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Division II
State of Washington
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NO. 53150-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

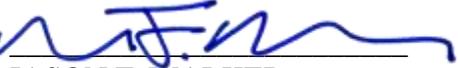
BOYD KEITH STACY,
Appellant.

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

THE HONORABLE DAVID EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The Defendant suffered no consequence as a result of his attorney's scrivener's error so he is not entitled to withdrawal his plea.**
- 2. The trial court did not deprive the Defendant of his right to present a defense and did not err by excluding the tardy witness, but any error is unpreserved for appeal.**
- 3. The defense witness's credibility was relevant so the State was entitled to challenge his testimony, and any error is unpreserved.**
- 4. A good-faith title jury instruction was unnecessary and the Defendant was not entitled to it.**
- 5. There was no cumulative error.**
- 6. The parenthetical reference in the Defendant's judgment & sentence does not render his sentence unclear.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The State is satisfied with the Defendant's recitation of the facts, with the exception of the excerpts below.

ARGUMENT

- 1. Despite a scrivener's error on the Statement of Defendant on Plea of Guilty, there is no evidence the Defendant's plea was involuntary and he will not face any consequence.**

The Defendant's first assignment of error stems from a scrivener's error his attorney made in filling out the Statement of Defendant on Plea

of Guilty form. The error is easily explained, and it does not appear that the Defendant relied upon the error. However, there is no consequence to the Defendant, so is he not prejudiced.

Standard of review.

“Due process requires that a defendant’s guilty plea be knowing, voluntary, and intelligent.” *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). Withdrawing a guilty plea requires a showing of manifest injustice. CrR 4.2(f). The Defendant bears the burden of proving a “manifest injustice” entitles him to withdrawal his plea. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405, 408 (1996).

An involuntary plea constitutes a manifest injustice. *State v. Paul*, 103 Wn.App 487, 12 P.3d 1036 (2000) (citing *State v. Aaron*, 95 Wn.App. 298, 302, 974 P.2d 1284, *review denied*, 139 Wn.2d 1002, 989 P.2d 1138 (1999).) “A plea is involuntary unless it is made with an understanding of all direct consequences of the plea.” *Id.* (citing CrR 4.2(d) and *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980), *emphasis added.*)

There is no evidence the Defendant was “misinformed” - his trial counsel made a simple scrivener’s error.

The Defendant points out that his trial counsel wrote the standard range of sentence in a column labeled “Community Custody” on the Statement of Defendant on Plea of Guilty for the crime of Attempting to

Elude a Pursuing Police Vehicle, count 2. The Defendant is correct that no community custody is authorized for this crime. See RCW 9.94A.701. However, the facts make it highly unlikely that the Defendant was misinformed or relied upon this mistake.

The scrivener’s error stems from the differences in the forms provided for in the court rules and those provided by the Administrative Office of the Courts. The Statement of Defendant on Plea of Guilty, a form that included in CrR 4.2(g), contains a table for confinement times. The table in the Defendant’s Statement was filled out 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	54,000, \$10,000 Fine
2					
3					

*The sentencing enhancement codes are: (RPh) Robbery of a pharmacy, (CSG) Criminal street gang involving minor, (AE) Endangerment while attempting to elude. The following enhancements will run consecutively to all other parts of my entire sentence, including other enhancements and other counts: (F) Firearms, (D) Other deadly weapon, (V) VUCSA in protected zone, (JP) Juvenile present, (VH) Veh. Hom., see RCW 46.61.530, (P16) Passenger(s) under age 16.

CP at 9. Note that the standard range (22 – 29) is written in both the “standard range” column and the “community custody” column.

Now compare a similar table from the Administrative Office of the Courts' judgment & sentence form, this example being from the Defendant's Judgment & Sentence:

2.3 Sentencing Data:

<i>Count No.</i>	<i>Offender Score</i>	<i>Seriousness Level</i>	<i>Standard Range (not including enhancements)</i>	<i>Plus Enhancement</i>	<i>Total Standard Range (including enhancements)</i>	<i>Maximum Term</i>
1	27+	V	72 – 96 months	- None -	72 – 96 months	10 years in prison and/or a \$20,000 fine
2	27+	I	22 – 29 months	- None -	22 – 29 months	5 Years In Prison and/or a \$10,000 Fine

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (RPh) Robbery of a pharmacy, (VH) Veh. Hoen, see RCW 9.94A.533(7), (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude, (ALF) assault law enforcement with firearm, RCW 9.94A.533(12), (P16) Passenger(s) under age 16.

CP at 32.¹

In the table from the AOC document, the column after “Plus Enhancements” is for the *total* standard range, whereas the table in the form from the court rule uses that column for community custody. Clearly, trial counsel simply wrote in the standard range, noted that there was no enhancement, and then mistakenly wrote the total standard range

¹ This table is from “WPF CR 84.0400 P” provided by the Administrative Office of the Courts. See *Court Forms: Felony Judgment and Sentence*, http://www.courts.wa.gov/forms/documents/CR84.0400_FJSform_Prison_nonsexoffense_2019%2007.doc (accessed March 30, 2020).

in the column for community custody, as he would if he were filling out a similar table on an AOC document.

