

NO. 41630-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY REEK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-01134-4

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether, although the trial court erred in not entering written findings of fact following the CrR 3.5 hearing, the error was harmless when the trial court rendered detailed oral findings of fact and conclusions of law which are sufficient to allow this court to address the issues on appeal? In addition, whether the trial court erred in holding that the Defendant's statements were voluntary and admissible, when the court's findings were supported by substantial evidence?

2. Whether the Defendant's claim that the trial court erred in failing to give WPIC 6.41 is without merit when the Defendant was not entitled to this instruction based on the actual facts produced at trial? In addition, whether, even if the trial court did err, any error was clearly harmless?

3. Whether the Defendant's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found the State proved the essential elements of the crime of Burglary beyond a reasonable doubt?

4. Whether the Defendant's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found the State proved the essential elements

of the crime of bail jumping beyond a reasonable doubt?

5. Whether the Defendant's claim of ineffective assistance of counsel is without merit when the Defendant has failed to show that defense counsel's representation was deficient or that the Defendant suffered any prejudice?

6. Whether the Defendant's claim of prosecutorial vindictiveness is without merit when there is no presumption of prosecutorial vindictiveness when the State amends charges in a pretrial setting and when the Defendant has failed to show any evidence of actual vindictiveness?

7. Whether the Defendant's claim of cumulative error is without merit when the Defendant has failed to show that the trial court erred?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Anthony Reek was charged by amended information filed in Kitsap County Superior Court cause number 09-1-01134-4 with eleven counts. CP 68. On December 3, 2010, the Appellant was convicted at trial of a total of 10 counts, including five felonies and five gross misdemeanors. CP 169-74. The felony convictions included Burglary in the Second Degree, two counts of Forgery, and two counts of Bail Jumping. CP 261. The Gross misdemeanors included convictions for three counts of Criminal Trespass in the First Degree

and two counts of Making a False Statement. The trial court imposed a standard range sentence that included a total sentence of 68 months confinement. CP 261. This appeal followed.

B. FACTS

In September of 2007 Walmart issued a permanent “trespass” notice to the Defendant informing him that he was not to enter any Walmart stores and that if he did enter a Walmart he could be charged with trespassing. RP 61-65; Exhibit 1.

Philip Grimes, the asset protection coordinator for the Poulsbo Walmart store further explained that Walmart has a policy that it will allow customers to return merchandise without a receipt, but that Walmart requires ID’s for these returns as the store tracks these “no receipt” returns and only allows a customer to have three “no receipt” returns in any 12 month period. RP 58-60.

Despite the previous trespass notice, the Defendant entered the Poulsbo Walmart store on August 5, 2009. RP 65-69. On this visit the Defendant went to the customer service desk and returned a “family tent” without a receipt. RP 65-69, 70; Exhibit 21. The transaction was captured on the store’s video surveillance system, which was then played for the jury at trial. RP 65-69. Mr. Grimes explained that during the transaction the Defendant used a Washington State ID numbered “FARISDM164LE.” RP

66-69; Exhibit 21. The Defendant was able to successfully obtain a refund on this occasion. RP 66.

The Defendant returned to the Poulsbo store again on August 13, 2009 and returned another tent. RP 70. As in the previous return, the Defendant again had no receipt and the transaction was videotaped and the tape was played at trial. RP 70-71. For this transaction the Defendant used a Washington State ID with the number "CLINTNL384NG." RP 70.

On August 17th, the Defendant made two additional visits to the store. The first visit occurred early in the morning at a time when the customer service counter was not open, so refunds were handled at a regular checkout register. RP 72. The Defendant went to a register to purchase an item and tried to return two faucets. RP 73. This transaction was denied. RP 75-76.

