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NO. 51803-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

TRAVIS SCHUETTKE,

Appellant.

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

The Honorable Chris Lanese, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's right to effective assistance of counsel was violated when his attorney failed to object when exhibit 22, a police recording of his arrest, was admitted in violation of the privacy act.

2. Appellant's right to effective assistance of counsel was violated when his attorney failed to object to inadmissible hearsay used to unfairly bolster the credibility of a state's witness.

3. Appellant's right to effective assistance of counsel was violated when his attorney failed to object to admission of the domestic violence designation attached to his 2008 prior conviction under ER 609.

4. The jury instruction defining knowledge violated due process because it permitted the jury to find appellant guilty of possessing a stolen vehicle without finding he had actual knowledge the vehicle was stolen.

5. The community custody condition prohibiting contact with known users, dealers, or manufacturers of controlled substances is unconstitutionally vague in violation of due process.

6. The community custody condition prohibiting contact with known users, dealers, or manufacturers of controlled substances unconstitutionally violates appellant's First Amendment freedom of association.

7. Under State v. Ramirez,<sup>1</sup> the court erred in ordering appellant to pay the criminal court filing fee of \$200 and the DNA database fee of \$100.

Issues Pertaining to Assignments of Error

1. The jury heard inadmissible hearsay that a critical state witness had given the same statement earlier to police, viewed a video recording obtained in violation of Washington's privacy act, and learned that appellant's prior conviction involved a domestic violence case. Was appellant's right to effective assistance of counsel violated when his attorney failed to object to three instances of damaging and inadmissible evidence?

2. A person cannot be convicted of possession of a stolen vehicle without proof beyond a reasonable doubt that the person actually knew the vehicle was stolen. The jury instruction defining knowledge permits the jury to convict if the defendant had information that would lead a reasonable person to know. The instruction does not clarify that, in order to convict, the jury must conclude beyond a reasonable doubt that the defendant actually knew, rather than merely that a reasonable person should have known. Does the jury instruction violate due process by

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<sup>1</sup> State v. Ramirez, \_\_\_ Wn.2d, 426 P.3d 714, 2018 WL 4499761 (no. 95249-3, filed Sept. 20, 2018).

relieving the State of its burden to prove actual knowledge beyond a reasonable doubt?

3. A community custody condition prohibits appellant from contacting users, dealers, and manufacturers of controlled substances. Must this condition be stricken because it is unconstitutionally vague in violation of due process and because it is not narrowly tailored to protect appellant's constitutional rights to free speech and association under the First Amendment?

4. Under the Supreme Court's recent Ramirez decision, should the \$200 criminal filing fee and the \$100 DNA collection fee be stricken?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Thurston County prosecutor charged appellant Travis Schuettke with one count of possessing a stolen motor vehicle and one count of possessing a controlled substance, methamphetamine. CP 5. The jury found Schuettke guilty, and the court imposed a standard range sentence. CP 26, 27, 36-37. The court also ordered Schuettke to pay the victim penalty assessment<sup>2</sup> of \$500, the criminal court filing fee<sup>3</sup> of \$200, and the DNA

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<sup>2</sup> RCW 7.68.035 authorizes crime victim penalty assessments.

<sup>3</sup> RCW 36.18.02

collection fee<sup>4</sup> of \$100. CP 39. Schuettke submitted a declaration stating that he has no income or assets and undischarged debts amounting to approximately \$1,000.00. CP 32. The trial court found he was indigent and ruled that he was entitled to counsel on appeal at public expense. CP 29-30. Notice of appeal was timely filed. CP 28

2. Substantive Facts

When the police arrived at a property near Interstate 5 South of Olympia, they found Schuettke with his body at least partially inside a white van that they had identified as stolen. Schuettke testified he merely leaned inside to shift the vehicle into neutral and release the brake so he could move it out of the way. 3RP<sup>5</sup> 234. Police claimed he was lying on his back on the floorboard of the passenger side of the car with his feet hanging out. 3RP 122.

The property where the van was found belonged to Schuettke's friend John Clausen. 3RP 109, 227-28. Schuettke had spent the night on the property in Lisa Walker's trailer, which was temporarily stranded there. 3RP 184. Schuettke testified his friend Erin Johnson had dropped him off at Clausen's property and, earlier that day, he had borrowed Johnson's van to

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<sup>4</sup> RCW 43.43.7541

<sup>5</sup> There are five volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Mar. 21, 2018; 2RP – Mar. 27, 2018; 3RP – March 27-29, April 26, 2018.

take Clausen to the store. 3RP 212-13, 215. During the night, Schuettke heard the sound of a car arriving, and when he awoke, the white van was there. 3RP 216, 238. Clausen, by contrast, claimed Schuettke had arrived driving the white van the previous evening and had driven him to the store in the van as well. 3RP 102-03, 104.

Walker and Johnson both corroborated Schuettke's account, rather than Clausen's. Johnson testified she regularly gave Schuettke rides to Clausen's property and once that week let him borrow her silver/gray van. 3RP 196-97, 199. Walker testified Johnson had dropped Schuettke off and, when she and Schuettke had gone to bed, the white van was not on the property. 3RP 179.

On cross examination, Schuettke admitted to prior convictions for making a false statement to a law enforcement officer and witness tampering. 3RP 225-26. The prosecutor clarified with him, "And was that in relationship to a domestic violence case?" 3RP 226. Schuettke answered, "I told my mom please don't go to court without me." 3RP 226. He admitted it was a domestic violence case. 3RP 227.

The State also attempted to undercut the defense case by eliciting that Schuettke had only contacted Walker and Johnson to ask them to testify within the past week or so preceding the trial. 3RP 229-31. At the time of his arrest, when police asked him to verify who had dropped him off at the

property, Schuettke did not mention Johnson and repeatedly asked why it mattered. 3RP 213. Eventually, he gave a name, "Jesse." 3RP 254; Ex. 22. At trial, he admitted he did not know anyone named Jesse, and he had lied to the police because Johnson had a suspended license, and he did not want to get her in trouble. 3RP 212-13, 231-32. Johnson confirmed she had no license or insurance. 3RP 209. Officer Randall Hedin- Baugh agreed he had, in the past cited her for driving with a suspended license. 3RP 246.

The van was returned to the owner, who drove it away from Clausen's property. 3RP 74, 143. The owner testified the van was missing its license plates and was totaled, with new dents on the driver's front quarter panel and front fender and a bent out rear bumper. 3RP 61-64. The license plate was lying in the back of the van. 3RP 74. The tools he kept in the van were gone. 3RP 64-65. At Clausen's property, the owner saw his (the owner's) back brace in a burning pile of garbage. 3RP 67. At the behest of police, Walker came out of her trailer and showed the owner a container full of screws that he recognized as his from the van. 3RP 67.

Later that day, the owner called police to turn over a bag of methamphetamine he claimed to have found when he replaced the motor harness. 3RP 75. A lab test confirmed the substance was methamphetamine. 3RP 92. Schuettke denied any knowledge of the methamphetamine. 3RP 232-33.

C. ARGUMENT

1. SCHUTTKE WAS DEPRIVED OF A FAIR TRIAL WHEN HIS ATTORNEY FAILED TO OBJECT TO INADMISSIBLE EVIDENCE.

Schuettker was denied his right to effective assistance of counsel when his attorney failed to object to inadmissible bolstering evidence by a State's witness and evidence taken in violation of Schuettker's rights under Washington's privacy act, and to inadmissible details that Schuettker's prior conviction domestic violence. Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

a. Counsel was ineffective in failing to object to inadmissible hearsay that bolstered Clausen's testimony.

Schuettker's friend John Clausen testified for the State. He claimed Schuettker drove the white van onto his property the night before the police came. 3RP 103. The prosecutor asked him about the written statement he

gave to police at the scene. 3RP 106. The prosecutor asked, “And in that statement, did you indicate that Mr. Schuettke was the one that drove the van onto your property the previous night, on October 6<sup>th</sup>?” 3RP 106. Clausen answered, “Yes.” 3RP 106. This testimony constituted improper hearsay and bolstering of a State’s witness. The failure to object was deficient performance that prejudiced Schuettke’s defense.

*i. Testimony about Clausen’s out of court statements was inadmissible hearsay.*

Statements made outside of court are hearsay, even when reported by the same person who made the statements. ER 801; Thomas v. French, 99 Wn.2d 95, 659 P.2d 1097 (1983). This is because “repetition is not generally a valid test for veracity.” State v. Harper, 35 Wn. App. 855, 857, 670 P.2d 296 (1983). Hearsay is inadmissible unless an exception applies. ER 802. No exception applies here, and Clausen’s testimony about his previous written statement to the police was inadmissible.

The limited hearsay exception for prior consistent statements does not apply. A prior consistent statement of a witness may be admissible to rebut a charge that the witness’ current testimony has been recently fabricated. ER 801(d)(1)(ii). No such charge was made in this case. Clausen was not previously or subsequently accused of fabricating his testimony. Schuettke’s cross examination of Clausen was extremely brief and did not

suggest any motive for fabrication of his testimony. 3RP 107-09. On the contrary, Schuettke testified he and Clausen were friends. 3RP 227-28. The implication of the defense theory of the case was that Clausen was mistaken, that it was Erin Johnson's van he saw with Schuettke.

It is well established that corroborating evidence intended to rehabilitate a witness “is not admissible unless the witness's credibility has been attacked by the opposing party.” State v. Bourgeois, 133 Wn.2d 389, 401, 945 P.2d 1120 (1997) (quoting State v. Petrich, 101 Wn.2d 566, 574, 683 P.2d 173 (1984)). “Prior out-of-court statements consistent with the declarant's testimony are not admissible simply to reinforce or bolster the testimony.” State v. Osborn, 59 Wn. App. 1, 4, 795 P.2d 1174 (1990) (citing State v. Purdom, 106 Wn.2d 745, 750, 725 P.2d 622 (1986); State v. McDaniel, 37 Wn. App. 768, 771, 683 P.2d 231 (1984)).

This case is not a child sex offense, where there are no other witnesses and no physical evidence so the complainant's credibility is an inevitable central issue. In Bourgeois and State v. Hakimi, the defendants were charged with sex abuses against children and the jury's decision rested entirely on whether they believed the children's statements. State v. Hakimi, 124 Wn. App. 15, 25-26, 98 P.3d 809 (2004) (discussing State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997)). Therefore, some bolstering

testimony was permitted to remove the sting of attacks on credibility that the prosecution knew would be forthcoming. Id.

This case is nothing like Bourgeois or Hakimi. There was physical evidence including photographs of the van and the methamphetamine found in it. There was testimony by multiple witnesses, both for the State and the defense. The jury's decision did not rest solely on the credibility of one person, making an attack on that credibility inevitable and central. Clausen was one of many witnesses, and his credibility was not attacked. His prior consistent statement to police was, therefore, not admissible to bolster his trial testimony.

ii. *Counsel was ineffective in failing to object.*

Reasonably competent defense counsel would have objected to this inadmissible evidence. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). There was no possible reason to sit back and allow Clausen to bolster his own credibility with inadmissible out-of-court statements. The only possible outcome would be to reinforce the State's case in violation of the rules of evidence.

The failure to object is deficient performance that prejudices the defendant when an objection would likely have been sustained and, without the evidence, there is a reasonable probability the outcome of the trial would have been different. State v. Hendrickson, 129 Wn.2d 61, 79-80, 917 P.2d 563 (1996). Here, an objection would likely have been sustained because such testimony is clearly inadmissible under the hearsay rules discussed above.

The erroneous admission of this bolstering testimony undermines confidence in the outcome of the proceedings. While a conviction did not rest solely on Clausen's testimony, his assertion that Schuettke drove the white van to his property was important testimony in the State's favor. And the jury's assessment of this significant point was unfairly bolstered by inadmissible evidence. That raises a reasonable probability that, without the bolstering, the jury might have agreed Clausen was mistaken, particularly in light of Walker's testimony corroborating Schuettke's account.

The prejudice of this testimony was compounded by the prosecutor's express reliance on it in closing argument. After summarizing Clausen's testimony, the prosecutor declared, "And he wrote a statement to the police that said the same thing. He gave that statement on the day the police were out there in writing that said I saw Travis Schuettke drive this van onto my property." 3RP 290.

Prior out of court statements are generally not admissible because “repetition is not a valid test for veracity.” Osborn, 59 Wn. App. at 4. Yet counsel’s failure to object led to such improper bolstering evidence being admitted, and then expressly relied on to persuade the jury to convict Schuettke. Schuettke’s right to a fair trial was compromised by his attorney’s failure to object to inadmissible hearsay that bolstered the State’s case.

- b. Counsel was ineffective in failing to object to violation of Schuettke’s rights under Washington’s Privacy Act.

Counsel was additionally ineffective in failing to object to the admission of exhibit 22, a video recording by the camera on board the police car. Under the privacy act, this recording was inadmissible unless the recording contained 1) advice to Schuettke that he was being recorded, 2) full advisement of his constitutional rights, and 3) a statement of the start and end time of the recording. RCW 9.73.090(b). Because the recording in exhibit 22 contains neither a statement of Schuettke’s constitutional rights nor statements as to the start and end times of the recording, the recording was inadmissible under the privacy act. “Generally, recordings that fail to comply strictly with statutory requirements are inadmissible.” State v. Mazzante, 86 Wn. App. 425, 428, 936 P.2d 1206 (1997) (citing State v. Cunningham, 93 Wn.2d 823, 830-31, 613 P.2d 1139 (1980)).

Admission of this recording, therefore, only occurred because defense counsel apparently withdrew his objection. 3RP 253. If defense counsel had objected under the privacy act, the recording would have been excluded. Mazzante, 86 Wn. App. at 428. Reasonably competent defense counsel would not have failed to protect his client's rights under the privacy act.

There was no legitimate tactical or strategic reason to fail to object. The prosecutor played this recording in order to present to the jury a false statement by Schuettke, naming his friend Jesse as the person who had dropped him off. Ex. 22; 3RP 254. Counsel's only comment on the record was that he had not seen the exhibit and did not know what it was. 3RP 252. After a sidebar that was not recorded in any way, counsel withdrew his objection. 3RP 253.

There was no possible benefit to Schuettke's case in having this evidence presented. The video also shows Schuettke being bent forward over the hood of the police car being handcuffed and verbally sparring with police. Ex. 22. Admission of this exhibit could only harm the defense case. Reasonably competent counsel would have recognized that it was both damaging and inadmissible and would have objected. Schuettke was prejudiced by presentation of the untrue statement and the unflattering, inculpatory portrayal of him in handcuffs. Like the other instances of

ineffectiveness complained of in this brief, the admission of Exhibit 22 negatively impacted Schuettke's credibility. Confidence in the outcome is undermined because, had counsel objected and the exhibit been properly excluded, it is far more likely the jury would have believed Schuettke's version of events.

- c. Counsel was ineffective in failing to object to admission of the fact that Schuettke's prior conviction carried a domestic violence designation.

Prior to 2011, offenses could be designated as "domestic violence" by the Court, but that designation served only as a reminder to law enforcement and the courts to take the offense seriously, with the goal of ensuring maximum protection for victims. State v. Hagler, 150 Wn. App. 196, 201, 208 P.3d 32 (2009). The designation was not an element of the offense, was not pled or proved beyond a reasonable doubt, and could not be used to increase the punishment for the crime. Id. at 201-02. In Hagler, the court deemed it error to inform the jury of this domestic violence designation because of the danger of prejudice to the defendant. Id. The court explained,

The jury's task is to decide whether the State has proved the elements of the charges beyond a reasonable doubt. A domestic violence designation under chapter 10.99 RCW is neither an element nor evidence relevant to an element. The fact of the designation thus does not assist the jury in its task. We can see no reason to inform the jury of such a designation, and we believe that prejudice might result in some cases.

Hagler, 150 Wn. App. at 202.

This designation was apparently applied to Schuettke's 2008 conviction for witness tampering. CP 36; 3RP 226. But this designation was not admissible to impeach Schuettke's testimony under ER 609, and his attorney was ineffective in failing to object when the prosecutor intentionally elicited details of the prior conviction.