It does not appear that the Defendant relied upon this information in pleading. There was no plea agreement. When the trial judge performed the plea colloquy with the Defendant, community custody was never mentioned. VRP 2/13/2019 at 59-63. The judge only confirmed that the Defendant understood the standard range was 22 to 29 months. VRP 2/13/2019 at 60.

The Defendant's attorney probably made the error because he was rushed. The Defendant was late in arriving to the courthouse on the morning of trial. VRP 2/13/2019 at 2. The Defendant pled guilty after the jury was empaneled, right before opening statements. VRP 2/13/2019 at 56. The Defendant attorney, probably sensing the court's impatience, said he would complete the plea paperwork in "three minutes tops." VRP 2/13/2019 at 59.

Clearly, the Defendant's trial counsel simply made an error in his haste. However, the Defendant will suffer no consequence, as he will serve no community custody, regardless of the scrivener's error in the plea form.

***Mendoza* is distinguishable because the Supreme Court has held that an absence of community custody is not a consequence.**

The Defendant points to *State v. Mendoza* for the proposition that the scrivener's error rendered the plea involuntary. However, *Mendoza* is substantively distinguishable because it involved a direct consequence of a plea. Here, the Defendant faces no consequence, direct or otherwise.

In *Mendoza* the parties entered in a plea agreement which specified the defendant's offender score at 7 and his standard range as 51 – 60 months. *Mendoza* at 584. A sentencing report then calculated the defendant's offender score as 6 and the standard range as 41 – 54 months. *Id.* The defendant was sentenced to 52 months, a sentence within both ranges. *Id.* at 586.

Our Supreme Court held that a sentencing range that had been calculated too low implicates the same concerns when a sentencing range is too high, because, “risk management decisions of a defendant inherent in plea bargaining bear equally in situations where, as here, the correct standard range is lower than the mistaken standard range upon which a plea is entered.” *Mendoza* at 59. (quoting *State v. Moon*, 108 Wn.App. 59, 64, 29 P.3d 734 (2001).) In other words, a defendant may make a different decision with a lower sentencing range just as with one that is too

high, because any sentence is still a consequence. However, no community custody is not a consequence.

In *State v. Oseguera Acevedo* the Defendant pled guilty to possession of cocaine with intent to deliver pursuant to a plea agreement. *Oseguera Acevedo*, 137 Wn.2d 179, 184, 970 P.2d 299 (1999). Missing from the Statement of Defendant on Plea of Guilty was language that informed the defendant that he would be on community placement² for at least one year. *Id.* at 185. The defendant was an undocumented alien from Mexico who had previously been deported, was expected to be deported again, and was not expected to serve any community placement, and this was known to the parties. *Id.* at 195. During the plea colloquy the court informed the defendant that he would be supervised by the Department of Corrections, *if he remained in this country.* *Id.* at 186. The plea was accepted. *Id.*

The defendant appealed,³ asking to withdraw his plea, in relevant part, because he alleged he had been misinformed about the community placement. Our Supreme Court, recognized that “a mandatory period of

² What is now called “community custody” was called “community placement” prior to 2008. *See e.g.* Laws of 2008, ch. 231, §3.

³ Prior to sentencing the defendant moved to withdraw his plea, but the motion was denied. *Oseguera Acevedo.* at 189.

community placement is a ‘direct consequence’ of a plea of guilty concerning which the defendant must be informed before entering a voluntary plea of ‘guilty.’ ” *Id.* at 193. However, under those facts the court held that, because the defendant was to be deported and would not serve the community placement, “[o]ne cannot logically conclude Respondent Oseguera's mandatory term of community placement is a ‘direct consequence’ of his plea of guilty.” *Id.* at 196.

Mendoza was going to be confined, so whether his sentence range was calculated to high or too low he would face a consequence. But like Oseguera, the Defendant here faces no community custody. Therefore, there is no consequence. As the Supreme Court pointed out, it would be illogical to call the absence of a consequence “a consequence.”

Because the Defendant faces no consequence there is no manifest error. This Court should decline to allow the Defendant to withdrawal his plea on that basis.

Conclusion.

Because the Defendant faces no consequence any error is not constitutional. Because he is not prejudiced and there is no real indication that he was counting on serving community custody, he is not prejudiced. This Court should deny the Defendant’s request to withdrawal his plea.

2. The Defendant was not deprived of his defense and the court did not abuse its discretion.

The Defendant next claims his right to present a defense was violated because one of his witnesses, who arrived late and who had not previously been disclosed as a witness to the court, was not allowed to testify. However, the Defendant had another witness who gave essentially the same testimony, so the Defendant was not deprived of his right to present a defense. The Court acted within its authority to ensure orderly proceedings and the rights of both parties.

The trial court did not deprive the Defendant of his right to a defense.

The Defendant argues that the trial court's exclusion of his witness is of constitutional magnitude because it deprived him of the right to present a defense. But the record shows that the Defendant's defense was presented through his other, more prompt witness, Mr. Glasman.

The Defendant listed two witnesses in an Omnibus Response, "Jasmine Whitaker" and "Michael Eduardo." CP at 60. The document stated that "[b]oth of these witnesses will testify to seeing a transaction where the Defendant purchased the Ford F-650 in early September 2018."⁴

⁴ Presumably alleged to be the stolen truck the Defendant used to flee from the police.

CP at 60. As the Defendant has conceded, this document was not filed with the Court at the time of trial. CP at 59.

