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COA NO. 53150-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

BOYD K. STACY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in accepting appellant's guilty plea to the eluding charge because it was not knowing, voluntary and intelligent, in violation of due process.

2. The court violated appellant's constitutional right to present a complete defense in excluding a defense witness from testifying.

3. The court erred in admitting evidence that a witness previously met appellant in prison.

4. Appellant received ineffective assistance of counsel, in violation of the Sixth Amendment, due to counsel's failure to seek instruction on a good faith claim of title defense.

5. Cumulative error deprived appellant of his due process right to a fair trial.

6. The judgment and sentence is unclear regarding community custody.

Issues Pertaining to Assignments of Error

1. Due process requires a guilty plea be knowing, voluntary, and intelligent. The written statement of defendant on plea of guilty misinformed appellant about the imposition of community custody for the eluding charge. Must appellant be allowed to withdraw his plea because he was misinformed about a direct consequence of his plea?

2. Because the jury was not informed of the name of a defense witness listed on the omnibus response during voir dire, the court prohibited the witness from testifying. Did the court's exclusion violate appellant's right to present a defense?

3. Whether the court erred in allowing the State to question a defense witness about being in prison 12 years ago where he met appellant because it constituted impermissible impeachment on a collateral matter and was unfairly prejudicial under ER 403 and ER 404(b) since it implicated appellant as a prior criminal?

4. Whether counsel was ineffective in failing to seek instruction for a good faith claim of title defense to the taking of a motor vehicle charge because evidence supported the instruction, the failure to seek one was not a legitimate tactic, and the lack of instruction undermines confidence in the outcome?

5. Whether a combination of errors described in issues 2, 3 and 4 violated appellant's due process right to a fair trial under the cumulative error doctrine?

6. Where the law requires that the judgment and sentence clearly set forth the term of community custody, whether the judgment and sentence must be clarified to show no community custody is imposed?

B. STATEMENT OF THE CASE

The State charged Boyd Stacy with attempting to elude a police vehicle and first degree taking of a motor vehicle (TMV). CP 1-4. Before trial, Stacy pleaded guilty to the eluding charge. CP 8-18; 5RP¹ 56-63. The TMV charge proceeded to a jury trial, where the following evidence was produced.

A truck belonging to Lincoln Creek Lumber went missing from its lot in Centralia on September 8, 2018. 5RP 70-72, 76. Video surveillance footage showed a vehicle pull up, someone get out, get into the truck, and drive off with it. 5RP 71-72. The truck was a two-ton, white Ford F-650 with red fenders and a dump bed. 5RP 70-71, 83, 93. It had Washington license plates. 5RP 73. Lincoln Creek Lumber lettering and a logo was on each door. 5RP 70, 73. There was a long piece of lumber in the bed. 5RP 73. A report was made to Centralia police. 5RP 69, 72.

On September 12, 2018, Lincoln Creek Lumber received a tip that their truck had been seen near Oakville. 5RP 78-79, 81. Employee Ellery Finley and co-worker Chad Martin drove towards the location. 5RP 78-79. They saw the truck backed into a driveway on Pearson Road in Grays

¹ The verbatim report of proceedings is cited as follows: 1RP - one volume consisting of 10/1/18, 12/17/18, 2/1/19; 2RP - 10/22/18; 3RP - one volume consisting of 1/28/19, 2/4/19; 4RP - 2/11/19; 5RP - one volume consisting of 2/13/19, 2/14/19; 6RP - 2/14/19 (jury instruction conference and closing argument); 7RP - 2/15/19.

Harbor County. 5RP 79-81, 83-84, 93. The piece of timber was still in the back of the truck. 5RP 94. Finley called Centralia Police. 5RP 79, 82.

Officer Ortivez from the Chehalis Tribal Police responded to the scene. 5RP 82-83, 107. He saw one person in the truck. 5RP 108. When the truck pulled onto the highway, the officer activated his emergency lights. 5RP 109. A police pursuit involving multiple vehicles ensued, with the truck going well over the speed limit. 5RP 86, 110-16, 128. The lead pursuit vehicle's emergency lights and sirens were activated. 5RP 130-32. The truck sped through traffic and ran a red light. 5RP 128-29. One officer set down spikes on the roadway to stop the oncoming truck, but the truck drove around them. 5RP 119, 121, 123. The truck eventually stopped and the driver, Stacy, was taken into custody. 5RP 96, 133-34.

Finley and Martin arrived at the location of the stop. 5RP 87, 89. From scorch marks, it appeared as if a torch were used to remove the logo and lettering from the doors. 5RP 73, 75, 87, 98. The truck had an Oregon license plate. 5RP 134, 145. The registered owner of the plate was a business called "BKS Design," with an address that matched Stacy's driver's license address. 5RP 151. Stacy's initials are "BKS." 5RP 151. There was no record of sale of the truck after September 8, 2018. 5RP 156.

Shortly after the jury was selected, defense counsel announced his intention to call Jasmine Whitaker as a witness for the defense. 5RP 63. Whitaker was listed as a witness in the defense omnibus response. CP 60. She would have testified that she saw Stacy purchase the truck. CP 60. The State raised no objection, but the court prohibited the defense from calling this witness because her name was not given to the jury pool during voir dire. 5RP 64.

Instead, the defense called Michael Glassman as a witness. 5RP 157. The 54-year-old Glassman was an intern at Evergreen Treatment Services and a student at Grays Harbor College, studying to be a drug and alcohol counselor. 5RP 158-59. He admitted to a 2006 conviction for witness tampering. 2RP 161.

Glasmann and Stacy knew each other. 5RP 159. According to Glasmann, Stacy contacted him in early September 2018, wanting him to look at a truck that Stacy was considering buying. 5RP 159-60, 162. They looked at the truck together, which Glasmann described as a big, flatbed truck. 5RP 160, 164. It was a "Ford F something, like 450, 550, some shit like that." 5RP 164. The truck was white. 5RP 163. Glasmann did not pay attention to the fenders and did not remember their color. 5RP 163. There were no stickers on the truck. 5RP 163. Glasmann did not notice any damaged or removed logos. 5RP 166. He did not pay attention

to the contents of the bed but "there was no cars or anything on it like that." 5RP 163, 166.