Later that same day the Defendant came back to the store and attempted to return two faucets. RP 76. The Defendant provided an ID, and the employee then took the ID and showed it to Mr. Grimes, the asset protection supervisor. RP 77-78. Mr. Grimes explained that the first five letters of this ID were "GARCIA" and that the ID appeared to have been washed, the lettering was suspicious, and the picture appeared to have been scraped. RP 80; Exhibit 24. The Defendant (who was able to see Mr. Grimes and the supervisor talking) then left the building, leaving the faucets and the

ID behind. RP 78. Mr. Grimes thought the ID was fraudulent, so he called 911. RP 79. Mr. Grimes then followed the Defendant out of the store and saw him leave in a car RP 79, 81. Mr. Grimes then gave a description of the car to law enforcement. RP 79, 81.

Officer Nick Hoke of the Poulsbo Police Department was dispatched to the scene and saw the car driven by the Defendant as it was leaving the Walmart parking lot. RP 87-88. Officer Hoke pulled the Defendant over and spoke with the Defendant. RP 88-89. The Defendant did not have any identification on him but he verbally identified himself as “Brian Patrick Reek” and gave a date a birth and said he was from Missouri. RP 89-90.

Mr. Grimes then came to the scene and gave Officer Hoke the ID card that the Defendant had left behind in the store. RP 91. Officer Hoke then arrested the Defendant, put him in handcuffs, and advised him of his rights. RP 26. The ID that the Defendant had left behind at the store had a different name on it than the name the Defendant had given to the officer, so Officer Hoke asked the Defendant about it. RP 91. The Defendant admitted that it was the ID he had left behind at the store when he was trying to return merchandise. RP 91-92. The Defendant also admitted that the he had manufactured the ID card himself at home and that it was his intent to defraud the store. RP 92.

An additional ID and papers used in cutting and pasting the fake IDs were later recovered from the car the Defendant had been in. RP 92-93; Exhibit 25. In sum, the IDs Officer Hoke recovered from Mr. Grimes and the car listed two names: “Anthony James Garcia” and “Nichols Lewis Clint.” RP 96-97.

The Defendant was initially charged with one count of Burglary in the Second Degree. CP 1. Several court dates were set and several hearings were held. RP 129-35.¹ On November 6, however, the Defendant failed to appear for one of his previously scheduled court hearings despite being given written and oral notice of the hearing. RP 134-35. A warrant was then issued for his arrest. RP 135.

On May 10, 2010, Officer David Shurick of the Poulsbo Police Department stopped the Defendant for driving on a suspended license. RP 119-21. When asked for identification the Defendant claimed he had none and verbally identified himself as “Brian P.Reek” and gave a date of birth and a social security number. RP 121-22. Officer Shurick checked on the name an information the Defendant gave and found that the Defendant did not match the physical description of “Brian P.Reek.” RP 122-23. Officer Shurick then investigated further and found that the Defendant was actually

¹ The Court documents also indicate that the Defendant, Anthony Reek, answered to his “true name as charged.” See, e.g., Exhibit 6.

“Anthony Reek,” and the Defendant was then arrested. RP 124.

The Defendant was later present in 2010 when new dates were set on his case. RP 149. Specifically, the Defendant was given written and oral notification of a new court date of July 13, 2010. RP 149-50. The Defendant, however, failed to appear for this hearing and a warrant again was issued for his arrest. RP 151.

III. ARGUMENT

- A. ALTHOUGH THE TRIAL COURT ERRED IN NOT ENTERING WRITTEN FINDINGS OF FACT FOLLOWING THE CRR 3.5 HEARING, THE ERROR WAS HARMLESS AS THE TRIAL COURT RENDERED DETAILED ORAL FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH ARE SUFFICIENT TO ALLOW THIS COURT TO ADDRESS THE ISSUES ON APPEAL. IN ADDITION, THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE DEFENDANT’S STATEMENT WERE VOLUNTARY AND ADMISSIBLE, AS THE COURT’S FINDINGS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The Defendant argues that trial court erred in finding that the defendant’s confession was admissible and by failing to enter written findings of fact following the CrR 3.5 hearing. App.’s Br. at 8-12. These claim, however, are without merit because: (1) the trial court’s failure to enter written findings was harmless as the trial court rendered detailed oral findings of fact and conclusions of law which are sufficient to allow this court to

address the issues on appeal; and (2) there was substantial evidence supporting the trial court's findings of fact and conclusion of law that the Defendant's statements to Officer Hoke were voluntary and admissible.

