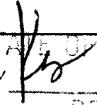


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DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD DEWEY EDVALDS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stoltz

No. 07-1-04622-6

CORRECTED BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
JESSE WILLIAMS
Deputy Prosecuting Attorney
WSB # 35543

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Has the defendant established any incidents of prosecutorial misconduct?
2. Does RCW 9.94A.535 and .537 require formal notice of the State's intent to seek an exceptional sentence under the free-crimes doctrine?
3. Where a defendant is always on notice of the potential for an exceptional sentence under the free-crimes doctrine, does due process require the State to provide formal notice of this potential?

B. STATEMENT OF THE CASE

Richard Edvalds, hereinafter "the defendant," appeals his convictions and exceptional sentence for two counts of Second Degree Burglary, one count of Second Degree Theft, and one count of Unlawful Possession of a Controlled Substance. CP at 170-71. The defendant alleges several incidents of prosecutorial misconduct and also maintains that he received insufficient notice of the possibility for an exceptional sentence. The trial proceedings and evidence pertinent to this appeal are as follows.

1. The Crimes

On the night of August 28, 2007, the defendant broke into the Tacoma Presbyterian Church and stole several items. Ex. 14; RP at 212, 233, 268. The defendant would return several hours later to steal additional items from the church. Ex. 14. Church members would

subsequently discover that the defendant had stolen a number of things, including a flat-screen television, several large speakers, a laptop computer, a projector, and an undetermined amount of cash and checks. RP at 219, 221-27.

The burglaries were captured by surveillance cameras posted in the church parking lot and inside the church. Ex. 14; RP at 236, 240. The church had a locked fence surrounding it. RP at 205. The defendant cut the fence lock and then drove a truck into the parking lot. Ex. 14; RP at 207-08. The truck was a two-tone Ford Ranger with a camper shell. Ex. 14; RP at 458. In the surveillance footage, the defendant was seen wearing camouflage pants, white tennis shoes with dark-colored tongues, at least two different sets of gloves, and black wraparound sunglasses. Ex. 14.

After the burglary, law enforcement circulated stills from the surveillance footage in an effort to identify the defendant and the truck. RP at 264. Lakewood Police Officer Adam Leonard recognized the defendant and the truck. RP at 149-50. The officer had investigated the defendant after receiving tips that he trafficked in stolen property, including wire and copper. RP at 149. The officer had conducted surveillance of the defendant and his place of employment, R&R

Recycling. RP at 149-50. The officer had seen the defendant with several vehicles, including the two-tone Ford Ranger with camper shell. RP at 149-50.

On September 5, exactly one week after the burglaries, several officers waited for the defendant at R&R Recycling. RP at 268-69. When the defendant arrived, officers approached him as he exited his white Ford Ranger. RP at 271-72. The officers identified themselves and the defendant responded by saying, “[f]uck you.” RP at 272. The defendant then jumped back into his truck and took off at a high rate of speed into a parking lot which proved to be a dead end. RP at 272. The officers surrounded the truck and had to forcibly remove the defendant in order to place him under arrest. RP at 273.

The defendant agreed to talk with Investigator Richard Barnard about the burglary. RP at 276. He admitted to being in the church parking lot on the night of the burglary. RP at 276. He accurately described the church, its location, and the surrounding buildings. RP at 276-78. According to the defendant, he had parked his truck in the church lot so he could sleep for the night. RP at 278-79. When the officer noted that the defendant could not park his truck in the lot because it was fenced and locked, the defendant claimed that he must have been thinking about a different church parking lot. RP at 279. When the investigator confronted the defendant with photos of him burglarizing the church, he denied it was

him. RP at 280. He also claimed that he did not own any camouflage pants like those worn in the photo. RP at 280-81.

When the defendant was arrested, Investigator Barnard found hypodermic needles on his person. RP at 275-76. The defendant initially told the investigator that he used the needles for diabetes. RP at 276. The defendant would subsequently admit that he had lied and that he was a methamphetamine addict who used the needles to inject the drug. RP at 276, 318.

Officers subsequently obtained a search warrant for R&R Recycling, the defendant's white Ford Ranger, and the defendant's station wagon which was also at the scene. RP at 281. Inside the station wagon were camouflage pants, white tennis shoes with blue tongues, three sets of gloves, and a set of shaved keys used to break into and steal vehicles. RP at 289-90, 297-99, 304-05, 307-09. In the defendant's white Ford Ranger were bolt cutters, black wraparound sunglasses, a baggie of methamphetamine, and a scale with methamphetamine residue. RP at 290-91, 296, 303-04, 427-29.

2. Procedural History

The State charged the defendant with a number of felony offenses and the matter proceeded to trial. CP at 1-2. On November 7, 2008, the jury convicted the defendant of two counts of Second Degree Burglary, one count of Second Degree Theft, and one count of Unlawful Possession

of a Controlled Substance. CP at 170-71; RP at 770. Sentencing was set for December 12, 2008. CP at 98.

Prior to sentencing, on November 14, 2008, the State charged the defendant under a separate cause number with a number of felony counts related to the defendant's employment at R&R Recycling. CP at 185-188. The charges included three counts of Attempted First Degree Trafficking in Stolen Property; two counts of Operate a Scrap Metal Business which Possessed Private Metal Property; and one count of Make, Cause or Allow to be Made any False Statement. CP at 185-188.