The seller, a "curly-haired dude" named "Mark," was there and said he was trying to sell the truck to Stacy. 5RP 160, 163-64. The proposed deal was for \$6000-8000 and a trade-in for an F-250 pickup. 5RP 166, 170. Glasmann, a self-described backyard mechanic, did not have concerns about the truck's mechanical worthiness. 5RP 161, 163, 165-66. Stacy asked him what he thought, and Glassman said it was "a pretty good deal, if I could get it for that, and trade my F-250 for it, I would do it." 5RP 164. Stacy responded "right on, bro." 5RP 164. Stacy purchased the vehicle. 5RP 160, 164. Stacy wanted the truck because he was in the business of buying cars and a big flat bed can be used for car transport. 5RP 165. It was "a dream truck to have if you are in that kind of business." 5RP 166.

On cross-examination, the prosecutor asked, "you met him about 12 years ago because you both bought and sold cars, is that right?" 5RP 166. Glasmann answered "Yeah." 5RP 166. Over defense objection, the prosecutor asked, "You said you met the defendant while car dealing about 12 years ago, weren't you in prison 12 years ago?" 5RP 167-70. Glasmann answered "Yes, I was in prison 12 years ago. That's where I met Mr. Stacy." 5RP 170.

The jury found Stacy guilty of committing the TMV offense. CP 26. Relying on the "free crimes" aggravator under RCW 9.94A.525(c), the court imposed an exceptional sentence by running the sentences for each offense consecutively for a total of 125 months in confinement. CP 33-34, 41-42. Stacy appeals. CP 27.

C. ARGUMENT

1. STACY WAS MISINFORMED ABOUT A DIRECT CONSEQUENCE OF HIS PLEA, RENDERING THE PLEA CONSTITUTIONALLY INVALID.

Stacy's plea was not knowing, voluntary, and intelligent because he was misinformed about a direct consequence of his plea. Stacy's guilty plea violates due process because he was misinformed that community custody would be imposed as part of his sentence for attempting to elude a police officer.

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. Amend. XIV, Wash. Const. art. I, § 3. A guilty plea is otherwise invalid. Boykin v. Alabama, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228(1996). This standard is reflected in CrR 4.2(d), "which mandates that the trial court 'shall not accept a plea of guilty, without first determining that it is made voluntarily,

competently and with an understanding of the nature of the charge and the consequences of the plea." State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). "Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). "An involuntary plea produces a manifest injustice." Id.

Stacy may raise this error for the first time on appeal. An invalid guilty plea based on misinformation of sentencing consequences may be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). Mendoza, 157 Wn.2d at 589 (citing State v. Walsh, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001)).

A guilty plea is not knowingly made when it is based on misinformation regarding a direct sentencing consequence. Mendoza, 157 Wn.2d at 584, 590-91; In re Pers. Restraint of Quinn, 154 Wn. App. 816, 835-36, 226 P.3d 208 (2010). A sentencing consequence is direct when "the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Ross, 129 Wn.2d at 284 (internal quotation marks omitted) (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). Mandatory community custody is a direct consequence because it affects the punishment flowing immediately from the guilty plea and imposes significant restrictions on a defendant's

constitutional freedoms. Ross, 129 Wn.2d at 285-86; Quinn, 154 Wn. App. at 836 (concluding the correct length of a term of community custody is a direct consequence of a guilty plea).

RCW 9.94A.701 specifies the crimes for which community custody is authorized, including those that qualify as a "serious violent offense," a "violent offense," and "crimes against persons." RCW 9.94A.701(1), (2), (3)(a). The offense of attempting to elude a police officer is not a "crime against person," a "violent offense," a "serious violent offense," or any other type of offense that calls for community custody. RCW 9.94A.701; RCW 9.94A.030(47) (serious violent offenses), (56) (violent offenses); RCW 9.94A.411(2) (crimes against persons); see In re Postsentence Review of Leach, 161 Wn.2d 180, 186, 163 P.3d 782 (2007) (crimes listed in RCW 9.94A.411(2) are exhaustive, not illustrative).

In Stacy's case, the "statement of defendant on plea of guilty" sets forth, in discrete paragraphs, certain consequences flowing from the plea. CP 9-12. The standard range sentence information is set forth as follows:

6. In Considering the Consequences of My Guilty Plea, I Understand That:

(a) Each crime with which I am charged carries a maximum sentence, a fine, and a **Standard Sentence Range** as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
1	19	22-29	None	22-29	54 mos \$10,000 Fine
2					
3					

CP 9.

According to the plea form, one of the consequences is that the standard range sentence includes a community custody term of 22-29 months. CP 9. This is erroneous information. No community custody attaches to an eluding offense. Stacy was therefore misinformed about community custody, which constitutes a direct consequence of his plea. Community custody was not addressed during the plea colloquy. 5RP 59-63. The court, though, confirmed Stacy had read the statement of defendant on plea of guilty and understood its contents. 5RP 59-60. This confirms Stacy had a misunderstanding about the community custody term set forth in the plea document. A trial judge has an obligation not to accept a guilty plea without "first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the

consequences of the plea." State v. Easterlin, 159 Wn.2d 203, 208, 149 P.3d 366 (2006) (quoting CrR 4.2(d)). The trial judge failed in this regard.

A guilty plea is deemed involuntary when based on misinformation regarding a direct consequence of the plea, regardless of whether the actual sentence received was more or less onerous than anticipated. Mendoza, 157 Wn.2d at 590-91. In Mendoza, the Supreme Court held the defendant may withdraw a guilty plea based on involuntariness where the plea is based on misinformation regarding the direct consequences of the plea, including a miscalculated offender score resulting in a lower standard range than anticipated by the parties when negotiating the plea. Id. at 584. "Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." Id. at 591.

