

FILED
Court of Appeals
Division II
State of Washington
6/26/2020 4:52 PM
NO. 53173-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JARROD ALLAN AIRINGTON,
Appellant.

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

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

BY: 
JASON F. WALKER
Chief Criminal Deputy
WSBA # 44358

OFFICE AND POST OFFICE ADDRESS
Grays Harbor County Prosecuting Attorney
102 West Broadway Room 102
Montesano, WA 98563
(360) 249-3951

T A B L E S

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

RESPONSES TO ASSIGNMENTS OF ERROR 1

RESPONDENT’S COUNTER STATEMENT OF THE CASE..... 1

ARGUMENT 13

1. The indicia found in the Defendant’s bedroom, which included a record of the Defendant’s prior convictions, was properly admitted; any error is evidentiary and unpreserved..... 13

The judgment & sentence, which contained the Defendant’s criminal history on page 2, was not a stand-alone exhibit, but one piece of indicia among several that were seized at once. . 13

Rulings concerning evidence of prior bad acts are evidentiary, not constitutional..... 16

This issue is not preserved for appeal. 18

The judgment & sentence was relevant to prove the Defendant’s possession of the methamphetamine in the middle bedroom. 22

The prior convictions in the indicia are part of the *res gestae*.24

Any error was harmless..... 28

There is no evidence the jury considered the list. 29

2. The Defendant’s impeachment witness’ testimony was inadmissible. 31

Matthew Price’s evidence was inadmissible hearsay..... 31

Harmless error. 35

3. Allowing the testimony of Brandon Craven in rebuttal was not error. 36

This alleged error is not preserved for appeal. 37

Rebuttal evidence may overlap with evidence from the case-in-chief. 39

The Defendant fails to establish how the timing of Brandon Craven’s testimony effected the defense.	40
CONCLUSION	43

TABLE OF AUTHORITIES

Washington Cases

<i>Bardwell v. Ziegler</i> , 3 Wn. 34, 28 P. 360 (1891).....	23
<i>State v. Aguirre</i> , 168 Wn.2d 350, 229 P.3d 669 (2010).....	33
<i>State v. Allen S.</i> , 98 Wn. App. 452, 989 P.2d 1222 (1999).....	33
<i>State v. Brinkley</i> , 66 Wn. App. 844, 837 P.2d 20 (1992).....	40, 41
<i>State v. Canabrana</i> , 83 Wn. App. 813, 939 P.2d 220 (1997).....	23
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	22
<i>State v. Enberg</i> , 2020 WL 1911437 at 1 (Div. I, Apr. 20, 2020, unpublished.).....	25, 26
<i>State v. Fairfax</i> , 42 Wn.2d 777, 258 P.2d 1212 (1953).....	39
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	21
<i>State v. Gould</i> , 58 Wn. App. 175, 791 P.2d 569 (1990).....	23, 30
<i>State v. Grier</i> , 168 Wn. App. 635, 278 P.3d 225 (2012).....	24
<i>State v. Hamilton</i> , 196 Wn.App. 461, 383 P.3d 1062 (2016).....	19
<i>State v. Harmon</i> , 21 Wn.2d 581, 152 P.2d 314 (1944).....	32
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	38
<i>State v. Lynn</i> , 67 Wn. App. 339, 835 P.2d 251 (1992).....	16
<i>State v. McWilliams</i> , 177 Wn. App. 139, 311 P.3d 584 (2013).....	32
<i>State v. Newbern</i> , 95 Wn. App. 277, 975 P.2d 1041 (1999).....	16
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	19, 38
<i>State v. Peele</i> , 10 Wn. App. 58, 516 P.2d 788 (1973).....	43
<i>State v. Powell</i> , 166 Wn.2d 73, 206 P.3d 321 (2009).....	16, 20
<i>State v. Ray</i> , 116 Wn.2d 531, 806 P.2d 1220 (1991).....	28
<i>State v. Reano</i> , 67 Wn.2d 768, 409 P.2d 853 (1966).....	18
<i>State v. Rice</i> , 48 Wn. App. 7, 737 P.2d 726 (1987).....	22
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	22

<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	16
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990)	39
<i>State v. Watt</i> , 160 Wn.2d 626, 160 P.3d 640 (2007).....	36
<i>State v. Weber</i> , 99 Wn.2d 158, 659 P.2d 1102 (1983).....	22
<i>State v. White</i> , 74 Wn.2d 386, 444 P.2d 661 (1968).....	39
<i>State v. Wilson</i> , 108 Wn. App. 774, 31 P.3d 43 (2001)	42