At trial a Michael Glasman testified for the Defendant. Mr. Glasman testified that the Defendant had brought a large truck to him to check out for mechanical fitness, and that the Defendant ended up purchasing it. VRP 2/13/2019 at 160. Mr. Glasman testified that the seller, a “curly-haired dude” named “Mark” was also present. VRP 2/13/2019 at 163-64. This is, essentially, what Ms. Whitaker’s evidence would have been, according to the Defendant’s Omnibus Response.

The Defendant argues that, because Mr. Glasman was impeached with a prior crime of dishonesty, Ms. Whitaker’s testimony was still important. Certainly, a defendant in a criminal case has a right to present a defense. A defendant has a right to present a defense under both the United States and Washington constitutions. *State v. Jones*, 168 Wn.2d 713, 720, 730 P.3d 576 (2010). But it would be an odd rule that would guarantee a criminal defendant’s defense be *effective*.

But even if Ms. Whitaker’s testimony had bolstered Mr. Glasman’s claim that the Defendant bought the truck from a “curly-haired dude” named “Mark,” it is unlikely that the outcome would have changed. The Defendant apparently was attempting to convince the jury that he was not

the culprit who drove the truck away from Lincoln Creek Lumber. But that is not a defense. As this Court has ruled concerning the charge of Taking a Motor Vehicle Without Owner's Permission, "[t]he presence of an intervening taker [i]s immaterial." *State v. Gonzales*, 133 Wn. App. 236, 241, 148 P.3d 1046, 1048 (2006) (citing *State v. Hudson*, 56 Wn.App. 490, 784 P.2d 533 (1990).)

Because the Defendant presented his defense through Mr. Glasman, his constitutional right to present a defense was not violated. To any extent the trial court erred, it was not manifest error affecting a constitutional right.

Exclusion of the late witness is invited error.

"[A] defendant is not denied due process of law by an omission that results from his own acts." *State v. Marks*, 90 Wn. App. 980, 987, 955 P.2d 406, 409 (1998) (citing *State v. Lewis*, 15 Wn.App. 172, 177, 548 P.2d 587, *review denied*, 87 Wn.2d 1005 (1976).) "Under the invited error doctrine, a party may not set up error at trial and then complain about the error on appeal." *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13, 30 (2006).

In this case the record indicates that the Defendant's own lack of diligence led to his witness being excluded. Twelve days before the trial

the Defendant's attorney had to admit to the court that, although he knew of two witnesses, "I don't know very much about them, and I am not sure I will be calling them..." VRP 2/1/2019 at 10.

As previously established, the Defendant's attorney prepared an Omnibus Response listing two witnesses, but never filed with the court. CP at 59-60. The document did not disclose the nature of the defense, only that the two witnesses would testify witnessing the Defendant purchase the truck. CP at 60. There is no indication in the record that these witnesses were ever served with subpoenas or even located.

This was not necessarily due to a lack of diligence by the Defendant's attorney. Only the Defendant would know who these witnesses were, so he must have provided this information. However, as the State had learned, the contact information listed was either false or erroneous. VRP 2/15/2019 at 5.

On the morning of trial, the Defendant was late. VRP 2/13/2019 at 2. The Defendant had called at 8:10 to say he was about thirty minutes away, but an hour later, he had still not appeared. VRP 2/13/2019 at 2. Jury trials in Grays Harbor Superior Court start at 8:30 AM. Grays Harbor LCR 77.

At that point, the Defendant's counsel told the court that the Defendant had *one potential witness*, Mr. Glasman. VRP at 2 – 3. Trial counsel had made the State aware of Mr. Glasman only the day before. VRP 2/13/2019 at 6.

The Defendant appeared sometime between 9:13 AM and 9:28 AM. CP at __. After the jury were empaneled and the Defendant pled guilty to Count 2, the Defendant's counsel became aware that Jasmine Whitaker had "appeared." VRP 2/13/2019 at 63-64. The Defendant's attorney candidly told the court that he hadn't had any contact with her. VRP 2/13/2019 at 64.

The trial court then ruled that she would not be able to testify because the opportunity to disclose her name to the jury before *voir dire* was gone.

At this point, the trial court had never heard this witness's name before, and may not have known that her name had been disclosed to the State. The Omnibus Response had not been filed, nor any notice that the State had been served with it. And as the Defendant points out, Grays Harbor's local criminal rules require the parties to give the court a written list of potential witnesses prior to *voir dire*. See Grays Harbor LCrR 6.1. To the court it must have seemed that she was a surprise witness.

The State anticipates the Defendant may claim that his trial counsel was ineffective for failing to get in contact with Ms. Whitaker before trial. The record does not necessarily support this. However, there is a strong presumption that the Defendant's counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). As previously pointed out, these witnesses would have only been known to the Defendant. And although the record does not reflect when he told his attorney about these witnesses, assuming his attorney disclosed them to the State promptly, it was shortly before trial, and with useless contact information.

What is in the record is that the Defendant had a poor track record of keeping in contact with his other attorneys in his other pending criminal matters in other counties. VRP 2/1/2019 at 8. Given that he also provided his attorney with a forged document purporting to show a title transfer of the truck,⁵ it may be that his trial counsel, once he found he could not contact the witnesses, assumed that they were fictitious as well. This might explain why he never filed the Omnibus Response with the Court.

