

No. 37425-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES C. HARTZELL,
JEREMY R. TIESKOTTER,

Appellants.

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STATE OF WASHINGTON
BY  DEWEY

COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Wickham, Judge
Cause Nos. 07-1-01831-3
07-1-01832-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the action of a police K-9 sniffing at the open window of Hartzell's vehicle was a constitutionally impermissible search such that the gun subsequently located by the dog as a result of that sniff should be suppressed.

2. Whether the court properly allowed the State to connect Hartzell to the .357 firearm and Tieskotter to the 9 mm firearm used in the Thurston County shooting by admitting evidence of their associations with the same weapons within the following four weeks in Kitsap and Pierce counties.

3. Whether Tieskotter received ineffective assistance of counsel because his attorney did not prevent the State from presenting evidence that Tieskotter had been in possession of the same gun used in the Thurston County shooting four days later.

4. Whether Hartzell opened the door to hearsay statements of Sarah Dodge that were harmful to his case by eliciting other hearsay statements made by Dodge that were helpful to him.

5. Whether the limiting instruction No. 27 was inadequate for that purpose and whether it constituted an impermissible judicial comment on the evidence.

6. Whether the court should have granted Tieskotter's motion for a new trial on the grounds that Instruction No. 27 constituted an impermissible judicial comment on the evidence.

7. Whether the prosecutor's remarks on rebuttal shifted the burden of proving the State's case onto Hartzell or implied facts not in evidence, and whether the argument was so flagrant and ill-intentioned that a curative instruction would have been useless.

8. Whether the jury finding that Hartzell was armed with a deadly weapon prohibited the sentencing judge from imposing the longer firearm enhancement.

9. Whether Instruction No. 23, the to-convict instruction for unlawful possession of a firearm in the first degree, omitted an

essential element of the charge, and if so, whether the error is harmless.

10. Whether there was sufficient evidence presented at trial to support Tieskotter's convictions for second degree assault and first degree unlawful possession of a firearm.

11. Whether Tieskotter received a sentence that, including community custody, exceeds the statutory maximum for the crime of which he was convicted, and if so, whether he received ineffective assistance of counsel.

12. Whether there was cumulative error.

B. STATEMENT OF THE CASE.

A. Procedural facts.

The State accepts the procedural facts as set forth by both Hartzell and Tieskotter.

B. 1. Substantive facts—Hartzell's CrR 3.6 hearing.

The State accepts Hartzell's statement of the substantive facts of the CrR 3.6 hearing.

2. Substantive facts--trial.

The State has no dispute with the facts as set forth by either appellant. However, since each appellant concentrates on facts relating to his own case, but not his co-defendant's, the facts set forth below integrate the two cases for a comprehensive view. This account is less detailed than either of the appellants'.

On April 7, 2007, at about 5:00 o'clock in the morning, Michael Vernam was awakened by the sound of gunshots outside his residence on Trailblazer Road in Thurston County, Washington. [RP 129]¹ He looked out his second story window and saw a car about seventy yards away, a person in or near the vehicle, and muzzle flashes as the person fired a gun. He heard ten to twelve shots, saw about four muzzle flashes, and concluded there was a second person present because the car was moving although the person shooting could not have been driving. [RP 130-32] The shooter appeared to be protruding through a window or a sunroof. [RP 133] Vernam testified that he was sure at the time that the car had a sunroof, but he could be mistaken, and he did, in fact, later identify a photo of a car without a sunroof as the suspect vehicle. [RP 133, 138-39, 147, 150] The color of the car, which he could see only by the light of the muzzle flashes, appeared to him to be maroon, reddish, or possibly brown. [RP 134-35] Vernam did not call the police, but did speak to law enforcement officers when they arrived, and spoke to them again when he returned home from work that day. [RP 142-43]

¹ Unless otherwise noted, all references to the Report of Proceedings are to the four-volume trial transcript of February 25—March 3, 2008.

Kimberly Hoage lived at 321 Trailblazer Road, Apt. B. Her five-year-old daughter lived with her and slept in her bed with her at night. In the early morning of April 7, 2007, Hoage was awakened by loud noises that she interpreted as someone pounding on the side of her apartment. She did not get up. [RP 379-80] There had been a history of domestic violence with her daughter's father, and such noises were not out of the ordinary. [RP 413, 420] At about 1:00 p.m. that same day, Hoage began to clean her apartment and for the first time discovered bullet holes in the headboard of the bed in which she and her daughter had been sleeping. There were also bullet holes in the window of another bedroom, a downstairs wall, and the kitchen. [RP 380-81] She found bullet fragments on the floor. [RP 384]

Deputy Shawn Solomon of the Thurston County Sheriff's Department responded at 4:59 a.m. to the call that shots had been fired on Trailblazer Street. [RP 67] He located and collected a total of eleven cartridge casings which were of two different calibers, one 9 mm and the other .357. [RP 72, 85] Detective Tim Arnold, also of the Thurston County Sheriff's Department, later inspected the inside of Hoage's apartment and located nine bullet holes and one spent bullet. [RP 93, 100]

On April 11, 2007, in Lakewood, Pierce County, Washington, Officer Austin Lee responded at about 3:00 p.m. to a report of shots fired. [RP 323] Complainants Daniel Cook and Charissa Vann told him that a man Vann knew by name, Jeremy Tieskotter, had fired a weapon just a few feet from them. [RP325, 330] Lakewood Police Department Detective Bryan Johnson located and collected a 9 mm cartridge case ejected from the gun used by Tieskotter. [RP 329, 336-37] Tieskotter was interviewed by Lakewood Police Officer Adam Leonard on April 19, 2007, and Tieskotter admitted he had fired a 9 mm semi-automatic handgun equipped with a laser sight on April 11th. He first claimed to have since destroyed the gun, and then that he gave it to someone else. [RP 360, 364]

On May 5, 2007, in a rural part of south Kitsap County, Deputy Daniel Twomey responded to a man-with-a-gun call on Sidney Road SW. Shortly after his arrival at the scene, a Toyota RAV4 pulled up at the end of the driveway and parked on the shoulder of the road. Charles Hartzell got out and approached the deputy. [RP 237-241] Because of his suspicious activity he was detained in handcuffs, [RP 244] and eventually arrested, primarily because he gave his name as Anthony Avery, the person named as a suspect in the call to which the deputy was responding. [RP

247, 250, 257] The deputy walked around the RAV4 and saw a bullet hole in the passenger door; shining a flashlight through the driver's window, he saw a .357 SIG cartridge casing on the passenger side floor. [RP 252, 256] After Hartzell was taken to the sheriff's office and searched, an unexpended .357 SIG bullet was found in the seam of his jacket pocket. [RP 257]