Federal Cases

<i>Davis v. Alaska</i> , 415 U.S. 308, 94 S.Ct. 110, 539 L.Ed.2d 347 (1974) ...	33, 34
<i>Massey v. United States</i> , 407 F.2d 1126, 1128 (9 th Cir. 1969)	34, 35

Non-Washington Cases

<i>Bertholf v. State</i> , 298 Ga. App. 612, 680 S.E.2d 652, 653 (2009).....	26, 27
--	--------

Rules

ER 401	22
ER 402	22
ER 404	16, 21
ER 607	33
ER 613	33
ER 801	32
ER 802	32
RAP 2.5.....	38

Other Authorities

B. Garner, <i>Black's Law Dictionary</i> (8th ed. 2007)	17
---	----

RESPONSES TO ASSIGNMENTS OF ERROR

- 1. The trial court properly admitted indicia of dominion and control found in the Defendant's bedroom, which included a felony judgment & sentence for the Defendant's last conviction. This is not a constitutional issue. To any extent there was error, it was not preserved, but is harmless.**
- 2. The defense witness' testimony was inadmissible hearsay, so the trial court was correct to exclude it.**
- 3. Because rebuttal evidence may properly overlap evidence from the case-in-chief, the trial court was well within its discretion to allow the testimony of the victim in rebuttal, but the error assigned on appeal is not preserved.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

Brandon Craven, at the time of the incident here, was a 28-year-old homeless drug addict. RP Vol. II at 478-79. He was newly addicted to heroin, but had been addicted to methamphetamine for half his life. RP Vol. III at 479.¹

On July 6, 2018 Craven was asked to drive the Defendant's mother, "Auntie Bobbi," from Aberdeen to Ocean Shores. RP Vol. III at 480-81. Craven drove Auntie Bobbi to a house on Rain Street in Ocean Shores, near the post office, where he met the Defendant for the first time. RP Vol. III at 480-81.

¹ Craven's testimony was not always chronological in a strictly linear sense. The State has attempted to reconstruct the events as they appear to have occurred for clarity.

Craven was uncomfortable at the house, so he left to score some heroin, took the heroin, and returned to the house. RP Vol. III at 483-84. He also smoked meth while there. RP Vol. III at 511.

Because he was homeless, he took the opportunity to use the shower. RP Vol. III at 484. Shortly after he got out of the shower the Defendant pointed a semiautomatic pistol at Craven and accused him of stealing a piece.² RP Vol. III at 485-86.

TJ Seward, with whom Craven was familiar, was also present. RP Vol. I at 486. The Defendant and Seward aggressively accused Craven of stealing the heroin. RP Vol. III at 487. They stripped Craven's clothes off and told him they were going to search his anus with hot knives. RP Vol. III at 487. They told Craven that they had chopped "the last guy's" fingers off. RP Vol. III at 491.

At some point Seward attempted to calm the situation. RP Vol. III at 488. The Defendant tied Craven to a chair and struck him on the top of the head with the pistol. RP Vol. III at 490. Craven fell over. RP Vol. III at 90. Then, the Defendant put on his steel-toed boots. RP Vol. III at 490.

The Defendant, and possibly Seward, started kicking Craven. RP Vol. III at 491-92. The Defendant told Craven that it would be easier if he

² The State had previously established that a 'piece' is a standard unit of measurement of heroin equivalent to about 25 grams, worth about \$1200. RP Vol. II at 360-61.

told them where the heroin was, and that he would be able to walk out of the house. RP Vol. III at 493. The Defendant brandished a knife as he tried to get Craven to reveal where the missing heroin was. RP Vol. III at 492.

Seward left about an hour and a half. RP Vol. III at 494. About 15 minutes before Seward left, Brandon Jenkins had entered the room. RP Vol. III at 495. Jenkins told Craven that “this was going to be bad,” and that if Craven lied again Jenkins was going to do “crazy shit.” RP Vol. III at 496. Jenkins pushed a small Swiss Army knife blade into Craven’s left arm, causing it to bleed. RP Vol. III at 496-97. The Defendant gave Craven something to tie his arm off with. RP Vol. III at 496-97.

Craven’s denials angered the Defendant, so he started striking Craven with a distinctive walking stick. RP Vol. III at 493-94. Craven later identified the walking stick in a photograph the police had taken at the Rain Street house. RP Vol. III at 499.