Because the record indicates that the exclusion of the Defendant's witness came about because of his own lack of diligence, this Court

⁵ VRP 2/15/2019 at 4-5.

should not allow him to complain of the natural consequence of his inaction now. This Court should find that, to any extent there was error, it was invited by the Defendant's conduct and not reach this issue.

This issue is not preserved for appeal.

Because the Defendant did not make a specific objection, this issue is not preserved for appeal, and this Court should not reach the issue.

“A party may assign evidentiary error on appeal only on a specific ground made at trial.” *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125, 130 (2007) (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).) “The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter.” *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756, 760 (2009), *as corrected* (Jan. 21, 2010).

In this case, when the trial court ruled that the late witness would not be allowed to testify, the Defendant's trial counsel simply said, “Thank you, your honor.” VRP 2/13/2019 at 63-64.

While it is true that the Defendant said to the Court, “can I just say that I have an objection to my witnesses not being able to testify” this is insufficient. “An objection which does not specify the particular ground

upon which it is based is insufficient to preserve the question for appellate review.” *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322, 1324 (1976). Even an objection which cites to a specific evidentiary rule, such as “foundation,” without more, is insufficient to preserve an issue for appeal. *City of Seattle v. Carnell*, 79 Wn. App. 400, 403, 902 P.2d 186, 188 (1995).

In this case, the Defendant’s trial council probably knew that he would not be able to make a *prima facie* case to the court as to why the defense witness must be allowed to testify. He had had no contact with her. VRP 2/13/2019 at 63-64. He knew Mr. Glasman would testify to the same facts, that the Defendant bought the truck, apparently from an intervening taker. And that any witness who testified to this transaction might inadvertently open the door to the Defendant’s forged release of interest document.⁶

Because there was no specific, timely objection to the trial court’s decision to exclude the tardy witness, this Court should decline to reach this issue as unpreserved.

⁶ See VRP 2/15/2019 at 5-6 and Exhibit #1 (2/15/2019).

The trial court did not err by excluding the witness.

A defendant's right to present testimony is not absolute. *State v. Lizarraga*, 191 Wn. App. 530, 553, 364 P.3d 810, 822 (2015), *as amended* (Dec. 9, 2015). That right may have to “bow to accommodate other legitimate interests in the criminal trial process.” *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 1264, 140 L. Ed. 2d 413 (1998). Trial courts have great discretion to act to maintain orderly procedures, which is “disturbed only upon a showing that the accused has been prejudiced and/or that the result of the trial would likely have been different.” *State v. Deskins*, 180 Wn.2d 68, 82, 322 P.3d 780 (2014).

The parties in a criminal action “have the right to some surface information about prospective jurors which might furnish the basis for an informed exercise of peremptory challenges or motions to strike for cause based upon a lack of impartiality.” *United States v. Baldwin*, 607 F.2d 1295, 1297 (9th Cir. 1979) (citing *United States v. Segal*, 534 F.2d 578, 581 (3rd Cir. 1976) and *United States v. Jackson*, 542 F.2d 403, 413 (7th Cir. 1976).) “[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.” *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S. Ct. 2222, 2230, 119 L. Ed. 2d 492 (1992). Indeed, failure to allow questioning the jury about their

knowledge of witnesses has been held to be reversible error in the Ninth Circuit.⁷ See *United States v. Washington*, 819 F.2d 221 (9th Cir. 1987).

The trial court had legitimate reasons for requiring the names of the potential witnesses be disclosed to the *venire*. Grays Harbor is a relatively small county, with a population of about 75,000.⁸ The jury pool is much smaller once children, aliens, felons, and other unqualified persons are subtracted. With a small jury pool, concerns about jurors knowing witnesses are much more of a concern than in a large county.

In fact, two members of the *venire* in this case knew some of the witnesses the court named. VRP 2/13/2019 at 19. One of those jurors was excused for cause. VRP 2/13/2019 at 25-26. Another potential juror identified a law enforcement witness as the son of her pastor. VRP 2/13/2019 at 48. Yet another member of the *venire* was the wife of the former elected prosecutor who had hired the deputy prosecutor who was representing the State at the trial. VRP 2/13/2019 at 44.

There appears to be no Washington State case involving exclusion of a witness because the witness was not identified for *voir dire*.

⁷ In *Washington* the trial court conducted the *voir dire*, but refused the defense's request to ask the prospective jurors if they knew any of the government's witnesses. *Washington* at 223.

⁸ See *U.S. Census Bureau*, www.census.gov/quickfacts/graysharborcountywashington (retrieved April 10, 2020.)

However, appellate courts have routinely upheld trial court decisions that effectively exclude defense witnesses, such as denying requests for continuances.

In *State v. Eller* the defendant was charged with aiding and abetting the delivery of a controlled substance. *Eller*, 84 Wn.2d 90, 91, 524 P.2d 242, 243 (1974). A woman named Pat Thorson had requested to purchase some narcotics, had declined to complete the transaction when she saw them, but apparently remained at the scene to witness the State's undercover informant arrange to buy the drugs. *Id.* at 92. The defense wanted to subpoena Ms. Thorson, but she refused to come to court and evaded service of process. *Id.* at 93-94.