The same reasoning applies to Stacy's case. The face of the plea form shows he was affirmatively misinformed about a direct consequence in the form of community custody. CP 9. Under Mendoza, it does not matter that the sentence imposed was less onerous than anticipated based on misinformation.

To prevail, Stacy need not show reliance on the incorrect community custody provision set forth in the plea form. "[A] defendant who is misinformed of a direct consequence of pleading guilty is not

required to show the information was material to his decision to plead guilty." Mendoza, 157 Wn.2d at 589; see also State v. Weyrich, 163 Wn.2d 556, 557, 182 P.3d 965 (2008) ("The defendant need not establish a causal link between the misinformation and his decision to plead guilty."). The Mendoza court specifically rejected "an analysis that requires the appellate court to inquire into the materiality of mandatory community placement in the defendant's subjective decision to plead guilty" because "[a] reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision." Mendoza, 157 Wn.2d at 590 (quoting Isadore, 151 Wn.2d at 302).

Nor does it matter that the misinformation did not ultimately result in an increase in Stacy's sentence. Where a defendant is misinformed of a direct consequence, the plea is invalid even where the misinformation has no practical effect on the sentence. In re Pers. Restraint of Bradley, 165 Wn.2d 934, 939-41, 205 P.3d 123 (2009) (even though the defendant's concurrent sentences meant he would never serve the lower standard range about which he was misinformed, the defendant was still not properly advised on the direct consequences of his plea and was entitled to withdraw it); Walsh, 143 Wn.2d at 5, 9-10 (authorizing plea withdrawal

based on misinformation about standard range even though defendant received exceptional sentence).

Where a guilty plea is based on misinformation regarding the direct consequences of the plea, the defendant may withdraw the plea based on involuntariness. Mendoza, 157 Wn.2d at 584. Stacy should be given the opportunity to withdraw his plea because he was misinformed that he would receive community custody as a consequence of pleading guilty.

2. THE COURT VIOLATED STACY'S RIGHT TO PRESENT A DEFENSE IN UNJUSTIFIABLY EXCLUDING A WITNESS FROM TESTIFYING.

Stacy wanted to call Jasmine Whitaker as a witness in his defense. The court barred him from doing so because her name was not announced during voir dire as a potential witness. This was not a constitutionally justified reason for excluding the witness. Before resorting to the extraordinary remedy of exclusion, the court is required to consider, on the record, (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. The court considered none of these factors. It therefore erred in

excluding the witness. Reversal of the TMV conviction is required because this constitutional error is not harmless beyond a reasonable doubt.

a. The court barred the defense witness from testifying.

At a February 1, 2019 pre-trial conference, the prosecutor requested that defense counsel disclose witnesses. 1RP 9-11. Defense counsel said that it would be done that same day. 1RP 10-11. The defense omnibus response lists two witnesses, Jasmine Whitaker and Michael Eduardo, and summarizes their testimony as follows: "Both of these witnesses will testify to seeing a transaction where the Defendant purchased the Ford F-650 in early September 2018." CP 60.

Before voir dire took place on February 13, the court asked whether defense counsel had any witnesses he expected to call at trial. 5RP 2. Counsel responded that he had one witness and wrote down Michael Glasmann's name. 5RP 2-4. Voir dire ensued and a jury was sworn in. 5RP 8-55. Stacy subsequently pleaded guilty to the eluding charge. 5RP 55-63. Before the jury returned to the courtroom to hear opening statement and witness testimony, the following exchange occurred:

MR. FOLEY: And, Your Honor, I have one other matter to address while we are outside the presence of the jury. On our omnibus response, we indicated to the State that a woman named Jasmine Whittaker would potentially testify. When the Court asked her name this morning, I hadn't had

any contact with Ms. Whittaker and hadn't seen her. She has appeared, and we are asking the Court's permission if, at the time in Mr. Stacy's defense, it's appropriate, we would be asked to be allowed to call her. If the State needs time to talk to her, we will give him that.

THE COURT: The problem, Mr. Foley, is that we have selected the jury.

MR. FOLEY: I understand that, Your Honor.

THE COURT: And all of the prospective jurors were provided the names of everyone who might testify so that they could indicate if they knew anyone. That opportunity has now gone. So the request is denied.

MR. FOLEY: Thank you, Your Honor.

THE DEFENDANT: So they are not going to let me call my witnesses?

THE COURT: Pardon me?

THE DEFENDANT: He knew the witnesses. I had my witness list, and they have been trying to contact him.

THE COURT: Mr. Stacy. Mr. Stacy, you need to go have a seat.

THE DEFENDANT: Okay, but I still have the witnesses.

THE COURT: Mr. Stacy --

THE DEFENDANT: So they can't testify?

CORRECTIONS OFFICER: Have a seat.

THE COURT: All right. Are we ready for the jury?

MR. WALKER: Yes.

THE DEFENDANT: Your Honor, can I -- I am not trying to -- can I just say that I have an objection to my witnesses not being able to testify?

THE COURT: Mr. Stacy, Mr. Foley is your attorney. He speaks on your behalf. I am not listening to arguments from both of you. You have an attorney, and I will listen to him, and not to you. You need to be quiet the remainder of this trial; do you understand me?

THE DEFENDANT: How do I --

THE COURT: Mr. Stacy, you are going to be taken into custody in a minute.

5RP 63-65.

b. The right to call witnesses to support a defense is of constitutional magnitude.

The Sixth Amendment and due process require the accused be given a meaningful opportunity to present a complete defense. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, § 3, 22. A defendant thus has the Sixth Amendment and due process right to offer the testimony of his witnesses to establish a defense. Taylor v. Illinois, 484 U.S. 400, 412-13, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, § 3, 22. "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

A criminal defendant's right to present witnesses is an "essential attribute of the adversary system itself." Taylor, 484 U.S. at 408. As explained in Taylor: "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a

partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." Id. at 408-09 (quoting United States v. Nixon, 418 U.S. 683, 709, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974)).