The Defendant is correct that a trial court's failure to reduce its CrR 3.5 findings and conclusions to writing is error. Any such error, however, is harmless if the trial court's oral findings in the record are sufficient to allow appellate review. *State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994). Here, the trial court rendered detailed oral findings of fact and conclusions of law, which are sufficient to allow this court to address the issues the Defendant raises on appeal. The error, therefore, was harmless.

Police must advise a suspect of his constitutional rights before questioning him in a custodial setting. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004); *see also Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A confession is voluntary and, "therefore admissible, if made after the defendant has been advised concerning rights and the defendant then knowingly, voluntarily and intelligently waives those rights." *State v. Aten*, 130 Wn.2d 640, 663, 927 P.2d 210 (1996). The State bears the heavy burden of demonstrating that law enforcement officers fully advised the defendant of his rights, that he understood them, and that he knowingly and intelligently waived them. *State v. Reuben*, 62 Wn. App. 620, 625, 814 P.2d 1177 (1991).

An appellate court is not to disturb on appeal a trial court's determination that a defendant's confession was voluntary "if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence." *Aten*, 130 Wn.2d at 664. To determine the voluntariness of a confession, the trial court evaluates the totality of the circumstances of the interrogation, including the "crucial element of police coercion," the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health, and finally, whether police advised the defendant of the rights to remain silent and have an attorney present during custodial interrogation. *State v. Unga*, 165 Wn.2d 95, 100–01, 196 P.3d 645 (2008) (citing *Withrow v. Williams*, 507 U.S. 680, 693–94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993)).

In addition, credibility determinations are for the trier of fact; and an appellate court will not disturb the trial court's credibility determinations on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

In the present case the trial court heard conflicting testimony from Officer Hoke and the Defendant at the CrR 3.5 hearing. Officer Hoke testified that he initially detained the Defendant and explained that he had a

report from Walmart that there had been a problem. RP 24. Mr. Grimes then came to the scene and explained what had occurred in the store and gave Officer Hoke the fake ID that the Defendant had left in the store. RP 25. Officer Hoke then arrested the Defendant, put him in handcuffs, and advised him of his rights. RP 26. The Defendant expressed no confusion about his rights and Officer Hoke then asked him if he understood his rights and was willing to speak with him about the incident. RP 26. The Defendant then agreed to speak with the officer. RP 26. Furthermore, Officer Hoke made no statements promises to the Defendant that he would release him if he agreed to speak with him or anything like that. RP 37. Officer Hoke also explained that the Defendant did not appear to be under the influence of any alcohol or other intoxicants. RP 38.

Officer Hoke then explained that he asked the Defendant about the ID he had left in the store and that the Defendant then admitted that he had been in the store trying to defraud Walmart. RP 37-38.

The Defendant also testified at the CrR 3.5 hearing, and he claimed that the only thing he said to the officer before being advised of his Miranda warnings was that he “didn’t steal anything.” RP 41. The Defendant acknowledged that he was advised of his Miranda rights and was aware that he being arrested and was going to jail. RP 41-42, 45. The Defendant, however, claimed that he made no statement at all after being advised of his

rights and never made any statement about the ID's or anything else. RP 41-42,45. The Defendant also claimed that he had been using methamphetamine and was both "cashing" and "high" from the methamphetamine and was falling in and out of sleep. RP 42-45.

At the conclusion of the testimony at the CrR 3.5 hearing defense counsel briefly argued that the Defendant's statements were not voluntary because the Defendant testified that he was under the influence of drugs. RP 46. This argument, however, was contradicted by Officer Hoke's testimony that the Defendant did not appear to be under the influence of any alcohol or other intoxicants. RP 38.

The trial court then noted that all of the testimony from both sides was consistent in that the Defendant was Mirandized, although the Defendant claimed he made no statements. RP 46. The court then explained that it did not find the Defendant credible and specifically stated:

I'm not persuaded that the self-serving testimony about meth use, crashing simultaneously with being high, is credible. And I find that the statements were made knowingly, intelligently, and voluntarily, that he knew of the impact of his situation. The statements are admitted.