On the morning of trial defense counsel moved for a continuance to attempt to serve Ms. Thorson, but the motion was denied. *Id.* at 94. The court noted that it was unclear what Ms. Thorson would testify to. *Id.* The Washington Supreme Court upheld the decision to not allow the continuance, noting that Thorson's testimony, "would have had no qualitative impact or significant effect upon the ultimate result." *Id.* at 98.

In this case, as in *Eller*, the Defendant was denied the opportunity to call a witness to offer testimony that would have ultimately been the same as another witness's testimony. It is not at all clear how Ms.

Whittaker's testimony would have differed from Mr. Glasman's.

Therefore, it is extremely unlikely that the Defendant was prejudiced, or that the outcome of the trial would have been any different.

The court was well within the bounds of its discretion to exclude the tardy witness. The result of the trial would not have likely changed. This Court should uphold the trial court's decision.

The trial court's decision avoided a potential mistrial.

The Defendant argues that the trial court should have simply conducted another *voir dire* on the empaneled jury to discover whether they knew the Defendant's tardy witness. However, this could have put the court, and the parties, in an untenable position.

Jurors who have either an actual or implied bias should be excused by the trial court. *State v. Slett*, 186 Wn.2d 869, 877, 383 P.3d 466 (2016) (citing CrR 6.4(c)(2), RCW 4.44.170 and *State v. Irby*, 187 Wn.App. 183, 347 P.3d 1103 (2015).) Both the state and federal constitutions protect a defendant's right to an unbiased and unprejudiced jury. *State v. Boiko*, 138 Wn.App. 256, 260, 156 P.3d 934 (2007) Trial courts have a continuing obligation to remove jurors who are unable to perform their duties. *State v. Jordan*, 103 Wn.App. 221, 227, 11 P.3d 866 (2000) (citing RCW 2.36.110 and CrR 6.5.) Failure to excuse a juror who demonstrates

actual bias has been found to be manifest constitutional error. *See State v. Irby*, 187 Wn.App 183, 193, 347 P.3d 1103 (2015).

If the Court had allowed the parties to engage in another *voir dire* session with the empaneled jury, either party, or the court, could have challenged a juror who knew the Defendant's tardy witness.

In this case, no alternate was selected. *See* VRP 2/13/2019 at 54. Washington's constitution guarantees the right of a criminal defendant to be tried by a jury of twelve in a court of record. *State v. Stegall*, 124 Wn.2d 719, 723, 881 P.2d 979, 981 (1994). If any juror were excused, either for cause or otherwise, the Defendant might then be in a position of choosing between his right to a speedy trial, and his right to have 12 jurors hear his case. The courts of this state have taken a dim view of requiring criminal defendants to choose between competing constitutional rights.

Conclusion.

The Defendant was not deprived of his right to present a defense. Mr. Glasman testified that the Defendant bought the truck, just as Ms. Whitaker would have. Rather, the Defendant's lack of diligence put the court in a position where the witness appeared to be a surprise witness. To any extent there was error, it was invited. Recognizing this, the

Defendant's attorney did not object, so the issue is not preserved for appeal.

The trial court was not able to follow the orderly procedures put in place to ensure the empaneled jurors have no relationship to any of the witnesses. Allowing the witness to testify would have been a minefield of potential errors. Its decision should be affirmed.

3. Evidence of the Defendant's prior incarceration was inadvertently admitted during proper cross-examination.

Next, the Defendant claims that the court erred by admitting evidence of the Defendant's prior incarceration. But this evidence was unsolicited, blurted out by a defense witness whose credibility was at issue and was being challenged. The Court, consistent with the Defendant's wishes, did its best not to draw attention to the evidence. There was no error.

This issue is not preserved for appeal because the Defendant agreed that the cross-examination was proper.

"A party may assign evidentiary error on appeal only on a specific ground made at trial." *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007) (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).)

"The appellate courts will not sanction a party's failure to point out at trial

an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *O’Hara* 167 Wn.2d at 98.

As previously discussed, a defendant and his trial counsel are obligated to seek a remedy to errors *as they occur*. *O’Hara* at 98. In this case the Defendant’s trial counsel said nothing when Glasman blurted out that he and the Defendant had been in prison together. VRP 2/13/2019 at 170. This was likely because he did not want to draw further attention to the remark. *See* VRP 2/14/2019 at 2-4 and CP at 57-58. Therefore, this Court should not reach this issue as any error is unpreserved.

Impeachment evidence is relevant if the credibility of the witness is relevant so Glasman’s misrepresentation was not collateral.

Appellate courts review a trial court’s finding of relevance and balancing of probative value against prejudice with a great deal of deference using a “manifest abuse of discretion” standard. *State v. Russell*, 125 Wn.2d 24, 78, 882 P.2d 747, 781 (1994). Discretion is only abused when no reasonable person would have decided the issue as the trial court did. *Id.* ER 403 does not require a trial court to perform an on-the-record balancing test. *State v. Baldwin*, 109 Wn.App. 516, 528, 37 P.3d 1220 (2001). The trial judge is in the best position to judge the prejudice of a statement. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d

1102 (1983) (citing *State v. Johnson*, 60 Wn.2d 21, 371 P.2d 611 (1962) and *State v. Taylor*, 60 Wn.2d 32, 371 P.2d 617 (1962).)