Jenkins sat Craven down again, and struck him with a distinctive bowie knife with a blade about a foot long. RP Vol. III at 498-99. Jenkins told Craven to admit that he took the heroin, and if he flinched, he would be cut. RP Vol. III at 500. Jenkins slapped Craven with the flat of the blade. RP Vol. III at 500.

After that, things calmed down a little. RP Vol. III at 501. The Defendant and Jenkins told Craven to clean up, and left him alone for a little while. RP Vol. III at 501. Craven contemplated ways to escape. RP Vol. III at 501. However, The Defendant and Jenkins brought Craven out to the living room and put him in a chair, and a female gave him a bottle of water. RP Vol. III at 502.

The Defendant had left, but when he returned he told Craven that they were going to take him somewhere else. RP Vol. III at 502. As soon as they took him outside, Craven started running. RP Vol. III at 503. He ran to his friend Ryan Dawson's house. RP Vol. III at 503.

Mr. Dawson was not home, but Jonni Heath and their children were. RP Vol. III at 503. Ms. Heath testified that Craven had a black eye, was actively bleeding, had blood on his head, and was out of breath. RP Vol. I at 112. She testified to the wound on Craven's arm where Jenkins had stabbed him. RP Vol. I at 115.

Mr. Dawson arrived home shortly thereafter. RP Vol. I at 117. He testified that Craven had a black eye, a bruise on his arm, a fat lip and was bleeding, and made no sense when he was talking. RP Vol. I at 125. Mr. Dawson gave Craven towels to staunch the bleeding. RP Vol. I at

128. Mr. Dawson drove Craven to the hospital, and had to keep him awake on the drive. RP Vol. I at 129.

Officer Blundred of the Hoquiam Police responded to the hospital. RP Vol I at 136. Officer Blundred had been led to believe that Craven had been stabbed in Hoquiam. RP Vol. I at 136. Craven admitted on the stand that he had lied when he claimed at the hospital that he had been attacked in Hoquiam. RP Vol. III at 514.

Officer Blundred testified that Craven was obviously in pain. RP Vol. I at 137. Officer Blundred took several photographs of Craven's injuries. RP Vol. I at 137-45.

Tom "TJ" Seward testified to the assault of Brandon Craven. He confirmed that the Defendant had pointed a Ruger P90 .45 semiautomatic pistol at Craven. RP Vol. I at 156. He testified that he took it from the Defendant, but then the Defendant took it back and "pistol-whipped" Craven with it. RP Vol. I at 157. He confirmed that the incident was about a "piece" of missing heroin. RP Vol. I at 168. Seward testified that Craven had been told to strip and sit in a chair. RP Vol. I at 162. Seward confirmed that the Defendant kicked Craven and made him bleed. RP Vol. I at 163. Seward said that he struck Craven on the back and knee

with a “shackle.” RP Vol. I at 164. Seward testified that Jenkins stabbed Craven in the shoulder area. RP Vol. I at 167.

Seward testified that he took the Ruger out of the house. RP Vol. I at 173. Seward admitted that he had a methamphetamine addiction, and that he was probably high when these events occurred. RP Vol. I at 175. Seward explained to the jury that he agreed to cooperate with law enforcement in exchange for only being charged with Assault in the Fourth Degree for his participation. RP Vol. I at 189-90.

Seward’s testimony was interrupted when a woman in the courtroom was found to be filming him. RP Vol. II at 158. The footage was posted on Facebook in an apparent attempt to intimidate Seward. RP Vol. III at 465.

Erick Knight had to be compelled to come to court via a material witness warrant. CP at 120. He had been assaulted and told not to come to court. RP Vol. III at 466.

Knight testified that while he was in the Defendant’s house on Rain Street one day, the Defendant asked Knight if Knight knew Brandon Craven. RP Vol. II at 326. Knight testified that the Defendant said Craven had taken something and the Defendant was going to make Craven pay for it. RP Vol. II at 326-27. Knight went on to recount how the

Defendant had claimed to have knocked a dental appliance from Craven's mouth, "tuning [Craven] up" and sticking Craven with a knife. RP Vol. II at 328.

Detective Sergeant Wallace of the Grays Harbor Sheriff's Department became aware of Officer Blundred's encounter with Brandon Craven at the hospital. RP Vol. I at 239-40; RP Vol. II at 270. Sgt. Wallace had an opportunity to speak with Craven while he was incarcerated. RP Vol. II at 271. Although Craven was too frightened to talk about what had happened to him at first, he eventually gave Sgt. Wallace information that formed the basis for a search warrant of the house on Rain Street. RP Vol II at 271.