RP 47.

Given the testimony from Officer Hoke that he advised the Defendant of his Miranda rights and that the Defendant did not appear to be under the

influence (as well as the Defendant's own acknowledgment that he was advised of his rights and understood what was occurring), there was substantial evidence supporting the trial court's findings of fact and conclusion of law that the Defendant's statements to Officer Hoke were voluntary and admissible. Accordingly, the Defendant has failed to show that the trial court erred in denying the Defendant's motion to suppress his confession.

B. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN FAILING TO GIVE WPIC 6.41 IS WITHOUT MERIT BECAUSE THE DEFENDANT WAS NOT ENTITLED TO THIS INSTRUCTION BASED ON THE ACTUAL FACTS PRODUCED AT TRIAL. IN ADDITION, EVEN IF THE TRIAL COURT DID ERR, ANY ERROR WAS CLEARLY HARMLESS.

Reek next claims that the trial court erred in failing to give the defendant's proposed instruction based on WPIC 6.41. This claim is without merit because the facts at trial did not warrant the instruction since the Defendant did not raise an issue of voluntariness at trial and because the trial court's instructions accurately stated the law and allowed the defense to argue its theory of the case. In addition, even if it could be said that the trial court erred, any error was clearly harmless.

CrR 3.5 provides that if a trial court rules that a defendant's statement is admissible at trial the Defendant "may offer evidence or cross-examine the witnesses with respect to the statement without waiving an objection to the admissibility of the statement." CrR 3.5(d)(1). Furthermore, if a defendant raises the issue of "voluntariness" via its evidence or cross examination, then the defendant is entitled to an instruction that the jury may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit. CrR 3.5(d)(4); WPIC 6.14.

Washington courts have previously examined the instruction at issue in the present case and have explained that the instruction is only warranted if a defendant raises the issue of voluntariness at trial. For example, in *State v. Smith*, 36 Wn. App. 133, 141-42, 672 P.2d 759 (1983) the court explained that if a trial court finds at the pre-trial 3.5 hearing that a statement is admissible, then at trial,

" . . . the accused may reargue the issue of voluntariness to the jury if the court rules against him. The defendant is entitled upon request to a cautionary instruction like WPIC 6.41 **if the voluntariness issue is raised at trial.**"

Smith, 36 Wn. App. At 141 (emphasis added). In addition, the *Smith* Court concluded that, "The instruction requested by Smith need be given only when the accused challenges the voluntariness of his statement." *Smith*, 36 Wn. App. at 141, *citing* CrR 3.5(d)(4).

Although the Defendant in the present case the Defendant did challenge the voluntariness of his statements to law enforcement at the CrR 3.5 hearing, the Defendant later abandoned this approach and did not challenge the voluntariness of the statement at trial. Specifically, defense counsel did not cross-examine Officer Hoke about the circumstances surrounding the Defendant's statement, nor did the Defendant (or any other witness) testify that the Defendant was intoxicated. See, e.g., RP 97. In short, there were no facts or argument before the jury suggesting that the statement was involuntary. The Defendant's proposed instruction, therefore, was not warranted. *Smith*, 36 Wn. App. at 141.

In addition, the fact that there were no relevant cross examination of Officer Hoke (nor any facts presented at trial otherwise suggesting that the statement was involuntary) also demonstrates that even if the trial court erred in failing to give the instruction, any error would have necessarily been harmless. Simply put, as there were no "surrounding circumstances" raised at trial that would in any way suggest that the Defendant's statement was involuntary, it was clearly harmless for the trial court not to instruct the jury that they could consider the surrounding circumstances. This conclusion is further supported by the additional instructions that were actually given to the jury, as discussed below.

Under Washington law a defendant's right to an instruction such as WPIC 6.41 is procedural and not constitutionally mandated. *State v. Taplin*, 66 Wn.2d 687, 691, 404 P.2d 469 (1965). A nonconstitutional error warrants reversal only if this court finds that, within a reasonable probability, the outcome would have been different but for the error. *State v. Aamold*, 60 Wn. App. 175, 181, 803 P.2d 20 (1991).