Courts must safeguard this fundamental right with "meticulous care." State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808, 811 (1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). The defendant's right to present relevant evidence may only be limited by compelling government interests. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983); see also Crane, 476 U.S. at 690-91 (exclusion of evidence bearing on the credibility of a confession deprived defendant of right to present a defense in the "[in] the absence of any valid state justification."). No state interest is compelling enough to preclude defense evidence of high probative value. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

A trial court's decision to exclude a witness is reviewed for abuse of discretion. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). A claimed violation of the Sixth Amendment right to present a defense is reviewed de novo. Jones, 168 Wn.2d at 719.

- c. **The court abused its discretion in excluding the defense witness without considering the relevant factors that must be considered before resorting to such a draconian sanction.**

Although not cited by the trial court, Grays Harbor Superior Court Local Criminal Rule 6.1(a)(1) states: "Counsel shall report to the assigned Trial Judge at least one-half hour before the scheduled beginning of a jury trial and provide the Judge with a written list of the names and city of residence of witnesses and general voir dire questions to be asked of the jury." The local rule further provides "If a party fails to comply with these local rules regarding trial procedures, the Court may impose monetary sanctions, or enter such other orders, as the Court deems appropriate to address and remedy the failure to comply." Grays Harbor County LCrR 6.1.

Stacy's appellate counsel has located no Washington decision where the trial court excluded a defense witness as a sanction for not identifying a witness for voir dire. There is, however, a developed body of case law addressing exclusion of a witness due to late disclosure under the discovery rules. *See, e.g., Blair v. TA–Seattle No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011); *State v. Hutchinson*, 135 Wn.2d 863, 8882-83, 959 P.2d 1061 (1998); *Burnet*, 131 Wn.2d at 494. That legal framework is properly applied here because both situations involve exclusion of a

witness in the context of a criminal rule violation. The rule at issue in each situation permits the trial court to take appropriate action in response to the violation. Compare Grays Harbor County LCrR 6.1 with CrR 4.7(h)(7)(i) ("[T]he court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances."). And the criminal rules applicable to all superior courts "are intended to provide for the just determination of every criminal proceeding." CrR 1.2.

The judge was content with citing the technical violation of the rule as the sole reason justifying exclusion. Court rules, however, cannot diminish constitutional rights. City of Auburn v. Brooke, 119 Wn.2d 623, 632-33, 836 P.2d 212 (1992). And criminal rules "shall not be construed to affect or derogate from the constitutional rights of any defendant." CrR 1.1.

Only in narrow circumstances should trial courts employ the extraordinary sanction of excluding defense testimony for violating a court rule. Hutchinson, 135 Wn.2d at 882 (addressing discovery violation). The factors to be considered in deciding whether to exclude a witness as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by

the witness's testimony; and (4) whether the violation was willful or in bad faith. Id. at 882-83 (citing Taylor, 484 U.S. at 415 n. 19); Burnet, 131 Wn.2d at 494.

Excluding a witness without considering these factors on the record is an abuse of discretion. Blair, 171 Wn.2d at 344, 348-49. The trial court's ruling excluding Stacy's witness did contain any findings as to willfulness, case impact, prejudice, or consideration of lesser sanctions. The record does not reflect these factors were even considered. That should be the end of the matter in terms of establishing error for appeal. The Supreme Court has explicitly "reject[ed] the premise 'that an appellate court can consider the facts in the first instance as a substitute for the trial court findings that our precedent requires.'" Teter v. Deck, 174 Wn.2d 207, 217-18, 274 P.3d 336 (2012) (quoting Blair, 171 Wn.2d at 351).

But even had the trial court considered the requisite factors, it would have abused its discretion in excluding Stacy's witness. No "sanction," lesser or otherwise, was needed to remedy the problem. The court could simply have asked the empaneled jury, before the State made its opening statement and presented its case, whether they knew Jasmine Whitaker. The court acted as if its hands were tied but there was nothing to prevent the court from simply asking the question upon learning of counsel's intention to call the witness. If, by some small chance, a juror

knew Whitaker, then whether the juror could be fair and impartial could be explored at that time. Any disruption of the normal trial process would likely have been minimal.

The impact of exclusion on the defense case was significant. Whitaker would have provided relevant, material testimony that she observed Stacy purchase the vehicle that the State alleged was intentionally taken without the owner's permission. CP 60. The court gave no consideration to how exclusion prejudiced the defense case.

There was no prejudice to the State. The State did not object when defense counsel announced his intention to call Whitaker as a witness. The court, sua sponte, excluded the witness. 5RP 64. Whitaker was listed as a witness in the omnibus response, so the State was not taken by surprise that she could be called as a witness. CP 60.

There was no bad faith here. Defense counsel explained that he hadn't had any contact with Whitaker when the court addressed the witnesses to be named for the jury pool. 5RP 64. Due to the lack of contact, defense counsel understandably anticipated at that time that this witness would not be called. The witness, though, subsequently appeared, which prompted defense counsel to alert the court of his intention to call her as a witness at that time. 5RP 64. Perhaps, in an abundance of caution, defense counsel in hindsight should have made sure her name was

on the list of witnesses read to the jury pool. But there is no showing of an intentional nondisclosure, willful violation of the local rule, or other unconscionable conduct. Trials are fluid. Unanticipated things happen. Sometimes a witness shows up and defense counsel is forced to react on the fly.

A trial court abuses its discretion when applies the wrong legal standard or bases its ruling on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). The court here abused its discretion in excluding the defense witness without applying the proper legal standard for determining whether exclusion is justified.

d. This constitutional error requires reversal of the conviction because it is not harmless beyond a reasonable doubt.