“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The threshold for what is “relevant” is very low; even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002) (citing *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).)

“Impeachment evidence is relevant if (1) it tends to cast doubt on the credibility of the person being impeached and (2) the credibility of the person being impeached is a fact of consequence to the action.” *State v. Horn*, 3 Wn.App.2d 302, 313, 415 P.3d 1225, 1230 (2018) (citing *State v. Allen S.*, 98 Wn.App. 452, 459-60, 989 P.2d 1222 (1999).)

In this case, Mr. Glasman testified he had met the Defendant about 12 years ago. VRP 2/13/2019 at 162. Mr. Glasman also volunteered that he met the Defendant because they were both buying and selling cars. VRP 2/13/2019 at 166. However, the State knew that the Defendant was in prison 12 years ago. As the court pointed out, Mr. Glasman’s statement about how he had met the Defendant was likely untrue due to the logistical

difficulties inherent to dealing cars while in prison. The fact that Glasman's statement was untrue cast doubt on his credibility. *Falsus in uno, falsus in omnibus.*⁹

And Mr. Glasman's credibility was a fact of consequence to the action. Mr. Glasman's testimony was designed to convince the jury that the Defendant acquired Lincoln Creek Lumber's truck legitimately, in an effort to undermine the *mens rea* of the crime. Therefore, his credibility was at issue.

Mr. Glasman's testimony was relevant, so his credibility was relevant. The jury were entitled to know that he made a material misrepresentation while under oath. And this was not "manufactured by the prosecutor," as the Defendant claims. Brief of Appellant at 28. Mr. Glasman's testimony regarding both how he met the Defendant and their shared incarceration time was essentially nonresponsive to the questions he was asked.

It should be noted that the State also impeached Mr. Glasman using his prior conviction for Witness Tampering. VRP 2/13/2019 at 161. The Defendant fails to explain why impeachment under ER 609(a)(2) was proper, but pointing out Glasman's misrepresentation on the stand is not.

⁹ "False in one thing, false in everything."

Because Mr. Glasman’s credibility was relevant, he could be impeached. He was not asked about the Defendant’s incarceration, he volunteered it. This Court should uphold the trial court’s decision and affirm the conviction.

ER 404(b) did not preclude evidence of Glasman’s incarceration and the evidence of the Defendant’s incarceration was unsolicited.

ER 404(b) is designed to exclude character evidence being used to prove action in conformity therewith. The rule is not meant to deprive the State of relevant evidence needed to prove the crime. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The trial court ruled that evidence of Mr. Glasman’s incarceration was relevant because he had made a misrepresentation while testifying under oath.¹⁰ The State went on to ask Mr. Glasman, “you said you met the defendant while car dealing about 12 years ago, weren't you in prison 12 years ago?” VRP 2/13/2019 at 169-70 (emphasis added.) To which Mr. Glasman replied that he was, then added, unprompted, “That’s where I met Mr. Stacy.” VRP 2/13/2019 at 170.

¹⁰ The trial court was cognizant that the jury would probably infer that the Defendant was incarcerated as well, even though Mr. Glasman did not say whether the Defendant was a prisoner, worked in the prison, or was there in some other capacity such as an educator or volunteer. VRP 2/13/2019 at 170.

The test for whether an inadvertent remark is reversible error is, did the remark, when viewed against the backdrop of all the other evidence, so taint the proceedings that the defendant could not have had a fair trial? *State v. Kraus*, 21 Wn. App. 388, 390, 584 P.2d 946, 947 (1978) (quoting *State v. Nettleton*, 65 Wn.2d 878, 880, 400 P.2d 301, 303 (1965).) “The record must... leave no doubt on the question of prejudice...” *Id.* (quoting *State v. Wright*, 12 Wn.App. 585, 588, 530 P.2d 704, 707 (1975) (alteration in original removed, emphasis added.)

Erroneously admitted evidence of other crimes is not always prejudicial. *State v. Mack*, 80 Wn.2d 19, 22, 490 P.2d 1303 (1971). Improperly admitted evidence is harmless error “if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997) (citing *Nghiem v. State*, 73 Wn.App. 405, 413, 869 P.2d 1086 (1994).)

In the instant case, the evidence against the Defendant was fairly overwhelming. He had fled from the police, in dramatic fashion, in a stolen truck that he had placed his own license plates on. His only defense was that he had purchased the truck from an intervening taker.

Further, the State had already established that Mr. Glasman had been convicted of witness tampering just over 12 years ago. VRP

2/13/2019 at 161. The Defendant does not allege that evidence was improperly admitted. Jurors could have surmised from that information alone that Mr. Glasman and the Defendant had been partners in crime a dozen years ago.

In this case the evidence left the jury with little doubt the Defendant was guilty, regardless of his prior incarceration. The passing remark of Mr. Glasman does not render the verdict unsafe. This Court should affirm the conviction.

Conclusion.

The State's cross-examination of the defense witness was proper because his credibility was at issue. The Defense witness's remark about the Defendant's prior incarceration was unsolicited. The Defendant did not object. This Court should affirm the Defendant's conviction.

