.

The plastic bags, with myself and my experience, I don't have the capability of taking fingerprints off a plastic bag. And, number three, the location where the narcotics were found, in my opinion, it was pretty obvious who owned them.

3RP 335. Thornton did not object and did not attempt revisit the issue on re-cross-examination.¹

Here, the primary thrust of the officer's testimony was that no fingerprints were taken because it was not feasible. She did not actually state that she believed Thornton owned the drugs, or that she thought he was guilty. As such, under *Kirkman* and *Heatley*, the testimony was not a direct or indirect comment on guilt.

Moreover, even if inappropriate, the comment could not have been prejudicial. Tellingly, Thornton presents no argument in his brief that there was actual prejudice to his case. The State's theory of the case at trial was one constructive possession. 4RP 441. The evidence showed that there were three people in the car. Only one was in the back seat, Thornton. The case in which the drugs were found was shoved between the cushions directly behind where he was seated.

In his defense, Thornton simply denied that the drugs were his or that

¹ Officer Walker was asked the same question on re-direct and responded only that they did

he used methamphetamine. 3RP 352. He also called the other occupants of the car, Dill and King. King denied knowing anything about the drugs. 3RP 374. Dill, the owner of the car, stated that he had no idea that there was methamphetamine in the car. 3RP 391. He did testify that the backpack that contained Thornton's backpack also contained a "teener"² scale of the type used for measuring drugs. 3RP 393. Although he complained that people he gave rides to frequently left a lot of stuff in his car, he denied that anyone had ever left methamphetamine or paraphernalia in it. 3RP 395. He also conceded that it was possible that Thornton could have stuffed the glass case into the seat. 3RP 396.

In light of the evidence and the weak defense presentation, the omission of Deatherage's brief comment, which was apparently so slight as to draw neither an objection nor rebuttal, could not have resulted in a different verdict. Thornton thus fails to show manifest constitutional error. This claim should be rejected.

D. THORNTON FAILS TO SHOW THAT ANY PART OF HIS TRIAL WAS CLOSED TO THE PUBLIC.

Thornton next claims that the trial court violated his right to a public

not have any reason to take fingerprints. 3RP 300.

² He then tried to clarify that he had meant to say he meant a "teeter" scale. 3RP 394.

trial when it closed a portion of the voir dire to the public. This claim is without merit because the record does not show that the public was excluded from any part of Thornton's trial.

Article 1, section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial. Similarly, article 1, section 10 provides that "[j]ustice in all cases shall be administered openly...." These rights extend to jury selection, which is essential to the criminal trial process. *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). It is the appellant's burden, however, to show that a constitutional violation has occurred. *State v. Momah*, 141 Wn. App. 705, 708, 171 P.3d 1064 (2007), *review granted*, ___ Wn.2d ___ (Apr. 1, 2008). Thornton fails to meet his burden of showing that the courtroom was in fact closed.

The record shows that a recess was held in the ordinary course of voir dire. 2RP 105. Before the venire returned from the break, Juror 36 entered the courtroom. 2RP 106. She indicated that she had an issue that she did not wish to discuss in front of the rest of the panel. 2RP 106. Questions were asked and answered regarding her son's imprisonment and her husband's former work as a deputy sheriff, after which she stepped back out of the courtroom. 2RP 107-11. After she exited, she was excused for cause by agreement of the parties. 2RP 112. The remaining members of the venire were then brought back into the courtroom. 2RP 112. At no point does the

record reflect that the public was excluded from the proceeding, which was clearly held in the courtroom.

Nor do the clerk's minutes contain any indication that the proceeding was closed to the public. To the contrary, the minutes suggest that the inquiry was held in open court:

- 10:13 Clerk administers Qualification Oath to Jurors
Court conducts general voir dire
- 10:40 Jurors admonished and excused
Court in recess
- 10:55 Court in session. All parties present outside of the jurors presence
Bailiff informs court that juror #36 would like to speak privately
Juror #36 is brought in and questioned individually
Ms. Adams would like juror #38 excused for cause.
No objection.
Court excuses juror #36 for cause.
- 11:05 Jury panel enters courtroom
Court continues with general voir dire

Supp. CP (Clerk's Minutes – Jury Trial, at 4).

Moreover, contrary to the situation in *In re Orange*, 152 Wn.2d at 808, the trial court here specifically ruled at the beginning of trial that the entire voir dire process would be open to the public, including Thornton's family:

They [Thornton's family] have the absolute right to be here and will be here at all times. The only time though -- you are in the back now. Sometimes when we have the jurors -- I

don't know how many jurors we're going to have, usually it's 35 to 40. Usually they're able to fill up the first two rows. They might go back into the third row. But the chairs in the back, we will make sure there are chairs always here in the courtroom so you can have a seat. But once we get a jury selected, the benches will be open again, when they do that.

1 RP 9.

The record is devoid of any indication that the public was excluded from any part of the trial. Thornton thus fails to show a constitutional violation and this claim should be rejected.

E. THORNTON FAILS TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO EXCUSE THE ENTIRE PANEL WHEN TWO JURORS COMMENTED ON THORNTON'S APPEARANCE DURING VOIR DIRE.

Thornton's final claim is the trial court abused its discretion in refusing to empanel and new venire after two jurors commented on Thornton's appearance during voir dire. This claim is without merit because the trial court specifically admonished them to disregard the comments. Moreover, the court was in the best position to gauge the juror's reactions, and was satisfied that the remaining jurors could be fair.