Detectives Rathbun and Ramirez of the Grays Harbor Drug Task Force, unaware that Sgt. Wallace had just spoken to Craven, also went to speak with him that day. RP Vol. II at 335. They found him shaken, afraid and crying. RP Vol. II at 335. Craven gave a basic account of what happened. RP Vol. II at 336. Sgt. Wallace and Detective Ramirez re-interviewed Craven the following day. RP Vol. II at 336.

Sgt. Wallace, along with the Grays Harbor Drug Task Force and the Ocean Shores Police served the search warrant on the Rain Street house based on what Craven had told them. RP Vol. I at 270-71. The

officers waited for the Defendant to leave. RP Vol. I at 241. Trooper Blake of the State Patrol conducted a traffic stop on the Defendant at the Ocean Shores post office, arrested him and transported him to the county jail. RP Vol. I at 198-200.

Detective Logan of the Grays Harbor Sheriff's Department served a search warrant on the Defendant's car. RP Vol. I at 207. He found large quantities of heroin, methamphetamine,³ packaging materials, scales and rubber bands. RP Vol. I at 209-10. Detective Logan, who has experience in narcotics interdiction, testified that the amounts of heroin and methamphetamine were thousands of times more than a personal use amount. RP Vol. I at 221-22. Detective Logan testified that the baggies were commonly used to package narcotics. RP Vol I at 223. He testified that the scales appeared to have methamphetamine and heroin residue on them. RP Vol. I at 224. Later testimony established that the methamphetamine had a street value of approximately \$9000.00, and the heroin about \$10,000.00. RP Vol. II at 359-60.

Back at the Rain Street house, most of the occupants were arrested on outstanding warrants. RP Vol. I at 243. The officers searched the

³ Although Detective Logan characterized the narcotics as *suspected* heroin and *suspected* methamphetamine, the Defendant stipulated to the lab results which proved that those substances were as Detective Logan suspected. RP Vol. I at 195.

residence to find evidence of the assault on Craven. RP Vol. I at 244.

They were looking for sticks, knives, blood evidence, gloves and boots.

RP Vol. II at 289.

The officers found a .22 revolver in the house. RP Vol. I at 250.

The officers also found blood all over the house, and took over a dozen swabs. RP Vol. II at 290. They selected four to be sent for DNA testing.

RP Vol. II at 290-91. One of the samples, item #17, was a blood smear

from a refrigerator. RP Vol. II at 293-94. Item 17 was tested by the

Washington State Patrol Crime Lab, which found that the sample

contained Brandon Craven's DNA. RP Vol. II at 318-19.

There were three bedrooms in the house. RP Vol. II at 272. The

Defendant's mother, "Auntie Bobbi" was found in the furthest room,

which had female clothing and jewelry in it, so the officers concluded it

was her room. RP Vol. II at 272-73. The near bedroom had small male

clothes in it, and Sgt. Wallace described Brandon Jenkins, the other male

occupant, as small-statured. RP Vol. II at 275. But the clothes in the

middle bedroom were consistent with the Defendant's size. RP Vol. II at

274-75.

In that middle bedroom, the officers found 59 grams of

methamphetamine, a large quantity worth as much as \$2000. RP Vol. II at

357-59. The officers also found “crib notes,” records of transactions in narcotics. RP Vol. II at 354-55. In a dresser drawer the officers found rolls of currency totaling \$8000. RP Vol. II at 351-52; 361. Detective Logan had testified that that the rubber bands he found in the Defendant’s car matched the rubber bands used to wrap the rolls of currency. RP Vol. I at 229-30.

The officers also searched the middle bedroom for indicia of dominion and control. RP Vol. II at 275-76. The items seized for this purpose were: a credit card in the name of Lenore Moquick, two cards bearing Rachel Olson’s name, a letter from the county courthouse addressed to the Defendant at Coyote Ridge Corrections Center, a prison document with the Defendant’s name on it, a certificate from “White Bison wellbriety” with the Defendant’s name on it, a Washington State offender card in the Defendant’s name, a photo of the Defendant, and a judgment & sentence from the Defendant’s last conviction. RP Vol. II at 279 *and see* Exhibit #72. Rachel Olson was identified as the Defendant’s girlfriend, who was present when the warrant was served. RP Vol. II at 305. Some of her clothing was found in the middle bedroom as well. RP Vol. II at 305. The indicia were placed all together in an evidence bag,

which was sealed and later opened and admitted at trial at Exhibit #72.