Under the facts of the present case the record shows that any failure to give the Defendant's proposed instruction cannot be said to have affected the jury's verdict. First, there simply were no "surrounding circumstances" before the jury that suggested that the Defendant's statement was involuntary.

Second, the record below further shows that even if the jury had received the instruction (and even if it had disregarded the Defendant's confession) there was still abundant, independent evidence of the Defendant's guilt. Accordingly, any conceivable error by the trial court in refusing to give the instruction was harmless.

In addition, the trial court in the present case instructed the jury that:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the

witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 133. This instruction correctly informed the jury of its role in determining the credibility of each witness. It enabled defense counsel to argue, to the extent possible based on the limited evidence or cross-examination on this issue, that the Defendant's statements should be disregarded or ignored. Thus, the trial court's actual instructions to the jury further demonstrate that any error in failing to give the Defendant's proposed instruction was harmless.²

² The Defendant also argues that the trial court failed to hold a hearing to allow "formal objection" to the court's instructions. App.'s Br. at 16-17. The record clearly shows that he Defendant was allowed to orally request the instruction at issue and the issue was discussed in open court. See RP 180-81. Thus the Defendant clearly was given an opportunity to propose an instruction and the court considered it in open court. There is no claim, no could there be, that the defense was somehow precluded from preserving the instruction issue for review. Nor has the Defense shown (or otherwise asserted) that the process used by the trial court resulted in any prejudice whatsoever. The Defendant's complaint about the trial court's process, therefore, is clearly without merit.

C. THE DEFENDANT'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE CRIME OF BURGLARY BEYOND A REASONABLE DOUBT.

Reek next claims that trial court erred in failing to dismiss the Burglary counts and essentially argues that the evidence for these counts was insufficient. App.'s Br. at 18. This claim is without merit because viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the crime of burglary beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 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. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, 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). Accordingly, a reviewing court defers 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). The relevant inquiry, therefore, 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.” *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), citing *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

Pursuant to RCW 9A.52.030, a person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling. In addition, RCW 9A.04.110(17) defines “Person,” and states that the term includes “any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association.” Furthermore, RCW 9A.04.110(22) states that “‘Property’ means anything of value, whether tangible or intangible, real or personal.”

The Defendant’s argument on appeal and at trial regarding the burglary charges was that Walmart is a corporation and not a “person” and that there was, therefore, insufficient evidence that the Defendant entered the

Walmart store with the intent to commit a crime against a “person or property therein.” App.’s Br. at 20; RP 170.

The Defendant’s argument, however, ignores the plain language of RCW 9A.04.110, which defines the term “person” to include a corporation. Furthermore, even if this were not the case the evidence still showed that the Defendant entered the store to defraud the store and to wrongfully obtain a “no-receipt” refund. Thus, the record clearly showed that the Defendant intended to commit a crime against “property” inside the store as the Defendant was attempting to wrongfully obtain something of “value.” See RCW 9A.04.110(22).

In short, the Defendant’s arguments in this regard ignore the plain language of the relevant statutes and are clearly without merit.

D. THE DEFENDANT’S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE CRIME OF BAIL JUMPING BEYOND A REASONABLE DOUBT.

The Defendant next claims that there was insufficient evidence to support the jury’s finding of guilt on the bail jumping charges. App.’s Br. at 25. This claim is without merit because viewing the evidence in a light most

favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the crime of bail jumping beyond a reasonable doubt.

In the present case the Defendant was convicted of bail jumping in violation of RCW 9A.76.170, which provides in relevant part that

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1). “The elements of bail jumping are satisfied if the defendant (1) was held for, charged with, or convicted of a particular crime; (2) had knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required.” *State v. Downing*, 122 Wn. App. 185, 192, 93 P.3d 900 (2004). Moreover, “the knowledge requirement is met when the State proves that the defendant has been given notice of the required court dates.” *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004) (*citing State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004)).