In an effort to locate the gun that had fired the shot through the car door, Kitsap County Deputy Aaron Baker and his partner, a German Shepherd named Ryker, were called in to search for the weapon. [RP 518] Ryker jumped up on the passenger side of the RAV4, the window of which was open, sniffed, and began searching the southbound shoulder of Sidney Road. [RP519-21] Approximately 100 to 130 yards from the RAV4, the dog located and retrieved a .357 Springfield XD handgun, loaded, with a round in the chamber. [RP 522-24]

All of the bullets, casings, and the one recovered gun from these three incidents were eventually sent to the Washington State Crime Lab and examined by Johan Schoeman, a firearms and tool mark examiner. [RP 436] He determined that the 9 mm casings collected at the scene of the Thurston County shooting matched the 9mm casing found in Lakewood where Tieskotter had fired the gun;

all were fired from the same weapon. [RP 454-56] The .357 casings found at the Thurston County location were fired from the gun located near Hartzell's vehicle in Kitsap County, [RP 458-60], as was the casing found on the floorboard of the RAV4. [RP 264, 266, 461] No fingerprints were found on the gun or any of the casings. [RP 575-76]

Ashley Rochelle testified that she had dated Tieskotter briefly from late February or early March of 2007, ending the relationship toward the end of April of that year. She owned a red Dodge Neon, which was used by Tieskotter during the month of April 2007. [RP 230] It was her car that Vernam identified as being similar to the vehicle he observed at the time of the shooting. [RP 157-58] She knew that Tieskotter and Hartzell were close friends and described themselves as brothers, though they were not actually related, [RP 216] but in March Tieskotter and Hartzell both told her they had had a falling out and weren't speaking to each other. [RP 220, 230] Each separately told her that on more than one occasion. [RP 234] She believed it to be true because they did not have the same type of contact that they had had before. [RP 228]

Kimberly Hoage, the victim in the Thurston County shooting, testified that she knew both Tieskotter and Hartzell. [RP 386] She allowed Hartzell and his girlfriend, Sarah, to stay in her spare bedroom for four days in early April, 2007, [RP 388, 391], but Hoage asked them to leave because they were forging checks and she was afraid she would get in trouble for allowing them to be at her home. [RP 391-393] She threatened to call the police if they did not leave her apartment; they left, taking all of their property with them. [RP 394] They were upset at being evicted, and Hoage was surprised when just before leaving Hartzell told her there were no hard feelings and kissed her on the head. [RP 544-45] Within twenty-four hours of their departure, Hoage received a phone call from Hartzell, and possibly a voice message, demanding that his laptop be returned. Because she has seen him leave with the laptop, and she wanted no further contact with him, Hoage ignored the call. [RP 394-96] After the shooting, she received a text message signed "Chase", the name by which she knew Hartzell, stating he wanted \$1000 and his laptop back, and something about it being cold when there are holes in the house and that he seals leaks. [RP 396] Hoage was sufficiently frightened that she reported it to the sheriff's office. [RP 396] The shooting on April 7th occurred

a couple of days after Hoage evicted Hartzell and his girlfriend. [RP 391]

Hoage also testified that when asked to name possible suspects in the shooting she had suggested a man named Will, who had purchased from her a red Camero with a T-top. Will's aunt had apparently given Will the money to buy the car, but Will did not pay Hoage, and so she refused to turn over the title, which angered the aunt. Hoage believed Will was associated with gangs. [RP 411-412] Before testifying, Hoage received use immunity from the prosecutor for any forgeries in which she participated. [RP 397-98]

James Rocha testified on behalf of Tieskotter that he had seen a man named Juan Copin sell a semi-automatic pistol with a laser sight to Tieskotter "roughly" around April 7th or 8th of 2007 at a park and ride in Tacoma. [RP 581-82, 585]

Florence Johnson, Hartzell's mother, testified that from the first week of April until the first week of May, 2007, Hartzell worked with her at her job cleaning a restaurant. [RP 608] They worked from Wednesday to Saturday, [RP 612] and worked two to four hours a night, beginning between two and three o'clock in the morning. [RP 609]

C. ARGUMENT.

1. The actions of the police K-9 jumping up on the side of Hartzell's vehicle and sniffing at the open window did not unreasonably intrude into his private affairs. The gun located by the dog after sniffing the car was correctly admitted into evidence.

Kitsap County Deputy Sheriff Aaron Baker testified at the CrR 3.6 hearing that Ryker jumped up on the passenger side of the RAV4 driven by Hartzell. [2/4/08 RP 70] He did not know whether Ryker's nose actually went inside the vehicle; his paws did not, nor did the dog attempt to jump inside the vehicle. [2/4/08 RP 72-73]

The court entered Finding of Fact No. 9:

Deputy Aaron Baker, allowed his K-9, "Ryker" to jump on the passenger door and stick his nose into the open window of the vehicle. (The window was already in a "down" position.) The dog put his nose in the vicinity of the window and Deputy Baker commanded: "find it".

[Hartzell's CP 139] The court then made Conclusions of Law:

1. The activities of the dog—putting his nose in or within the vicinity of an open vehicle window, did not intrude upon any privacy right of the defendant. A person has no privacy interest in the open air about an open window of a parked vehicle.
2. The officers and K-9 were in a place they had a right to be—in a lawful vantage point from which to make observations. They made "open view" observations.

[Hartzell's CP 140]

An appellate court reviews challenged findings of fact for substantial evidence; evidence is substantial if it is sufficient to provide a rational, fair-minded person of the truth of the matter asserted. Conclusions of law are reviewed de novo. State v. Lemus, 103 Wn. App. 94, 98-99, 11 P.3d 326 (2000). Hartzell has assigned error to Finding of Fact No. 9 [Appellant's Brief, page 1] but does not argue that it is incorrect. The basis of his argument is that the dog's nose intruded into the vehicle past the point where the window would have stopped it had the window been rolled up, constituting an intrusion into a constitutionally protected area.

Washington Constitution article 1, section 7, provides greater protection to a person's private affairs than does the Fourth Amendment. State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994). The inquiry concerns "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." Id., at 181, (citing to State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)) The home receives greater constitutional protection than other locations. Id., at 185.

Here the trial court found that Ryker's sniffing of the air at the vehicle window was an open view observation. [Hartzell's CP 140]

Open view occurs when an officer observes something from an area not protected by the constitution, and thus is not a search at all. Lemus, *supra*, at 102.