The December 12 sentencing date was continued at the defendant's request to January 23, 2009. CP at 218. On that date, the defendant first pleaded guilty to two felony counts of Attempted First Degree Trafficking in Stolen Property on the recently charged R&R Recycling case. RP (S.C. 08-1-05406-5) at 3-10. The matter then proceeded to sentencing. RP (S.C. 08-1-05406-5) at 9-10. In exchange for the defendant's guilty plea, the State agreed to recommend that the trafficking counts run concurrently with the sentences on the burglary case. RP (S.C. 08-1-05406-5) at 7-8. However, the State stressed, and the defense acknowledged, that this recommendation in no way limited the State's sentencing recommendation that would later follow on the burglary case. RP (S.C. 08-1-05406-5) at 8.

Immediately following the plea and sentence on the trafficking case, the parties proceeded to sentencing on the burglary case. RP (S.C. 08-1-05406-5) at 9-10. The State calculated the defendant's offender score as an 11 on the two burglary convictions, and as a 9 on the theft and drug convictions. RP at 779-80. These offender scores each included 2 points for the trafficking convictions. CP at 171. The State then recommended that the court impose an exceptional sentence on the burglary convictions:

Under RCW 9.94A.535, subsection (2), subsection (c), the Court can impose a sentence above the standard range when the defendant has committed multiple current offenses, and the defendant's high offender score results in some of the current offenses going unpunished. That's exactly what you have. You have a defendant with an offender score of 11 on the burglary counts, a range of 51 to 68 months. If he hadn't had drugs with him, his score would be 10. His range would be 51 to 68 months. If he hadn't committed a theft or stolen from the church, his score would be 9; and his range would still be 51 to 68 months. If he had no drugs, and he hadn't stolen from the church, his range would still be 51 to 68 months; so what you have here is free crimes. The defendant is -- will be treated the same as if he hadn't possessed drugs, as if he hadn't stolen from the church, if the Court imposes a standard range sentence; and I don't think that's appropriate; so what I'm asking the Court to do is impose a sentence of 92 months on Counts I and II, the burglary counts, that being 24 months above the standard range sentence -- above the high end of the standard range sentence

RP at 782-83.

The defendant objected to the court imposing an exceptional sentence on the basis that the State had not provided notice. RP at 787, 789-90. The defense did not ask to continue the sentencing hearing in order to address the State's request. The defendant then took the opportunity to challenge his offender score and hold the State to its burden of proof in establishing his criminal history. RP at 786-90. The State noted the following in response to the defense's objection:

[Defense counsel] asserted that this was the first time he had notice of the exceptional sentence. It's not an argument I can make until Mr. Edvalds pled guilty on his other case. He didn't have an offender score of 11 in excess of the 9 cap until he pled guilty on the other case 30 minutes ago; so in terms of notice, I couldn't give him notice until he plead guilty

RP at 794-95.

The court ultimately decided to impose standard range sentences on each of the burglary-related convictions but to run those sentences consecutive to the sentences on the trafficking case. RP at 798; RP (S.C. 08-1-05406-5) at 5, 9. The court believed in doing so that it was not imposing an exceptional sentence. RP at 798. In calculating the defendant's offender score on each conviction, the court ruled that the theft conviction constituted the same criminal conduct as the burglary convictions. CP at 171; RP at 798. The defendant therefore had an offender score of 10 on each burglary conviction, and a 9 on the drug conviction. CP at 171.

The court subsequently held another hearing at which it concluded that under RCW 9.94A.589(1)(a), it had imposed an exceptional sentence by running the burglary and trafficking cases consecutive. RP (Feb. 13, 2009) at 3, 6. The court then concluded that an exceptional sentence was appropriate under the “free crimes” provision of RCW 9.94A.535(2)(c). CP at RP (Feb. 13, 2009) at 6. The court imposed the same sentence and supported it with written findings of fact and conclusions of law. CP at 166-69, 171, 174.

This appeal from the burglary case followed. CP at 160-62. The defendant did not file an appeal in the trafficking case.

C. ARGUMENT.

1. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING ANY INSTANCE OF PROSECUTORIAL MISCONDUCT OR A RESULTING PREJUDICE.

A defendant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Comments will be deemed prejudicial only where “there is a substantial likelihood the misconduct affected the jury’s verdict.” *Brown*, 132 Wn.2d at 561. The prejudicial effect of a prosecutor’s improper comments are determined, not by looking at the comments in isolation, but by placing the remarks “in the context of the total argument,

the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *Brown*, 132 Wn.2d at 561. Where the defense fails to object to an improper comment, any misconduct is considered waived “unless the comment is 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.” *Brown*, 132 Wn.2d at 561. 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).

In this appeal, the defendant contends that the State committed numerous incidents of misconduct. The cited incidents are largely without the defendant’s objection at trial. The defendant’s assertions are also cursory and without a careful grasp of the record and the trial court’s rulings. A careful examination of each alleged incident reveals no improprieties.

a. The State’s cross-examination of the defendant.

The first allegation of misconduct centers on the State’s cross-examination of the defendant concerning his prior convictions. Br. of Appellant at 12. The defendant had a lengthy criminal history, including five felony convictions and at least twelve misdemeanor convictions. CP

at 171; RP at 598-99. The only convictions admissible per se under ER 609 were for forgery and theft. RP at 17-19. The following exchange occurred during the defendant's direct examination:

Q. Have you had to deal with a court of law in the past?

A. Yes.

Q. Okay. What for?

A. I had a forgery about 11 years ago or so, and then I had a theft.

RP at 593. After the direct examination and outside the jury's presence, the State argued that the defendant had opened the door to admit the full extent of his criminal history. RP at 596. The State maintained that the questioning and answers improperly suggested that the defendant was an upstanding citizen with only two minor run-ins with the law. RP at 596. The court agreed in part, ruling that the State could inquire about the defendant's other convictions that were ten years old or less. RP at 597-98, 600-01. In so ruling, the court excluded a number of convictions that were more than 10 years old. RP at 598-600.