Reversal of the TMV conviction is required because the trial court's extraordinary remedy violated Stacy's constitutional right to call a witness in aid of his present defense. The denial of the right to present a defense is constitutional error. Crane, 476 U.S. at 690; Jones, 168 Wn.2d at 724. "Constitutional error is presumed prejudicial and the State bears the burden of showing the error was harmless beyond a reasonable doubt." State v. Chambers, 197 Wn. App. 96, 128, 387 P.3d 1108 (2016), review denied, 188 Wn.2d 1010, 394 P.3d 1004 (2017). "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable

doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The issue at trial was whether the State proved Stacy intentionally took the truck without the permission of the owner. Whitaker's testimony, had it been allowed, would have provided a basis for the jury to find that Stacy did not do so. First-hand observational evidence that Stacy bought the truck undercuts the State's case. Were this evidence believed, the jury may have found Stacy lacked the culpable mental state necessary for the offense.

While Glasmann testified that Stacy bought the truck, his credibility was subject to doubt because he had been convicted of witness tampering, a crime of dishonesty. 2RP 161. The prosecutor urged the jury to reject Glasmann's exculpatory testimony because of that crime of dishonesty and due to claimed deficiencies in his account. 6RP 15-17. Nothing in the record shows Whitaker suffered from a similar infirmity that would undercut her credibility. The jury may have found her testimony more persuasive than Glasmann's testimony and returned a different verdict. Criminal defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania

v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). This Court cannot determine the jury would necessarily have reached the same result if the jury had heard testimony from Whitaker showing Stacy purchased the truck. Reversal of the TMV conviction is therefore required.

3. THE COURT SHOULD NOT HAVE ADMITTED EVIDENCE OF STACY'S PRIOR IMPRISONMENT BECAUSE SUCH EVIDENCE WAS ELICITED THROUGH IMPEACHMENT ON A COLLATERAL MATTER AND WAS UNFAIRLY PREJUDICIAL.

The trial court allowed the State to impeach Glasmann with evidence that Glasmann met Stacy in prison 12 years ago. This constituted impeachment on a collateral matter, in violation of established law. Evidence of Stacy's criminal past was also unfairly prejudicial under ER 403 and ER 404(b). The evidence should have been kept out. The court's erroneous failure to keep it out prejudiced the outcome, requiring a new trial.

a. The court allowed the jury to hear evidence that Stacy was in prison 12 years ago.

On cross-examination, the prosecutor asked how long Glasmann had known Stacy. 5RP 162. Glassman answered, "Probably about 12 years, I imagine, somewhere around there, maybe a little more." 5RP 162. Glasmann also testified that Stacy "buys himself cars, just like I do." 5RP 165. A short time later, the prosecutor asked, with reference to Stacy: "you met him about 12 years ago because you both bought and sold cars,

is that right?" 5RP 166. Glasmann answered, "Yeah." 5RP 166. The prosecutor then asked to be heard outside the presence of the jury. 5RP 166-67. The prosecutor told the court "I have a copy of Mr. Glasmann's incarceration history. So, 12 years ago, her was in prison, and I imagine Mr. Stacy was as well. So, I am going to want to cross examine him about that." 5RP 167. Defense counsel objected "as to relevance" and maintained it was "highly prejudicial." 5RP 167. Counsel argued "any remote, probative value about these two fellas meeting in prison 12 years ago is greatly outweighed by the prejudicial effect. This is just a flat-out, unmitigated attempt to slander." 5RP 167. The court ruled:

Well, Mr. Foley, Mr. Glasmann has come in here and testified to a version of events that clearly you and Mr. Stacy want the jury to believe, and whether or not the jury believes Mr. Glasmann's testimony is going to hinge directly upon his credibility, and I believe the prosecutor is entitled to test his credibility as to all details that are connected in any way to this testimony that he has provided. And he has testified that, in fact, he volunteered, actually, it wasn't even in response to a direct question, that he and Mr. Stacy are both engaged in the regular purchase and sale of vehicles, and in fact, that's how he met him 12 years ago, that was his testimony. I think Mr. Walker has a right to challenge the voracity [sic] of that statement. I am going to allow him to do it. 5RP 168.

Defense counsel, perhaps seeking to ingratiate himself with the court, responded that the court was correct in its ruling, but case law involving this type of evidence was "rife with comments about prejudicial

effect." 5RP 168. If the prosecutor asked Glasmmann if he met Stacy in prison 12 years ago and Glasmann answered yes, "that's the end of it."

5RP 169. The court responded:

Well, I assume that Mr. Walker knows that rule, but right now, the testimony of Mr. Glasmann is that he met Mr. Stacy 12 years ago when they were both car dealers, and Mr. Walker is going to attempt to establish that 12 years ago he was in prison. And if that's true, he wasn't car dealing. And if he met Mr. Stacy 12 years ago, I assume the jury is going to infer from that that they met in prison, and I can't – and there is nothing you can do to avoid that. 5RP 169.

Glasmann stayed in the courtroom during this back and forth. The jury returned. 5RP 169. Resuming testimony, the prosecutor asked, "You said you met the defendant while car dealing about 12 years ago, weren't you in prison 12 years ago?" 5RP 169-70. Glasmann answered "Yes, I was in prison 12 years ago. That's where I met Mr. Stacy." 5RP 170.

The State later proposed an instruction that testimony regarding Glasmann meeting Stacy in prison may be considered for the limited purpose of "deciding what weight or credibility to give to the testimony of the witness." 6RP 2-3; CP 57-58. Defense counsel did not want the instruction. 6RP 3-4. The court ruled it was not going to give the instruction because it "simply calls undue attention to the testimony." 6RP 3-4.

b. Evidence that Glasmann met Stacy in prison 12 years ago was inadmissible because it constituted impeachment on a collateral issue.