Occupants of automobiles have a privacy interest under article I, section 7. Id. However, a person “does not have any expectation of privacy on a city street. . . . There is no expectation of privacy shielding that portion of an automobile which can be viewed from outside by diligent police officers.” Id., at 103. An officer observing the interior of a vehicle through its windows while it is parked in a public place does not conduct a search. Id. Because the window of the RAV4 was open, Riker’s act of sniffing at the window, even if his nose did pass the point where the glass would have been had it been rolled up, is analogous to an officer standing outside the car and seeing what is plainly exposed. A person cannot reasonably expect that particular air molecules will remain inside a vehicle when the window is open; it is reasonable to expect that had the dog’s nose stopped half an inch before reaching the window, it would still have picked up the odor which it followed to find the gun. A police officer making a traffic stop, and perhaps inserting his hand into the interior of the car to accept

documents from the driver, is not conducting a search if he smells alcohol on the driver's breath at the same time.

In State v. Dearman, 92 Wn. App. 630, 962 P.2d 850 (1998), the police were investigating a confidential informant's tip that Dearman was distributing marijuana. Officers took a narcotics dog to Dearman's residence and had it sniff along the door seams of the adjacent garage. The dog alerted to the smell of marijuana, and a search warrant was obtained based upon that evidence. Growing marijuana was found in the garage. The trial court suppressed the evidence on the grounds that the dog sniff was an unconstitutional search, and the appellate court affirmed. The basis for the holding of the Court of Appeals was the sanctity of the home. Dearman's garage was very close to the house, but the court recognized that the "result in this case might be different had the garage been at some distance from the house. But here we afford it the same level of protection because it was right next to the home." Id., at 633, fn. 5. The Dearman court also recognized that an officer's observations from a lawful vantage point would not be a search, but "a substantial and unreasonable departure from a lawful vantage point, or a particularly intrusive method of viewing, may constitute a search." Id., at 634 (citing to other cases). As Hartzell's argument

acknowledges, it was not the fact of the canine sniff that the court found unreasonable but the fact that the intrusion was so close to the defendant's home.

The fact that the odor was detected by a trained dog does not convert an open view observation into a search. Under the Fourth Amendment, a canine sniff is not a search. Washington courts, however, inquire into the nature of the intrusion. State v. Stanphill, 53 Wn. App. 623, 630, 769 P.2d 861 (1989). Citing to State v. Boyce, 44 Wn. App. 724, 729-30, 723 P.2d 28 (1986), the court said:

Indeed, we can envision few situations where a canine sniff of an object would unreasonably intrude into the defendant's private affairs. As long as the canine sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred.

Stanphill, *supra*, at 630. Hartzell had no reasonable expectation of privacy in the air just inside the car window that he had left open. The intrusion was minimal. None of the dog's body with the possible exception of his nose penetrated past the plane where the window glass would have been. He jumped up on the side of the vehicle, which would be vertical, and thus had only a second to sniff

before falling to the ground, and he could not have stuck his nose in very far.

The fact that a human would not have been able to detect the scent did not make the dog sniff unreasonable. In State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994), the court rejected the analogy between a canine sniff and the infrared surveillance that it found to be unreasonable in that case. Id., at 187-88. However, the issue in Young was less the method of detection as the fact that it was the defendant's home that was the target of the infrared surveillance. While refusing to adopt the blanket federal rule that dog sniffs are not searches, the court noted that Washington courts examine the circumstances of each case, and that each of the cases in which warrantless dog sniffs were approved involved some location other than a private residence. Id., at 188.

In State v. Seagull, 95 Wn.2d 898, 632 P.2d 44 (1981), a police officer on legitimate business entered the property where Seagull lived. A greenhouse was located approximately twenty feet from the house, and between the greenhouse and the house was an area of patchy grass where people walked while going from the front to the back door. Unable to get an answer at the front door, and having been told earlier that the occupants could not hear a

knock at that door if they were in the back, he headed toward the back door. Rather than taking the most direct route alongside the house, he walked down the middle of the open area and, from a distance of six to ten feet, observed what he thought was a marijuana plant in the greenhouse. He obtained a search warrant, and although what he saw turned out to be a tomato plant, there was marijuana growing in the greenhouse. The trial court refused to suppress the evidence and both the Court of Appeals and the Supreme Court affirmed.

Even though Seagull's home was nearby, the court found that the officer did not intrude into an area protected by the Constitution. (The court here was using a Fourth Amendment analysis, but the language is consistent with an Article I, section 7 analysis.) "[W]e cannot say that the limited deviation, within the open area, that occurred in this case was so unreasonable as to be an intrusion upon a privacy expectation deserving of Fourth Amendment protection . . .". *Id.*, at 905. In Hartzell's case, if there was a deviation into the area constitutionally protected, it was extremely minimal. This is particularly so in light of the fact that the "evidence" seized was scent molecules in the air. The dog did not snatch a physical item out of the car.

Hartzell did not have a reasonable expectation of privacy in the air space at the open window of his vehicle, parked on the shoulder of a public road. Because any intrusion was so minimal as to make no difference, the dog sniff was constitutionally permissible and the gun was correctly allowed into evidence.

2. The court properly admitted evidence of Hartzell's connection to the .357 firearm located in Kitsap County and Tieskotter's connection to the 9mm firearm fired in Pierce County, because it was circumstantial evidence that they were the persons who fired the same weapons at the victim's residence in Thurston County.

Hartzell argues that the trial court improperly admitted evidence relating to the May 5, 2007, incident in Kitsap County which resulted in his arrest and the recovery of the .357 firearm which was used in the Thurston County shooting. This evidence was admitted pursuant to ER 404(b). A trial court's decision to admit such evidence is reviewed for abuse of discretion; discretion is abused when it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The State wanted evidence of the Kitsap County incident before the jury to show that Hartzell had gone there from Olympia, was "arguably in possession of a SIG pistol" used in the Thurston

County shooting, and that ammunition found in the vehicle Hartzell was driving linked him to the gun, which linked him to the Thurston County shooting. [RP 18] Hartzell complains that there was insufficient proof of his connection to the weapon found in Kitsap County. However, the gun was located 100 to 130 yards from the vehicle that Hartzell drove to the scene. [RP 521] More importantly, it was tracked there by a dog that was following the scent from the car that Hartzell had been driving. [RP 519-21] The gun was clean enough that it could not have been there for a significant amount of time. [RP 527] There was a spent casing on the passenger floorboard of the vehicle Hartzell was driving and that casing had been fired from the gun found alongside the road. [RP 264-65, 460] In his pocket, Hartzell had an unexpended bullet of the same type of ammunition, [RP 257] and additional ammunition was found in the back of the vehicle [RP 262, 472] While Hartzell made frequent mention of another man named Randy, nobody else was in the vehicle nor did the officers at the scene see anyone else. Hartzell's fingerprints were not on the gun, but nobody's were [RP 576], and it is unlikely that the gun leaped into the brush alongside the road by itself. There was sufficient evidence connecting Hartzell to the weapon to permit admission of the gun. He complains that the court

did not properly weigh the probative value against the prejudicial effect, but it is apparent from the court's colloquy with the parties that it did, in fact, make that determination. [RP 18-27] Further, as will be of concern later in this argument, the court warned Hartzell that he risked opening the door for the State to introduce evidence that Hartzell wanted to exclude. [RP 27]

Hartzell also argues that the evidence was not admissible to establish identity under ER 404(b), which reads:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake of accident.