The following exchange then occurred on cross-examination:

Q. . . . You would agree, sir, that the jury here has to decide whether you're credible?

A. Yes.

[Defense Counsel]: Objection. That is going to jury-type instructions. He doesn't bear that kind of knowledge.

THE COURT: I'll sustain the objection. That is the problem with the instructions by the Court to the jury.

Q. Sir, you would agree that the jury has to decide whether your testimony here today is truthful?

[Defense Counsel]: Same objection.

THE COURT: Let's go to side bar, Counsel.

(Side bar.)

THE COURT: Court has sustained the objection. [The deputy prosecutor] is withdrawing the question.

Q. Sir, yesterday you were asked and I quote, "Have you ever been to a court of law before?" Do you remember that question?

A. Yes.

Q. Again, please answer yes or no. You responded that you had been in a court of law in 1998 for a forgery case and also, I believe, you said seven or eight years ago for a false statement case. Is that what you testified to yesterday?

A. Yes.

Q. Mr. Edvalds, that wasn't accurate, was it; yes or no?

A. No.

Q. Truth, Mr. Edvalds, you have been in a court of law a number of times in the last ten years; isn't that correct?

A. Yes.

Q. In truth, you were in a court of law in 1998 when you were convicted for a felony charge of unlawful possession of a controlled substance?

A. Yes.

RP at 608-10. The same form of questioning repeated itself as the State brought attention to the defendant's eight other convictions over the past ten years (including the two mentioned on direct examination).

In this appeal, the defendant does not challenge the court's ruling that defense counsel opened the door to his prior convictions. Nor does he argue that defense counsel was constitutionally ineffective in so opening

the door. Rather, he first asserts that the State committed misconduct by asking him whether he agreed that the jury had to decide both whether he was credible and whether his testimony was truthful. But the trial court sustained the objections to these two questions and no further limiting instruction was requested. The court also ultimately instructed the jury to disregard any questioning or evidence that the court ruled inadmissible. CP at 104-05. Juries are presumed to follow the court's instructions. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). The defendant therefore cannot establish a resulting prejudice even assuming that these questions were improper.

The defendant then asserts that the State committed misconduct by using the word "truth" in posing questions during cross-examination. Br. of Appellant at 12. It must be noted that no such objections were lodged at trial. The defendant relies on *State v. Stith*, 71 Wn. App. 14, 856 P.2d 415 (1993), for the proposition that it is error for a prosecutor to use the word "truth" when asking a witness about their trial testimony. In *Stith*, the prosecutor asked the defendant during cross-examination whether the police officers were lying when they testified to witnessing the defendant deal narcotics. *Stith*, 71 Wn. App. at 19-21. The prosecutor also argued in closing that a judge had already found probable cause in the case and that the criminal justice system had incredible safeguards to prevent police officer perjury. *Stith*, 71 Wn. App. at 21-23.

Stith simply emphasizes a now well understood principle of law: It is improper for a prosecutor to vouch for the credibility of a witness or to ask one witness to comment on the credibility of another witness. See *State v. Ish*, 150 Wn. App. 775, 786, 208 P.3d 1281 (2009) (“While it is improper for a prosecutor to vouch for the credibility of a witness, no prejudicial error arises unless counsel clearly and unmistakably expresses a personal opinion as opposed to arguing an inference from the evidence.”); *State v. Jerrels*, 83 Wn. App. 503, 507, 925 P.2d 209 (1996). No such impropriety occurred in this case.

Here, the trial court agreed with the State that the defendant gave misleading testimony on direct that he had only been to a court of law twice. The State was permitted to correct that by questioning the defendant about the *true* extent of his contacts with the criminal justice system over the previous ten years. Cross-examination routinely includes phrases equal to that used here, for example, “Isn’t it true . . .” or “You would agree . . .” The common and appropriate nature of the State’s questioning is reflected in the lack of an objection from the defense. This assertion of misconduct is without merit.

The defendant next argues that the State committed misconduct when it asked him if he expected the jury to believe certain aspects of his testimony. Br. of Appellant at 12-13. The defendant testified on direct examination that he was “up front” with the investigator about the hypodermic needles in his possession. RP at 566. On cross-examination,

the defendant conceded that he lied to the investigator about using the needles for diabetes. RP at 612. The defendant also conceded that he was not truthful when he testified that he was “up front” with the investigator about the needles. RP at 612.

The following exchange then occurred on cross-examination:

Q. Thank you. You can go ahead and put that back in the bag for me. Mr. Edvalds, yesterday you testified about the camouflage pants that have been admitted into evidence; is that correct?

A. I did.

Q. And according to your testimony and I quote, “I was gave those.” Does that sound correct?

A. I was given those, yes, I suppose.

....

Q. So when Investigator Bernard [sic] showed you a picture with camouflage pants and you said, “I don’t own any camouflage pants,” yes or no, that was a lie?

A. No.

Q. I’ll show you what’s been marked as Plaintiff’s Exhibit No. 7. Those are the camouflage pants we’re talking about, correct?

A. These are the ones that were hanging on the wall in the shop, yes.

Q. The ones that were given to you as a gift?

A. Which I never wore, yes, these are the ones.

Q. Again, it’s your testimony that those pants came from inside of R and R Recycling and not from the Ford Escort?

A. Yes.

Q. And, again, Mr. Edvalds, you expect the jury to believe that - -

[Defense Counsel]: Objection, argumentative, Your Honor.