Prior convictions are generally inadmissible because they are irrelevant and prejudicial, shifting the jury's focus from the merits of the charge to the defendant's general propensity for criminality. State v. Hardy, 133 Wn.2d 701, 706, 710, 946 P.2d 1175 (1997). ER 609 carves out a narrow exception to the general rule. Hardy, 133 Wn.2d at 706. Under ER 609(a), two types of prior convictions are admissible to impeach the credibility of a witness. The first type includes crimes punishable by death or imprisonment in excess of one year, but only if "the court determines that the probative value of admitting this evidence outweighs the prejudice." ER 609. The second type includes crimes that "involved dishonesty or false statement, regardless of the punishment." ER 609.

Interpretation of an evidentiary rule is a question of law, subject to de novo review. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). In addition, courts narrowly construe ER 609(a) "because of the danger for injustice associated with admitting evidence of a criminal

defendant's past convictions." State v. Garcia, 179 Wn.2d 828, 847, 318 P.3d 266 (2014).

ER 609(a)(2), allowing admission of prior convictions for crimes of dishonesty, does not allow admission of the domestic violence designation. First, the domestic violence designation is not part of fact of the conviction which is admissible under the rule. Details of the conduct leading to the prior conviction are generally inadmissible under ER 609. State v. McBride, 192 Wn. App. 859, 867, 370 P.3d 982 (2016). Cross-examination about the conviction is limited to "the fact of the conviction, the type of crime, and the punishment." State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996) (citing State v. Coe, 101 Wn.2d 772, 776, 684 P.2d 668 (1984)). "Cross examination exceeding these bounds is irrelevant and likely to be unduly prejudicial, hence inadmissible." Id.

The domestic violence designation is prejudicial and inadmissible because it exceeds these bounds. The domestic violence designation does not refer to the nature of the crime, the fact of the conviction, or the punishment. It gives additional details about who the crime was committed against.

The nature of the crime and the fact of the conviction are inquiries that rest on the elements of the offense. A conviction must be based on the jury finding the elements of the crime beyond a reasonable doubt. RCW 9A.04.100. But the domestic violence designation is not an element of the

offense. Hagler, 150 Wn. App. at 201-02. The fact that the offense may have been committed against a family member does not define the fact of the conviction or the type of crime that was committed. As the Hagler court noted, “A domestic violence designation under chapter 10.99 RCW is neither an element nor evidence relevant to an element.” 150 Wn. App. at 202. The fact that a crime involved domestic violence is not part of the nature of the crime. It merely specifies the identity of the victim in relation to the offender. The victim’s identity and relation to the offender are not part of what defines the offense.

Nor is the designation part of the punishment in this case. If domestic violence is pled and proven after August 1, 2011, the punishment for future offenses may be increased under RCW 9.94A.525(21). Because Schuettke’s witness tampering conviction dates from 2008, this law does not apply. The domestic violence designation does not reflect the punishment for this prior offense.

Additionally, admitting the designation does not align with the purpose of ER 609. The aim of ER 609 is to achieve the proper “balance between the right of the accused to testify freely in his own behalf and the desirability of allowing the State to attack the credibility of the accused who chooses to testify.” 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice § 609.1, at 471 n. 14 (5th ed. 2007). The domestic violence

designation falls on the wrong side of that balance. It makes the defendant look bad in the eyes of the jury but has no relevance to a reasonable evaluation of the defendant's credibility as a witness.

The purpose of ER 609 is to admit prior convictions to impeach a witness when they are relevant to the witness' credibility. Carson v. Fine, 123 Wn.2d 206, 222-23, 867 P.2d 610 (1994). Convictions involving dishonesty, so long as they occurred within the last 10 years, are automatically and per se relevant to credibility. ER 609; State v. Newton, 109 Wn.2d 69, 79, 743 P.2d 254 (1987). By contrast, it is not relevant to a person's level of honesty or credibility whether the crime was committed against a family or household member.

Other jurisdictions have excluded domestic violence from the crimes of dishonesty that are per se admissible under ER 609(a)(2). For example, the Federal District Court for the District of South Dakota determined, "the domestic violence conviction would not be admissible because it is a misdemeanor conviction, there is no connection to the instant offense, and it is not a crime of dishonesty or false statement. See Fed.R.Evid. 609." United States v. Allman, No. CR 12-30056-RAL, 2012 WL 4343049, at \*3 (D.S.D. Sept. 21, 2012).<sup>6</sup> The South Carolina Court of Appeals similarly held, "The

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<sup>6</sup> GR 14.1 permits citation to unpublished decisions of Courts from other jurisdictions to the extent permissible under those jurisdictions' rules. The Federal Rules of Appellate

domestic violence convictions, however reprehensible, do not establish Hunter was deceitful or untruthful. Accordingly, these convictions would not be admissible under Rule 609(a)(2).” Hunter v. Staples, 335 S.C. 93, 101, 515 S.E.2d 261, 265 (Ct. App. 1999). More recently, the Ohio Court of Appeals has held in two unpublished cases that the crime of domestic violence is not a crime of dishonesty under that state’s corollary of ER 609. State v. Bradford, 2010-Ohio-6429, ¶ 77, 2010 WL 5508718 (Ct. App. 2010); State v. McCrackin, 2002-Ohio-3166, ¶ 35, 2002 WL 1358669 (Ct. App. 2002).<sup>7</sup>

The domestic violence designation is not part of the conviction or the punishment, nor is it probative of credibility. It is, therefore, not admissible under ER 609. Had counsel objected, the domestic violence designation would likely have been excluded. Counsel was deficient in failing to admission of the domestic violence designation because admission of this evidence could only prejudice Schuettke in the eyes of the jury and improperly sway the jury to believe Clausen over him.

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Procedure permit citation to all unpublished district court opinions since 2007. FRAP 32.1. A copy of the opinion is attached as Appendix A to this brief.

<sup>7</sup> GR 14.1 permits citation to unpublished decisions of Courts from other jurisdictions to the extent permissible under those jurisdictions’ rules. Ohio supreme court rules permit citation to all unpublished opinions of the Court of Appeals since May 12, 2002. Rep.Op.R. 3.4, available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/reporting/Report.pdf>. Last visited 10/9/18. The opinions are attached as Appendix B and Appendix C to this brief, respectively.

Schuettker's constitutional right to effective assistance of counsel was violated when his attorney failed to object to the domestic violence designation, as well as to improper hearsay that bolstered Clausen's testimony and an exhibit that violated his privacy rights. Schuettker's convictions should be reversed because, taken alone or cumulatively, these errors undermine confidence in the outcome of the trial. Strickland, 466 U.S. at 694.

2. THE JURY INSTRUCTION DEFINING KNOWLEDGE VIOLATED SCHUETTKE'S RIGHT TO DUE PROCESS BY PERMITTING THE JURY TO FIND HIM GUILTY BASED ON CONSTRUCTIVE, RATHER THAN ACTUAL KNOWLEDGE THAT THE VEHICLE WAS STOLEN.

The offense of possession of a stolen vehicle requires proof that the person knew the car was stolen. State v. Lakotiy, 151 Wn. App. 699, 714, 214 P.3d 181 (2009). In this case, the jury was instructed jurors may find knowledge if the defendant has "information that would lead a reasonable person in the same situation" to have that knowledge. CP 17. This instruction violates due process because it permitted the jury to find Schuettker guilty without finding he had actual, subjective knowledge the van was stolen.

[I]t is no exaggeration to say that a criminal defendant can currently be found to have acted with knowledge, and therefore be found guilty of a crime, even though the defendant had no awareness of the fact he or she allegedly knew, and even though the "fact" he or she supposedly

“knew” was not even true. This is untenable; the law must change.

Alan R. Hancock, True Belief: an Analysis of the Definition of “Knowledge” in the Washington Criminal Code, 91 Wash. L. Rev. 177 (2016).<sup>8</sup>

Washington law has long held that, for a defendant to have knowledge under the criminal code, he must be proved to have actual, subjective knowledge of the fact in question. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980).<sup>9</sup> Knowledge may not be redefined to include its opposite, mere negligent ignorance. Shipp, 93 Wn.2d at 516. To do so would be unconstitutionally vague. Id. It would violate the constitutional requirement that criminal statutes provide fair warning of what is prohibited by stretching the meaning of knowledge far beyond what any reasonable person would understand it to mean. Id.

This does not mean, however, that the State must somehow present direct evidence of knowledge. Knowledge may be proved by circumstantial evidence, including evidence that the defendant was in possession of

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<sup>8</sup> Available at <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1556/91WLRO177.pdf?sequence=1&isAllowed=y>; last visited 9/27/18. This article is attached as Appendix D to this brief.

<sup>9</sup> But see State v. Jennings, 35 Wn.App. 216, 219, 666 P.2d 381 (1983) (possession of stolen property requires proof of actual or constructive knowledge that the property is stolen).

knowledge which would lead a reasonable person to know the fact in question. Allen, 182 Wn.2d at 374.

In Allen, the Court reiterated the “subtle” but “critical” distinction between proving actual knowledge via circumstantial evidence and finding knowledge merely because the defendant should have known. Id. The court acknowledged it would be unconstitutional to permit a finding of knowledge merely because the person should have known. Id. if, for example, the defendant is less intelligent or less attentive than an ordinary reasonable person, then the same information may not lead to the actual knowledge that the law requires. Shipp, 93 Wn.2d at 516.

By permitting conviction when a reasonable person would have known the item was stolen, rather than when the defendant actually did know, the instruction essentially reduces the mens rea for the offense from knowledge to a state lower, even, than criminal negligence. Washington law provides that a person is criminally negligent when (1) the person is “aware of a substantial risk that a wrongful act may occur” and (2) “his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(d). The instruction defining knowledge, however, permits conviction when a reasonable person would have been

aware, without requiring any proof that the defendant's failure to be aware was a gross deviation from the standard of care. CP 17.

The instruction fails to preserve the critical distinction between actual knowledge (shown based on circumstantial evidence) and mere negligent ignorance. See Allen, 182 Wn.2d at 374. The instruction undermines and confuses the actual knowledge requirement and permits the jury to misapply the law by finding knowledge even in the face of its absence.

The Shipp court deemed this problem solved because the jury was merely allowed, but not required, to find knowledge if the defendant had information which would lead a reasonable person to have knowledge. 93 Wn.2d at 516-17. So long as the inference was permissive, the Shipp court concluded, it allowed for the possibility that the jury could find the defendant was "less attentive or intelligent than an ordinary person." Shipp, 93 Wn.2d at 516. But Shipp did not go far enough. It is not enough to *permit* the jury to acquit if it does not find actual knowledge. The instructions must make clear that, without actual knowledge, acquittal is required.

A conviction must rest not just on the jury's finding that a reasonable person should have known, but also on the jury's conclusion that the defendant is no less intelligent or attentive than an ordinary person and therefore did know. This second requirement that is missing from the instruction. CP 17.

Allen illustrates the problem. In that case, the prosecutor, in closing argument, urged the jury to convict Allen of being an accomplice because a reasonable person in the defendant's shoes should have known, rather than because Allen actually did. Allen, 182 Wn.2d at 374-75. When the prosecutor expressly urged such a conclusion, the court had no difficulty viewing this as a serious problem requiring reversal of Allen's conviction. Id. at 375, 380.

But the jury instruction, not misconduct by prosecutors, lies at the heart of the problem. Whether a prosecutor expressly urges conviction based solely on constructive knowledge or not, the jury instructions allow it. The prosecutor's argument in Allen is a reasonable interpretation of the language used to define knowledge in the pattern jury instruction. Compare Allen, 182 Wn.2d at 374-75 (quoting the prosecutor's closing argument that "under the law, even if he doesn't actually know, if a reasonable person would have known, he's guilty"); CP 17 ("If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact."). Many a juror might come up with that reasonable, but incorrect, interpretation even without a prosecutor misstating the law.

Jury instructions not be misleading and must properly inform the trier of fact of the applicable law. Bodin v. City of Stanwood, 130 Wn.2d

726, 732, 927 P.2d 240 (1996). Jury instructions must convey “that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). It is reversible error when the instructions relieve the State of this burden. State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984) (“Failure to inform the jury that there is an intent element is thus a ‘fatal defect’ requiring reversal”); see also State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

By permitting a jury to find knowledge based on mere negligent ignorance, the jury instruction violates due process. It misleads the jury, fails to inform the jury of the requirement of actual knowledge, and relieves the State of its burden to prove actual knowledge. Although Washington case law makes clear that the jury “must still find subjective knowledge,” the jury instruction does not. Shipp, 93 Wn.2d at 515; CP 17.

When a jury instruction permits conviction on evidence less than proof beyond a reasonable doubt of every element of the crime, the instruction violates due process. Allen, 101 Wn.2d at 358. Omitting an element of the crime from the jury instructions, so as to fail to require proof of that element, is automatic constitutional error that may be raised for the first time on appeal. State v. O’Hara, 167 Wn.2d 91, 103, 217 P.3d 756, 763 (2009), as corrected (Jan. 21, 2010). By permitting conviction based on

constructive knowledge when the law requires actual knowledge, the jury instruction in this case violated due process and requires reversal of Schuettke's conviction for possession of a stolen vehicle.

3. THE COMMUNITY CUSTODY CONDITION DIRECTING SCHUETTKE NOT TO ASSOCIATE WITH "KNOWN USERS, DEALERS, OR MANUFACTURERS OF CONTROLLED SUBSTANCES" IS UNCONSTITUTIONAL.

As a condition of community custody, the trial court ordered Schuettke not to "associate with known users, dealers, or manufacturers of controlled substances." CP 38. The condition is unconstitutionally vague because is insufficiently definite to inform him of what conduct is prohibited and permits arbitrary enforcement by the Department of Corrections. Additionally, it violates his First Amendment right to freedom of association.

- a. The term "known users, dealers, or manufacturers of controlled substances" fails to provide fair warning of what conduct is prohibited.

The due process vagueness doctrine requires the State to provide citizens fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). It also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable

standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Community custody conditions are subject to reversal when they are manifestly unreasonable. Id. at 791-92. The imposition of an unconstitutionally vague condition is ipso facto manifestly unreasonable. Id. at 792.

In Sanchez Valencia, the challenged condition stated the defendant “shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.” 169 Wn.2d at 785. The supreme court held the condition failed under both prongs of the vagueness test.

First, the term “paraphernalia,” without specifying *drug* paraphernalia, was so broad that it failed “to provide the petitioners with fair notice of what they can and cannot do.” Id. at 794. Second, the condition “might potentially encompass a wide range of everyday items,” like sandwich bags or paper, depending on the particular CCO’s whim. Id. “A

condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.” *Id.* at 795.

*i. The term “known” is intolerably vague.*

Under the first vagueness prong, the community custody condition requiring Schuettke not to associate with “known users, dealers, or manufacturers of controlled substances,” does not provide sufficient definiteness such that Schuettke would know with whom he may or may not associate. The word “known” in the condition is too vague because it does not specify *who* must know that a particular person is a user or seller of illegal substances. Must a person be known to Schuettke as such? Known to the CCO? Known to law enforcement generally? These possibilities and more could qualify as “known” users or sellers under the language of the condition. Because it does not specify who or what must know a person is a user, dealer, or manufacturer of controlled substances, the condition fails to provide sufficient notice of what is proscribed.

In addition, the condition does not contain any reference to when the use/dealing/manufacturing may have occurred. It could qualify as a violation of the condition to associate with a person who is known to have used or sold drugs decades ago but who has not done so since. Indeed, under the language of the condition, it could constitute a violation to associate with any person who has ever used a controlled substance, even only once. Because it

contains no temporal limitation, ordinary persons would not be able to distinguish with the requisite definiteness with whom they are permitted to associate.

This extremely broad prohibition on association with others implicates the First Amendment. “[W]hen a statute or other legal standard, such as a condition of community placement, concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms.” Bahl, 164 Wn.2d at 753. For this reason, a heightened level of clarity is demanded. Id. “[R]estrictions implicating [Schuettke’s] First Amendment rights must be clear and must be reasonably necessary to accomplish essential state needs and public order.” Id. The broad and vague prohibition on association with anyone “known” to have ever used, dealt, or manufactured controlled substances must be clarified so that it conforms with stricter First Amendment scrutiny.