4. Defense counsel was not ineffective for not requesting a good faith claim of title instruction.

The Defendant next claims his trial counsel was ineffective for not requesting a good faith title instruction. However, such an instruction was not warranted. The instruction was unnecessary because it would be logically impossible for the jury to convict the Defendant if they believed that he had acquired title in good faith. Additionally, requesting such an instruction might have invited the State to use damaging evidence that the

Defendant himself had furnished. And finally, in light of case law since the good faith title instruction was first held to be applicable to the crime the Defendant was charged with, it appears that his own defense would preclude the instruction.

Standard of review for ineffective assistance of counsel.

In order to establish ineffective assistance of counsel, a defendant must show (1) deficient performance from his attorney that (2) caused prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). If the claim of ineffective assistance centers on the failure to request a jury instruction, then a defendant must additionally show he was entitled to the instruction. *State v. Johnston*, 143, Wn.App. 1, 177 P.3d 1127 (2007). In order for counsel's performance to be deficient it must fall "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

This is because "[i]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. Therefore, "judicial scrutiny of counsel's performance must be highly deferential." *Id* at 669.

The defendant bears the “heavy burden” of proof as to both prongs. *State v. Carson*, 184 Wn.2d 207, 210, 357 P.3d 1064, 1066 (2015). If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Strickland* at 687.

A good faith title instruction was unnecessary.

The good faith claim of title defense is based on RCW 9A.56.050(2)(a).¹¹ A defendant’s mere claim that he was entitled to the property is insufficient. *State v. Ager*, 128 Wn.2d 85, 95, 904 P.2d 715, 720 (1995). Further, a good faith claim of title instruction is unnecessary when it is “logically impossible to convict without implicitly rejecting any claim of good faith.” *State v. Casey*, 81 Wn. App. 524, 527, 915 P.2d 587, 589 (1996).

In this case, the jury were instructed, in relevant part, that to find the Defendant guilty, “That ... the Defendant intentionally took or drove away a motor vehicle without permission of the owner or person entitled to possession[.]” CP at 22. “Intentionally” was defined as, “when acting with the objective or purpose to accomplish a result that constitutes a

¹¹ “In any prosecution for theft, it shall be a sufficient defense that.. [t]he property... was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable....”

crime.” *Id.* Knowledge that the motor vehicle is stolen is implicit in this instruction. *State v. Toms*, 75 Wn.App. 55, 58-59, 876 P.2d 922 (1994) (citing *State v. Robinson*, 78 Wash.2d 479, 481, 475 P.2d 560 (1970) and *State v. Simmons*, 30 Wn.App. 432, 435, 635 P.2d 745 (1981), *review denied*, 97 Wn.2d 1007 (1982).)

If the jury believed that he bought the truck in good faith, they would have had to believe that the Defendant believed that *he* was entitled to possession. An element of the crime would not have been proved, and the jury would be required to acquit.

In other words, the jury were instructed that they had to find, beyond a reasonable doubt, that the Defendant’s objective or purpose was to drive the truck *without the owner’s permission*. If the jury believed that he had bought the truck in good faith, then they could not also believe that he intended to drive it without the permission of the owner or person entitled to possession. The implicit element of knowing the vehicle was stolen would have been defeated.

Because no good faith title instruction was required, it was not ineffective assistance to not request it and the Defendant’s claim fails.

Requesting the instruction could have opened the door to more damaging evidence against the Defendant.

Additionally, to support a claim of ineffective assistance, the defendant must show that “counsel’s performance was deficient and not a matter of trial strategy or tactics.” *In re Tortorelli*, 149 Wn.2d 82, 95, 66 P.3d 606 (2003). In this case it is very likely that the Defendant’s trial counsel did not request this instruction for fear of inviting more incriminating evidence, evidence that his client himself had supplied.

The Defendant’s trial counsel disclosed a document he had received from the Defendant to the State. VRP 2/15/2019 at 4. This document purported to be a Washington Department of Licensing “Release of Interest/Power of Attorney.” Sentencing Exhibit 1. The State gave it to the sheriff’s deputy who had arrested the Defendant, who determined that 1) the notary who allegedly notarized the document had never seen it before; 2) the driver’s license number listed for the person releasing the interest in the vehicle had never been issued; and 3) the person named as the seller probably did not exist. VRP 2/15/19 at 5.

Introduction of this document and the facts of the forgery would have been very damaging to the Defendant. Had the Defendant claimed that he had acquired the vehicle openly and avowedly, the State could have used that document and the damning evidence in rebuttal.

Because the decision to not seek a good faith title instruction was probably a strategic decision, this Court should reject the Defendant's ineffective assistance claim.

The Defendant was not entitled to a good faith title instruction because he claimed not to have been the person who took the truck.

The Defendant cites to *State v. Williams*, 22 Wn.App. 197, 588 P.2d 1201 (1978) for the proposition that the good faith title instruction is warranted for a charge of Taking a Motor Vehicle Without Owner's Permission in the First Degree, despite the fact that the defense is specifically addressed only to crimes of theft. However, subsequent case law indicates this defense is inapplicable.