THE COURT: I’ll overrule the objection. This is cross-examination.

Q. You expect the jury to believe that just like you expect the jury to believe that you were being up front

with the investigator?

[Defense Counsel]: Objection - -

THE COURT: I will sustain the objection.

It's a compound question. Secondly, let's try to take one at a time, all right?

Q. You expect the jury to believe that you're being up front with them with that testimony; is that right?

A. I do.

Q. Just like you were being up front with Investigator Bernard [sic]?

A. I was up front with him, yes.

RP at 615-17.

Other than the compound question that the court sustained the objection to, there was nothing improper about this line of questioning. With the defendant having conceded that he was willing to lie whether or not he was under oath, it was proper for the prosecutor to explore other areas where the defendant's credibility might be doubted. It was proper to try and ascertain the defendant's criteria for when he told the truth and when he lied. Although the prosecutor's questions could have been better phrased, they focused on matters that were proper for cross-examination. The defendant has not established flagrant and ill intentioned misconduct.

The defendant continues his conclusory assertions of misconduct by citing three other questions posed to the defendant on cross-examination. Br. of Appellant at 13. The defendant again does not provide context for the questions, articulate in any detail how each constitutes misconduct, or provide any supporting authority. These assertions should thus be dispatched without further review. See *State v.*

Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (court will not review issues that have only received passing treatment); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider claims that are insufficiently argued); *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999) (appellate court need not consider arguments that are conclusory).

Nonetheless, the State will briefly address each question. The defendant asserts that it was misconduct to ask him in cross-examination whether he agreed that property stolen from the church had a value in excess of \$250. RP at 624. The court sustained the objection to this question and thus no prejudice can be established in this appeal. Further, it should be noted that this question followed a long line of questions without objection in which the defendant conceded that two burglaries had occurred at the church, and that the only issue in dispute was the identity of the perpetrator. RP at 623-24. It is not misconduct for one party to obtain concessions from the other party in order to narrow the range of disputed issues for the jury's consideration.

The defendant next asserts that it was misconduct to question him on the depth of the investigation he conducted in order to prove his innocence. RP at 622-23. The defendant testified that he had done several things to prove his innocence, including posting flyers, reviewing discovery in the case, and personally contacting law enforcement and encouraging others to do the same. RP at 590-91, 621-23. The defendant

objected only once when the State questioned him about his efforts, and the basis for the objection was “argumentative,” which was sustained. RP at 623. Once the defendant put his efforts into evidence, the State was free to cross-examine him on this topic. It was not misconduct for the State to question the quality and quantity of the defendant’s investigation

Lastly, the defendant references the following passage:

Q. Mr. Edvalds, we talked in length about a number of prior convictions, and I don’t want to go into those per se. As part of those convictions, you have been arrested before, correct?

A. Yes.

Q. And as part of those arrests, have you ever been arrested from a car? You were driving in a car - -

RP at 620. The court sustained an objection to this question after a sidebar off the record. RP at 620. The defendant therefore cannot establish a resulting prejudice from the question. Further, it is worth noting that the jury had already been informed through prior unchallenged rulings and questioning that the defendant had a number of prior convictions including *driving* with a suspended driver’s license. RP at 610-11. Again, no prejudice can be established.

b. The State’s questioning regarding surveillance of R&R Recycling.

The defendant next asserts that the State elicited testimony in violation of a pretrial ruling. The defendant had moved to exclude any testimony concerning law enforcement’s familiarity and prior investigations of the defendant. RP at 13-16, 148-56, 188-90. The court

ruled that Officer Leonard could testify that he had previously observed the defendant and had seen him driving the two-tone Ford Ranger with camper shell. RP at 152-55. The court ruled that the officer could not use the term “surveillance” and that he could not testify as to reasons for his prior observations of the defendant. RP at 154-55.

In arguing that this ruling was violated, the defendant first cites to Officer Leonard’s testimony at RP 451 to 456. Br. of Appellant at 14. The defendant offers no analysis and simply makes the conclusory assertion that this testimony violated the pretrial ruling. This argument should be rejected on that basis alone.

Further, the defendant appears to misunderstand the court’s pretrial ruling. A review of the record reveals that at no time did the officer use the word “surveillance” or testify as to the reasons for his interest in the defendant. *See* RP at 446-69. Indeed, although objections were made during the officer’s direct examination, there was no objection on the grounds that the testimony violated the court’s pretrial ruling. The officer’s testimony did not violate the court’s pretrial ruling and the defendant has not shown that the prosecutor committed misconduct.

The defendant then argues that the State violated the pretrial ruling in questioning defense witness Roger Pederson. Br. of Appellant at 14. The defendant again offers no analysis other than his conclusory assertion that this was misconduct. The defendant also appears to again

misunderstand the court's pretrial ruling, which concerned only law enforcement testimony about "surveillance" of the defendant.

Pederson was the owner of R&R Recycling and the former father-in-law of the defendant. RP at 517. On cross-examination, the State asked Pederson if he knew law enforcement had surveilled R&R Recycling. RP at 524. Pederson answered that he did and the defendant objected. RP at 524. In response to the objection, the State noted that the defense had made Officer Leonard's credibility a central issue by disputing his testimony that he had seen the defendant with the two-tone Ford Ranger. RP at 526. Pederson's confirmation that law enforcement had watched R&R Recycling thus verified the officer's opportunity to observe the defendant and the two-tone Ford Ranger. RP at 526. The court agreed with the State. RP at 527-28. Pederson thereafter testified that law enforcement had been watching R&R Recycling. RP at 529. And, although non-responsive, he testified that "I guess my answer would be that in the industry at that time, law enforcement was surveiling [sic] all recycling centers because of stolen metal properties." RP at 529.