The Defendant’s argument on appeal appears to be that the State’s evidence was insufficient because the Court Clerk called by the State as a witness was not personally present at the pretrial hearings where the court dates were set and where the Defendant was given notice of those hearing

dates. App.'s Br. at 28.

A claim of insufficiency, however, admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Moles*, 130 Wn. App. at 465. Circumstantial and direct evidence are equally reliable. *Delmarter*, 94 Wn.2d at 638.

In the present case the State introduced the court records that showed the Defendant was present in court and that he was given notice of the court dates. While it is true that the State did not present "direct" evidence of this fact (since Ms. Rogers was not personally present to observe these events) the State presented circumstantial evidence of these facts in the form of the various court documents and Ms. Rogers' testimony. Specifically, the evidence at trial showed that the Defendant was initially charged with one count of Burglary in the Second Degree. RP 128-29; Exhibit 30. The evidence also showed: (1) that the defendant was present at a hearing on October 27, 2009; (2) that at that hearing the court set a future court date for November 6; and, (3) that the Defendant was given written and oral notice of this fact. RP 133-34; Exhibit 6. On November 6, however, the Defendant failed to appear and a warrant was then issued for his arrest. RP 135.

Similarly, the Defendant was later present in 2010 when new dates were set on his case. RP 149. Specifically, the Defendant was given written

and oral notification of a new court date of July 13, 2010. RP 149-50. The Defendant, however, failed to appear for this hearing and a warrant was issued for his arrest. RP 151.

Viewing this evidence in a light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The Defendant's sufficiency of the evidence claim, therefore, is without merit.

E. THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WITHOUT MERIT BECAUSE THE DEFENDANT HAS FAILED TO SHOW THAT DEFENSE COUNSEL'S REPRESENTATION WAS DEFICIENT OR THAT THE DEFENDANT SUFFERED ANY PREJUDICE.

The Defendant next claims that his trial counsel was ineffective for failing to object to an exhibit at trial and for failing to offer mitigating evidence at sentencing. App.'s Br. at 23-25. These claims are without merit because the Defendant has failed to show that defense counsel's representation was deficient or that the Defendant suffered any prejudice.

To establish ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all circumstances; and (2) defense counsel's deficient representation prejudiced

the defendant, i.e. there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Because the defendant must prove both deficient representation and resulting prejudice, a lack of prejudice will resolve the issue without requiring an evaluation of counsel's performance. *State v. Lord*, 117 Wn.2d 829, 884, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). Moreover, when reviewing a claim of ineffective assistance brought on direct appeal, an appellate court may not consider matters outside the trial record. *McFarland*, 127 Wn.2d at 335. In addition, courts engage in a strong presumption counsel's representation was effective. *McFarland*, 127 Wn.2d at 335, *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226, 743 P.2d 816.

The Washington Supreme Court has held that the failure to bring a pretrial suppression motion is not per se deficient representation and the defendant bears the burden of showing the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *McFarland*, 127 Wn.2d at 336, 899 P.2d 1251. In addition, when a defendant claims that his counsel was ineffective for failing to bring a suppression motion, the defendant must also show, based on the existing trial record, that the motion

to suppress would have probably been successful, otherwise there can be no prejudice. *McFarland*, 127 Wn.2d at 334 n. 2, 337 n. 4; *see also State v. Klinger*, 96 Wn. App. 619, 623, 980 P.2d 282 (1999).

The Defendant in the present case raises two issues regarding his counsel's performance. First, the Defendant claims that his counsel was ineffective for failing to object to Exhibit 1. App.'s Br. at 23. The Defendant, however, fails to explain what the basis for the objection would have been, and the Defendant has also failed to argue or provide any support for a claim that motion to suppress would have likely been successful. In the present case Exhibit 1 was a trespass notice issued by Walmart, and the State called Mr. Grimes (a supervisor at Walmart) with regard to this business record. See RP 58-85; Exhibit 1. In short, the Defendant has failed to offer any argument or support for his claim that his counsel should have, or could have, objected to the exhibit. The Defendant, therefore, has failed to demonstrate deficient performance or prejudice.