Hartzell maintains that the Kitsap County evidence was inadmissible to prove identity because in order to do so, the two crimes must be so unique as to constitute a *modus operandi*—if we know that Hartzell committed one, he must necessarily have committed the other. But that was never the purpose of the State's evidence, nor has Hartzell produced any authority for the proposition that *modus operandi* is the only way in which identity can be established. Clearly the two crimes were different. The identity issue arises because there was evidence that Hartzell had

in his possession on May 5, 2007, in Kitsap County, the weapon that had been used in the drive-by shooting in Thurston County on April 7, 2007. That alone would be insufficient to convict him of the Thurston County crime. However, added to the fact that he had been staying in the victim's home, had been evicted under circumstances causing anger and resentment, and had both telephoned the victim and sent her a text message referring to a similar event, it is relevant and powerful evidence.

Modus operandi is not the sole method of using evidence of other bad acts to prove identity. The evidence of his connection to the gun was one piece of evidence linking him to the drive-by shooting. The State intended to offer only the bare bones facts regarding the Kitsap County incident, and Hartzell did not object to the evidence of the weapon coming in; he wanted to offer additional evidence about the circumstances of the incident so he could throw the blame on Randy. [RP 18-27] The court did not err by allowing in evidence of the incident in which the .357 was located and connected to Hartzell.

Tieskotter also argues that the sole purpose (and effect) of the evidence that he shot the 9 mm weapon four days later in Lakewood was to establish that he had a propensity to go around

shooting guns, and that there can be no relevancy to such evidence. That simply overlooks the common sense observation that a person who has a gun in his possession on April 11 can be inferred to have had the same gun in his possession four days earlier. The State does not disagree that this fact alone would be insufficient to convict him of the Thurston County shooting. However, combined with the evidence that he and Hartzell were so close they considered themselves like brothers and that there had been at least two people involved in the Thurston County shooting, the jury could reasonably infer that Tieskotter was with Hartzell at the time.

If Tieskotter had had some other gun, even another 9 mm weapon, in his possession in Pierce County, any relevancy would clearly have been outweighed by the prejudice. He didn't. He had the same gun in his hand. Evidence of other bad acts is not inadmissible even if it does tend to show propensity as long as that is not the sole purpose of the evidence. "If the *only* relevancy is to show propensity to commit similar acts, admission of prior acts may be reversible error." State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001) (emphasis added). Here the evidence connected

each defendant to specific guns used in the Thurston County shootings; propensity was not the purpose for it.

To make its point, the State only needed to prove that Tieskotter had the 9 mm firearm in his possession and that the 9mm casings found in Thurston County had been fired from that weapon. Under the circumstances, there was no way to get that evidence in front of the jury without testimony from the witnesses who saw him fire it. [RP 325, 491, 495] Even so, the evidence was “sanitized” so that the jury did not hear that the shooting occurred during an attempted robbery. [RP 10, 03/11/08 RP 18, 22] An effort was made to avoid undue prejudice, but incriminating evidence will always be prejudicial. That does not make it unfairly so, and the probative value outweighed the prejudicial effect. The evidence was properly admitted.

3. Tieskotter did not receive ineffective assistance of counsel because his attorney did not prevent the State from presenting evidence that Tieskotter had been in possession of the same gun used in the Thurston County shooting four days after that shooting.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient

performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance was so deficient that he was deprived of "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The State wanted to get in only evidence that Tieskotter was seen with the same firearm in Pierce County that was fired four days earlier in Thurston County and that a cartridge case was recovered. [RP 10-11] Defense counsel did not object, acknowledging that the evidence went to show identity. [RP 11-12] He was concerned that the witnesses not testify as to any details about the Pierce County crime, [RP 12] and they did not. [RP 487-495] The court found the evidence relevant to the issue of identity. [RP 15] Defense counsel made a clear tactical decision not to make a frivolous objection to evidence he recognized was relevant. He was careful to make sure that only the fact of identification came in, not other details surrounding the Pierce County incident.

Tieskotter's argument on appeal that the evidence was inadmissible is incorrect. Trial counsel correctly recognized that and acted to limit any prejudice. Defense counsel's performance cannot be said to have fallen below an objective standard of reasonableness.

4. Hartzell opened the door to the hearsay statements of Sarah Dodge that were harmful to his case because he elicited other of her hearsay statements that were favorable to him. To exclude the harmful statements would have left the jury with an untruthful account of the facts that would have been unfair to the State.

On direct examination of Deputy Twombly, the State did not elicit any statements made by Sarah Dodge, only the fact that the deputy had contacted her. [RP 246] On cross-examination, Hartzell, without objection from the State, elicited from Twombly that Sarah had told him the gun was fired inside the vehicle while she was present, she did not remember who fired it, that Randy had asked her if she heard it and then told her to shut up, and that Randy had the gun. [RP 291-295] Dodge herself never testified. This evidence left the jury with the distinct impression that Randy was the only person connected to the gun.

A trial court has wide discretion to control the scope of redirect examinations. Its decision to admit or exclude evidence will

not be reversed unless there is a manifest abuse of that discretion.

State v. Gallagher, 112 Wn. App. 601, 609, 51 P.3d 100 (2002).

The “opening the door” doctrine allows otherwise inadmissible evidence under two circumstances:

- (1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and
- (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party’s evidence.

Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.14, at 66-67 (5th ed. 2007). The rules of evidence do not supersede this open door doctrine. State v. Brush, 32 Wn. App. 445, 451, 648 P.2d 897 (1982), *review denied* 98 Wn.2d 1017 (1983). This often-quoted observation is appropriate here:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) (citing to State v. Stevens, 69 Wn.2d 906, 421 P.2d 360 (1966) and several other cases).