The State did not commit misconduct in this instance. The initial question of Pederson that prompted the objection did not contravene any pretrial ruling. The court also agreed with the State that such testimony was admissible. The defendant does not challenge that ruling in this appeal. Pederson's testimony also noted that law enforcement's focus was on R&R Recycling and not the defendant, thus alleviating any potential

for the jury to improperly infer prejudice against the defendant. This allegation of misconduct is without merit.

The defendant has presented a litany of alleged instances of prosecutorial misconduct. Many of those instances are given little if any argument by the defendant. Other instances reflect the defendant's misunderstanding of the record. A careful examination of each alleged misconduct reveals no improprieties. The defendant has not set forth a single example of prosecutorial misconduct.

- c. The defendant cannot establish that any misconduct, assuming it occurred, likely impacted the jury's verdict given the strength of the State's case.

A claim of misconduct also requires the defendant to establish prejudice. Prejudice requires a "substantial likelihood" that the misconduct affected the jury's verdict." *Brown*, 132 Wn.2d at 561. Here, the jury was presented with high-quality surveillance footage that clearly captured the burglary culprit. The jury viewed the footage as well as the defendant and determined that they were one in the same. It heard from Officer Leonard who identified the defendant and his vehicle in the footage. It heard that the defendant admitted to being in the church parking lot on the night in question. It heard that the defendant attempted to flee when contacted by law enforcement. It also heard that the defendant possessed bolt cutters like those used to cut the gate padlock. It also heard that the defendant possessed numerous distinct items worn

during the burglary, including camouflage pants, white tennis shoes with blue-colored tongues, at least two different sets of gloves, and black wraparound sunglasses. Based on this evidence, the defendant cannot establish that any alleged misconduct likely impacted the jury's verdicts.

2. THE COURT'S EXCEPTIONAL SENTENCE UNDER THE FREE-CRIMES PROVISION OF RCW 9.94A.535(2)(C) DID NOT VIOLATE THE DEFENDANT'S RIGHT TO NOTICE.

The defendant next challenges the court's exceptional sentence, arguing that he did not receive adequate statutory or constitutional notice. But under RCW 9.94A.535 and .537, a defendant is always on notice of the potential for an exceptional sentence under the free-crimes doctrine. These statutory provisions do not impose a formal notice requirement. These contentions should be rejected.

- a. RCW 9.94A.535 and .537 provide general notice to all defendants of the possibility for an exceptional sentence under the free-crimes doctrine. These provisions do not impose a formal notice requirement for such an exceptional sentence.

The State first addresses the issue of statutorily-required notice. *See State v. Moro*, 117 Wn. App. 913, 920, 73 P.3d 1029 (2003) (noting that the parameters for due process notice of an exceptional sentence depend on the notice requirements provided by sentencing statutes). The defendant's notice argument hinges solely on RCW 9.94A.537(1) (hereinafter ".537"), which reads as follows:

At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, *the state may give notice* that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(Emphasis added).

The interpretation of a statute is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The goal of statutory interpretation is to discern and implement the legislature's intent. *Armendariz*, 160 Wn.2d at 110. Where the language of a statute is unambiguous, legislative intent is derived from the language of the statute alone. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 876, 215 P.3d 162 (2009). Statutes must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous. *Rothwell*, 166 Wn.2d at 877. The court must also avoid constructions that yield unlikely, absurd, or strained consequences. *Rothwell*, 166 Wn.2d at 877.

The State will assume that .537 generally requires the prosecutor to give notice if it intends to seek an exceptional sentence. It should be noted, however, that the statute simply states that the State "may" give notice if it intends to seek an exceptional sentence. Mandatory notice would be the unambiguous directive if the statute read, "At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state ~~may~~ shall give notice ~~that~~ if it is seeking a sentence above the standard sentencing range." See *State v. Krall*, 125

Wn.2d 146, 148, 881 P.2d 1040 (1994); *State v. Stivason*, 134 Wn. App. 648, 656, 142 P.3d 189 (2006) (“In construing statutes and court rules, the words ‘will’ and ‘shall’ are mandatory, while words like ‘may’ are permissive and discretionary.”); *In re Rogers*, 117 Wn. App. 270, 275, 71 P.3d 220 (2003) (“Where a provision contains both the words ‘shall’ and ‘may,’ it is presumed that the lawmaker intended to distinguish between them; ‘shall’ being construed as mandatory and ‘may’ as permissive or discretionary.”). The plain language of the statute thus reflects no mandatory notice requirement.¹

¹ The state supreme court has offered contradictory statements on this question. In a case where the aggravating circumstances had to be proved to a jury, the court interpreted the notice provision in .537 as a mandatory prerequisite for the imposition of an exceptional sentence. *State v. Womac*, 160 Wn.2d 643, 663, 160 P.3d 40 (2007) (“RCW 9.94A.537(1) permits the imposition of an exceptional sentence only when the State has given notice, prior to trial, that it intends to seek a sentence above the standard sentencing range.”). But in *State v. Pillatos*, 159 Wn.2d 459, 479, 150 P.3d 1130 (2007), the court wrote the following in addressing one of several challenges to Laws of 2005, chapter 68, portions of which were codified at RCW 9.94A.535 and .537: Defendants assert, additionally, that they may not be subject to an exceptional sentence unless the aggravating factors are charged in the information. Laws of 2005, chapter 68, does not explicitly require such pleading of aggravators. Instead, it says that if the “substantial rights of the defendant” are not offended, notice of intent to seek an exceptional sentence may be given any time “prior to trial or the entry of a guilty plea.” (quoting Laws of 2005, ch. 68, § 4(1)). This statement however might be construed as dicta. The court refused to decide whether notice was obligatory because the issue was “not ripe for review”—the defendant had yet to plead guilty or proceed to trial and thus there was no exceptional sentence to object to. *Pillatos*, 159 Wn.2d at 479.