The Defendant's second claim is that his counsel was ineffective because she failed offer any mitigating evidence at sentencing. App.'s Br. at 24. The Defendant, however, has again failed to offer any explanation of what mitigating evidence counsel should have produced at sentencing. In addition, the record contains no evidence that would have supported a mitigated sentence. Thus, based on the record before this court there is

simply no basis to conclude that counsel's performance was deficient or that the Defendant suffered any prejudice. The Defendant's ineffective assistance of counsel claims, therefore, are clearly without merit.

F. THE DEFENDANT'S CLAIM OF PROSECUTORIAL VINDICTIVENESS IS WITHOUT MERIT BECAUSE THERE IS NO PRESUMPTION OF PROSECUTORIAL VINDICTIVENESS WHEN THE STATE AMENDS CHARGES IN A PRETRIAL SETTING AND BECAUSE THE DEFENDANT HAS FAILED TO SHOW ANY EVIDENCE OF ACTUAL VINDICTIVENESS.

Reek next claims that the State engaged in prosecutorial vindictiveness for adding charges prior to trial. App.'s Br. at 29. This claim is without merit because there is no presumption of prosecutorial vindictiveness when the State amends charges in a pretrial setting, and the Defendant has failed to show any evidence of actual vindictiveness.

A prosecutor is entitled to amend an information before the verdict or finding if the substantial rights of the defendant are not prejudiced. CrR 2.1(d); *See also, State v. Penn*, 32 Wn. App. 911, 914, 650 P.2d 1111 (1982) (the State has discretion to amend a charge where evidence supports the additional charges). But constitutional due process principles prohibit prosecutorial vindictiveness. *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006); *United States v. Goodwin*, 457 U.S. 368, 373, 102 S. Ct. 2485, 73

L. Ed. 2d 74 (1982). “Prosecutorial vindictiveness occurs when ‘the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights.’” *Korum*, 157 Wn.2d at 627 (quoting *United States v. Meyer*, 258 U.S.App. D.C. 263, 810 F.2d 1242, 1245 (1987)). There is no presumption of prosecutorial vindictiveness, however, when the State amends charges in a pretrial setting. *Korum*, 157 Wn.2d at 629; *State v. Bonisisio*, 92 Wn. App. 783, 790, 964 P.2d 1222 (1998). Rather, proof of actual vindictiveness is required before an appellate court may invalidate the prosecutor's adversarial decisions made before trial. *State v. McDowell*, 102 Wn.2d 341, 344, 685 P.2d 595 (1984). Furthermore, Washington courts have explained that “[p]rosecutorial vindictiveness must be distinguished, however, from the rough and tumble of legitimate plea bargaining.” *State v. Lee*, 69 Wn. App. 31, 35, 847 P.2d 25 (1993). Finally, the defendant bears the burden of proving prosecutorial vindictiveness. *Bonisisio*, 92 Wn. App. at 791.

In the present case the Defendant has presented no evidence of actual vindictiveness. Rather the record only shows that the State added additional charges when the State and Defense were unable to reach an agreed resolution of the case and when the Defendant repeatedly failed to appear for his court dates. Nothing in the record suggests anything that the prosecutor engaged in anything other than “the rough and tumble of legitimate plea

bargaining.” As the Defendant has failed to meet his burden of establishing prosecutorial vindictiveness, his claim must fail.

G. THE DEFENDANT’S CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT BECAUSE THE DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT ERRED.

Finally, the Defendant argues that a reversal is warranted due to cumulative error. App.’s Br. at 35. This claim is without merit, as the trial court did not err.

Cumulative error applies when several errors occurred at the trial court level but none alone is sufficient to warrant reversal. Where the combined errors effectively denied the defendant a fair trial, the cumulative error requires reversal. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). But where there was no “prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial.” *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 1194 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, clarified by 123 Wn.2d 737, 870 P.2d 964 (1994).

In the present case the Defendant has failed to show any error or prejudice. His cumulative error argument, therefore, is without merit.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED November 30, 2011.

Respectfully submitted,

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DOCUMENT1

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