RP Vol. II at 276-77.

The Defense called Matthew Price of Shelton. RP Vol. II at 386-87. Price had been in jail for Eluding a Police Vehicle with TJ Seward. RP Vol. II at 387. Price was going to testify that, while they were both in jail, TJ Seward had told Price that he would lie to get out of jail and make sure the Defendant was convicted. RP Vol. I at 388-89. The State objected to the testimony as inadmissible hearsay and the Court sustained the objection. RP Vol. II at 395. The Defendant's trial counsel admitted that the testimony was inadmissible. RP Vol. II at 395.

The defense's other witness was Brandon Jenkins. Jenkins claimed that he was the primary leaseholder of the Rain Street house, but could not name the person he rented from, who he described as a "family friend." RP Vol. II at 402. Jenkins claimed that his roommates were "Auntie" Bobbi Filipetti and Rachel Olson, and that the Defendant would occasionally stay over, but did not reside there. RP Vol. II at 403-04.

Jenkins claimed on the day of the incident that he got out of the shower and saw TJ Seward pointing a gun at and beating Brandon Craven. RP Vol. II at 406-07. Jenkins claimed that the Defendant was trying to "calm the situation down." RP Vol. II at 407. Jenkins identified the .22

revolver found in the residence, and claimed it was the gun Seward had wielded against Craven. RP Vol. II at 408. Jenkins claimed that Seward pointed it at everyone else in the house. RP Vol. II at 408. Jenkins claimed that Seward told Jenkins to assault Craven. RP Vol. II at 409. Jenkins claimed that Seward tied Craven to the chair. RP Vol. II at 412. Jenkins claimed that the Defendant cleaned up Craven's blood and gave Craven towels and a change of clothes. RP Vol. II at 414. Jenkins claimed that people always left stuff in the back of the red car that the Defendant was pulled over in. RP Vol. II at 416-17.

On cross-examination, Jenkins admitted that his testimony was inconsistent with statements he had previously made to the police, but claimed that Seward had threatened him into making the prior inconsistent statements. RP Vol. II at 422-23.

The jury convicted the Defendant of all counts. He now appeals.

ARGUMENT

1. **The indicia found in the Defendant's bedroom, which included a record of the Defendant's prior convictions, was properly admitted; any error is evidentiary and unpreserved.**

In the Defendant's first assignment of error he claims that the introduction of a document bearing his name, which was used to prove his possession of a large quantity of narcotics, violated his constitutional right to a fair trial because the was a judgment & sentence which contained a record of his prior criminal convictions. The document was admitted because it was highly probative of a contested issue – whether drugs found in a bedroom belonged to the Defendant. That the document recorded some of the Defendant's criminal history was part of the *res gestae*. This is an evidentiary issue, not constitutional. This is important because the precise issue the Defendant raises was never raised in the trial court. But any error in admitting it was harmless against the backdrop of the other evidence in this case.

The judgment & sentence, which contained the Defendant's criminal history on page 2, was not a stand-alone exhibit, but one piece of indicia among several that were seized at once.

The Defendant implies in his brief that the State introduced a felony judgment & sentence of the Defendant's as an exhibit. Although

such a document was used as evidence of the Defendant's dominion and control, the exhibit is not exactly as represented.

The judgment & sentence was contained in Exhibit #72, a police evidence bag of indicia. The documents were seized from one of three bedrooms in the house that the assault on Craven took place. RP 2/27/2019 at 276-78. In this bedroom, referred to as the "middle bedroom," the police found thousands of dollars' worth of methamphetamine, thousands of dollars of US currency, clean sandwich baggies of the type used to package narcotics for sale, and crib notes.

The evidence bag was sealed when the items were seized. RP Vol. II at 276. The State's witness Sgt. Wallace opened the bag in front of the jury when the exhibit was admitted. RP Vol. II at 277.