Evidentiary decisions are reviewed for abuse of discretion. State v. Hudlow, 182 Wn. App. 266, 281, 331 P.3d 90 (2014). A trial court abuses its discretion when fails to adhere to the requirements of an evidentiary rule. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court necessarily abuses its discretion if it applies the wrong legal standard or bases its ruling on an erroneous view of the law. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). Further, a court's decision is manifestly unreasonable if it is "outside the range of acceptable choices, given the facts and the applicable legal standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The firmly established rule is that "a witness cannot be impeached upon matters collateral to the principal issues being tried." State v. Oswalt, 62 Wn.2d 118, 120, 381 P.2d 617 (1963). "This rule is nothing more than a reflection of the universal rule that evidence is not considered relevant unless it is both probative and material to the issues at trial." 5 K. Tegland, Evidence Law and Practice § 607.19 at 409 (5th ed. 2007). A party cannot impeach a witness "on facts not directly relevant to the trial issue." State v. Aguirre, 168 Wn.2d 350, 362, 229 P.3d 669 (2010). This is the test for whether impeachment evidence is collateral: "Could the fact, as to which

error is predicated, have been shown in evidence for any purpose independently of the contradiction?" Oswalt, 62 Wn.2d at 121.

Whether Glasmann was buying and selling cars 12 years ago or was in prison 12 years ago is not directly relevant to an issue at trial. The fact that he was in prison 12 years ago was not independently admissible. Its only purpose was to contradict Glasmann's earlier testimony on cross-examination, not volunteered but elicited by the prosecutor, that he was buying and selling cars 12 years ago. This is a textbook example of impeachment on a collateral matter, and one that was manufactured by the prosecutor to boot. What Glasmann was doing 12 years ago is not material and probative to whether the State proved Stacy was guilty of taking a motor vehicle in 2018.

Moreover, the circumstance in which Glasmann met Stacy 12 years ago is collateral to the issues at trial. Whether Glasmann met Stacy 12 years ago in prison was not directly relevant to whether Stacy committed the motor vehicle offense in 2018. The trial court, in admitting this evidence, did not identify why it was relevant to prove an ingredient of the crime charged. Instead, the court justified admissibility on its belief that "the prosecutor is entitled to test his credibility as to all details that are connected in any way to this testimony." 5RP 168. In other words, the trial court thought it was proper to impeach Glasmann through showing an asserted contradiction

without identifying how it was independently relevant beyond mere impeachment. That is not the proper legal standard for admission. To avoid impermissible impeachment on a collateral matter, the fact must be shown to have a purpose independent of the contradiction. Oswalt, 62 Wn.2d at 121. That was not done here. The court abused its discretion in applying the wrong legal standard for admission and in failing to adhere the requirements of the evidentiary rule. Lord, 161 Wn.2d at 284; Foxhoven, 161 Wn.2d and 174.

c. Even if impeachment was not on a collateral matter, evidence that Glasmann met Stacy in prison was still inadmissible under ER 403 and ER 404(b).

Unduly prejudicial evidence is subject to exclusion under ER 403. State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). Even where impeachment on a matter is not collateral, it is still error to admit such evidence if it unfairly prejudicial under ER 403. State v. Descoteaux, 94 Wn.2d 31, 38-39, 614 P.2d 179 (1980), overruled on other grounds by State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982).

Counsel's prejudice objection not only invokes ER 403 but is also adequate to preserve error based on ER 404(b). 5RP 167; State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007). Prior misconduct is inadmissible to show the defendant is a "criminal type" and is likely to have committed the charged crime. State v. Halstien, 122 Wn.2d 109, 126,

857 P.2d 270 (1993). Evidence that a defendant has a criminal history triggers ER 403 and ER 404(b) concerns. State v. Acosta, 123 Wn. App. 424, 433, 437-38, 98 P.3d 503 (2004); State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987). In applying ER 404(b), a trial court must establish the relevance of the evidence and identify its permissible purpose, then balance on the record the probative value of the evidence against the prejudicial effect it may have on the factfinder. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). ER 404(b) incorporates the unfair prejudice standard found in ER 403. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697, 698 (1982).

"[U]nfair prejudice occurs whenever the probative value is negligible, but the risk that a decision will be made on an improper basis is great." State v. Rivera, 95 Wn. App. 132, 139, 974 P.2d 882, 886 (1999), review granted, cause remanded, 139 Wn.2d 1008, 989 P.2d 1142 (1999), opinion modified on remand, 95 Wn. App. 132, 992 P.2d 1033 (2000). Stated another way, unfair prejudice is "prejudice caused by evidence of 'scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.'" Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (quoting United States v. Roark, 753 F.2d 991, 994 (11th Cir. 1979)).

Descoteaux illustrates the problem. In that case, the prosecutor at trial asked: "Mr. Descoteaux, is not it a fact then on November 9th, 1977, you were scheduled to take a polygraph commonly referred to as a 'lie detector' examination regarding possible violations, perhaps even criminal activities on your part?" Descoteaux, 94 Wn.2d at 37. The inquiry was not deemed collateral given the issue in the case. Id. at 37-38. But the trial court still abused its discretion in allowing it because the prejudicial effect of the inquiry outweighed any probative value under ER 403. Id. at 39. "The reference in the question to 'possible violations, perhaps criminal activities' on defendant's part allowed the jury to speculate and draw inferences that defendant had violated the terms of his work release program and engaged in criminal activities." Id. at 39. "A defendant in a criminal case must be tried on the offense charged and evidence of unrelated acts of misconduct are inadmissible." Id. at 39.

Stacy's case presents a similar problem. In an effort to impeach Glasmann, the jury was exposed to evidence that Stacy was previously in prison. The jury thus learned Stacy has a criminal history and that he must have been convicted because he was in prison. That Stacy was in prison 12 years ago is unrelated to the charged misconduct for which he stood trial. Where "the minute peg of relevancy" is "entirely obscured by the dirty

linen hung upon it," evidence of prior misconduct stays out. State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950).