This court recognized the vagueness of the term “known” in City of Spokane v. Neff, 152 Wn.2d 85, 87, 93 P.3d 158 (2004), involving an anti-prostitution ordinance that prohibited loitering with the purpose of soliciting prostitution as evidenced by being a “known prostitute.” The court explained the phrase invited arbitrary enforcement because the term “known prostitute” may include “anyone from a person with a recent conviction for prostitution

to a person who is simply loitering on a street where prostitution occurs.” Id. at 91. The court held the term “known prostitute” was unconstitutionally vague because it invited an inordinate amount of police discretion due to the lack of guidelines. Id. The term “known” is equally vague here.

*ii. The ban on contact with users of controlled substances is intolerably vague.*

Aside from the vagueness of the word “known,” the condition is also intolerably vague because it prohibits association with users, dealers, or manufacturers of “controlled substances.” The term “controlled substances” includes many substances that are lawfully sold and consumed pursuant to a prescription.

A controlled substance is any “drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or commission rules.” RCW 69.50.101(f). Schedule II drugs specifically include those which have a “currently accepted medical use in treatment in the United States.” RCW 69.50.205. This schedule includes opium and all its derivatives, including commonly prescribed pain relievers such as codeine, hydrocodone, and oxycodone. RCW 69.50.206. Virtually every pharmacist is thus a seller of controlled substances. And untold numbers of persons using prescription pain medication for acute or chronic injuries or illness are users of controlled substances. Broadly construed, this

term could also prohibit association with anyone who has ever worked, in any capacity, for a pharmaceutical company that produces these prescription drugs. Employing the term “controlled substances,” does not fairly notify Schuettke whether he is or is not permitted to enter a pharmacy or drug store or associate with persons who have ever in their lives used opium derived drugs pursuant to a lawful prescription.

The condition also fails the second prong of the vagueness test because it gives rise to arbitrary enforcement. A CCO could interpret the condition broadly and sanction Schuettke for entering a drug store, associating with someone who once had an oxycodone prescription after having a root canal, or meeting a friend who once had worked a temp job as a receptionist at a drug company. Where a condition leaves so much discretion to an individual CCO, it is unconstitutionally vague. Sanchez Valencia, 169 Wn.2d at 795. The condition prohibiting association with known users, dealers, or manufacturers of controlled substances gives Schuettke’s CCO almost unfettered discretion to define known drug users and dealers of controlled substances. Without additional language to clarify its parameters, this condition “does not provide ascertainable standards for enforcement.” Bahl, 164 Wn.2d at 758.

The State may point to State v. Llamas Villa, 67 Wn. App. 448, 454-56, 836 P.2d 239 (1992), where this court upheld a condition prohibiting

association “with persons using, possessing, or dealing with controlled substances.” But that condition is less vague because it actually requires the associates to be presently “using, possessing, or dealing” with controlled substances, rather than the condition here which extends to any person who has ever been a user or seller of a controlled substance. Moreover, there was no challenge in that case to the vagueness or breadth of the term “controlled substances” so the court did not consider it.

The condition is unconstitutional because it fails to provide reasonable notice as to what conduct is prohibited and exposes Schuettke to arbitrary enforcement. The condition is drawn so broadly—potentially reaching every person who has ever used prescription pain medication or worked for a drug store or drug company in his or her lifetime, even once—that it unnecessarily restricts Schuettke’s associations. The State cannot demonstrate how the condition is narrowly tailored to protect public safety when it prohibits Schuettke’s association with any person who has ever used a controlled substance. The condition therefore does not meet the requirements of due process and must be stricken.

- b. The vast prohibition on contact with even legal drug users and sellers violates Schuettike’s constitutional right to freedom of association.

The condition is also unconstitutional because it violates Schuettke’s freedom of association under the First Amendment. Careful review of

sentencing conditions—even more so than in the typical case—is required where those conditions interfere with the fundamental constitutional right of an accused. Riles, 135 Wn.2d at 347. Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order. Id. Additionally, conditions that interfere with fundamental rights must be sensitively imposed. Bahl, 164 Wn.2d at 757; State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

This Court’s decision in State v. Hearn, 131 Wn. App. 601, 128 P.3d 139 (2006), is consistent with these principles. There, this Court, considering a constitutional challenge, affirmed the condition that an offender convicted of methamphetamine possession refrain from associating with known drug offenders. This Court reasoned “[r]ecurring illegal drug use is a problem that logically can be discouraged by limiting contact with other known drug offenders.” Id. at 609.

This case stands in contrast to Hearn because the restriction on association in this case is not limited to those who have committed criminal offenses involving controlled substance. Most of the people Schuettke is prohibited from contacting are likely to be people who have, at some point in their lives, consumed a controlled substance by lawful prescription or who have some connection to lawful purveyors of lawful prescription medications.

Here, the trial court's order prohibiting Schuettke from associating with any person who has ever been involved, even legally, with a controlled substance, bears no reasonable relation to the goal of promoting safety and public order. There is, moreover, no indication that it was sensitively imposed. This extremely broad prohibition fails to promote public order and pointlessly infringes on Schuettke's right to freely associate. The condition is, therefore, unconstitutional, and it must be stricken for this reason as well. Bahl, 164 Wn.2d at 757-58.

4. THE \$200 CRIMINAL FILING FEE AND THE \$100 DNA COLLECTION FEE SHOULD BE STRICKEN UNDER *STATE V. RAMIREZ*.

The discretionary legal financial obligations must be stricken because Schuettke is indigent. In State v. Ramirez, an appellant challenged discretionary legal financial obligations (LFOs) on the grounds that the trial court had not engaged in an appropriate inquiry regarding his ability to pay under State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). State v. Ramirez, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2018 WL 4499761 at \*2 (no. 95249-3, filed Sept. 20, 2018). The Supreme Court agreed, setting forth detailed instructions regarding the appropriate inquiry. Id. at \*4-6. But, based on watershed statutory amendments that took effect while Ramirez's appeal was pending, the Supreme Court ultimately granted relief on statutory grounds.

The Court explained that Laws of 2018, ch. 269, § 6(3) (“House Bill 1783”) made substantial modifications to several facets of Washington’s LFO system. In doing so, the legislature “address[ed] some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction.” Ramirez, \_\_\_ Wn.2d at \_\_\_, 2018 WL 4499761 at \*6.

For example, House Bill 1783 eliminates interest accrual on the nonrestitution portions of LFOs, establishes that the DNA database fee is no longer mandatory if the offender’s DNA has been collected because of a prior conviction, and provides that a court may not sanction an offender for failure to pay LFOs *unless* the failure to pay is willful. Ramirez, \_\_\_ Wn.2d at \_\_\_, 2018 WL 4499761 at \*6 (citing Laws of 2018, ch. 269, §§ 1, 18, 7.)

It amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. Id. It also prohibits imposing the \$200 filing fee on indigent defendants. Id.

As Ramirez further noted, a trial court “shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” Ramirez, \_\_\_ Wn.2d at \_\_\_, 2018 WL 4499761 at \*7 (quoting Laws of 2018, ch. 269, § 6(3)).

Thus, indigency may be established by three objective criteria. “Under RCW 10.101.010(3)(a) through (c), a person is ‘indigent’ if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.” Ramirez, \_\_\_ Wn.2d at \_\_\_, 2018 WL 4499761 at \*7.<sup>10</sup>

Crucially to this case, the Court also held that the House Bill 1783 amendments applied prospectively to cases not yet final on appeal. Ramirez, \_\_\_ Wn.2d at \_\_\_, 2018 WL 4499761 at \*7-8 (citing State v. Blank, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997)). The Supreme Court concluded that the trial court impermissibly imposed discretionary LFOs, as well as the \$200 criminal filing fee, on Ramirez. The Court remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. Ramirez, \_\_\_ Wn.2d at \_\_\_, 2018 WL 4499761 at \*8.

Here, the record indicates Schuettke is indigent under RCW 10.101.010(3). CP 29-30. And House Bill 1783 applies prospectively to his case. This Court should remand to strike the \$200 filing fee.

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<sup>10</sup> If none of these criteria apply, only then must the trial court engage in an individualized inquiry into current and future ability to pay. Ramirez, \_\_\_ Wn.2d at \_\_\_, 2018 WL 4499761 at \*7.

This Court should also strike the DNA fee under House Bill 1783 and Ramirez. RCW 43.43.7541, the statute controlling the imposition of a DNA fee, was amended under House Bill 1783. The statute now provides that

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*

RCW 43.43.7541 (emphasis added.); Laws of 2018, ch. 269, § 18.

Schuettker's criminal history includes three previous violations of the Uniform Controlled Substances Act. CP 36. Clearly, the State has previously collected his DNA. Because Schuettker's case is not yet final, the new statute applies. Ramirez, \_\_\_ Wn.2d at \_\_\_, 2018 WL 4499761 at \*7-8. As a result, the DNA fee must be considered a discretionary LFO, which may not be imposed on an indigent defendant. Thus, the DNA fee should be stricken.

D. CONCLUSION

The violation of Schuettker's right to effective assistance of counsel requires reversal of his convictions. Additionally, the conviction for possession of a stolen vehicle should be reversed because the jury instruction defining knowledge relieved the state of its burden of proof of an essential element. Alternatively, this Court should strike the unconstitutional

community custody condition and the improperly imposed legal financial obligations.

DATED this 18<sup>th</sup> day of October, 2018.

Respectfully submitted,

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# Appendix A

2012 WL 4343049

Only the Westlaw citation is currently available.  
United States District Court, D. South Dakota,  
Central Division.

UNITED STATES of America, Plaintiff,

v.

Barry ALLMAN, Defendant.

No. CR 12-30056-RAL.

Sept. 21, 2012.

#### Attorneys and Law Firms

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Edward G. Albright, Federal Public Defender's Office,  
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#### OPINION AND ORDER AFFIRMING DENIAL OF MOTION TO SEVER FOR TRIAL

ROBERTO A. LANGE, District Judge.

#### I. INTRODUCTION

\*1 Defendant Barry Allman filed a Motion to Sever Counts for Trial, Doc. 42, seeking to sever the count charging him with being a convicted domestic violence offender in possession of a firearm from all other counts. Magistrate Judge Mark A. Moreno filed a Memorandum Opinion and Order Denying Motion to Sever. Doc. 50. Allman has appealed Judge Moreno's ruling to this Court. Doc. 52. The United States Court of Appeals for the Eighth Circuit has "emphasized the necessity ... of retention by the district court of substantial control over the ultimate disposition of matters referred to a magistrate." *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir.1994). This Court, accordingly, has conducted a de novo review of the record and affirms the Memorandum

Opinion and Order Denying the Motion to Sever.

#### II. FACTS

This Court is familiar with the background facts of this case because this Court has considered testimony and ruled on Allman's motion to suppress. Doc. 44. This case arises out of a May 3, 2012 altercation on the Rosebud Sioux Tribe Reservation, during which two people were shot. Defendant Barry Allman fled the locale in a vehicle after the shots were fired. The vehicle was stopped, officers searched the vehicle, and Allman made statements to tribal and federal law enforcement agents on May 3 and 4, 2012. *Id.*

On May 7, 2012, an indictment was filed, charging Allman in Count I with assault with a dangerous weapon, in Counts II and III with assault resulting in serious bodily injury, and in Count IV with discharging, brandishing, carrying, or possessing a firearm during and in relation to a crime of violence. Doc. 9. Allman's criminal history allegedly includes a conviction on a misdemeanor charge of domestic violence on March 25, 2011, in Pennington County, South Dakota. Doc. 46 at 2. This domestic violence conviction in violation of South Dakota Codified Law ("SDCL") § 22-18-1 allegedly makes Allman a prohibited person under 18 U.S.C. § 922(g)(9). Doc. 36. A superseding indictment filed on July 10, 2012, added Count V, a charge against Allman of convicted domestic violence offender in possession of a firearm. *Id.*

Allman moved to suppress the statements made to tribal police officers and the FBI, and to suppress evidence seized from the vehicle search. Doc. 27. This Court denied Allman's motion to suppress. Doc. 44. Allman filed a Motion to Sever for Trial Count V of the Superseding Indictment. Doc. 42. On August 22, 2012, Judge Moreno issued a Memorandum Opinion and Order denying Allman's Motion to Sever for Trial. Doc. 50. Allman then appealed the Memorandum Opinion and Order. Doc. 52.

#### III. DISCUSSION

Allman objects to Judge Moreno's ruling on the application of Federal Rule of Criminal Procedure 8(a) ("Rule 8(a)") and Federal Rule of Criminal Procedure 14 ("Rule 14"). These objections are addressed in turn.

### A. Application of Federal Rule of Criminal Procedure 8(a)

\*2 Allman argues that Count V was improperly joined with Counts I through IV in the Superseding Indictment. The Government argued, and Judge Moreno concluded, that joinder was proper because the charges were temporally and logically connected.

Federal Rule of Criminal Procedure 8(a) states that “[t]he indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged ... are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.” Rule 8(a) is “broadly construed in favor of joinder to promote the efficient administration of justice.” *United States v. Taken Alive*, 513 F.3d 899, 902–03 (8th Cir.2008) citing *United States v. Little Dog*, 398 F.3d 1032, 1037 (8th Cir.2005), *United States v. Rock*, 282 F.3d 548, 552 (8th Cir.2002).

The five counts in the Superseding Indictment are of “the same or similar character, or are based on the same act or transaction.” Fed.R.Crim.P. 8(a). All five counts arise out of Allman’s alleged conduct on May 3, 2012, in Parmalee, South Dakota. Convictions on Counts I, IV, and V, hinge in part on the Government proving beyond a reasonable doubt that Allman possessed a gun on May 3, 2012. Indeed, the only additional proof that the Government appears to bear in proving up the elements of Count V, over and above what the Government must prove to obtain convictions on other counts, is that Allman has an underlying domestic violence conviction rendering him a person prohibited from possessing a firearm. Thus, Count V of the Indictment is of “the same or similar character” and is “based on the same act or transaction” as the remaining counts of the Superseding Indictment. See Fed.R.Crim.P. 8(a); *United States v. Boyd*, 180 F.3d 967, 981–82 (8th Cir.1999).

### B. Application of Federal Rule of Criminal Procedure 14

Allman requests severance of Count V from Counts I through IV under Rule 14 of the Federal Rules of Criminal Procedure and argues that there is a serious risk that a trial of Count V joined with that of the remaining counts would prejudice Allman. The Government argues, and Judge Moreno concluded, that one trial would not

unduly prejudice Allman’s rights and would be more efficient.

Rule 14 provides that “[i]f the joinder of offenses ... appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendant’s trials, or provide any other relief that justice requires.” Fed.R.Crim.P. 14. “Where evidence that a defendant had committed one crime would be probative and thus admissible at the defendant’s separate trial for another crime, the defendant does not suffer any additional prejudice if the two crimes are tried together.” *Taken Alive*, 513 F.3d at 903 (quoting *United States v. Rodgers*, 732 F.2d 625, 630 (8th Cir.1984)). A trial court has considerable discretion on when to sever a count for trial or conduct a bifurcated trial. See *Athey v. Farmers Ins. Exch.*, 234 F.3d 357, 362 (8th Cir.2000) (finding broad discretion for bifurcating civil trials); *Yakus v. United States*, 321 U.S. 414, 444 (1944) (finding splitting a criminal trial into civil and criminal parts is valid); *United States v. Jackson*, 549 F.2d 517, 523 (8th Cir.1977) (holding that “the motion to sever is addressed to the discretion of the trial court”); Fed.R.Crim.P. 14 (providing trial courts the right to bifurcate by granting discretion to award “any other relief that justice require[s]”).

\*3 Allman does face potential prejudice from trial of Count V with that of the remaining counts. In a separate trial on Counts I through IV, the prior domestic violence conviction would not be admissible evidence. Federal Rule of Evidence 609 limits the admittance of evidence of prior criminal conviction for impeachment purposes. With respect to trial of Counts I through IV, the domestic violence conviction would not be admissible because it is a misdemeanor conviction, there is no connection to the instant offense, and it is not a crime of dishonesty or false statement. See Fed.R.Evid. 609. Likewise, the prior misdemeanor domestic violence conviction would be inadmissible in a trial of Counts I through IV under Federal Rule of Evidence 404(b). Rule 404(b)(1) prohibits evidence of a crime to prove a person’s character in order to show that on a particular occasion the defendant acted in accordance with that character. Evidence of a prior crime is admissible under Rule 404(b) in a criminal trial only for other purposes, such as “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed.R.Evid. 404(b)(2). None of those exceptions apply in this case with respect to Counts I through IV. Therefore, a trial of Count V with Counts I through IV could result in introduction of evidence of a prior misdemeanor domestic violence conviction, where it would otherwise be inadmissible.