The trial court is best suited to judge the possible prejudice of a remark during voir dire. Because of this, this Court reviews the denial of a motion for mistrial for abuse of discretion. *State v. Weber*, 99 Wn.2d 158,

166, 659 P.2d 1102 (1983). A mistrial should be granted only if the defendant has been so prejudiced that nothing short of a new trial will insure a fair trial. *Weber*, 99 Wn.2d at 165. Denial of a fair trial will be found only if there is a substantial likelihood that the prejudicial remark affected the verdict. *State v. Crane*, 116 Wn.2d 315, 333, 804 P.2d 10 (1991). Where, as here, the comment is made by a member of the panel rather than an attorney or member of the court staff, the potential for prejudice is much less:

We disagree. This is not a case of misconduct by an officer of the court or a party to the proceedings whose comment would be irreparably prejudicial. We are dealing with a comment by a stranger, which could not be taken as anyone's opinion but his own. Moreover, the trial judge's immediate admonishment was sufficient to cause any reasonable person to resent this unwarranted outburst, and to cause him to make certain that it would not interfere with his giving fair consideration to the evidence. Jurors are assumed to be fair and reasonable and there is a total absence of evidence that the jurors selected in this case were otherwise.

State v. Eggers, 55 Wn.2d 711, 713, 349 P.2d 734 (1960).

Here, after the comments by two members of the venire were made, the trial court specifically admonished Juror 24 that the juror was not address the defendant. 2RP 216. Defense counsel then asked the panel about appearances and inquired whether they thought the case should be decided on that basis. 2RP 216. Several jurors responded that they thought not, because based on their experiences, appearances could be misleading. 2RP 217-20. Several commented that they had to decide the case on credible testimony and

evidence. 2RP 217-20. Another juror agreed, and brought up the beyond-a-reasonable-doubt standard. 2RP 218. At this point, the court called the afternoon recess.

After the recess, but before the panel was brought back in the parties and the court addressed the issue. 2RP 223. The trial court excused for cause the two jurors who made the comments. 2RP 223. After hearing argument from the parties, the trial court made a preliminary decision to instruct the remaining members that they were to disregard the comments. It also determined that it would question them to make sure none of them were affected by the comments. 2RP 228.

The panel was then brought back into the courtroom, and the trial court gave them a lengthy admonition:

THE COURT: Everyone may sit down. There's been a rather interesting occurrence that happened at the end. First, I'm sorry we weren't able to have you back in 15 minutes. It's a long 15 minutes. But there's a matter that I feel the need now to discuss with you because you heard two jurors give an opinion from their personal experience in life of what they think from their mere observation of the defendant that means about drug use. First of all, that is the expression of a bias. Such opinions based on mere appearance alone would never be sufficient in a court of law for someone to be found guilty much less even be charged with such offense. As one of the jurors mentioned earlier, appearances are very deceptive and, in fact, one of the best craftsmen was one who, if you looked at him, wouldn't think for a moment he could be. The same is true for appearances. The annals of medicine are full of mimic indications of numerous different conditions that appear to be something entirely different. Nutritional issues

could very well be involved in appearances that have nothing whatsoever to do. So to come to an opinion, although you have now heard this from two individuals who indicated they had an experience with people and now they have an opinion, the real issue for me right now is to learn if any of you feel that, now that you have heard this, you would not be able to put it out of your mind? Because it is baseless under the law and the rules of evidence. And what we require, both by oath, by submission to direct and cross-examination, to test foundations of the experience, the background, the training, these are the types of things that we require before people are allowed to express opinions with respect to reality.

2RP 231. The trial court then inquired of the jurors as to whether any of them felt that the comments would affect their ability to fairly try the case:

So what I need to know now from each of you and honestly -- there's no right and wrong answer here -- I sincerely need to know, is there any of you who feel, now that you have heard this expression of opinion, feel that that would somehow creep into your decision-making process or how you view the world or view the evidence or how you look at the defendant now or how you might listen to the evidence in the case and let that creep in, instead of making the decision based upon your own observations from the witness stand and the like in deciding what the facts are in this case?

So I would like to have hands of someone who honestly feels that this is really soured you to this case? If I can put it that way. Now, I don't see any hands. But my memory was when some folks -- there was reaction. A gentleman actually started talking to the defendant directly; there might have been some heads nodding. I really need to understand, right now, is there anyone in here who cannot assure me at this time that this is not going to worm its way, so to speak, into your decision-making process? Does anybody have any questions you would like to ask about the question I asked you, if I'm not clear. I hope I'm clear with what I'm trying to get at. But it's a very serious matter. And things like this come up from time to time. And I need to be assured, if you sit on this jury, the defendant is going to get a

full, fair, careful review of the facts and not based upon bias or prejudice against him, based upon appearances alone or the comments by other people who think they have a view of reality that is worth mentioning.

2RP 231-33. None of the jurors indicated they would be unable to be fair.

After a brief recess, the voir dire continued. 2RP 236. Thornton's counsel made a number of inquiries regarding the jurors' perceptions of his appearance, and about the issue of appearances. 2RP 236-38. None of the jurors expressed any indication they could not be fair.

Thornton fails to show a substantial likelihood of prejudice. Although the jurors heard the comments, neither of the speakers had any personal knowledge of Thornton. Their comments were at best supposition. There were numerous questions to the jurors about the effect of the comments and about appearances in general and none gave any indication they could not be fair. Moreover, the judge issued a strongly worded admonition to disregard the comments, which the jurors are presumed to have heeded. *Eggers*, 55 Wn.2d at 713.

In view of the foregoing, Thornton fails to show that the trial court, which was present and able to judge the reactions of the jurors to the comments, abused its discretion. This claim should be rejected.

IV. CONCLUSION

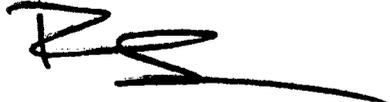
For the foregoing reasons, Thornton's conviction and sentence should

be affirmed.

DATED April 15, 2008.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal flourish extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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