Hartzell is correct that the open door doctrine must give way to constitutional concerns about a fair trial. State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007). He specifically complains that his Sixth Amendment right to confront witnesses was violated. However, constitutional rights can be waived, and by introducing Dodge's hearsay statements that slanted the evidence his way, he could be said to waive the right to confront that witness. As mentioned above, he was warned that he could open the door to evidence he did not want the jury to hear. Deputy Twomey was properly allowed to testify that Dodge also told him that Randy had threatened that Hartzell would kill her either with his bare hands or with a gun, and while Randy was speaking, Hartzell was behind him indicating agreement with his threats. Dodge further told the deputy that before she jumped from the vehicle Hartzell told her, "I hope you die so I don't have to kill you." [RP 473-76]

Hartzell cannot fairly have it both ways. Because he offered hearsay evidence that made it appear Randy was the sole "bad actor" involved, he cannot expect that other hearsay statements,

made by the same witness at the same time, should be excluded because they put him in a bad light. He was warned that this could happen, [RP 27] he chose to represent himself knowing he was held to the same standards as an attorney, [RP 31] and he tried to skew the evidence in his favor. The challenged testimony came in only on redirect. It would not have been offered at all had Hartzell not opened the door. "But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." Justice Benjamin N. Cardozo, Snyder v. Massachusetts, 291 U. S. 97 (1934) While it may well have been prejudicial, Hartzell himself caused it to be offered. It was not error for the trial court to allow it.

5. Jury Instruction No. 27 was a proper limiting instruction and did not constitute an impermissible judicial comment on the evidence.

When evidence is admitted for one purpose but not another, the court must give a limiting instruction if requested by the party against whom the evidence was admitted. The court does not have to give the instruction requested by that party, but has broad discretion to create its own instruction. Gallagher, *supra*, at 611. Here the evidence connecting Tieskotter to the gun used in Pierce County and Hartzell to the gun located in Kitsap County was

admitted for the purpose of establishing that during the relevant time period, each of these defendants had been in possession of one of the guns used in the Thurston County drive-by shooting. The court engaged in a lengthy colloquy with all parties in crafting Instruction No. 27, which the State and Tieskotter eventually agreed to. [RP 626-639] Hartzell expressed reservations. [RP 638-39]

Both appellants have correctly stated the law regarding limiting instructions. However, both appellants read a great deal that isn't there into the two sentences that comprise Instruction No. 27:

Evidence from other jurisdictions has been admitted that you may consider as establishing an association of the defendants to the crimes charged. You must not consider this evidence for any other purpose.

[Tieskotter's CP 107, Hartzell's CP 201]

Hartzell complains that the phrase "evidence from other jurisdictions" means that the jury could consider every piece of evidence introduced about the Kitsap County incident and was encouraged to reason that he was a violent, lying, gun-carrying, heartless skinhead who would think nothing of shooting into the bedroom where a woman and her small child were asleep. This is

an enormous overstatement of the instruction. While it is true that the jury could consider all of the evidence connected to Kitsap County, Hartzell has offered no authority for the proposition that a jury can be prohibited from considering evidence that has been admitted. A limiting instruction does not limit the evidence to be considered, but rather the purpose to which it can be put. The instruction here does just that; the jury could consider it only to determine whether it connected the defendants to the Thurston County crimes. The only possible connection was through the guns. "You must not consider this evidence for any other purpose" prohibits the jury from the "once a thief, always a thief" logic that Hartzell postulates. By no stretch of the imagination does this instruction tell the jury that it could find that if either defendant exhibited detestable character traits at another time and in another jurisdiction, it was free to conclude that he was responsible for the Thurston County shooting in the absence of any other evidence.

Hartzell further argues that the instruction was not only a comment on the evidence but equivalent to a directed verdict because it made a factual determination that the defendants were connected to the Thurston County crimes, a determination that the jury was required to make. That is not a fair reading of the

instruction. The jury was instructed that it may—not must—consider the evidence from other jurisdictions. Hartzell construes the phrase “as establishing an association” to mean the instruction really says, “You may consider this evidence because it shows the defendants are connected to the charged crimes.” A more reasonable reading of the instruction is, “You may consider this evidence to decide whether it establishes a connection between the defendants and the charged crimes.” By no stretch of the imagination does it inform the jury that it can consider the other-county evidence as proof that these two defendants have a propensity to run around shooting at people.

Tieskotter argues that the instruction informs the jury that the two defendants were involved in each other’s crimes in other jurisdictions. The State maintains that is simply a distorted reading of the instruction. There was no hint of that in any of the evidence admitted. A reasonable person would understand the instruction to mean that Tieskotter’s possession of the 9 mm gun in Pierce County and Hartzell’s constructive possession of the .357 weapon in Kitsap County could be considered by the jury as evidence that each of them was in possession of the guns fired in Thurston County at the time shots were fired into the apartment of Kimberly

Hoage. The instruction no more linked the two together than the fact that they were being tried together. Instruction No. 8, [Hartzell's CP 182] informing the jury that each count must be separately decided, is not contradictory.

The trial court in this case was concerned about avoiding a comment on the evidence. [RP 627] It gave careful thought to the wording of this instruction. There is no basis for the assertion that the instruction told the jury it was free to use any evidence for any purpose it wished. It can be considered a comment on the evidence only by distorting the words to imply a meaning that just isn't there.

6. The court did not err in denying Tieskotter's motion for a new trial.

Tieskotter argues that because the limiting instruction constituted a comment on the evidence, the court should have granted his motion for a mistrial. Because the instruction was not an error of law, the court properly denied the motion. State v. Marks, 90 Wn. App. 980, 984, 955 P.2d 406 (1998).

7. The prosecutor's rebuttal argument did not shift the burden of proving the State's case or imply facts not in evidence, nor was it so flagrant and ill-intentioned that a curative instruction would have been useless.

The remarks of the prosecutor to which Hartzell objects were made during rebuttal argument, not the initial closing. He points out

that evidence was elicited that Sarah Dodge told Deputy Twomey that she had seen only Randy Perry in possession of the gun. [RP 283-84, 288] He fails to point out that Hartzell himself elicited this testimony on cross-examination. On re-direct, the deputy was permitted to testify that Sarah Dodge told him that she did not know who fired the gun inside the RAV4. [RP 476]

During his closing argument, which Hartzell refers to in his brief as “appropriate,” he insisted that the Kitsap County incident was the real subject matter of the trial. [RP 712] He argued that the victim, Sarah Dodge, said Randy Perry had the gun and that she had no reason to lie for him (Hartzell) [RP 712]. Much of Hartzell’s argument was actually testimony, including his assertion that the holster and ammunition box belonged to Randy Perry and that Perry had dropped the gun in the brush when he left. [RP 714-15, 721] He argued that there was a nexus between the weapon and Perry, but not himself. [RP 715] He vouched for the veracity of his mother. [RP 716] He called the prosecutor a bulldog. [RP 720] He accused the State of withholding evidence:

Why wouldn’t you want to call the guy who investigated the whole crime? Where is Det. Ivanovich? Where is Sarah Dodge? I will tell you where they are. He struck them from the list. They were all on his list, and he struck them. He struck

them, because he's afraid they were going to tell you the truth.