An instruction to the jury on restricting use and consideration of the misdemeanor conviction to determine whether the Government has proven all elements of Count V and for no other purpose is one way to seek to avoid undue prejudice to Allman. The Government's position is that entering evidence of the prior domestic violence conviction would not prejudice Allman because a stipulation along with a limiting instruction would ensure no prejudice was suffered by Allman. While this may be true, the parties have reached no such stipulation.

As the decision of Judge Moreno reflects, considerable authority exists that a prohibited person offense may be tried along with other counts of the nature Allman faces. *See, Rock*, 282 F.3d at 552 (holding that "witness tampering and felon-in-possession offenses" did not need to be severed); *United States v. Kind*, 194 F.3d 900, 906 (8th Cir, 1999) (upholding denial of severance for a felon-in-possession charge absent a clear showing of prejudice when government's evidence did not highlight the facts of the underlying prior conviction); *United States v. Rogers*, 150 F.3d 851, 855-57 (8th Cir.1998) (upholding denial of severance and holding that although stipulation disclosed the nature of the underlying felony offenses, the limiting instruction properly protected defendant from prejudice); *see United States v. Aldrich*, 169 F.3d 526, 528 (8th Cir.1999) (reversing denial of severance where "the jury learned of [defendant's] criminal record as part of the government's proof" on counts not involving prohibited person status). This Court is mindful of the need to ensure that the jury does not convict Allman because it believes him to be a bad person

based on his prior domestic violence conviction. If the parties stipulate that there is a prior misdemeanor conviction that renders Allman prohibited from possessing a firearm, then such a stipulation, together with a limiting instruction, would make trial of Count V with the remaining counts not unfairly prejudicial to Allman. If Allman's defense to Count V is that there is no such prior conviction of him, and the Government is forced to put on evidence about the nature of the conviction, this Court might reconsider the Motion to Sever for Trial and bifurcate trial of Count V from his remaining charges. At this point, the Court finds no error or reason to reverse Judge Moreno's decision to deny the Motion to Sever for Trial because there should be ways to avoid unfair prejudice to Allman through a single trial with Count V tried along with Counts I through IV.

#### IV. CONCLUSION

\*4 For the foregoing reasons, it is hereby

ORDERED that Defendant's Motion to Sever for Trial (Doc. 44) is denied and the Memorandum Opinion and Order Denying Motion to Sever (Doc. 50) is affirmed.

#### All Citations

Not Reported in F.Supp.2d, 2012 WL 4343049

# **Appendix B**

2010 WL 5508718

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,  
Twelfth District, Warren County.

STATE of Ohio, Plaintiff–Appellee,  
v.  
Donta BRADFORD, Defendant–Appellant.

No. CA2010–04–032.

Decided Dec. 29, 2010.

Criminal Appeal from Warren County, Court of Common Pleas, Case No. 09CR25934.

#### Attorneys and Law Firms

Rachel A. Hutzell, Warren County Prosecuting Attorney,  
Michael Greer, Lebanon, OH, for plaintiff-appellee.

Keith L. O’Korn, Westerville, OH, for  
defendant-appellant.

#### Opinion

RINGLAND, J.

\*1 { ¶ 1 } Defendant-appellant, Donta Bradford, appeals his conviction in the Warren County Court of Common Pleas for burglary and menacing by stalking. For the reasons outlined below, we affirm.

{ ¶ 2 } Appellant was indicted on one count of burglary in violation of R.C. 2911.12(A)(2), a second-degree felony, and two counts of menacing by stalking in violation of R.C. 2903.211(A)(1), both fourth-degree felonies. Following a two-day jury trial, appellant was found guilty on all counts and sentenced to serve a total of six years in prison.<sup>1</sup>

<sup>1</sup> Appellant was also indicted for telecommunications harassment in violation of R.C. 2917.21(A)(5), but the trial court severed this charge under Crim.R. 8(A) to be tried separately.

{ ¶ 3 } Appellant now appeals from his conviction, raising four assignments of error. For ease of discussion,

appellant’s assignments of error will be addressed out of order.

{ ¶ 4 } Assignment of Error No. 2:

{ ¶ 5 } “APPELLANT’S CONVICTIONS WERE BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1, 10 & 16 OF THE OHIO CONSTITUTION.”

{ ¶ 6 } In his second assignment of error, appellant argues his conviction was not supported by sufficient evidence, and his conviction was against the manifest weight of the evidence.

{ ¶ 7 } The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. See *State v. Curtis*, Brown App. No. CA2009–10–037, 2010–Ohio–4945, ¶ 18; *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 1997–Ohio–52. In reviewing the sufficiency of the evidence underlying a criminal conviction, the appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *Curtis* at ¶ 18. In reviewing a record for sufficiency, “the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *Id.*

{ ¶ 8 } While the test for sufficiency requires a determination as to whether the state has met its burden of production at trial, a manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *Id.* at ¶ 19. In determining whether a conviction is against the manifest weight of the evidence, the appellate court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.* However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide. *Id.*; *State v. Ligon*, Clermont App. No. CA2009–09–056,

2010-Ohio-2054, ¶ 23.

\*2 { ¶ 9} “Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.” *Curtis*, 2010-Ohio-4945 at ¶ 20, quoting *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶ 119.

### Menacing by Stalking

{ ¶ 10} Appellant first disputes the state proved, beyond a reasonable doubt, that he committed the crime of menacing by stalking when he entered the victim’s home on June 10, 2009. To support his argument, appellant points to the victim’s prior statement during the preliminary hearing that she was “not afraid” appellant was going to “harm” her when he entered her home the night of June 10, 2009.

{ ¶ 11} Appellant was charged with menacing by stalking in violation of R.C. 2903.211(A)(1), which states, in pertinent part:

{ ¶ 12} “No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.”

{ ¶ 13} “Mental distress” is defined by R.C. 2903.211(D)(2) as:

{ ¶ 14} “(a) Any mental illness or condition that involves some temporary substantial incapacity;

{ ¶ 15} “(b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.”

{ ¶ 16} In the case at bar, although the victim originally testified she did not fear appellant would “harm” her or her daughter during the burglary, she testified at trial that despite ending her relationship with appellant, he would repeatedly come to her home and “bang on [her] door.” The victim also testified that despite asking appellant to

cease calling her, he would “call 50 times after that” and “he was a hard person to get rid of.” Moreover, the state presented evidence that appellant left several threatening voicemail messages on the victim’s phone between June 1 and June 10, 2009. During the second voicemail, appellant told the victim “I will f\* \* \* you up \* \* \* pull you by your f\* \* \* \* \* hair and chop your f\* \* \* \* \* head off[.]”

{ ¶ 17} Regarding appellant’s voicemail and his overall behavior, the victim stated the following at trial:

{ ¶ 18} “STATE: Now, how did that phone [call] make you feel—when you received that voicemail?

{ ¶ 19} “VICTIM: I’m a different person now, I’m changed. I didn’t grow from this, I didn’t get stronger from this. It changed me. I live in fear, I never sleep. I have every light on in my home.

{ ¶ 20} “\* \* \*

\*3 { ¶ 21} “STATE: Before June 10th, June 11th, how did you perceive [appellant’s] conduct? How did it make you feel? The way that he was acting and the messages he was leaving for you?

{ ¶ 22} “VICTIM: Just, I felt violated \* \* \* I shouldn’t have to listen, hear this behavior, be around it and not be protected. So, I was continually calling the police and stressing my concern on him coming back because he would not go away. Even when they asked him to stop coming back, he didn’t listen to them.”

{ ¶ 23} Upon viewing the evidence in its totality, we find a rational jury could have found, beyond a reasonable doubt, that appellant knowingly caused the victim to believe he would cause her mental distress, if not physical harm. This court has previously held the “state need only show that a defendant knowingly caused the victim to *believe* that he would cause her mental distress or physical harm.” *State v. Hart*, Warren App. No. CA2008-06-079, 2009-Ohio-997, ¶ 31. (Emphasis added.) Therefore, “neither actual physical harm nor actual mental distress is required.” *Id.*, quoting *State v. Horsley*, Franklin App. No. 05AP-350, 2006-Ohio-1208, ¶ 45.

{ ¶ 24} After reviewing the record and weighing all of the evidence, we cannot say the jury clearly lost its way and created a manifest miscarriage of justice requiring reversal of appellant’s conviction for menacing by stalking. Accordingly, we find appellant’s menacing by stalking conviction is not against the manifest weight of

the evidence.

### Burglary

{ ¶ 25} Regarding his burglary conviction, appellant first argues the state failed to prove the element of “trespass.” See R.C. 2911.12(A)(2). Specifically, appellant argues his burglary conviction is against the manifest weight of the evidence because he lived with the victim “up until the time of the incident.”

{ ¶ 26} As previously stated, appellant was convicted of burglary in violation of R.C. 2911.12(A)(2), which provides: “(A) No person, by force, stealth, or deception, shall do any of the following: \* \* \* (2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense[.]”

{ ¶ 27} R.C. 2911.21 defines criminal trespass, in pertinent part, as: “(A) No person, without privilege to do so, shall do any of the following: (1) Knowingly enter or remain on the land or premises of another[.]” Privilege is the distinguishing characteristic between unlawful trespass and lawful presence on the land or premises of another. See *State v. Russ* (June 26, 2000), Clermont App. No. CA99-07-074, at 7. Privilege is “an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.” R.C. 2901.01(A)(12). “Where no privilege exists, entry constitutes trespass.” *Russ* at 7, quoting *State v. Lyons* (1985), 18 Ohio St.3d 204, 206, 480 N.E.2d 767.

\*4 { ¶ 28} Appellant argues the state did not establish the underlying act of trespass required for a burglary conviction. Appellant prefaces his argument on the contention that he lived with the victim, and was therefore privileged to be on the premises. To support his argument, appellant points to testimony that (1) the victim purchased a vehicle for appellant; (2) appellant spent up to three nights per week at the victim’s home; and (3) his clothes were in the victim’s home.

{ ¶ 29} As to the element of trespass, the state presented the following evidence. First, the victim and her daughter repeatedly testified appellant did not live in the victim’s

home. Both women also testified appellant did not keep more than one piece of clothing, if any, at the victim’s home, and that appellant never had a key to the home. The women also testified the victim was the sole mortgagor of the home, and appellant did not pay “a dime for anything” in the home, including rent. The victim’s daughter also testified she picked up her mother’s mail every day, and never found any mail addressed to appellant. From this evidence, it can reasonably be inferred that appellant did not, in fact, live with the victim.

{ ¶ 30} Moreover, the evidence indicates the victim revoked any privilege appellant may have had to enter her home prior the incident on June 10, 2009. See *State v. Steffen* (1987), 31 Ohio St.3d 111, 115, 509 N.E.2d 383 (“a privilege once granted may be revoked”); *State v. Ray*, Lucas App. No. L-04-1273, 2005-Ohio-5886, ¶ 20 (“past consent does not constitute current consent”). Specifically, the state presented the following testimony during trial:

{ ¶ 31} “STATE: Before June 10, 2009,[sic] had you told [appellant] he was no longer permitted in your home?”

{ ¶ 32} “VICTIM: I told [appellant] many times that.

{ ¶ 33} “STATE: When was the last time that [appellant] had been in your home before that day?”

{ ¶ 34} “\* \* \*

{ ¶ 35} “VICTIM: Probably a week before that and then \* \* \* when I got news about other things he had done to me, I just totally, that was it. I was never going to answer the door, answer the phone, I just totally am finished.”

{ ¶ 36} This evidence indicates that during the burglary, appellant neither lived in the victim’s home, nor did he have the privilege to be on the premises. While the jury also heard appellant’s testimony that he lived with the victim at the time of the offense, it clearly chose to disbelieve appellant’s version of the events.

{ ¶ 37} Appellant next argues the state offered insufficient evidence to prove he had the purpose to commit any crime when he entered the victim’s home. See R.C. 2911.12(A)(2).

{ ¶ 38} After a thorough review of the record, and while appellant may claim he merely “fell” into the victim’s window and did not intend to harm or frighten anyone, it is well established that “[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest



which was a permanent or temporary habitation of [the victim], when another person was present, or likely to be present, with the purpose to commit any crime. \* \* \* So, the first part, about this occupied structure. There's really not an issue here. The defendant admits that the house that is involved in this case, was an occupied structure under the law and that the house was the permanent habitation of [the victim], and she was present when the defendant entered the house."

{ ¶ 53} Appellant argues this instruction required the jury to "presume that the condo was the permanent habitation of [the victim] but not the cohabitation of [appellant]," which foreclosed the jury's consideration of appellant's defense of privilege to enter the home. Appellant also suggests this comment constituted judicial misconduct. We disagree on both grounds.

{ ¶ 54} R.C. 2909.01(C) defines "occupied structure" as:

{ ¶ 55} "[A]ny house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

{ ¶ 56} "(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

{ ¶ 57} "(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

{ ¶ 58} "(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

{ ¶ 59} "(4) At the time, any person is present or likely to be present in it."

{ ¶ 60} In the case at bar, we find the trial court's statements do not rise to the level of plain error. Rather, appellant mischaracterizes the nature of the trial court's statements, which conform to the definition of "occupied structure," as well as to the related suggested jury instructions.<sup>2</sup> Contrary to appellant's argument, this instruction does not invite the jury to find that no one *else* lived in the victim's home. We find the trial court merely provided the jury with the necessary information for purposes of giving its verdict pursuant to R.C. 2945.11: namely, the incident took place in the victim's home, which was clearly consistent with the definition of occupied structure under R.C. 2909.01(C).

2 { ¶ 5 a} The suggested jury instructions for R.C. 2911.12(A)(2) state:

{ ¶ 5 b} "The defendant is charged with burglary. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, and in \_\_\_\_\_ County, Ohio, the defendant, by (force) (stealth) (deception) trespassed in \* \* \* (an occupied structure) \* \* \* that was the permanent or temporary habitation of (*insert name of occupant* ) when another person (other than an accomplice of the defendant) was (present) (likely to be present), with purpose to commit therein the offense of (*insert name of applicable criminal offense* )." 4 Ohio Jury Instructions (2005), Section 511.12(1) at 388. (Emphasis in original.)

\*7 { ¶ 61} Reading the trial court's statements in their entirety, we find the instruction did not preclude the jury from considering appellant's argument that he, too, lived in the victim's home. Although no judicial commentary on this issue would have been preferred, there is no evidence that appellant was prejudiced by the trial court's statements, where ample evidence existed to refute appellant's privilege argument. As evidenced by the verdict, it is apparent that the jury believed the testimony of the prosecuting witnesses and the corroborating evidence presented by the state, and as previously discussed, such evidence was sufficient to support the guilty verdict. See, e.g., *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212.

{ ¶ 62} Further, because the trial court's instructions sufficiently complied with the applicable suggested instructions, we find the court's statements did not constitute judicial misconduct. Cf. *State v. Casino*, Cuyahoga App. No. 92536, 2010-Ohio-510. In addition, appellant's argument above goes to the issue of trespass, which was adequately covered by the court's instruction.

{ ¶ 63} The second issue appellant presents within this assignment of error relates to his claim that the trial court committed structural and plain error when it failed to specify the alleged crime appellant had the "purpose to commit" during the alleged burglary. We disagree.

{ ¶ 64} The Ohio Supreme Court addressed this very issue in *State v. Gardner*, 118 Ohio St.3d 420, 889 N.E.2d 995, 2008-Ohio-2787. In *Gardner*, the defendant was charged with aggravated burglary pursuant to R.C. 2911.11(A)(2), but the trial court did not give the jury a specific crime to consider in determining defendant's intent in entering the victim's home. The Court held defendant was not deprived of a unanimous verdict

because there was no jury confusion where the state presented evidence of “only crimes within a single conceptual grouping—assault, felonious assault, or menacing.” *Id.* at ¶ 79, 889 N.E.2d 995.