State v. Williams involved a lesser-included version of the instant crime, referred to as "joyriding."¹² *Williams* at 199. *Williams* held that the good faith title defense was applicable to intentionally taking a motor vehicle without permission, even though that crime did not include a larceny (theft) element, because,

It would be a strange rule of law which would permit the defense of appropriation in good faith to be lodged if a defendant were charged

¹² That law is now Taking or Riding in a Motor Vehicle Without Owner's Permission in the *Second* Degree, RCW 9A.56.075. Compare Laws of 1975, 1st Ex. Sess. ch. 260, chapter 9A.56. In 2002 the legislature added the instant crime, Taking a Motor Vehicle Without Owner's Permission in the First Degree. For a history of these two statutes please see *Gonzales*, 133 Wn. App. at 240.

with the more severe offense of outright larceny, but deny it to one charged with a lesser offense of joyriding. Good faith belief of one's entitlement should be a defense in either case.

Williams at 199.

However, since *Williams, State v. Gonzales, supra*, held that a defendant need not be the person who initially drove away (stole) the vehicle. *Gonzales*, 133 Wn. App. at 242. Essentially, pursuant to the *Gonzales* decision taking a motor vehicle without owner's permission can be committed in two ways; by either taking the vehicle away from the owner (as in a larceny or theft), or by later possessing (and driving) said stolen vehicle.

This distinction is important because Division III of this Court has held, in *State v. Hawkins*, that the defense of good faith title is unavailable to crimes involving the possession of stolen property. *Hawkins*, 157 Wn.App. 739, 749, 238 P.3d 1226 (2010). This is because of simple statutory construction. The *Hawkins* court pointed out that the modern crime of possession of stolen property contains no theft component and is not defined as larceny or theft anywhere in the criminal code. *Id* The defense, by its very terms, applies only the cases of theft. RCW 9A.56.020(2)..

In this case the Defendant's defense was that he was not the original taker. VRP 2/13/2019 at 160. The Defendant concedes as much in his Brief. Brief of Appellant at 37. Essentially, he was arguing he only *possessed* (while driving away) the truck. It would be strange, then, to entitle him to a statutory defense reserved for only the thief.

Because the statutory defense of good faith title is only available to those who commit thefts, and the Defendant's evidence amounts to a claim that he was only a possessor, this Court should rule that he was not entitled to a good faith title defense and affirm the conviction.

5. Cumulative error doctrine does not apply.

The cumulative error doctrine does not apply when there are no errors or where the errors are few and have little or no effect on the trial's outcome. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Because the State does not agree that the assignment of errors are in fact errors, the State cannot agree that cumulative error doctrine applies. Because the evidence was overwhelming, should this Court find that errors did occur, it should find that the verdict is safe and uphold the Defendant's conviction.

6. The Defendant was not prejudiced by a reference to the law in the judgment & sentence.

Finally, the Defendant challenges the Judgment & Sentence because it contains a parenthetical reference to the statutes authorizing community custody. This odd assignment of error fails to explain what ambiguity might possibly result in prejudice to the Defendant.

The defense is correct that no community custody is authorized for the Defendant's crimes. *See* RCW 9.94A.701. Nothing in the record indicates that the Court ordered community custody erroneously, or that community custody is imposed upon the Defendant.

The Defendant's assertion is that because the judgment & sentence document contains a parenthetical sentence that points the reader towards the statutes that authorize community custody, some ambiguity exists. The Defendant then explains, correctly, how those statutes do not authorize community custody.

To any extent the ambiguity exists, it is lost on the State. Court recognize that parenthetical references do not suggest inclusion or otherwise create any ambiguity. *See e.g. State v. Wilcox*, 196 Wn. App. 206, 211, 383 P.3d 549, 551 (2016), *as amended* (Nov. 1, 2016).

This Court should take no action on this alleged assignment of error unless and until the Defendant can demonstrate that he is somehow prejudiced.

CONCLUSION

The evidence of the Defendant's guilt was overwhelming. The Defendant fled from the police in a large, distinctive truck. He did this right in front of employees of the truck's rightful owner. When he was caught, the Defendant's Oregon license plates were on the vehicle, and the logo on the door had apparently been burned off.

Before trial the Defendant furnished a forged document to his attorney in an apparent effort to prove he had bought the vehicle in good faith. He also provided his attorney with the names of alleged witnesses with useless contact information shortly before trial, even though he had previously asked for a continuance.

At trial the Defendant appeared late and hastily pled guilty to Count 2, Eluding Police. His attorney made a scrivener's error in the Statement of Defendant on Plea of Guilty, but the Defendant will suffer no consequence, and it does not appear he relied upon the mistake.

Of the Defendant's alleged witnesses, only Mr. Glasman had contacted the Defendant's attorney prior to trial, although another witness unexpectedly arrived sometime after *voir dire*. The trial court properly exercised its discretion and excluded her, as the parties had not been allowed to question the jury about her.

Fortunately, the Defendant was still able to present his defense that he had purchased the truck from a "curly-haired dude" named "Mark" through Mr. Glasman. Because Mr. Glasman made his credibility an issue, the State was entitled to impeach him, first with his prior conviction, and second when he made a misrepresentation on the stand.

Finally, when the Defendant was sentenced, a parenthetical note was left in the Community Custody section in the Defendant's Judgment & Sentence. This does not make his sentence unclear.

For these reasons, this Court should uphold the Defendant's convictions and deny his request to withdraw his plea.

DATED this 17th day of April, 2020.

Respectfully Submitted,

BY: 

JASON F. WALKER
Chief Criminal Deputy
WSBA # 44358

JFW / jfw

GRAYS HARBOR PROSECUTING ATTORNEY

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