The bag contained multiple documents, most bearing the Defendant's name. Many of them documented his recent prison stay. The bag also contained what Sgt. Wallace identified only as a "Superior Court judgment and sentence for Mr. Airington." RP 2/27/2019 at 279. On the second page of that judgment & sentence is the following table:

2.2 Criminal History (RCW 9.94A.525):

<i>Crime</i>	<i>Date of Crime</i>	<i>Sentencing Court (County & State)</i>	<i>A or J (Adult or Juvenile)</i>	<i>Type of Crime</i>	<i>Points</i>
Burglary 2	4/9/87	King 87-8-1784-4	J	FB	.5
TMVWOP	3/1/88	King 88-8-1087 2	J	FC	.5
Criminal Trespass 2	10/8/89	King	A	M	
Assault 4 DV	2/28/94	Hoquiam	A	GM	
Assault 4 DV	3/6/94	Aberdeen	A	GM	
Obstructing	4/7/94	Aberdeen	A	GM	
UPF 2	3/9/94	Grays Harbor 95-1-108-7	A	FC	1
VUCSA (meth)	5/27/94		A	FC	1
Assault 4	9/19/94	Hoquiam	A	GM	
Resisting Arrest	10/5/94	Aberdeen	A	M	
Malicious Mischief 3	10/12/94	Aberdeen	A	M	
VUCSA (meth)	11/27/96	Grays Harbor 97 1 2-8	A	FC	1
UPF 2	8/1/97	Grays Harbor 97 1 279-9	A	FC	1
VUCSA (meth)	2/5/99	Grays Harbor 99-1-47-4	A	FC	1
UPF 2	2/28/99	Grays Harbor 99-1-121-7	A	FC	1
Poss Stolen Property 2	2/23/01	Grays Harbor 01 1 107-1	A	FC	1
Resisting Arrest	10/7/01	Aberdeen	A	M	
Disorderly Conduct	10/7/01	Aberdeen	A	M	
VUCSA (meth)	12/6/02	Thurston 02-1-02105-4	A	FC	1
Poss Short-Barreled Shotgun	12/6/02		A	FC	1
UPF 1	12/6/02		A	FB	1
Poss of Dangerous Weapon	4/14/03	Grays Harbor	A	GM	
False Statement	4/14/03	Grays Harbor	A	GM	
Poss of Unlawful Weapon	6/9/06	Aberdeen	A	GM	
Assault 4 DV	4/22/10	Grays Harbor	A	GM	
UPF 2	3/20/11	Grays Harbor 11-1-118-3	A	FC	1

* DV Domestic Violence was pled and proved.

Exhibit #72.

In closing the State argued that the indicia in Exhibit #72, including the judgment & sentence, proved that the middle bedroom, and the methamphetamine within, belonged to the Defendant. RP Vol. III at 568. No witness made any mention of any prior conviction of the Defendant at trial, and neither of the attorneys mentioned it in argument.

Rulings concerning evidence of prior bad acts are evidentiary, not constitutional.

The Defendant claims admission of this document is error of constitutional magnitude. However, as this Court has observed, “[c]riminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.” *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992).

It has been long established that admission of evidence showing prior crimes, wrongs, or bad acts is, even if error, is not constitutional. *See State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009). The general prohibition on admitting evidence of prior bad acts is contained in ER 404(b).

The Defendant’s claim that this assignment of error is constitutional seems to be based on a flawed syllogism. The Defendant appears to argue 1) the Defendant exercised his a constitutional right not to testify; 2) Exhibit #72 contained impeachment evidence under ER 609; therefore 3) the State impeached the Defendant, even though the Defendant did not testify, and therefore violated his constitutional rights.

There are numerous flaws in this proposition. For one, a person who does not testify cannot be impeached. *See State v. Newbern*, 95 Wn. App. 277, 292, 975 P.2d 1041, 1049 (1999) (citing 5A K. Tegland,

Washington Practice, *Evidence* § 256, at 310 (3d ed.1989) and 3A J. Wigmore, *Evidence* § 1043, at 1059–61 (1970).) Impeachment means, “[t]he act of discrediting a witness, as by catching the witness in a lie or by demonstrating that the witness has been convicted of a criminal offense.” B. Garner, *Black's Law Dictionary* 768 (8th ed. 2007).

The Defendant’s assertion that “ER 609 limits when prior history can be used...” is also problematic. Brief of Appellant at 12. In fact, ER 609 is a rule that *allows* prior criminal convictions to be introduced as evidence, within certain limits.

But finally, and most importantly, the judgment & sentence was never admitted to prove bad acts pursuant to ER 609. It was used to prove the Defendant’s possession of the drugs that were found nearby.

To support his argument of constitutional error, the Defendant cites to numerous cases where evidence of prior bad acts were introduced in error. However, none of these cases are on point, because they all involve situations where the evidence of a defendant’s prior bad acts were wrongly introduced *to prove the bad act*.