{ ¶ 65} Similarly, in the case at bar, the state presented evidence supporting crimes of a “single conceptual grouping,” or, as the state characterized it, “crimes of violence,” namely: assault, attempted assault, or menacing by stalking. As in *Gardner*, a reasonable jury could conclude that appellant’s threatening voicemail messages and suspicious drive-by activities were a “criminal offense” of some form, even without a specific instruction as to the elements of assault, attempted assault, or menacing by stalking. Thus, given the evidence presented by the state, the absence of any apparent jury confusion regarding the “any criminal offense” element, and that the state did not present a “multiple-acts” case or submit evidence suggesting that the “any criminal offense” element was satisfied by crimes of “distinct conceptual groupings,” we find no risk of manifest injustice in the court’s instruction. *Id.* at ¶ 87, 889 N.E.2d 995. Accordingly, appellant’s second argument is meritless.

\*8 { ¶ 66} Third, appellant claims additional prejudice resulted from the jury instructions relating to the menacing by stalking charges. While somewhat unclear, appellant appears to argue pursuant to *Gardner*, he was entitled to an instruction requiring a unanimous finding that he caused the victim to believe he would cause her either physical harm or mental distress.

{ ¶ 67} The trial court instructed the jury as follows regarding R.C. 2903.211(A)(1): “Before you can find the defendant guilty, you must find beyond a reasonable doubt, that from the first through the 16th day of June in 2009, \* \* \* the defendant did knowingly engage in a pattern of conduct, causing another to believe that he will cause physical harm to the other person or cause mental distress to said other person. So, it’s in the alternative, either causing [the victim] to believe that he would cause her physical harm, or that he caused her mental distress.”

{ ¶ 68} Because the jury instructions adequately tracked the language of the indictment and R.C. 2903.211(A)(1), we find no error therein. See *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010–Ohio–1017. Accordingly, appellant’s third argument is meritless.

{ ¶ 69} Fourth, appellant argues the trial court improperly instructed the jury that his prior domestic violence convictions could be used to assess his credibility. Because appellant failed to object to this

instruction, his argument is again limited to plain error review.

{ ¶ 70} In 2002, appellant was convicted of domestic violence in the Mason Municipal Court pursuant to Mason Cod. Ord. 537.14. Additionally, in 2004, appellant received a second domestic violence conviction in the Hamilton County Municipal Court pursuant to R.C. 2919.25.

{ ¶ 71} At trial, the court granted the state’s request to instruct the jury they could use the prior convictions to assess appellant’s credibility.

{ ¶ 72} Evid.R. 609 provides in relevant part:

{ ¶ 73} “(A) General Rule. For the purpose of attacking the credibility of a witness:

{ ¶ 74} “ \* \* \*

{ ¶ 75} “(3) Notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance.”

{ ¶ 76} Under Evid.R. 609(A)(3), “all convictions for crimes involving dishonesty or false statement, regardless of the possible punishment, are admissible for purposes of impeaching witnesses.” *State v. McCrackin*, Butler App. No. CA2001–04–096, 2002–Ohio–3166, ¶ 34, quoting Weissenberger’s Ohio Evidence Treatise (2002) 258, Section 609.5. While convictions for offenses like perjury, subornation of perjury, bribery, false statement, criminal fraud, embezzlement, false pretense or concealment clearly fall within the scope of Evid.R. 609(A)(3), offenses solely involving force, assault, disorderly conduct, criminal damaging, public intoxication or driving under the influence clearly do not. *McCrackin* at ¶ 34.

\*9 { ¶ 77} In the case at bar, appellant’s convictions for domestic violence were not admissible pursuant to Evid.R. 609(A)(3), because domestic violence is not an offense involving dishonesty or false statement. *Id.* at ¶ 35. Therefore, we find the trial court erred in instructing the jury it could use appellant’s prior domestic violence convictions to assess his credibility. However, we also find the trial court’s error did not rise to the level of plain error.

{ ¶ 78} First, as we previously found, ample, if not

overwhelming, evidence existed connecting appellant to the crimes to permit the jury to choose to believe the state's evidence over appellant's testimony. In fact, several aspects of appellant's version of events appeared implausible. For instance, appellant asserted he "fell" through the victim's bedroom window. However, the victim's daughter testified the window was three to four feet from the ground, and one would "literally have to go through the bushes \* \* \* maybe two feet above the bottom of the window that you would have to climb through the bushes to break the window." The state also presented photographs taken by an officer of the Mason Police Department, depicting heavy shrubbery in front of the victim's windows.<sup>3</sup>

<sup>3</sup> While not argued on appeal, we note appellant's prior domestic violence convictions were admissible to prove he had a history of violence to justify a statutory enhancement of the penalty for his menacing by stalking conviction. R.C. 2903.211(B)(2)(e). Additionally, we find these prior convictions were admissible pursuant to Evid.R. 404(B), as contradictory evidence to appellant's testimony that he accidentally "fell" through the victim's window and had no intention of scaring or harming anyone upon entering the home.

{ ¶ 79} In light of the evidence challenging appellant's credibility in this case, we conclude the trial court's erroneous statement regarding the use of appellant's prior domestic violence convictions to assess his credibility did not prejudice appellant, nor rise to the level of plain error. Accordingly, appellant's fourth argument is meritless.

{ ¶ 80} Fifth, appellant argues the trial court erred in failing to issue an instruction that the victim's prior statements could be used for substantive purposes to show his innocence, rather than just for impeachment purposes against the victim. Appellant's argument relates to the following testimony during the preliminary hearing in September 2009:

{ ¶ 81} "STATE: Did you fear he was going to harm you that night?"

{ ¶ 82} "VICTIM: Not me, no."

{ ¶ 83} "STATE: Were you in fear that he was going to harm some family member?"

{ ¶ 84} "VICTIM: When he opened the door and looked at us both he did not say one word, he left. That's when I realized it wasn't about getting us."

{ ¶ 85} This court has held that a "victim is not a party

opponent," and "[o]ut of court statements of a victim are not statements of a party opponent." *State v. Browning* (Dec. 19, 1994), Clermont App. No. CA94-04-022, at 6; *State v. Ingram*, Butler App. No. CA2006-01-012, 2006-Ohio-4559, ¶ 8. At this time, we find no compelling reason to reconsider our decisions in *Browning* and *Ingram*, and therefore find the trial court did not err in omitting an instruction to use the victim's testimony as that of a party-opponent within the meaning of Evid.R. 801(D)(2). Accordingly, appellant's fifth argument is meritless.

\*10 { ¶ 86} Sixth, appellant argues the trial court committed structural error in failing to notify the jury of appellant's plea of not guilty by reason of insanity and in failing to give an NGRI instruction. Appellant cites *State v. Cihonski*, Van Wert App. No. 15-08-04, 2008-Ohio-5191, to support his argument. In *Cihonski*, the defendant admitted to the conduct with which he was charged, but claimed his actions were not voluntary, and instead were the product of a "reflex action." The defendant also testified he had left a psychiatric hospital a few days prior to the incident. Based upon this testimony, the *Cihonski* court concluded he was advancing a defense of insanity and that by failing to notify the jury of his NGRI plea, the trial court committed structural error. *Cihonski* at ¶ 23.

{ ¶ 87} NGRI is an affirmative defense that a defendant must prove by a preponderance of the evidence. *State v. Monford*, Franklin App. No. 09AP-274, 2010-Ohio-4732, ¶ 70. R.C. 2901.01(14) provides: "A person is 'not guilty by reason of insanity' relative to a charge of an offense only if the person proves, in the manner specified in section 2901.05 of the Revised Code, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts."

{ ¶ 88} "The proper standard for determining whether a defendant has successfully demonstrated this defense and is thus entitled to an NGRI instruction is whether he has 'introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue.'" *Monford* at ¶ 70; *State v. Melchior* (1978), 56 Ohio St.2d 15, 381 N.E.2d 195, paragraph 1 of the syllabus. "A trial court does not err in refusing to include an instruction to the jury on the defense of insanity where the evidence presented does not warrant such an instruction." *Monford* at ¶ 70.

{ ¶ 89} In the case at bar, appellant failed to request an NGRI jury instruction. Moreover, while appellant testified

he was diagnosed in 1995 with bipolar disorder and paranoid schizophrenia, he did not provide a scintilla of evidence showing that at the time he committed the offense, he suffered from a severe mental disease or defect. We agree with the state's contention that appellant failed to adduce any evidence, expert or otherwise, that his mental disorders caused him to be unaware of the wrongfulness of his actions at the time of the offense. Regarding his mental state, appellant testified he cut his arm after breaking the victim's window "out of frustration," which caused an anxiety attack and his desire for his "Xanaxes." However, such testimony is hardly sufficient to warrant an instruction to the jury on an NGR1 plea. Accordingly, we dually find *Cihonski's* structural error analysis is inapplicable to the case at bar and appellant's sixth argument meritless.

\*11 { ¶ 90} Finally, we note appellant argues the state made inflammatory comments during its closing argument. Specifically, appellant argues the state committed reversible error in stating appellant "got some advice from another inmate that the best way to beat a burglary charge is to say that you lived there." However, because appellant failed to object to the prosecutor's comments during closing argument, he again waived all but plain error review. Crim.R. 52(B); *State v. Givens*, Butler App. Nos. CA2009-05-145, CA2009-05-146, 2010-Ohio-5527, ¶ 9. Prosecutorial misconduct rises to the level of plain error if it is clear the defendant would not have been convicted in the absence of the improper comments. *Id.*

{ ¶ 91} The state is normally entitled to a certain degree of latitude in making its closing argument. *Id.* at ¶ 10. Additionally, closing arguments must be viewed in their entirety to determine whether the disputed remarks were unfairly prejudicial. *State v. Treesh* (2001), 90 Ohio St.3d 460, 466, 739 N.E.2d 749. However, "[i]t is improper for an attorney to express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused." *Givens* at ¶ 10. Further, it is improper for a prosecutor to state that the defendant is a liar or that he believes the defendant is lying. *Id.* Also, "[i]t is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury." *Id.* "[T]he prosecution must avoid insinuations and assertions which are calculated to mislead the jury." *Id.*, quoting *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883.

{ ¶ 92} After reviewing the record, we conclude that the outcome of appellant's trial would not clearly have been otherwise, absent the alleged improper remarks. Even if we assume the state improperly commented on

appellant's credibility, appellant cannot demonstrate prejudice. The evidence of appellant's guilt was strong, as previously discussed.

{ ¶ 93} In light of the foregoing, we find the jury instructions and other perceived errors were either not improper, or did not prejudice appellant so as to deny him a fair trial. Therefore, appellant's first assignment of error is overruled.

{ ¶ 94} Assignment of Error No. 4:

{ ¶ 95} "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

{ ¶ 96} In his remaining assignment of error, appellant argues he was denied the effective assistance of counsel in numerous respects.

{ ¶ 97} To demonstrate ineffective assistance of counsel, a defendant must establish that his counsel's representation fell below an objective standard of reasonableness, and the defendant was prejudiced from counsel's deficient performance. *Strickland v. Washington* (1984), 466 U.S. 668, 687-691, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-143, 538 N.E.2d 373. "Reversal of a conviction for ineffective assistance of counsel 'requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *State v. Hand*, 107 Ohio St.3d 378, 840 N.E.2d 151, 2006-Ohio-18, ¶ 199, quoting *Strickland* at 687. In addition, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

\*12 { ¶ 98} "Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance." *State v. Smith*, 2009-Ohio-197 at ¶ 49, citing *Strickland* at 689. "Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." *Smith* at ¶ 49.

{ ¶ 99} The cumulative errors appellant asserts are counsel: (1) failed to object to the jury instructions; (2)

failed to seek instructions for lesser-included charges, including fourth-degree burglary; (3) failed to address appellant's NGRI plea filed with the court; (4) failed to object on grounds of prosecutorial misconduct during closing arguments; (5) failed to object when the court did not permit the victim's prior testimony to be used as of the state's case and/or at the close of evidence; (7) failed to object to appellant's sentence based upon *Oregon v. Ice*; (8) failed to make a "proportionality objection because six years in prison is disproportionate to [appellant's] conduct"; (9) failed to object to the notification of "three years of mandatory post-release control as [appellant] did not injure or threaten to injure [sic] anyone"; (10) failed to object to the court's "utter failure to make any findings under R.C. §§ 2929.11 and 12[sic] during the sentencing hearing"; (11) failed to introduce documents into evidence supporting appellant's defense that he lived in the victim's home at the time of the incident; and (12) failed to object to the racial composition of the jury pool.

{ ¶ 100} The majority of appellant's claims relate to previously discussed assignments of error for which we have already decided no error or prejudice occurred.

{ ¶ 101} Appellant additionally argues his counsel was ineffective for failing to request a lesser-included offense instruction on fourth-degree burglary. We find this decision was part of counsel's trial strategy and did not establish ineffective assistance of counsel. A decision not to seek an instruction on a lesser-included offense is a calculated and reasonable trial strategy aimed at obtaining a complete acquittal. *State v. Mackey* (Feb. 14, 2000), Warren App. No. CA99-06-065 at 12. Therefore, we find that counsel's failure to request a lesser-included offense instruction did not rise to the level of ineffective assistance of counsel and did not prejudice appellant.

{ ¶ 102} Appellant additionally argues his counsel was ineffective for failing to assert a Crim.R. 29 motion. However, the failure to assert a Crim.R. 29 motion is not, per se, ineffective assistance of counsel. See *State v. Annor*, Butler App. No. CA2009-10-248, 2010-Ohio-5423, ¶ 21. Trial counsel was not ineffective in this case for failing to move for acquittal under Crim.R. 29 because, as noted above, sufficient evidence was presented to support appellant's convictions. Any such motion would have been futile. *Id.* Similarly, we conclude the failure to object to the court's notification of three years of mandatory post-release control did not prejudice appellant because the trial court correctly stated "[i]t is mandatory that you have three years of post-release control [for Count One]." See R.C. 2967.28(B)(2). Therefore, any objection thereto would have been futile.

\*13 { ¶ 103} Appellant also argues his counsel was ineffective for failing to object to the proportionality of the sentence. Under *Strickland*, appellant cannot show that the outcome of his trial would have been different if counsel would have objected at the post-trial sentencing hearing. He therefore cannot show his counsel's failure to object prejudiced him in anyway. Lastly, even if his counsel had objected, it is unlikely this in and of itself would have changed his sentence. Accordingly, this argument lacks merit. Cf. *State v. Simmons*, Cuyahoga App. No. 93331, 2010-Ohio-3412.

{ ¶ 104} Appellant also argues his counsel was ineffective for failing to object to the racial composition of the jury, since appellant is black and the victim is white. Specifically, appellant takes issue with counsel's failure to object, ask for a mistrial, or seek a continuance "to investigate the juror venire selection process in Warren County or [ask] for a change in venue under Crim.R. 18 so to avoid a jury in such a racially charged courtroom[.]"

{ ¶ 105} Appellant's argument is unpersuasive. Counsel was present for voir dire and could see and hear the jurors answer questions. Appellant's counsel was in a much better position to determine if an objection or additional voir dire was appropriate. See, e.g., *State v. Sanders* (2001), 92 Ohio St.3d 245, 274, 750 N.E.2d 90. See, also, *State v. McKnight*, Vinton App. No. 07CA665, 2008-Ohio-2435, ¶ 89-93 (rejecting argument that counsel rendered ineffective assistance by failing to argue for change of venue based upon race when defendant failed to present evidence that the venire did not represent a fair cross-section of the community or that any of the jurors who did serve were unable to render an impartial verdict); *State v. Braswell*, Miami App. No.2001 CA 22, 2002-Ohio-4468, ¶ 8.

{ ¶ 106} Similarly, in the case at bar, appellant failed to show the jury venire did not contain a representative cross-section of the community or that any of the seated jurors were unable to render an impartial verdict. Thus, appellant does not show that there is a "reasonable probability" that but for counsel's actions, the result of the case would have been different. *Strickland*, 466 U.S. at 694.

{ ¶ 107} Because none of appellant's alleged errors meet the test for ineffective assistance of counsel, appellant's final assignment of error is overruled.