Although the plain language of .537 does not impose a notice requirement, one might argue that this straight forward reading renders .537 superfluous. It does beg the question: What is the point of a statute that permits but does not require the State to give notice? The State is always free to give notice of its intentions and is generally required to do so at some point to protect a defendant’s constitutional right to due process. Nonetheless, this is not an issue that the court must address to resolve this appeal. This Court can assume for the sake of argument that .537 imposes a general notice requirement. But .535 specifically provides that exceptional sentences based on “the fact of a prior conviction” are not subject to notice under .537. As discussed in this brief, the prior-conviction exception includes the free-crimes justification invoked in this case.

Assuming .537 contains a notice requirement, it must be read in conjunction with RCW 9.94A.535 (hereinafter “.535”), which begins as follows:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, *other than the fact of a prior conviction*, shall be determined pursuant to the provisions of RCW 9.94A.537.

RCW 9.94A.535 (emphasis added). .535 then contains three subsections: RCW 9.94A.535(1) concerns sentences below the standard range; .535(2) concerns sentences above the standard range based on facts considered by the court; and .535(3) concerns sentences above the standard range based on facts considered by the jury. The free-crimes aggravator falls under .535(2)(c), which reads:

(2) Aggravating Circumstances—Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

....

(c) The defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.

The free-crimes aggravator falls under the prior-conviction exception that explicitly does not invoke the notice requirements of .537. The Washington Supreme Court discussed the free-crimes aggravator in *State v. Alvarado*, 164 Wn.2d 556, 564 192 P.3d 345 (2008). There, the

defendant maintained that .535(2)(c) violated his right to a jury trial. The court rejected that claim:

[T]he only factors the trial court relies upon in imposing an exceptional sentence under RCW 9.94A.535(2)(c) are based on criminal history and the jury's verdict on the current convictions. [*State v. Newlun*, 142 Wn.App. 730, 742-43, 176 P.3d 529 (2008)]. Both fall under the *Blakely* prior convictions exception, as no judicial fact finding is involved. *Id.* Indeed, current offenses are treated as prior convictions for purposes of computing the offender score in relation to imposing an exceptional sentence. RCW 9.94A.589(1)(a).

Under RCW 9.94A.535(2)(c) the legislature provided that where current offenses go unpunished based on criminal history and current offenses, this is an aggravating circumstance per se. This provision was designed to codify the "free crimes" factor as an automatic aggravator without the need for additional fact finding as to whether the existence of "free crimes" results in a "clearly too lenient" sentence.

....
Recognizing the "automatic" effect of RCW 9.94A.535(2)(c) helps maintain the division of responsibility between jury as fact finder and judge as sentencing authority. *Blakely* underscores the role of the judge in determining whether particular circumstances constitute substantial and compelling grounds to impose an exceptional sentence. *Blakely*, 542 U.S. at 305 n. 8, 124 S. Ct. 2531. The determination under RCW 9.94A.535(2)(c) that "some of the current offenses [go] unpunished" rests solely on criminal history and calculation of the offender score, without the need for additional fact finding by the jury.

Alvarado, 164 Wn.2d at 566-69 (last alteration in original).

.535 provides that "[f]acts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the

provisions of RCW 9.94A.537.” Pursuant to *Alvarado*, the free-crimes justification is based solely on the fact of prior convictions. No additional facts must be determined to impose an exceptional sentence under this provision. Therefore, .535, by its own terms, specifically excludes the free-crimes justification from the notice provisions of .537. This court must therefore conclude that the defendant has no statutory right to notice of the State’s intent to seek an exceptional sentence under .535(2)(c).

This makes sense. The purpose of notice is to inform a defendant with reasonable certainty of the nature of the charges in order to prepare a defense. See *State v. Leach*, 53 Wn. App. 322, 328-29, 766 P.2d 1116 (1989). A defendant certainly needs notice to prepare a defense when the State seeks an exceptional sentence for any aggravating factor under .535(3), as these factors are submitted to the jury for determination, and the defense may want to challenge the State’s evidence or present conflicting evidence. But the concerns of preparing a proper defense are not implicated when the basis for the exceptional sentence is the free-crimes provision of .535(2)(c). This provision is automatically at issue anytime the defendant is facing sentencing on multiple felony offenses with an offender score in excess of 9. To that end, the defendant is always on notice of the potential for the free-crimes aggravator. No distinct pretrial preparation is needed to defend against a request for an exceptional sentence under .535(2)(c).