[RP 723]

On rebuttal, the prosecutor reminded the jurors that what Hartzell said, as well as what he, the prosecutor, said, was not evidence. [RP 726-27] He noted that Dodge was afraid to testify, but, contrary to his argument on appeal, where he claims Dodge was afraid of him, [Hartzell's Brief 36] Hartzell objected to the prosecutor's remark because "Ms. Dodge never said anything about any fear to anybody." The court sustained Hartzell's objection. [RP 733] Of the remarks to which Hartzell assigns error, he objected to only the remark about his mother trying to help her son. [RP 735]

Contrary to Hartzell's assertion, this last remark did not impermissibly imply facts not in evidence. In State v. Barrow, 60 Wn. App. 869, 809 P.2d 209 (1991), Barrow was convicted of drug charges. In closing, the prosecutor argued that, "It's a criminal deal, and anybody knows that if you don't want to get caught, you don't carry more than you absolutely have to. So you carry one, you get rid of one." Barrow's objection was overruled, and on appeal he

contended that the argument introduced facts not in evidence. The court there said:

We reject Barrow's contention because it mischaracterizes the prosecutor's argument. The prosecutor did not purport to quote from evidence that was not admitted. Rather, she simply made an argument based on common sense. Such argument does not fall within the prohibition of State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (improper for prosecutor, in argument, to introduce facts not in evidence).

Barrow, *supra*, at 873-74. The prosecutor here made the same type of argument, that it would be common experience that a mother would want to help her son. He was not claiming that there was testimony that Hartzell asked her to lie. Hartzell is particularly incensed about the prosecutor's remark that calling his mother was an act of desperation, but it was a reasonable inference from the evidence, and arguing reasonable inferences is something the State is permitted to do. State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718 (1991).

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the

prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, *supra*, at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." Id., at 85. While it is

true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. Id., at 87. See *also* State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000).

The challenged portions of the prosecutor's arguments set forth on page 36 of Hartzell's brief all occurred in rebuttal and all in response to the arguments made by Hartzell. Hartzell attacked the State, and the prosecutor personally, for not calling Sarah Dodge, even though the State made it clear at the outset that only the fact of Hartzell's connection to the gun was at issue. [RP 18]. Calling Dodge was unnecessary to establish the State's case and she would have been an unpredictable witness; [RP 28] Hartzell was the one who insisted on bringing in statements made by Dodge through Deputy Twomey. In closing, he argued vehemently that the State failed to call her because it was hiding something. Under these circumstances, even if the prosecutor's remark that Hartzell could have called Dodge as a witness was improper, it is not grounds for reversal, particularly since Hartzell did not object nor ask for a curative instruction. The jury was instructed that the State

bore the burden of proof and the defendants had no burden to prove reasonable doubt. [Hartzell's CP 177]

The prosecutor may comment on a defendant's failure to call a witness under some circumstances.

When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence. The prosecutor may comment on the defendant's failure to call a witness so long as it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness's ability to corroborate his theory of the case.

State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

Here, in closing argument, Hartzell plainly said that Dodge's testimony would be to his advantage when he accused the prosecutor of striking her from the witness list because the prosecutor was afraid she would tell the truth. There is nothing in the record to indicate that she was not equally as available to Hartzell as she was to the State, nor any indication that testifying favorably to Hartzell would incriminate her. The same considerations apply to Copin. Contrary to Hartzell's argument, there was no impermissible shifting of the burden of proof. "We do not agree, however, that any comment referring to a defendant's

failure to produce witnesses is an impermissible shifting of the burden of proof.” State v. Blair, *supra*, at 491. “In other words, a prosecutor can question a defendant’s failure to provide corroborative evidence if the defendant testified about an exculpatory theory that could have been corroborated by an available witness.” Barrow, at 872. Where Hartzell testified, both on the stand and during closing argument, he has no grounds to complain that the prosecutor called him on his accusations. The prosecutor never made any secret of the fact that the case against both defendants was circumstantial. [RP 689-93, 728] Despite Hartzell’s own rhetoric, the prosecutor’s statements were not impermissible or inflammatory.

Even if the court were to find that one or more of the prosecutor’s statements was improper, it would at most be harmless error. Hartzell “invited, provoked, or occasioned” the remarks of which he now complains, and they did not go “beyond a pertinent reply or bring before the jury extraneous matters not in the record,” nor were they so prejudicial that an instruction would not have cured any error. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (citing to State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)). Hartzell did not object, nor ask for a curative

instruction. The prosecutor's remarks were not of such a nature that an instruction from the judge would have failed to eliminate any prejudice.

8. The fact that the special verdict form used the words "deadly weapon" should not prevent the court from imposing a firearm enhancement.

The State does not dispute that a weapons or firearm enhancement must be based upon a jury finding. In this case, Hartzell was charged with second degree assault while armed with "a deadly weapon, a firearm." [Hartzell's CP 3] The jury was instructed that an element of second degree assault is an assault with a deadly weapon. [Hartzell's CP 186] This instruction tracks the language of RCW 9A.36.021, which includes assault with a deadly weapon as one of the alternatives, but does not require that the weapon be a firearm. The jury was instructed that for purposes of the special verdict, the definition of deadly weapon included a revolver or any other firearm, [Hartzell's CP 188,189] and that a firearm is a device which fires a projectile by use of an explosive. [Hartzell's CP 200] The special verdict form asked the jury to decide whether Hartzell had been armed with a deadly weapon at the time the crime was committed. [Hartzell's CP 207] The State's position is that these three documents together give notice to the

defendant that the sentencing enhancement for a firearm was being sought, the jury was properly instructed, and the evidence supported the jury verdict and the firearm enhancement.

RCW 9.94A.602 provides that when there is a special allegation that the defendant was armed with a weapon at the time the crime was committed, the jury must make a finding by special verdict "as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime." It does not say the jury must find whether the defendant was armed with a deadly weapon or a firearm. The second paragraph of that statute tracks the language of the jury instruction given in this case, and lists those implements or instruments that comprise deadly weapons, including a "pistol, revolver, or any other firearm." The plain language of the statute shows that the general category is "deadly weapon" and a firearm is a sub-category of deadly weapons.