{ ¶ 108} Judgment affirmed.

**State v. Bradford, Slip Copy (2010)**

2010 WL 5508718, 2010 -Ohio- 6429

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YOUNG, P.J., and BRESSLER, J., concur.

Slip Copy, 2010 WL 5508718, 2010 -Ohio- 6429

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# Appendix C

2002 WL 1358669

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,  
Twelfth District, Butler County.

STATE of Ohio, Plaintiff–Appellee,  
v.  
Rex McCrackin, Defendant–Appellant.

No. CA2001–04–096.

Decided June 24, 2002.

### Synopsis

**Background:** Defendant was convicted, after a jury trial in the Court of Common Pleas, Butler County, of rape. Defendant appealed.

**Holdings:** The Court of Appeals, Valen, J., held that:

officer could seek defendant’s consent to warrantless search of defendant’s vehicle for photographs, after defendant had invoked his right to counsel;

defendant voluntarily consented to the search; and

error in allowing defendant to be impeached with evidence that he had prior conviction for domestic violence was harmless.

Affirmed.

Criminal Appeal from Common Pleas Court.

### Attorneys and Law Firms

Robin N. Piper, Butler County Prosecuting Attorney,  
Daniel G. Eichel, Government Services Center, Hamilton,  
OH, for plaintiff-appellee.

Fred Miller, Hamilton, OH, for defendant-appellant.

### Opinion

VALEN, J.

\*1 { ¶ 1 } Defendant-appellant, Rex McCrackin, appeals from his conviction and sentence for rape in the Butler County Common Pleas Court. The trial court’s judgment is affirmed.

{ ¶ 2 } Yvonne Ziels is a licensed practical nurse who worked for a temporary agency that posted her at various nursing care facilities in the area. McCrackin was employed by another agency as a nursing assistant. Ziels first met McCrackin in May or June of 1999. At times, McCrackin worked under Ziels’ immediate supervision.

{ ¶ 3 } In August 1999, McCrackin began selling Ziels “diet” pills or “speed” to help her through the long shifts she had to work. He sold diet pills to her on about five occasions from August 1999 to December 1999. McCrackin visited Ziels’ home approximately four times, selling her diet pills on several of these occasions, even when Ziels’ husband and children were present.

{ ¶ 4 } On the morning of April 13, 2000, Ziels was returning home after dropping her son off at school when she saw McCrackin in his automobile at the stop sign on her street. She had not seen him for two months and had been trying to stay away from him because she had begun to feel uncomfortable around him. After McCrackin and Ziels exchanged pleasantries, he asked her to lend him some money. Ziels, who had loaned money to McCrackin in the past, agreed to do so. They drove to an automated teller machine, where Ziels withdrew \$100, giving \$80 of it to McCrackin. They did not discuss when McCrackin had to repay the money. The two then went their separate ways.

{ ¶ 5 } Ziels returned home, intending to lie down before going to work. However, at about 11:00 a.m., she heard someone beating on the door, on the bedroom window, and at the back of the house. When Ziels opened the door, McCrackin was there. He pushed his way into Ziels’ house, grabbed hold of her arms, and pushed her into the foyer. After trying unsuccessfully to push her towards a bedroom, he pulled her into the living room and threw her on the couch. In spite of Ziels’ plea, “don’t do this,” McCrackin removed her shorts and panties, and pulled down his sweatpants and underwear. He got on top of Ziels and engaged in vaginal intercourse with her.

{ ¶ 6 } When McCrackin stood up, Ziels grabbed her shorts and panties, ran into a bathroom and locked the door. Ziels heard McCrackin walking around and the

toilet flush in the master bedroom. When she was sure he had left, Ziels made several telephone calls for help, including one to 911.

{ ¶ 7} When Fairfield Township police officers arrived at her home, Ziels told them McCrackin had raped her. Ziels was taken to the hospital where she was examined by Amy Abner, a sexual assault nurse examiner, who specializes in treating victims of sexual assault. Abner observed red marks on both of Ziels' arms, and areas of redness and petechial bruising on Ziels' vaginal opening and cervix.

{ ¶ 8} McCrackin was arrested later that same day. During an inventory search of his automobile, police discovered a debit card with Ziels' name on it. When interviewed by Detective Captain Alan Laney, McCrackin explained that Ziels had given him the debit card so that he could collect money she owed him for some diet pills he had sold her. McCrackin also told Laney about several photographs of Ziels and her husband in sexually compromising positions, which he had secreted under the floor mat on the passenger side of his automobile. McCrackin claimed Ziels had given him the photographs as a symbol of their friendship.

\*2 { ¶ 9} When Laney made it clear to McCrackin that he was being investigated for rape, McCrackin asked for an attorney. Laney then asked McCrackin for his consent to retrieve the photographs of Ziels and her husband from his automobile. McCrackin granted Laney permission to retrieve the photographs, signing a handwritten "consent to search" form. In one of the photographs, a picture of Ziels' head had been cut off.

{ ¶ 10} McCrackin was indicted for rape pursuant to R.C. 2907.02(A)(2). McCrackin moved to suppress the statements he made to police and the items seized from his automobile on the grounds that they were illegally obtained. The motion was denied following a hearing.

{ ¶ 11} At McCrackin's trial, the state presented the testimony of Ziels, Abner and Laney, among others, who testified to the facts set forth above. Ziels also testified that the debit card found in McCrackin's car had been on a table in her living room, and that the photographs recovered from McCrackin's automobile had been in a box in her master bedroom's closet. Ziels testified that she did not give either the debit card or photographs to McCrackin.

{ ¶ 12} McCrackin testified on his own behalf. His version of events was as follows: He had been to Ziels' house at least ten times, and had met with Ziels at various

places, including the nursing homes where they both worked, and at the YMCA. He sold Ziels "diet drugs" on three occasions. His relationship with Ziels' progressed to the point where Ziels would allow him to kiss her, and they would fondle each other's genitals. According to McCrackin, Ziels had given him the pictures of her and her husband engaging in sex as a "symbol" of their friendship, and because she and McCrackin had never actually engaged in sexual intercourse with each other.

{ ¶ 13} McCrackin testified that he contacted Ziels two days prior to the date of the alleged rape to remind her she owed him \$100 for 20 Diatrex pills (speed) he had sold her. Ziels gave him her debit card so that he could get the money she owed him. After discovering he could not obtain money from the debit card, he called Ziels, who told him that she would have the money on April 13.

{ ¶ 14} McCrackin testified that on April 13, 2000 he traveled to Ziels' home, and then the two of them traveled separately to an ATM. Once there, he got into Ziels' automobile. Ziels withdrew the money she allegedly owed McCrackin, and gave it to him. The two then went their separate ways.

{ ¶ 15} McCrackin testified that after he had left Ziels, he noticed that a bottle of Diatrex pills worth about \$200, which he had been carrying in his coat pocket, was missing. After concluding the pills must have fallen out of his pocket when he was in Ziels' automobile, McCrackin called her twice. When she did not answer, he left a "nasty message" on her answering machine, threatening to show her husband the photographs she allegedly had given him unless she returned the pills to him. According to McCrackin, Ziels called him back immediately and agreed to leave his bottle of Diatrex "outside of her door, under her floor mat."

\*3 { ¶ 16} McCrackin testified that he traveled to Ziels' home and retrieved his pills from under the floor mat. According to McCrackin, Ziels came to the door wearing only a T-shirt and panties. McCrackin apologized to Ziels for leaving the "nasty" message. Then, according to McCrackin, the two began kissing, went inside the house, and had consensual sex on the living room couch. McCrackin testified that this was the first time he and Ziels engaged in vaginal intercourse. McCrackin said the two did not say anything to each other after he entered the house, and that he left her a "line" of powdered cocaine worth about two or three dollars before leaving.

{ ¶ 17} On rebuttal, Ziels testified that she and McCrackin had never had any form of sexual contact prior to the date of the alleged rape, and she reiterated that

McCrackin had raped her.

{ ¶ 18} The jury convicted McCrackin of rape. The trial court sentenced him to a three-year prison term and fined him \$4,000.

{ ¶ 19} McCrackin appeals, raising two assignments of error.

{ ¶ 20} Assignment of Error No. 1:

{ ¶ 21} “THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT–APPELLANT WHEN IT OVERRULED HIS MOTION TO SUPPRESS.”

{ ¶ 22} McCrackin argues the trial court erred by overruling his motion to suppress the photographs seized from his automobile. McCrackin points out that Laney asked for his consent to search his automobile for the photographs *after* he had invoked his right to counsel. McCrackin contends that when he invoked his right to counsel, all custodial interrogation should have ceased, including Laney’s request to search his automobile for the photographs. We find this argument unpersuasive.

{ ¶ 23} “Once an accused invokes his right to counsel, all further custodial interrogation must cease and may not be resumed in the absence of counsel unless the accused thereafter effects a valid waiver or himself renews communication with the police.” *State v. Knuckles*, 65 Ohio St.3d 494, 605 N.E.2d 54, 1992–Ohio–64, paragraph one of the syllabus. See, also, *Edwards v. Arizona* (1981), 451 U.S. 477, 484–485, 101 S.Ct. 1880, 1884–1885, 68 L.Ed.2d 378. Nevertheless, the police may seek a waiver of an accused’s Fourth Amendment right against unreasonable searches and seizures even after the accused has invoked his Fifth Amendment right to counsel. *State v. Childress* (1983), 4 Ohio St.3d 217, 448 N.E.2d 155, paragraph two of the syllabus, distinguishing *Edwards v. Arizona*. See, also, *State v. Tinch* (1992), 84 Ohio App.3d 111, 121, 616 N.E.2d 529. When an accused waives his Fourth Amendment rights, a court need determine only that his consent to the search was voluntary under the totality of the surrounding circumstances. *Childress* at 219, 448 N.E.2d 155.

{ ¶ 24} Here, Laney was permitted to seek a waiver of McCrackin’s Fourth Amendment right against a warrantless search and seizure even after McCrackin invoked his Fifth Amendment right to have counsel present during custodial interrogation. And there was sufficient evidence presented to show that McCrackin’s

waiver of his Fourth Amendment rights was voluntarily given. Laney testified that McCrackin *wanted* him to obtain the photographs, apparently, in the belief they would help prove his sexual encounter with Ziels was consensual. (Emphasis added.) Accordingly, McCrackin’s first assignment of error is overruled.

\*4 { ¶ 25} Assignment of Error No. 2:

{ ¶ 26} “THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT–APPELLANT WHEN IT PERMITTED THE STATE TO INTRODUCE EVIDENCE REGARDING APPELLANT’S PRIOR ‘BAD ACTS.’ “

{ ¶ 27} McCrackin argues the trial court erred by allowing the prosecution to introduce evidence of his prior conviction for domestic violence. The state contends that it introduced evidence of McCrackin’s prior conviction for impeachment purposes pursuant to Evid.R. 609(A)(3),<sup>1</sup> and that if the trial court erred in admitting the evidence, the error was harmless.

<sup>1</sup> In its appellate brief, the state actually cited Evid.R. 609(A)(2), but it is clear from the remainder of its argument that it meant to refer to Evid.R. 609(A)(3).

{ ¶ 28} In November 1996, McCrackin was convicted in the Hamilton Municipal Court of two counts of domestic violence pursuant to R.C. 2919.25. McCrackin received a six-month sentence on each count, to be served consecutively, with the sentences suspended, apparently, on the condition that McCrackin attend classes on preventing domestic violence.

{ ¶ 29} At McCrackin’s trial on the rape charge, the prosecutor was permitted, over defense counsel’s objection, to ask McCrackin if he had been convicted of domestic violence, and McCrackin answered in the affirmative.

{ ¶ 30} Evid.R. 609 provides in relevant part:

{ ¶ 31} “(A) General Rule. For the purpose of attacking the credibility of a witness:

{ ¶ 32} “ \* \* \*

{ ¶ 33} “(3) Notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is

admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance.”

{ ¶ 34} Under Evid.R. 609(A)(3), “all convictions for crimes involving dishonesty or false statement, regardless of the possible punishment, are admissible for purposes of impeaching witnesses.” Weissenberger’s Ohio Evidence (2002), 258, Section 609 .5. Evid.R. 609(A)(3) “does not attempt to delineate precisely which offenses may be characterized as supporting convictions involving ‘dishonesty or false statement.’ “ *Id.* Nevertheless, while convictions for offenses like perjury, subornation of perjury, bribery, false statement, criminal fraud, embezzlement, false pretense or concealment clearly fall within the scope of Evid.R. 609(A)(3), offenses solely involving force, assault, disorderly conduct, criminal damaging, public intoxication or driving under the influence clearly do not. *Id.* at 259, 448 N.E.2d 155.

{ ¶ 35} McCrackin’s conviction for misdemeanor domestic violence was not admissible pursuant to Evid.R. 609(A)(3), because domestic violence is not an offense involving dishonesty or false statement. See *State v. Glover* (Aug. 15, 1988), Clermont App. No. CA85–12–106. Therefore, we conclude the trial court erred in allowing the prosecutor to question McCrackin about his prior conviction for misdemeanor domestic violence. However, we also conclude that the trial court’s error was harmless under the facts of this case.

\*5 { ¶ 36} Error not involving the violation of the accused’s constitutional rights is harmless where there is substantial other evidence to support the guilty verdict. See *State v. Webb*, 70 Ohio St.3d 325, 335, 638 N.E.2d 1023, 1994–Ohio–425, and *State v. Davis* (1975), 44 Ohio App.2d 335, 346–348, 338 N.E.2d 793.

{ ¶ 37} McCrackin argues the trial court’s error was prejudicial because the trial’s outcome hinged essentially on whether the jury believed Ziels’ word that he had raped her, or his word that their sexual encounter was consensual. In support of his argument, McCrackin points to several inconsistencies in the state’s testimony, which, McCrackin asserts, tended to undermine Ziels’ credibility. This testimony included Ziels’ acknowledgment that she lent money to McCrackin without discussing when it needed to be repaid, despite her professed discomfort about being around him. McCrackin also mentions that, at trial, Ziels testified that he did not attempt to kiss her until after he had raped her, while Nurse Abner testified that Ziels had said he kissed her all over her face when she turned her head to the side. McCrackin also asserts that the fact he possessed the photographs of her and her

husband engaging in sex, which she allegedly gave to him, corroborated his testimony that he and Ziels had engaged in intimate sexual contact prior to the date of the alleged rape.

{ ¶ 38} However, Ziels’ testimony showed that McCrackin had an opportunity to take the photographs from Ziels’ house when she was hiding in her bathroom following the rape. Furthermore, McCrackin’s explanation as to why Ziels gave him the photographs is implausible. McCrackin testified that Ziels “gave me the pictures to, uh, since we had never engaged in actual, uh, intercourse, that she wanted to give me these pictures of me [sic] to, uh, be a symbol of some type of friendship.”

{ ¶ 39} In fact, several aspects of McCrackin’s version of events are implausible. For instance, McCrackin asserted that he and Ziels engaged in consensual sexual activity, including, for the first time, vaginal intercourse, after Ziels—according to McCrackin’s account—had tried to withhold from him \$200 worth of illicit drugs that belonged to him. McCrackin also alleged that this consensual sexual relationship occurred after he had left Ziels a “nasty message” in which he “cussed her out,” and had threatened to show Ziels’ husband the photographs that Ziels allegedly had given him.

{ ¶ 40} The trial court did not permit the state to question McCrackin about the details of his domestic violence conviction. Furthermore, McCrackin did not try to present himself as a “nice guy” who had simply been wrongly accused. Instead, McCrackin essentially acknowledged that he was a drug dealer, and referred to Ziels at one point as a “good customer.”

{ ¶ 41} Also, Detective Laney, who has 25 years of law enforcement experience, described Ziels’ conduct following the rape as being “completely” consistent with someone who had just been raped. When Laney first arrived at the crime scene, he asked Ziels if she wanted sit down on the living room couch, unaware at the time that she had just been raped there. Ziels refused to sit on the couch, saying, “I’m not going over there”; she sat on the floor in the foyer, instead.