That is not the case here. In this case, the evidence in question was used to establish the Defendant’s dominion and control, which circumstantially proved he possessed the drugs, cash, packaging material

and crib notes found nearby. That the same evidence also happened to document the Defendant's criminal history was incidental and probably unintentional.

The issue here is evidentiary, not constitutional. This Court should not even entertain this assignment of error unless the Defendant can show that the error is preserved and that he was prejudiced. As the State will demonstrate, the Defendant cannot make either showing.

This issue is not preserved for appeal.

The record shows that the Defendant objected to admission of the judgment & sentence, apparently as evidence of the conviction on the face of the document, under 404(b). But 1) 404(b) governs admission of evidence of prior bad acts as character evidence; and 2) the defense never raised the issue of the criminal history table that the Defendant now assigns error to. His objection below was substantively different than his assignment of error here.

The precise point upon which an appellant assigns error "must have been brought to the attention of the trial court and passed upon." *State v. Reano*, 67 Wn.2d 768, 771, 409 P.2d 853, 855 (1966) (citing *Lally v. Graves*, 188 Wn. 561, 63 P.2d 361 (1936).) An objection that is insufficient to apprise the trial judge of the grounds is insufficient to

preserve an issue for appeal. *State v. Hamilton*, 196 Wn.App. 461, 475 n.7, 383 P.3d 1062 (2016) (citing *State v. Maule*, 35 Wn.App. 287, 291, 667 P.2d 96 (1983).)

Requiring preservation also “precludes counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second trial if the first decision is adverse to the client.” *State v. Cardenas-Flores*, 189 Wn.2d 243, 278, 401 P.3d 19, 37 (2017) (Gonzales, J., concurring.) “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).

Before Exhibit #72 was to be offered as evidence the Defendant objected to the judgment & sentence on the basis of ER 404(b). RP Vol. II at 265. The trial court asked the prosecutor what crime the judgment & sentence was a record of, and the prosecutor explained he had only seen it through the evidence bag, but that the Defendant’s last conviction was for “a solicitation under [RCW Chapter] 69.50... to possess controlled substances. He got five years is my recollection.” RP Vol. II at 266. The trial court ruled that the document was highly probative of dominion and

control, any prejudice was outweighed by that probative value, and overruled the objection. RP Vol. II at 267.

From this record, it appears that a) only the record of the single conviction was before the trial judge; and b) the Defendant's objection was to the use of the prior conviction to prove the Defendant's character.

In *State v. Powell, supra*, the State wanted to introduce evidence that the defendant had consumed methamphetamine before committing a burglary to show his mental state. *Powell* at 74. The defense objected on the basis that the witness who would testify about the defendant being on methamphetamine was not credible. *Id.* at 82. The evidence was admitted and the Defendant appealed the decision.

The Washington Supreme Court ruled that 1) the issue was not constitutional; and 2) neither an ER 403 or 404(b) issue was preserved for appeal because trial counsel only objected to the evidence based on the witness' credibility. *Id.* at 84-85.

Like in *Powell* the Defendant here did object, but not on the grounds that he now raises. This Court should follow *Powell's* precedent and rule the assignment of error unpreserved and not constitutional.

That the criminal history table was not before the trial court is critical because much of the remaining indicia in Exhibit #72 documented

the Defendant's recent incarceration, but the Defendant did not object to any of that material. RP Vol. II at 265-67. Additionally, as the court pointed out, the Defendant had also already stipulated to the jury that he had been adjudicated guilty of a serious offense for the purposes of the firearms charge. RP Vol. I at 194. The jury knew he was a convicted felon, would see from the other indicia that he had recently been released from prison, so to the trial court a judgment & sentence recording a single felony conviction was essentially cumulative.

What the trial court did rule on was the Defendant's ER 404(b) objection. The Defendant argued that the judgment & sentence was barred by ER 404(b) simply because it contained a record of a prior bad act. But ER 404(b) prohibits the use of criminal history to prove action in conformity therewith. ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The trial court was right to overrule the 404(b) objection.

Here, the judgment & sentence was used to prove dominion and control, not as character evidence. This Court should rule that the issue the Defendant now raises is not constitutional and not preserved for appeal.

The judgment & sentence was relevant to prove the Defendant's possession of the methamphetamine in the middle bedroom.

Relevancy and the admissibility of relevant evidence are governed by ER 401 and ER 402. *State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726, 729 (1987). “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).)

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). The trial judge is in the best position to judge the prejudice of evidence. *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).) Discretion is only abused when no reasonable person would have decided the issue as the trial court did. *Russell* at 78.