This case also represents the absurd and unjust results that might result if .537 is construed to require a notice requirement for the free-crimes justification. Up to and through trial, the State could not formally notify the defendant because he was not eligible for an exceptional sentence: His offender score was at most 9 on the burglary counts, and 8 on the drug and theft counts.² The possibility for an exceptional sentence under .535(2)(c) arose only when, post trial, the defendant was charged and pleaded guilty in the trafficking case. There was no potential for free crimes in the burglary case until the defendant pleaded guilty to two felonies in the trafficking case, thereby raising his offender score. Mandatory pretrial notice would thus tie the State's hands in unforeseeable situations such as this where the defendant's offender score was subject to change due to the resolution of other felony cases, including ones that were not yet pending at the time the initial information was filed. In this case, the defendant would receive concurrent sentences and free crimes, and the State, without the benefit of clairvoyance, would be limited to recommending a standard range sentence. This would be the type of absurd and unjust result to be avoided in construing .535 and .537. *See*

² Without the trafficking case, the court ultimately determined the defendant's offender score was 8 on the burglary counts, and 7 on the drug and theft convictions. The 1-point reduction on each count was due to the court finding that the theft constituted the same criminal conduct as each of the burglaries.

State v. Brundage, 126 Wn. App. 55, 69, 107 P.3d 742 (2005) (free crimes are “inconsistent with the legislature’s stated purpose to ‘[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history.’”) (alteration in original) (quoting RCW 9.94A.010(1)).

It is also important to note the strange dichotomy that would exist if the State was required to provide notice of the free-crimes aggravator. A sentencing court may *sua sponte* impose an exceptional sentence based on the free-crimes aggravator of .535(2)(c). Indeed, .535(2) is entitled “Aggravating Circumstances—Considered and Imposed by the Court.” The notice requirement of .537 is directly only to the State—there is no corresponding provision for a sentencing court. Under the defendant’s argument, an exceptional sentence under .535(2)(c) would violate one’s right to notice only when the sentence was recommended by the State. This is an illogical distinction that only highlights the erroneous nature of the defendant’s position.

.535 unambiguously and specifically excludes the free-crimes aggravator from the formal notice provisions of .537. The defendant therefore has no statutory right to formal notice of the State’s intent to seek an exceptional sentence under .535(2)(c). The defendant is always on notice of the potential for the free-crimes aggravator when he is facing sentencing on multiple felony offenses with an offender score in excess of 9. The defendant’s argument to the contrary is without merit.

- b. The defendant has insufficiently addressed the issue of constitutionally-required notice.

Once again in this appeal, the defendant raises an issue that is given passing treatment, little legal analysis, and no more than conclusory assertions. The defendant devotes less than two pages to arguing that he did not receive statutorily or constitutionally sufficient notice of the State's intent to seek an exceptional sentence. Of these two pages, only four sentences appear to touch on the constitutional question. Those four sentences provide zero analysis. Rather, the four sentences provide very meager summaries of two cases that passed upon the requirements for prior convictions used to support an exceptional sentence.

“Parties raising constitutional issues must present considered arguments to this court.” *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); *see also State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008) (“Passing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review.”). “[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *Johnson*, 119 Wn.2d at 171 (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

This Court should not condone the defendant's perfunctory legal analysis. An allegation of a constitutional violation that would reverse an exceptional sentence deserves proper briefing and scrutiny. It is unfair to the State, who must not only point out the deficiency but also, in an

abundance of caution, provide the legal analysis missing from the defendant's brief. The State is left to flush out the contours of the defendant's argument as well as the applicable legal authority. This Court should decline to address the defendant's claim that he did not receive constitutionally-sufficient notice of the State's intent to seek an exceptional sentence.

- c. The defendant received constitutionally-sufficient notice of the State's intent to seek an exceptional sentence because a defendant is always on notice of the potential for an exceptional sentence under the free-crimes aggravator.

Assuming this Court overlooks the dearth of legal analysis from the defendant, there is no question that the argument fails on the merits. The essentials of procedural due process comprise notice of the charges and a reasonable chance to defend against them. See *Bonneville v. Pierce County*, 148 Wn. App. 500, 515, 202 P.3d 309 (2008). The State due process clause affords the same protection as its federal counterpart. *State v. Manussier*, 129 Wn.2d 652, 679-80, 921 P.2d 473 (1996).

.537 was enacted in 2005 as part of the response to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt). Prior to .537, there had been no general provision requiring notice

of the intent to seek an exceptional sentence. Appellate courts repeatedly rejected contentions of insufficient notice. *See, e.g., Moro*, 117 Wn. App. at 920; *State v. Wood*, 57 Wn. App. 792, 798, 790 P.2d 220 (1990); *State v. Falling*, 50 Wn. App. 47, 50, 747 P.2d 1119 (1987); *State v. Gunther*, 45 Wn. App. 755, 727 P.2d 258 (1986).

For example, in *Gunther*, the State notified the defendant after the trial that it would seek an exceptional sentence. 45 Wn. App. at 757. The Court of Appeals rejected the defendant’s claim that his right to due process was violated by the lack of notice:

The reason that a notice requirement was not included is that an exceptional sentence is a possibility in every sentencing under the Sentencing Reform Act. To require that each defendant be given notice of that ever-existent potentiality would be redundant. . . . The possibility of an exceptional sentence always exists, and notice of that fact is inherent in the statutory provisions which create the possibility.

Gunther, 45 Wn. App. at 758 (alterations in original) (quoting DAVID BOERNER, SENTENCING IN WASHINGTON § 9.19). The court continued, “[t]he State is not required to notify a defendant prior to trial that it may seek a sentence beyond the presumptive range. To require the State to commit itself to a sentence recommendation prior to trial makes little sense. An informed recommendation cannot be made until after trial.” *Gunther*, 45 Wn. App. at 758.