\*6 { ¶ 42} Additionally, Abner testified that Ziels had red marks on both of her arms, which corroborated Ziels’ testimony that McCrackin had gained entry into her house by grabbing her arms and pushing her back into the foyer, and then pulling her to the living room couch after trying unsuccessfully to push her towards the bedrooms. The state also presented photographs taken by Abner during her pelvic examination of Ziels, showing areas of redness and petechial bruising at Ziels’ vaginal opening and on

**State v. McCrackin, Not Reported in N.E.2d (2002)**

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her cervix.

{ ¶ 43} In light of the evidence presented in this case, we conclude the trial court's erroneous admission into evidence of McCrackin's prior conviction for domestic violence was harmless.

{ ¶ 44} McCrackin's second assignment of error is overruled.

{ ¶ 45} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

**All Citations**

Not Reported in N.E.2d, 2002 WL 1358669, 2002 -Ohio- 3166

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# Appendix D

of the elements of the crime is that the defendant must “know” that the property has been stolen. Under the first prong of the definition of “knowledge,” the defendant could be found to have such “knowledge” only if he or she had actual *awareness* of the fact that the property was stolen. But under the second prong of the definition, the defendant could seemingly be found to have such “knowledge” if he or she had information that would lead *a reasonable person in the same situation* to believe that the property was stolen, even though he or she had no actual awareness that the property was stolen.

Read literally, the second prong of the statutory definition of “knowledge” in the Criminal Code is unconstitutional; it violates the Due Process Clause of the Fourteenth Amendment because it does not provide citizens with adequate notice of what the law requires.<sup>8</sup> However, to avoid declaring the statute unconstitutional on its face, the Washington State Supreme Court interpreted this statute to mean that it permits, but does not direct, the finder of fact “to find that the defendant had knowledge if it finds that the ordinary person would have had knowledge under the circumstances. The jury must still be allowed to conclude that he [or she] was less attentive or intelligent than the ordinary person.”<sup>9</sup> In any case, the finder of fact “*must still find subjective knowledge.*”<sup>10</sup> Despite the holdings in *Shipp* and *Allen*, other case law and the pattern jury instruction defining “knowledge” still literally permit the jury to find the defendant guilty based on constructive knowledge.

There is a related problem connected with the definition of “knowledge.” The Washington State Supreme Court has held that a defendant can be found to have “knowledge” even though the supposed “fact” that he or she “knew” was not even true.<sup>11</sup> This is directly contrary to the definition,<sup>12</sup> which requires awareness of a *fact*, which by definition is a proposition that is true.

Thus, it is no exaggeration to say that a criminal defendant can currently be found to have acted with knowledge, and therefore be found guilty of a crime, even though the defendant had no awareness of the fact he or she allegedly knew, and even though the “fact” he or she

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8. See *Allen*, 182 Wash. 2d at 374, 341 P.3d at 273; *State v. Shipp*, 93 Wash. 2d 510, 513–16, 610 P.2d 1322, 1324–26 (1980).

9. *Shipp*, 93 Wash. 2d at 516, 610 P.2d at 1326.

10. *Id.* at 517, 610 P.2d at 1326 (emphasis added); see also *Allen*, 182 Wash. 2d at 374–75, 341 P.3d at 273.

11. *State v. Johnson*, 119 Wash. 2d 167, 829 P.2d 1082 (1992).

12. WASH. REV. CODE § 9A.08.010(1).

# TRUE BELIEF: AN ANALYSIS OF THE DEFINITION OF “KNOWLEDGE” IN THE WASHINGTON CRIMINAL CODE

Alan R. Hancock\*

## INTRODUCTION

In *State v. Allen*,<sup>1</sup> the Washington State Supreme Court reaffirmed *State v. Shipp*,<sup>2</sup> holding that in order for a defendant to have “knowledge” for purposes of the Washington Criminal Code, the defendant must have actual, subjective knowledge of the fact in issue.<sup>3</sup> However, glaring problems still remain with the statutory definition of the term “knowledge.”

The Criminal Code defines “knowledge” in two alternative ways. The first prong states that a person knows or acts knowingly or with knowledge when “he or she is *aware* of a fact, facts, or circumstances or result described by a statute defining an offense.”<sup>4</sup> The second prong of the definition states that a person knows or acts knowingly or with knowledge when “he or she has information which would lead *a reasonable person in the same situation* to believe that facts exist which facts are described by a statute defining an offense.”<sup>5</sup>

Consider, for example, the crime of possessing stolen property.<sup>6</sup> The term “possessing stolen property” is defined as “knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.”<sup>7</sup> Thus, one

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1. 182 Wash. 2d 364, 341 P.3d 268 (2015).
2. 93 Wash. 2d 510, 610 P.2d 1322 (1980).
3. *See Allen*, 182 Wash. 2d at 374, 341 P.3d at 273.
4. WASH. REV. CODE § 9A.08.010(1)(b)(i) (2014 & Supp. 2015) (emphasis added).
5. *Id.* § 9A.08.010(1)(b)(ii) (emphasis added).
6. This crime may be committed in any of three different degrees. *See id.* §§ 9A.56.150–.170.
7. *Id.* § 9A.56.140(1).

supposedly “knew” was not even true. This is untenable; the law must change.

The Legislature should amend the statute defining “knowledge” to eliminate the second prong of the definition. The second prong adds nothing useful to the first prong of the definition, and only causes confusion. The case law construing the statute has only added to the confusion. In addition, or in the alternative, the Washington Pattern Jury Instruction Committee should amend Criminal Washington Pattern Jury Instruction (WPIC) § 10.02 to eliminate the second prong of the definition.

#### I. THE SECOND PRONG OF WASHINGTON’S DEFINITION OF “KNOWLEDGE” SETS FORTH AN UNCONSTITUTIONAL NEGLIGENCE STANDARD

What is knowledge? In epistemological circles, knowledge is generally defined as justified true belief.<sup>13</sup> In other words, in order for a person to have knowledge of a given proposition, the proposition must be *true*, the person must *believe* it to be true, and the person must be *justified* in believing it to be true.<sup>14</sup>

The first prong of the definition of “knowledge” in the Criminal Code appears to define knowledge in terms of true belief, without any reference to what we might call justification for such true belief.<sup>15</sup> It states that “[a] person knows or acts knowingly or with knowledge when: (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense.”<sup>16</sup> This definition uses the term awareness rather than belief, and this is a reasonable synonym under the circumstances. Awareness connotes perception and consciousness, and certainly implies belief. The definition refers to awareness of a fact, facts, or circumstances. These terms necessarily

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13. See, e.g., RODERICK M. CHISHOLM, *THEORY OF KNOWLEDGE* 5–23 (1966). Chisholm formulates the elements of knowledge as follows: “*S* knows at *t* that *h* is true, provided: (1) *S* believes *h* at *t*; (2) *h* is true; and (3) *h* is evident at *t* for *S*.” *Id.* at 23. The term “evident” is a term of art in this context, which Chisholm explains in detail. It is roughly equivalent to the concept of being justified in one’s true belief.

14. In a famous paper, the philosopher Edmund L. Gettier III showed, by way of some ingenious counterexamples, that a person can have justified true belief of a proposition, and still not have knowledge of that proposition. Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 *ANALYSIS* 121 (1963). Still, as a rule of thumb, justified true belief is a good working definition of knowledge. Chisholm adds a qualification to his definition of “knowledge” in order to account for Gettier’s point. CHISHOLM, *supra* note 13, at 23.

15. WASH. REV. CODE § 9A.08.010(1)(b)(i).

16. *Id.*

imply the truth of the proposition the person is aware of. A fact by definition is something that is true.<sup>17</sup>

When we turn to the second prong of the definition of “knowledge,” however, we encounter a definition that is not only contrary to an ordinary understanding of the concept of knowledge, but also contrary to well-established principles of criminal law. The second prong of the definition of “knowledge” is as follows:

A person knows or acts knowingly or with knowledge when:

...

(ii) he or she has information which would lead a *reasonable person* in the same situation to believe that facts exist which facts are described by a statute defining an offense.<sup>18</sup>

This reasonable person standard was part of the original Washington Criminal Code, Title 9A of the Revised Code of Washington, enacted in 1975, to become effective in 1976.<sup>19</sup> The Criminal Code was a combination of a revised criminal code prepared by the Judiciary Committee of the Washington Legislative Council, which drew on the Model Penal Code,<sup>20</sup> and a criminal code drafted by the Washington Association of Prosecuting Attorneys.<sup>21</sup>

The Model Penal Code defines the term “knowingly” as follows:

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his [or her] conduct or the attendant circumstances, he [or she] is aware that his [or her] conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his [or her] conduct, he [or she] is aware that it is practically certain that his [or her] conduct will cause such a result.<sup>22</sup>

Both parts of this definition are consistent with the ordinary understanding of the term “knowledge,” in that they both refer to the person’s *awareness* of the person’s conduct, the attendant circumstances,

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17. It was not unreasonable for the Legislature to exclude any consideration of justification for the actor’s awareness of facts in defining “knowledge.” After all, the focus of the criminal law is on the state of mind of the actor, as well as the acts of the actor.

18. WASH. REV. CODE § 9A.08.010(1)(b)(ii) (emphasis added).

19. An Act Relating to Crimes and Criminal Procedure, 1975 Wash. Sess. Laws 826.

20. See MODEL PENAL CODE (AM. LAW INST. 1962).

21. See *Recent Developments, Criminal Law—Affirmative Defenses in the Washington Criminal Code—The Impact of Mullaney v. Wilbur*, 421 U.S. 684 (1975), 51 WASH. L. REV. 953, 954–55 n.10 (1976).

22. MODEL PENAL CODE § 2.02(b).

or the result of the person's conduct, as the case may be, which roughly equates to true belief.<sup>23</sup> The definition also avoids any concept of constructive knowledge.<sup>24</sup>

In stark contrast, the second prong of the definition of "knowledge" in the Washington Criminal Code essentially sets forth a negligence standard for determining whether a person has knowledge of a given fact. Civil Washington Pattern Jury Instruction § 10.01 sets forth the most common legal definition of negligence:

Negligence is the failure to exercise ordinary care. It is the doing of some act that a *reasonably careful person* would not do under the same or similar circumstances or the failure to do some act that a *reasonably careful person* would have done under the same or similar circumstances.<sup>25</sup>

There is a striking similarity between the definition of "negligence" and the second prong of the definition of "knowledge." Consider, for example, a situation in which a defendant is charged with possessing stolen property.<sup>26</sup> One of the elements of this crime is that the defendant "knew" that the property he or she possessed had been stolen.<sup>27</sup> Under the second prong of the definition of "knowledge," the defendant could be held to have such knowledge if he or she had information that would lead a reasonable person in the same situation to believe that the property had been stolen.<sup>28</sup> Under these circumstances, the defendant has acted negligently, i.e., he or she has failed to become aware of the fact that the property had been stolen; a reasonably careful person would have become aware of this fact.

*A. The Washington Courts Have Held that "Knowledge" Requires Actual Knowledge; Constructive Knowledge Is Insufficient*

*Shipp* and *Allen* address the legal defect in the second prong of the definition of "knowledge." Three cases were consolidated for hearing

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23. As previously noted, it would not be necessary to include the concept of justification in a criminal code definition of "knowledge."

24. In the law, "constructive knowledge" is generally understood to be knowledge imputed to a person who should have been aware of a fact if the person had exercised reasonable care. *See, e.g., Constructive knowledge*, BLACK'S LAW DICTIONARY 950 (9th ed. 2009).

25. 6 WASH. PATTERN JURY INSTRUCTIONS: CIVIL § 10.01 (2014) (emphasis added).

26. This crime may be committed in any of three different degrees. *See* WASH. REV. CODE §§ 9A.56.150–.170 (2014 & Supp. 2015).

27. *Id.* § 9A.56.140(1) (2014 & Supp. 2015).

28. *Id.* § 9A.08.010(1)(b)(ii).

before the Supreme Court in *Shipp*.<sup>29</sup> In two of these cases, the issue was whether a jury instruction tracking the language of the second prong of the definition of “knowledge” was lawful and constitutional.<sup>30</sup> The Court held that such an instruction is not lawful and constitutional because it redefines the accepted meaning of the term “knowledge” to mean negligent ignorance: “[t]he ordinary person reading one of the criminal statutes would surely be misled if the statute defining knowledge were interpreted to effect such a drastic change in meaning.”<sup>31</sup> The Court’s citations indicate that it was basing this ruling on the Due Process Clause of the Fourteenth Amendment.<sup>32</sup> The Court remanded these two cases for new trials.<sup>33</sup> *Shipp* mandates that different jury instructions must be given.

As the Court pointed out in *Shipp*: “[k]nowledge is intended to be a more culpable mental state than recklessness, which is a subjective standard, rather than the equivalent of negligence, which is an objective standard.”<sup>34</sup> Thus, if the jury is permitted to find that the defendant acted knowingly if “he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense,”<sup>35</sup> the jury would, in effect, be permitted to find knowledge if it finds the defendant negligent in not being aware of the relevant fact or facts. This is unacceptable because acting with mere negligence is not sufficient to establish criminal liability.<sup>36</sup> Even the definition of “criminal negligence” provides that the actor’s failure to be aware of a substantial risk that a wrongful act may occur must constitute “a *gross deviation* from the standard of care that a reasonable person would exercise in the same situation.”<sup>37</sup>

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29. *State v. Shipp*, 93 Wash. 2d 510, 512, 610 P.2d 1332, 1324 (1980).

30. *Id.* at 512–13, 610 P.2d at 1324.

31. *Id.* at 516, 610 P.2d at 1326.

32. *Id.*

33. *Id.* at 517, 610 P.2d at 1326.

34. *Id.* at 515, 610 P.2d at 1325.

35. WASH. REV. CODE § 9A.08.010(1)(b)(ii) (2014 & Supp. 2015).

36. *Shipp*, 93 Wash. 2d at 515–16, 610 P.2d at 1325–26. Compare 6 WASH. PATTERN JURY INSTRUCTIONS: CIVIL § 10.01 (2014) (“Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.”), with 11 WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL § 10.04 (2014) (“A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.”).

37. WASH. REV. CODE § 9A.08.010(1)(d) (emphasis added).

In *Shipp*, the Court correctly recognized the aforementioned problems with the second prong of the definition of “knowledge.”<sup>38</sup> First, it rejected any interpretation of this definition that would *require* the jury to follow a mandatory presumption that knowledge exists where a reasonable person in the same situation would have knowledge.<sup>39</sup> Second, it rejected any interpretation that would *permit* the jury to find knowledge based on the reasonable person standard if the jury believed that the defendant “was so unperceptive or inattentive that [the defendant] did not have knowledge in the ordinary sense.”<sup>40</sup> The Court pointed out that this second interpretation “redefines knowledge with an objective standard which is the equivalent of negligent ignorance,” a redefinition that is “inconsistent with the statutory scheme which creates a hierarchy of mental states for crimes of increasing culpability.”<sup>41</sup>

However, the Court salvaged the legality of the second prong of the definition of “knowledge.” The Court held that

the statute must be interpreted as only permitting, rather than directing, the jury to find that the defendant had knowledge if it finds that the ordinary person would have had knowledge under the circumstances. The jury must still be allowed to conclude that [the defendant] was less attentive or intelligent than the ordinary person.<sup>42</sup>

The Court further pointed out that “[t]he jury *must* still find subjective knowledge.”<sup>43</sup>

*Allen* underscores the problematic language of the second prong of the “knowledge” definition.<sup>44</sup> In that case, the Court reaffirmed that “the State was required to prove that Allen *actually* knew that he was promoting or facilitating Clemmons [the principal in the murder of four Lakewood police officers] in the commission of first degree

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38. *Shipp*, 93 Wash. 2d at 515, 610 P.2d at 1325.

39. *Id.* at 514, 610 P.2d at 1325.

40. *Id.* The *Shipp* Court referred to what it called “subjective knowledge,” and clearly intended this to mean actual knowledge in the sense that the person with knowledge believed, or was aware of, the fact, facts, or circumstances or result in question. *Id.* at 513–17. Actual or subjective knowledge is to be distinguished from constructive knowledge, i.e., knowledge imputed to a person who should have been aware of a fact if the person had exercised reasonable care. *See supra* note 24. In this sense, the second prong of the statutory definition can be characterized as a definition of constructive knowledge, as the Court noted in *Allen*. *State v. Allen*, 182 Wash. 2d 364, 374, 341 P.3d 268, 273 (2015).