RCW 9.94A.533(3) provides for additional times to be added to standard range sentences "if the offender or an accomplice was armed with a firearm." Those additional times are eighteen months, three years, or five years, depending on the underlying crime. RCW 9.94A.533(3)(a)-(c). If the offender was armed with a deadly

weapon other than a firearm, the additional times are six months, one year, or two years, again depending on the underlying crime. RCW 9.94A.533(4)(a)-(c). This statutory scheme does not support Hartzell's argument that a deadly weapon finding and a firearm finding are two mutually exclusive things. A firearm is a deadly weapon. It carries a stiffer sentencing enhancement, and therefore there is reason to expect that a defendant have notice that the State is seeking the higher penalty and that the jury find that a firearm was used.

In this case, there is reason to conclude that the jury found just that. The charging language notified Hartzell that the State was alleging he was armed with a firearm. The instruction for second degree assault does not include the word "firearm" because being armed with a firearm is not an element of that crime. The act of being armed with a firearm brings a sentencing enhancement, it is not a crime in itself. The jury was further instructed in Instruction No. 15 that the definition of deadly weapon included firearms. Finally, during the entirety of this lengthy trial, no weapon other than firearms was ever mentioned. There was exhaustive testimony about a 9 mm firearm and a .357 firearm, but not a word as to any other weapon. Both defendants were charged with drive-by

shooting, a charge for which the jury did not make a finding, not drive by stabbing or drive-by bludgeoning. For the jury to have answered “yes” on the deadly weapon verdict form, it had to have found the defendants were armed with firearms.

In 2005, the Washington Supreme Court issued an opinion in State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). In that case, Recuenco was charged with second degree assault, interfering with domestic violence reporting, and third degree malicious mischief. Although there was mention of a handgun in the charging document, the State made it clear it was not seeking a firearm enhancement. Id., at 159-60. The definition of a firearm was not submitted to the jury, and the verdict form only used the words “deadly weapon.” Nevertheless, at sentencing the court imposed the lengthier firearm enhancement. On appeal, the Supreme Court reversed, holding that the firearm enhancement could not be imposed without the jury specifically finding that a firearm was involved, and that, under a Sixth Amendment analysis, such error could never be harmless.

The case went to the United States Supreme Court and was decided in Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The U. S. Supreme Court held that failure to submit a

sentencing factor to the jury is not a structural error, and thus could be subject to a harmless error analysis under the federal constitution, and remanded it to Washington for our Supreme Court to determine if the Washington constitution permitted a harmless error analysis. On remand, the Washington Supreme Court did not apply harmless error. It held that the charging document, jury instruction, and verdict form all specified a deadly weapon other than a firearm, and thus no error occurred except by the sentencing court for imposing the higher enhancement. State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008).

After all this, the Washington courts have never held that this particular situation is not subject to a harmless error analysis. Unlike Recuenco, Hartzell was given notice in the charging document that a firearm enhancement was being sought. The jury instructions included pistols, revolvers, and other firearms in the definition of deadly weapon. The evidence at trial was that there were two guns, both of which fired multiple shots at the victim residence, proving beyond a reasonable doubt that the guns were operable. [Instruction No. 26, Hartzell's CP 200] No hint of any other weapon was introduced at trial. The jury verdict form, using the term deadly weapon, clearly reflected everyone's understanding

that the category was “deadly weapon” and that “firearm” was included in that category. Therefore, it is the State’s position that even if it was error to impose a lengthier firearm enhancement, it was at most harmless error.

In Washington v. Recuenco, the court said:

We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, “most constitutional errors can be harmless. . . . Only in rare cases has this court held that an error is structural, and thus requires automatic reversal.

Id., 126 S. Ct. at 2551.

A firearm is a deadly weapon, and the jury verdict was not erroneous. Because there cannot be a shred of doubt that the deadly weapons being considered were operable firearms, it was not error for the court to impose the lengthier enhancement on these defendants.

The State recognizes that while this brief was being written a decision was issued in In the Matter of the Pers. Restraint of Delgado, 3455-1-II (03/10/09), which holds otherwise. The State respectfully asks this court to reconsider Recuenco in light of these facts.

9. Although the non-statutory essential element of knowledge was omitted from the to-convict jury instruction for first degree unlawful possession of a firearm, the error in this case was harmless.

Tieskotter is correct that knowledge is a non-statutory essential element of the crime of first degree unlawful possession of a firearm, State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000). Instruction No. 23, the to-convict instruction for that offense, does not include that element. [Tieskotter's CP 103] Tieskotter correctly argues that this is an error of constitutional magnitude. State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). The State disagrees, however, that this is automatic reversible error.

In State v. Jennings, 111 Wn. App. 54, 44 P.3d 1 (2002), the defendant was convicted of five counts of first degree robbery and one count of second degree robbery. The jury was instructed that "display of a weapon", an element of first degree robbery, included speech which would lead a victim to believe the defendant was armed even if no weapon was visible, which is a misstatement of the law. Id., at 62. Jennings also argued that this error was not subject to a harmless error analysis. Referring to State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997), the same case on which Tieskotter relies, the court said:

Until recently, Washington law was clear that an instruction that relieves the State of its burden to prove an element of a crime is automatic reversible error. But the United States Supreme Court has unsettled this previously settled issue.

Jennings, *supra*, at 62. The Jennings court then discussed Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), which held that “a jury instruction that relieves the prosecution of its burden to prove an element of a crime is subject to harmless error analysis.” *Id.* Under Neder, only a structural error, affecting the framework in which a trial proceeds, can never be harmless. However, an instruction which omits an element of the offense is not structural. The Jennings court concluded that it must follow Neder because Washington cases on this issue rely on federal law or earlier Washington cases. *Id.*, at 63-64. Under the analysis required by Neder:

[A]n error is harmless when “it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” . . . Applied to an element omitted from, or misstated in, a jury instruction, the error was harmless if that element is supported by uncontroverted evidence. . . . The error is harmless . . . if it is clear beyond a reasonable doubt that the erroneous instruction could not have contributed to the verdict.

Id., at 64-65 (internal cites omitted).

In this case, the omission of the element of knowledge could have had no effect on the verdict. The person who fired the gun into Hoage's apartment could not fail to know he was in possession of a weapon. Knowledge of the weapon was never in question. The question before the jury was whether Tieskotter was that person.