"The law has long recognized that evidence of prior crimes is inherently prejudicial to a defendant in a criminal case." State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994). "Statistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record. H. Kalven & H. Zeisel, The American Jury 146, 160-69 (1966). It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again." King, 75 Wn. App. at 905 (quoting State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989)). Any marginal probative value of evidence that Glasmann met Stacy in prison 12 years ago was overwhelmed by the prejudicial force carried by the fact that Stacy was previously in prison. The trial court's decision to admit this evidence was manifestly unreasonable because it fell "outside the range of acceptable choices, given the facts and the applicable legal standard." Littlefield, 133 Wn.2d at 47.

d. The error prejudiced the outcome.

An evidentiary error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected

had the error not occurred." State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). This standard requires the reviewing court to measure the admissible evidence of guilt against the prejudice caused by the inadmissible evidence. Bourgeois, 133 Wn.2d at 403. Improper admission of evidence constitutes harmless error only if the evidence is trivial, of minor significance in reference to the evidence as a whole, and in no way affected the outcome. Oswalt, 62 Wn.2d at 122.

Admission of evidence relating to a defendant's prior criminal conduct impermissibly shifts the jury's attention to the defendant's propensity for criminality. State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997). To jurors, criminal propensity evidence is logically relevant even if it is not legally relevant. State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766, review denied, 106 Wn.2d 1003 (1986). Once a criminal, always a criminal. Wrong as it is, that's how juries tend to think. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), review denied, 116 Wn.2d 1020, 811 P.2d 219 (1991). That is why evidence of Stacy's criminal past was so pernicious. It had nothing to do with the issues at trial, but it encouraged the jury to convict based on a propensity to commit crime. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural

tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

Stacy put on a defense. Glasmann's testimony that Stacy bought the truck provided a tenable basis for a reasonable juror to conclude that the State had not proved its case beyond a reasonable doubt. The State will likely argue Glasmann's testimony lacked credibility. But the State considered the testimony of Glasmann sufficiently credible to require this attack on it, which now forms the basis for error on appeal. In this circumstance, the error cannot be considered harmless. See Oswalt, 62 Wn.2d at 122-23 ("The state seemingly considered the testimony of witness Ardiss sufficiently credible to require this attack. The defendant was convicted. It is difficult, therefore, to classify admission of the testimony in question trivial, formal, academic, or harmless, and to conclude that such did not affect the outcome of the case."). A new trial is required.

4. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO SEEK A JURY INSTRUCTION ON GOOD FAITH CLAIM OF TITLE.

Evidence that Stacy purchased the truck supported a good faith claim of title defense. Defense counsel, however, did not request a jury instruction on good faith claim of title. There was no legitimate reason why the

instruction was not sought, and its absence undermines confidence in the outcome, requiring reversal of the taking of a motor vehicle conviction.

a. The failure to seek jury instruction on a defense can be ineffective assistance of counsel.

Every person accused of a crime is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI; Wash. Const. art. I § 22. The right is violated where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Id. at 687. "A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo." State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

A defendant is entitled to a jury instruction supporting his theory of the case when supported by evidence at trial. State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009). "Effective assistance of counsel includes a request for pertinent instructions which the evidence supports." State v. Kruger, 116 Wn. App. 685, 688, 67 P.3d 1147, review denied, 150 Wn.2d 1024, 81 P.3d 120 (2003). Counsel's failure to request an instruction can constitute ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). When assessing counsel's failure to request a jury instruction, the reviewing court

determines whether (1) the defendant was entitled to the instruction, (2) failure to offer the instruction was a legitimate tactic, and (3) the defendant suffered prejudice. Powell, 150 Wn. App. at 154-158.

b. The evidence, looked at in the light most favorable to Stacy, supported jury instruction on a good faith claim of title defense.

RCW 9A.56.020(2)(a) states: "In any prosecution for theft, it shall be a sufficient defense that the property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." The phrase "claim of title" means a right of ownership or entitlement to possession. State v. Ager, 128 Wn.2d 85, 92, 904 P.2d 715 (1995). The defense is available for a charge of taking a motor vehicle. State v. Williams, 22 Wn. App. 197, 198-99, 588 P.2d 1201 (1978).

Instruction on the defense is proper when there is evidence that (1) the property was taken openly and avowedly and (2) there was some legal or factual basis upon which the defendant, in good faith, based a claim of title to the property taken. Ager, 128 Wn.2d at 87. The State must prove the absence of a good faith claim of title defense beyond a reasonable doubt. State v. Hicks, 102 Wn.2d 182, 187, 683 P.2d 186 (1984).

WPIC 19.08, as applied to the crime of taking a motor vehicle, provides:

It is a defense to a charge of [taking a motor vehicle] that the property or service was appropriated openly and avowedly under a good faith claim of title, even if the claim is untenable.

The [State] [City] [County] has the burden of proving beyond a reasonable doubt that the defendant did not appropriate the property openly and avowedly under a good faith claim of title. If you find that the [State] [City] [County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty [as to this charge].

"When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction." State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). All reasonable inferences must be drawn in the light most favorable to the requesting party. State v. Webb, 162 Wn. App. 195, 208, 252 P.3d 424 (2011). "This ensures that juries are the arbiters of factual disputes." State v. Tullar, 9 Wn. App. 2d 151, 153, 442 P.3d 620 (2019).

The evidence, looked at in the light most favorable to Stacy, supported a good faith claim of title instruction. Glasmann testified that Stacy bought the truck, describing an ordinary transaction. A price was quoted. Consideration was given. 5RP 159-66, 170. Glasmann did not notice any signage or logos on the doors, which allowed for the inference that they had been removed prior to Stacy becoming involved with the vehicle. 5RP 163. In other words, the available inference was that the

seller removed those identifying marks on the vehicle before Stacy purchased it.