41. *Shipp*, 93 Wash. 2d at 515, 610 P.2d at 1325.

42. *Id.* at 516, 610 P.2d at 1326.

43. *Id.* at 517, 610 P.2d at 1326 (emphasis added).

44. *See* WASH. REV. CODE § 9A.08.010(1)(b)(ii) (2014 & Supp. 2015).

premeditated murder.”<sup>45</sup> The Court correctly cited *Shipp* for this proposition.<sup>46</sup> One of the issues in *Allen* was whether the prosecutor had engaged in prosecutorial misconduct in closing argument by misstating the “knowledge” standard upon which the jury could convict the defendant. The Court held that the prosecutor had done so by repeatedly arguing “that the jury could convict Allen if it found that he *should have known* Clemmons was going to murder the four police officers.”<sup>47</sup>

While the Court reached the correct result in *Allen*, it did not directly address the highly problematic language of the second prong of the definition of “knowledge.” And it added to the confusion by stating:

While the State must prove actual knowledge, it may do so through circumstantial evidence. Thus, Washington’s culpability statute provides that a person has actual knowledge when “he or she has information which would lead a reasonable person in the same situation to believe” that he was promoting or facilitating the crime eventually charged.<sup>48</sup>

Therein lies one of the problems addressed in this Article. This statute (the second prong of the definition of “knowledge”) states on its face that the jury can find actual knowledge based on constructive knowledge, and that is unconstitutional, as previously explained.

*B. The Criminal Washington Pattern Jury Instruction Does Not Remedy the Problem*

The WPIC does nothing to remedy this glaring problem. WPIC § 10.02 now states the second prong of the definition of “knowledge” as follows: “[i]f a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.”<sup>49</sup>

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45. *Allen*, 182 Wash. 2d at 374, 341 P.3d at 273 (emphasis in original).

46. *Id.* While correctly citing *Shipp*, the Court misstated the nature of the case in its parenthetical description of the case: “[a]ccomplice must have actual knowledge that principal was engaging in the crime eventually charged.” *Id.* (citing *Shipp*, 93 Wash. 2d at 517, 610 P.2d at 1322). *Shipp* did not involve accomplice liability. Rather, three cases were consolidated for hearing in *Shipp*. They involved convictions for (1) knowingly promoting prostitution in both the first and second degrees, (2) knowingly riding in a stolen car, and (3) attempted rape in the second degree and knowing assault with intent to commit rape (second-degree assault). *Shipp*, 93 Wash. 2d at 512–13, 610 P.2d at 1324.

47. *Allen*, 182 Wash. 2d at 374, 341 P.3d at 273 (emphasis in original).

48. *Id.* (quoting WASH. REV. CODE § 9A.08.010(1)(b)(ii)).

49. 11 WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL § 10.02 (2014) (emphasis added).

This instruction essentially states that the jury *can find* that a person acted with knowledge of a fact if that person has information that would lead a reasonable person in the same situation to believe that that fact exists. But that is the very thing that *Shipp* and *Allen* hold to be impermissible, and therefore this instruction does not solve the problem addressed in those cases. Taken literally, the WPIC instruction does exactly what these cases, and any ordinary and commonsense understanding of the concept of knowledge, say cannot be done. The instruction allows the jury to find knowledge based on a constructive knowledge (reasonable person) standard even if the jury does not find that the defendant acted with actual or subjective knowledge. It does not say anything about the fact that the jury is required to find actual or subjective knowledge.

In *State v. Leech*,<sup>50</sup> the Washington State Supreme Court held that the WPIC instruction is consistent with *Shipp*.<sup>51</sup> Nevertheless, the holding of *Leech* is highly problematic. Neither *Leech* nor any of the other cases explains how its holding squares with *Shipp*, and it does not, in fact, square with *Shipp*. The *Leech* Court never addressed the fact that the State must prove that the defendant had actual, subjective knowledge of the fact in question in order to prove the element of knowledge.

This problem can be traced, in part, to a logical fallacy first introduced into this body of law in *State v. Davis*.<sup>52</sup> In that case, the court of appeals affirmed the use of WPIC § 10.02 as it describes the second prong of the definition of “knowledge.” The court held that WPIC § 10.02 complies with *Shipp*, and stated “[c]ontrary to defendant’s assertion, the instruction *allowed* the jury to consider the subjective intelligence or mental condition of the defendant.”<sup>53</sup> But the fact that the instruction *allows* the jury to consider the subjective intelligence or mental condition of the defendant is not the problem. The problem is that in order to find knowledge, the jury *must* find subjective knowledge. Regrettably, WPIC § 10.02 also *allows* the jury *not* to consider the subjective knowledge of the defendant, and this is clearly contrary to *Shipp* and *Allen*.

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50. 114 Wash. 2d 700, 790 P.2d 160 (1990).

51. *Id.* at 710, 790 P.2d at 165. In addition, the *Leech* Court cites numerous other cases upholding the WPIC instruction as constitutional. *Id.* at 710 n.20, 790 P.2d at 165 n.20. The *Leech* Court states, without any meaningful analysis, that the trial court’s definition of knowledge instruction in WPIC § 10.02 “avoids the due process problem identified in *Shipp*; it was not unconstitutional.” *Id.* at 710, 790 P.2d at 165.

52. 39 Wash. App. 916, 696 P.2d 627 (1985).

53. *Id.* at 919–20, 696 P.2d at 629 (emphasis added).

The fallacy in *Davis* is perpetuated in the other cases cited by the Washington State Supreme Court in footnote twenty of the *Leech* opinion,<sup>54</sup> and has become entrenched in the law. It is time to call a halt to any further use of this faulty reasoning. The defects in the second prong of the definition of “knowledge”<sup>55</sup> and WPIC § 10.02, as outlined in this Article, can lead to unjust and unconstitutional convictions. Jurors reading the instruction literally can reasonably conclude that they are permitted to find that the defendant acted knowingly if a reasonable person would have acted knowingly under the circumstances. In the absence of an improper closing argument by the prosecutor explicitly stating that the jury can find knowledge based on this objective standard, as happened in *Allen*, there is no remedy for a conviction based on such a result under current case law.

## II. ONE CANNOT KNOW A FALSE PROPOSITION EVEN IF ONE BELIEVES THE PROPOSITION TO BE TRUE

We have seen that the second prong of the definition of “knowledge” in the Criminal Code is defective on its face, and has led to erroneous legal reasoning. As outlined above, the Washington cases do not give proper attention to the requirement that a defendant have actual, subjective knowledge in order to be convicted of a crime in which “knowledge” is an element. It is not enough that a reasonable person in the same situation as the defendant would have had such actual knowledge. The WPIC on the definition of “knowledge” does not remedy this problem.

The second prong of the definition of “knowledge” has led to other problems as well. In *State v. Johnson*,<sup>56</sup> the State charged the defendant with the crime of promoting prostitution. The Washington Criminal Code defines this crime as follows: “[a] person is guilty of promoting prostitution if, having possession or control of premises which he or she *knows* are being used for prostitution purposes, he or she fails without lawful excuse to make reasonable effort to halt or abate such use.”<sup>57</sup> The Washington State Supreme Court upheld the defendant’s conviction for promoting prostitution, holding that the defendant knowingly allowed her premises to be used for prostitution purposes, even though the premises in question were not actually being used for prostitution

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54. *Leech*, 114 Wash. 2d at 710, 790 P.2d at 165.

55. WASH. REV. CODE § 9A.08.010(1)(b)(ii) (2014 & Supp. 2015).

56. 119 Wash. 2d 167, 829 P.2d 1082 (1992).

57. WASH. REV. CODE § 9A.88.090(1) (emphasis added).

purposes.<sup>58</sup> Rather, the defendant had been arrested pursuant to a sting operation in which undercover police officers posed as prostitute and patron.<sup>59</sup>

The *Johnson* Court cited the second prong of the definition of “knowledge,” and stated that “the Legislature has chosen to define knowledge so that one may ‘know’ something based upon a reasonable, subjective belief that a fact exists.”<sup>60</sup> In response to the defendant’s argument that one’s mistaken, reasonable, subjective belief is akin to an impermissible constructive knowledge standard invalidated in *Shipp*, the Court stated that “*Shipp* understood that actual knowledge included one’s subjective belief,”<sup>61</sup> and that the “fact that one’s subjective belief may be inaccurate is not equivalent to a presumption of knowledge.”<sup>62</sup> The Court concluded:

*Shipp* held that there cannot be a mandatory presumption of knowledge based upon one’s receipt of certain information because it would not allow a jury to take into account the subjective intelligence or mental condition of the defendant. *Shipp*, however, does permit a jury to find actual knowledge from a subjective belief based on circumstantial evidence. It is the defendant’s subjective belief that is important for culpability, not the objective state of facts. The jury is *permitted* to find actual subjective knowledge if there is sufficient information which would lead a reasonable person to believe that a fact exists. Therefore, a mistaken reasonable, subjective belief may constitute “knowledge” without violating *Shipp*.<sup>63</sup>

The Court is correct in stating that a jury is permitted to find actual knowledge based on circumstantial evidence, and that it is the defendant’s subjective belief that is important for culpability, at least to the extent that the defendant must subjectively believe that the fact in question exists. But the remainder of the Court’s analysis is erroneous.<sup>64</sup> First, the Court misconstrues the holding in *Shipp*, as other courts have done, in stating that the jury is permitted to find actual subjective knowledge if there is sufficient information which would lead a

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58. *Johnson*, 119 Wash. 2d at 174, 829 P.2d at 1085.

59. *Id.* at 169, 829 P.2d at 1083.

60. *Id.* at 174, 829 P.2d at 1085.

61. *Id.* (citing *State v. Shipp*, 93 Wash. 2d 510, 517, 610 P.2d 1322, 1326 (1980)).

62. *Id.* at 174, 829 P.2d at 1085.

63. *Id.* at 174, 829 P.2d at 1805–86 (emphasis in original).

64. Only one member of the Washington State Supreme Court that decided *Johnson* remains on the Court today, Justice Charles W. Johnson. Justice Johnson correctly dissented in *Johnson*.

reasonable person to believe that a fact exists.<sup>65</sup> As previously explained, *Shipp* holds that the jury *must* find that the defendant had actual, subjective knowledge in order to find that he or she acted with knowledge.

Second, the Court introduces a new fallacy into the discussion by stating that a *mistaken* reasonable subjective belief can result in culpability.<sup>66</sup> On the contrary, the definition of “knowledge” requires awareness of a “*fact, facts, or circumstances or result* described by a statute defining an offense.”<sup>67</sup> One cannot have knowledge for purposes of the Criminal Code unless one is aware of a *fact*. If a person has a *mistaken* belief concerning a supposed fact, then by definition, the person does not have knowledge. This is also consistent with the ordinary meaning of the term “knowledge” as (justified) *true* belief.<sup>68</sup>

The Court in *Johnson* waxed philosophical in its reasoning, citing an example in which a person can reasonably believe that by flicking a light switch, the light will come on. Yet, if there is a fault in the wiring, the light will not come on.<sup>69</sup> The Court stated that under these circumstances, “we believe or subjectively ‘know’ the switch will turn the lights on even though it is objectively impossible, until we obtain information that the wiring is faulty, i.e., by flicking the switch and the lights remain off.”<sup>70</sup> The Court’s quotation marks around the word “know” are telling. We do not, in fact, *know* something just because we reasonably believe it to be the case. In order to have knowledge, the fact we purport to know must be *true*. More to the point of this Article, the definition of “knowledge” in the Criminal Code requires awareness of a *fact*, not what someone believes to be a fact. The *Johnson* case is yet another instance in which the second prong of the definition of “knowledge” has led to erroneous reasoning and, in that case at least, a

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65. See, e.g., *Johnson*, 119 Wash. 2d at 174, 829 P.2d at 1085–86.

66. See *id.* at 174, 829 P.2d at 1086.

67. WASH. REV. CODE § 9A.08.010(1)(b)(i) (2014 & Supp. 2015) (emphasis added).

68. To be charitable, perhaps one interpretation of the court’s reasoning is that under the second prong of the definition of “knowledge,” a reasonable person could believe that the relevant facts exist, even though they did not exist and the person’s belief was mistaken, and still have knowledge. Any such interpretation would be erroneous, however. The first prong of the definition of “knowledge” clearly requires awareness of an actual fact, and the two parts of the statute must be considered as a whole, with all its provisions considered in relation to one another. See *State v. Bunker*, 169 Wash. 2d 571, 578, 238 P.3d 487, 491 (2010). Moreover, even assuming, for the sake of argument, that the statute is ambiguous in this regard, any such interpretation would violate the rule of lenity. See, e.g., *State v. McGee*, 122 Wash. 2d 783, 787, 864 P.2d 912, 913–14 (1993).

69. *Johnson*, 119 Wash. 2d at 173, 829 P.2d at 1086.

70. *Id.*

wrongful conviction.<sup>71</sup>

### III. THE LEGISLATURE SHOULD REPEAL THE SECOND PRONG OF “KNOWLEDGE,” AND THE JURY INSTRUCTIONS COMMITTEE SHOULD AMEND THE JURY INSTRUCTION

Voltaire once said that the “the Holy Roman Empire was neither holy, nor Roman, nor an empire.”<sup>72</sup> By the same token, the longstanding definition of “knowledge” is (justified) true belief. But under current Washington case law and the pattern jury instruction defining the second prong of “knowledge,” a defendant can be held to have knowledge of a given fact (1) even though he or she did not believe the fact to be true,<sup>73</sup> and (2) even though the supposed “fact” was not even true!<sup>74</sup> This flies in the face of the first prong of the definition of “knowledge” set forth in the Washington Criminal Code,<sup>75</sup> fundamental constitutional principles under the Due Process Clause of the Fourteenth Amendment as they relate to the second prong of the definition of “knowledge,”<sup>76</sup> and the common understanding of the concept of “knowledge” generally. It is not too much to ask that the law, and particularly the criminal law where liberty is at stake, be logical and reasonable.

The Legislature should remedy these problems by eliminating the second prong of the definition of “knowledge” in the Criminal Code altogether. After all, what is wrong with defining “knowledge” in accordance with the first prong of the definition? As is constitutionally required, this definition simply requires that the defendant have awareness of the fact in question (true belief) in order to have knowledge. There is nothing to be gained by adding a second definition that talks about what a reasonable person might believe about a fact in question. In order for any such second definition to be constitutional, it would have to make reference in some manner to the fact that the

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71. Even though the defendant could not properly have been convicted of promoting prostitution under the facts in *Johnson*, she could have been charged with and convicted of *attempted* promoting prostitution. See WASH. REV. CODE § 9A.28.020(2) (“If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.”).

72. OXFORD DICTIONARY OF QUOTATIONS 716 (Angela Partington ed., 4th ed. 1992).

73. See *supra* Section I.A.

74. See *supra* Part II.

75. WASH. REV. CODE § 9A.08.010(1)(b)(i).

76. *Id.* § 9A.08.010(1)(b)(ii).

defendant must still have actual, subjective knowledge, which is required in the first definition anyway.

Even if the Legislature does not repeal the second prong of the definition of “knowledge,” the Washington Supreme Court Committee on Jury Instructions should amend WPIC § 10.02 to eliminate the second paragraph thereof, which makes reference to the unconstitutional reasonable person standard in defining “knowledge,” or else amend it to include a requirement that the defendant must in any event act with actual, subjective knowledge. The Washington State Supreme Court should also reexamine, in an appropriate case, *State v. Leech*, *State v. Johnson*, and other problematic cases to rectify these problems.

## CONCLUSION

The second prong of the definition of “knowledge” in Washington’s Criminal Code sets forth an unconstitutional negligence standard. WPIC § 10.02 further complicates the problem. The Legislature should repeal the second prong of the definition of “knowledge” in the Criminal Code. Absent such a repeal, the jury instructions committee should amend WPIC § 10.02 to eliminate the potential for juries to find “knowledge” based on constructive knowledge. Until this happens, there is a substantial risk that juries will wrongly find defendants guilty of crimes based on constructive knowledge, rather than based on their *true belief*, as constitutionally required.

**NIELSEN, BROMAN & KOCH P.L.L.C.**

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