For the same reason, Tieskotter cannot establish ineffective assistance of counsel. The standards for the performance of counsel is found in section three above and in Tieskotter's opening brief. Although defense counsel's failure to object to the instruction might be considered unreasonable, Tieskotter must also prove that he was prejudiced by the inadequate representation. Since the verdict would have been the same even if the knowledge element had been set forth in the jury instruction, he cannot do so. His conviction for this offense should not be reversed.

10. There was sufficient evidence presented at trial to support Tieskotter's convictions for second degree assault and first degree unlawful possession of a firearm.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410,

415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Tieskotter's argument that there was insufficient evidence to support his convictions is based on the fact that the evidence against him and his co-defendant was entirely circumstantial. He cites to State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999), which cited to State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962), for the proposition that a "pyramiding of inferences" cannot support a finding of guilt beyond a reasonable doubt. The opinion in Bencivenga, however, distinguishes that case from Weaver, because Weaver was based on "the former rule which required that if a conviction rests solely on circumstantial evidence, the circumstances proved must be unequivocal and inconsistent with innocence." Bencivenga, *supra*, at 711.

We have since rejected this rule in favor of the rule that whether the evidence be direct, circumstantial, or a combination of the two, the jury need be instructed that it need only be convinced of the defendant's guilt beyond a reasonable doubt.

Id., (citing to State v. Gosby, 85 Wn.2d 758, 767, 539 P.2d 680 (1975)). "[I]t is the province of the finder of fact to determine what

conclusions reasonably follow from the particular evidence in a case.” Id. Washington now follows the federal rule that circumstantial evidence need not be inconsistent with any hypothesis of innocence. State v. Zunker, 112 Wn. App. 130, 135, 48 P.3d 344 (2002) (citing also to Gosby, *supra*, at 764-65). Circumstantial evidence is not necessarily less reliable than direct evidence. State v. Couch, 44 Wn. App. 26, 30, 720 P.2d 1387 (1986).

While there was conflicting evidence presented at trial, the jury determines which evidence to believe and what weight to give to it. There was ample evidence from which a rational trier of fact could conclude that Tieskotter and Hartzell fired the shots into Hoage's apartment on April 7, 2007. They were connected to the possession of the very weapons used to fire the shots, Tieskotter within four days and Hartzell within a month of the shooting. Hartzell had gone to Kitsap County from Olympia. There was evidence that the two were so close that they considered themselves like brothers, and even though they told other witnesses they had had a falling-out and weren't speaking at the time, there was no other evidence of that except that Ashley Rochelle did not see them having the same kind of contact they

formerly had. During the month of April, 2007, Tieskotter was driving the car that the eyewitness, who observed two individuals at the time of the shooting, later identified as similar to the car the shooters were driving. Hartzell had been evicted from Hoage's apartment a couple of days before the shooting, and although when he left Hartzell told her there were no hard feelings, her testimony was that there clearly had been and she was surprised by his statement. Hoage received a phone call from Hartzell that could be considered threatening, as well as, after the shooting, a text message signed "Chase", the name Hartzell used. "The jury is permitted to infer from one fact the existence of another essential to guilt, of reason and experience support the inference." State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989) (quoting Tot v. United States, 319 U.S. 463, 467, 63 S. Ct. 1241, 1244, 87 L. Ed. 1519 (1943)).

James Rocha testified that Tieskotter purchased the weapon "around April 7th or 8th"; the jury either didn't believe him or believed he was so uncertain of the date that he was likely mistaken. A trier of fact is free to reject evidence as not credible, as long as it does not do so arbitrarily. State v. Summers, 107 Wn. App. 373, 389, 28 P.3d 780 (2001). There is no requirement that the evidence exclude

reasonable hypotheses consistent with innocence. Zunker, *supra*, at 138. Because Tieskotter stipulated that he was ineligible to possess firearms, [RP 570] the only question before the jury was whether Tieskotter was one of the two people who fired the weapons into Hoage's apartment on April 7, 2007. There was sufficient evidence to support the jury verdict.

11. Tieskotter is correct that his sentence is written so that there is a theoretical possibility he could serve more than the statutory maximum, and the matter should be remanded for the court to clarify the judgment and sentence. He did not receive ineffective assistance of counsel.

Tieskotter is correct that his sentence for Count I, second degree assault while armed with a deadly weapon, of 120 months plus 18 to 36 months of community custody, is contrary to the law as set forth in State v. Vant, 145 Wn. App. 592, 186 P.3d 1149 (2008). The State agrees that the matter should be remanded for clarification of the sentence pursuant to Vant and State v. Sloan, 121 Wn. App. 220, 87 P.3d 1214 (2004).² Because Count 2, the unlawful possession of a firearm, does not carry a term of community custody, it is not at issue.

² The State recognizes that the reasoning of Sloan, a Division I opinion, has been abandoned by Division I. See State v. Linderud, 147 Wn. App. 944, 197 P.3d 1224 (2008). However, in Division II, Vant, based upon Sloan, is current law.

Although Hartzell did not raise this issue, he received the same sentence and his case should also be remanded for clarification of the sentence.

Tieskotter did not receive ineffective assistance of counsel. As long as the matter is remanded for clarification of the sentence, he will suffer no prejudice, and thus cannot establish the second prong of the Strickland test as set forth earlier in this brief.

12. There was no cumulative error.

While appellants correctly cite to the law concerning cumulative error, a review of the record shows that there was no single error requiring reversal, nor does the record show that either defendant was prejudiced by the claimed errors. A defendant is entitled to a fair trial, but not a perfect one. In re Pers. Restraint of Elmore, 162 Wn.2d 236, 267, 172 P.3d 335 (2007).

D. CONCLUSION.

This was a complicated and contentious trial, and many issues were raised on appeal. For all of the reasons argued above, the State respectfully asks this court to remand these matters for clarification of the sentences, but otherwise to affirm the convictions.

Respectfully submitted this 12th day of March, 2009.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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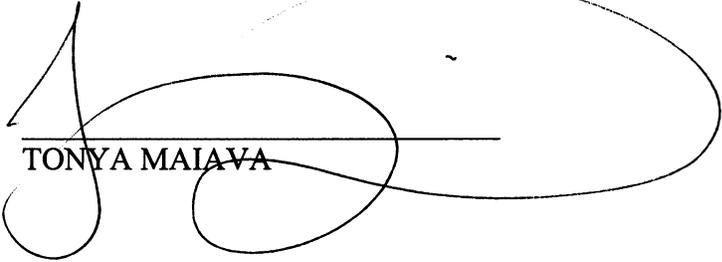
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DIVISION II

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

Dated this 12th day of March, 2009, at Olympia, Washington.



TONYA MAIAVA