Stacy, meanwhile, put his own business plate on the truck, showing he was not trying to conceal his association with the vehicle. 5RP 151. And he drove the vehicle on a public roadway, instead of trying to hide it in a concealed location. The evidence showed Stacy openly took the vehicle and allowed for the inference that he thought, mistakenly, that he had a lawful claim to the vehicle, even though it turns out the claim was untenable because it was stolen from the lumber business by someone else. The prosecutor elicited testimony that there was no record of a bill of sale of the truck after September 8, 2018, the day the truck was taken from the lumber business. 5RP 156. Stacy, though, was stopped only four days later. 5RP 81. By law, the purchaser of a vehicle has 15 days to apply for a new certificate of title, so the fact that none was applied for within four days does not undermine a good faith claim. RCW 46.12.650(5)(a). Drawing all reasonable inferences in Stacy's favor, the evidence supported instruction on good faith claim of title.

c. Counsel was deficient in failing to seek the instruction and the failure prejudiced the outcome.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate

trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). Counsel has a duty to know the relevant law. Id. at 862. Counsel's failure to find and apply legal authority relevant to a client's defense, without any legitimate tactical purpose, is constitutionally deficient performance. In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102-103, 351 P.3d 138 (2015).

Counsel presented a witness that supported a good faith claim of title defense. The defense theory at trial was that Stacy thought he was in lawful possession of the truck. 6RP 20-21. But counsel did not seek an instruction that would have allowed the jury to consider that defense and whether the State disproved it beyond a reasonable doubt. Although the jury heard evidence that supported a good faith claim of title instruction, the defense was unavailable for the jury to consider in the absence of an instruction authorizing the jury to consider the evidence for this purpose. See Kruger, 116 Wn. App. at 694-95 ("Even if the issue of Mr. Kruger's intoxication was before the jury, without the instruction, the defense was impotent.).

The failure to seek this instruction was objectively unreasonable because it withheld a defense to the charge without a legitimate reason. See Powell, 150 Wn. App. at 155 (deficient performance to not propose "reasonable belief" defense instruction when evidence supported it,

counsel argued the defense, and the defense was consistent with the defendant's theory of the case). Because the prosecution would have been required to prove the absence of this defense beyond a reasonable doubt, obtaining the instruction would only have made it more difficult for the prosecution to convict Stacy. Making it easier for the prosecution to convict is not valid strategy. See Kyllo, 166 Wn.2d at 869 (not valid strategy to propose defective instructions that decreased prosecution's burden to disprove self-defense).

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. Prejudice in this context means a reasonable probability that the trial outcome would have differed had jurors been instructed on the good faith claim of title defense. A "reasonable probability" is one sufficient to undermine confidence in the outcome. Powell, 150 Wn. App. at 153. Had the jury been correctly instructed, the jury may have determined that the State failed to carry its burden of proving beyond a reasonable doubt that Stacy did not act under a good faith claim of title. For the TMV crime, "an essential element is knowledge on the part of the taker that the taking is unlawful." Williams, 22 Wn. App. at 199. The good faith claim of title instruction would have provided a means by which the jury could conclude that the State failed to prove that Stacy

knew the taking of the truck was unlawful. See Powell, 150 Wn. App. at 155-58 (prejudice established for failure to propose "reasonable belief" defense instruction because jury would not have recognized legal significance of evidence and argument of counsel supporting the defense). Defense counsel's failure to ensure that the State was required to prove beyond a reasonable doubt that Stacy did not act under a good faith claim of title was ineffective assistance and denied Stacy a fair trial.

5. CUMULATIVE ERROR DEPRIVED STACY OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every person accused of a crime has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). An accumulation of errors affected the outcome and produced an unfair trial in Stacy's case. These errors include (1) error in excluding defense witness (section C.2., supra); (2) improper admission of collateral impeachment evidence that identified Stacy as a prior criminal (section C.3., supra); and (3) ineffective assistance of

counsel in failing to seek instruction on a good faith claim of title defense (section C.4., supra).

6. THE JUDGMENT AND SENTENCE MUST CLEARLY HOW THAT NO COMMUNITY CUSTODY IS IMPOSED.

A sentence must be "definite and certain." State v. Mitchell, 114 Wn. App. 713, 716, 59 P.3d 717 (2002) (quoting State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998)). Consistent with this rule, the judgment and sentence must "make clear, insofar as circumstances permit, what community custody obligation is imposed." State v. Pharris, 120 Wn. App. 661, 665, 86 P.3d 815 (2004).

In State v. Broadaway, 133 Wn.2d 118, 135, 942 P.2d 363 (1997), the judgment and sentence contained boilerplate language ordering community placement "for a community placement eligible offense . . . for the period of time provided by law." The Supreme Court held such language was insufficiently specific. Id. The term authorized by statute was 12 months, and that is what the judgment and sentence should have specified. Id.

Section 4.2 of the judgment and sentence in Stacy's case states: "Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701, RCW

10.95.030(3)). CP 34. This boilerplate language is insufficiently specific under Broadaway.

By law, neither attempting to elude a police officer nor first degree taking of a motor vehicle are eligible for community custody because they are not a "violent offense," a "serious violent offense," "crimes against persons," or any other type of offense that calls for community custody. RCW 9.94A.701(1), (2), (3)(a); RCW 9.94A.030(47) (serious violent offenses), (56) (violent offenses); RCW 9.94A.411(2) (crimes against persons). To be definite and certain, the judgment and sentence should clearly state that no community custody is imposed. "Where a sentence is insufficiently specific about the period of community placement required by law, remand for amendment of the judgment and sentence to expressly provide for the correct period of community placement is the proper course." Broadaway, 133 Wn.2d at 136. The proper course here, then, is remand to specify that no community custody is imposed.

D. CONCLUSION

For the reasons stated, Stacy requests that (1) he be permitted to withdraw his guilty plea to the eluding charge; (2) the TMV conviction be reversed; and (3) the judgment and sentence be clarified regarding no community custody.

DATED this 30th day of December 2019

Respectfully Submitted,

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