The logic set forth in *Gunther* applies with equal force here. As previously discussed, .537 does not mandate that the State formally notify

the defendant that it will may seek an exceptional sentence under the free-crimes provision of .535(2)(c). Such notice is unnecessarily redundant because a defendant is always on notice of this potential. Such a possibility exists anytime the State charges the defendant for multiple felony offenses and at least one offense has an offender score of 10 or above. “The possibility of an exceptional sentence always exists, and notice of that fact is inherent in the statutory provisions which create the possibility.” *Gunther*, 45 Wn. App. at 758 (quoting DAVID BOERNER, SENTENCING IN WASHINGTON § 9.19).

This conclusion is also consistent with cases addressing the notice requirement for “three strikes” or recidivism-related laws that increase an offender’s sentence –like the free crimes aggravator – based solely on his criminal history. In *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), the Court addressed whether procedural due process required notice before trial on an offense that would render a defendant a habitual criminal, and thus eligible for increased punishment. The Court concluded that the determination of whether an offender was a recidivist or a habitual criminal was “‘essentially independent’ of the determination of guilt on the underlying substantive offense.” *Oyler*, 368 U.S. at 452. The Court found no requirement under procedural due process that a defendant be given notice in advance of trial that he might be subject to the possibility of enhanced sentencing for recidivism following conviction. *Oyler*, 368 U.S. at 452. The Court noted that “[a]ny other rule

would place a difficult burden on the imposition of a recidivist penalty” because while “the fact of prior conviction is within the knowledge of the defendant, often this knowledge does not come home to the prosecutor until after the trial.” *Oyler*, 368 U.S. at 452 n.6.

The principles announced in *Oyler* have been applied in numerous notice-related challenges to The Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (“ACCA”), which raises the minimum and maximum sentences depending on an offender’s criminal history. See *Custis v. United States*, 511 U.S. 485, 487, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994). In *United States v. Mack*, 229 F.3d 226 (3d Cir. 2000), the court addressed a claim that a defendant was entitled to formal pretrial notice of the government’s intent to seek an enhanced sentence under the ACCA. Mack argued that pretrial knowledge of the applicability of the ACCA was critical in deciding whether to plead guilty or to go to trial. *Mack*, 229 F.3d at 231. Citing *Oyler*, the Court of Appeals concluded that notice was not required to impose an aggravated sentence under the ACCA. *Mack*, 229 F.3d at 231. The court noted that every circuit that has addressed this issue has reached the same conclusion. *Mack*, 229 F.3d at 231.

Washington Supreme Court decisions are in accord with these federal cases. In *State v. Clark*, 129 Wn.2d 805, 811, 920 P.2d 187 (1996), the court addressed the nature of the death penalty notice required by RCW 10.95.040(2), and concluded that the case did not present a constitutional issue as the constitution requires notice of the criminal

charges but not of the “penalty exacted for the conviction of the crime.” (Citing *State v. Lei*, 59 Wn.2d 1, 3, 395 P.2d 609 (1961)). In *Lei*, the court found no constitutional violation in informing a habitual offender after his conviction of a third felony that the State was seeking the mandatory penalty. The court held that the state constitution does not require the “accused be informed... relative to the penal provisions which may be imposed in the event of a conviction.” *Lei*, 59 Wn.2d at 3; *see also State v. Thorne*, 129 Wn. 2d. 736, 779-80, 921 P.2d 514 (1996) (formal notice not required in order to sentence a defendant as a persistent offender).

The principles set forth in the cases above flow from “long-standing and basic principles upon which our legal system depends, that all sane persons are presumed to know the law, and are, in law, held responsible for their free and voluntary acts and deeds.” *State v. Spence*, 81 Wn.2d 788, 792, 506 P.2d 293 (1973), *rev'd on other grounds*, 418 U.S. 405 (1974). Just as ignorance of the law does not provide a legal defense to a crime, a claim of ignorance of the potential penalty for a crime should not provide a means of escape from the imposition of a penalty authorized by the legislature.

In this case, the defendant pleaded guilty to two felony counts on the trafficking case knowing that it would raise his offender score on the burglary-related convictions. He also acknowledged that his plea imposed no limitations on what the State would recommend for the burglary-related

convictions. The defendant knew that because of his plea on the trafficking case, he would receive at least one free crime on the burglary case if standard range sentences were imposed. Because formal notice is not statutorily required for a free-crimes-based exceptional sentence, the defendant had no reasonable expectation to receive such notice. The State notified the defendant that it would seek an exceptional sentence on the basis of free crimes as soon as he was eligible for such a sentence—after the court accepted his guilty plea and entered convictions on the trafficking case. The defendant did object to lack of notice but did not request a continuance to evaluate the State’s request. The defendant was afforded an opportunity, and took advantage of it, to dispute his offender score and proof of prior convictions that subjected him to a potential free-crimes-based exceptional sentence.

Here, the defendant apparently hoped that he would receive a windfall benefit by the imposition of concurrent standard range sentences that in effect rendered some of his crimes unaccounted for. The fact that the defendant did not succeed does not mean that his right to due process was violated. It was not. This court must reject the defendant’s claim.

D. CONCLUSION

This Court should affirm the defendant's convictions and sentence. The defendant has failed to set forth a single incident of prosecutorial misconduct. Equally without merit is the defendant's claim that the court's exceptional sentence violated his right to statutory or constitutional notice.

DATED: December 14, 2009.

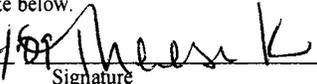
MARK LINDQUIST
Pierce County
Prosecuting Attorney



JESSE WILLIAMS
Deputy Prosecuting Attorney
WSB # 35543

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-14-09 
Date Signature

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