In this case the State had to prove that the room and its contents, specifically the drugs, crib notes, money and empty packaging material, belonged to the Defendant to prove that he possessed methamphetamine with the intent to deliver it. Because the Defendant was not in the room at the time of the seizure, the State used the documents it found, along with the large male clothing in the closet, to establish dominion and control. This is a factor in establishing that constructive possession. *State v. Canabrana*, 83 Wn. App. 813, 817-17, 939 P.2d 220 (1997).

This was a contested issue at trial, as a defense witness testified the Defendant only stayed at the house occasionally, and the bedroom was the Defendant's girlfriend's. RP Vol. II at 403-04. When the defense is mistaken identity "...virtually all evidence tending to prove or disprove the identity of the crime's perpetrator is probative." *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569, 573 (1990).

At trial, the Defendant argued that the judgment & sentence was unnecessary because the State "has other indicia." RP Vol. II at 266. But as the trial court observed, it is not the place of the judge to decide what enough evidence is. A trial judge of this state cannot decide if a contested point has been proven, conclusively or otherwise. *See Bardwell v. Ziegler*, 3 Wn. 34, 42, 28 P. 360, 362 (1891).

Because the judgment & sentence was relevant, this Court should rule that the documents in Exhibit #72, including the judgment & sentence, were properly admitted and affirm the conviction.

The prior convictions in the indicia are part of the *res gestae*.

Evidence that might otherwise be considered overly prejudicial is still admissible as part of the *res gestae* exception “if the evidence is admitted ‘to complete the crime story by establishing the immediate time and place of its occurrence.’” *State v. Grier*, 168 Wn. App. 635, 645, 278 P.3d 225, 230 (2012) (quoting *State v. Hughes*, 118 Wn. App. at 725, 77 P.3d 681, *review denied*, 151 Wn.2d 1039, 95 P.3d 758 (2004).) Here, the judgment & sentence that was one of the documents that proved the Defendant’s dominion and control also happened to show his prior convictions. That the judgment & sentence had such information on it simply enhanced the probative value of the document. As the trial court pointed out, why would anyone keep some else’s judgment & sentence in their bedroom? RP Vol. II at 266.

Prior bad acts have been ruled admissible as part of the *res gestae* before. In *State v. Grier* the defendant was charged with murder in the second degree. *Grier, supra*, at 636. The defendant moved *in limine* to exclude “any reference to any previous alleged threats ..., to include any

waving around of any guns” as well as her use of derogatory terms towards other people present earlier in the week of the murder. *Id.* at 640-41. The trial court denied the motions and such evidence was produced. *Id.* at 642-43.

On appeal the defendant assigned error to the decision denying her motion, but this Court upheld it, holding that the testimony was part of the *res gestae*. This Court rejected this application of *res gestae* being an exception to ER 404(b), but held that the evidence was “relevant and admissible under ER 401 and 402[.]” *Id.* at 643-44.

In the recent unpublished case of *State v. Engberg* the defendant was accused of rape in the second degree, assault in the second degree, unlawful imprisonment, felony harassment, and witness tampering, all alleged to be crimes of domestic violence because the victim was his girlfriend. *State v. Engberg*, 2020 WL 1911437 (Div. I, Apr. 20, 2020, unpublished.)⁴ The defendant, who had previously been convicted of assault of a child in the first degree said to the victim while strangling her, “if he had done that to his own daughter, to ‘imagine what he would do’ to [the victim] and the ones she loved.” *Id.* at 1.

⁴ Unpublished case cited as persuasive authority pursuant to GR 14.1(a).

On appeal, the Defendant claimed that admission of that statement was improper ER 404(b) evidence of a prior bad act. *Id.* at 2. In affirming the trial court's admission of that evidence under ER 404(b), Division I of this Court noted that "[t]he prior conviction was also being offered as *res gestae*, to help provide context for the threat[.]" *Id.* at 3.

Other jurisdictions have also recognized that evidence of a prior conviction can be *res gestae*. In *Bertholf v. State* the Defendant was charged with possession of methamphetamine, improper tag, and no proof of insurance. *Bertholf v. State*, 298 Ga. App. 612, 612, 680 S.E.2d 652, 653 (2009). The charges stemmed from a traffic stop wherein the Defendant produced a Georgia Department of Corrections ID card to the officer, and volunteered that he had previously been convicted of possessing methamphetamine. *Id.* at 612-13. The officer then requested permission to search the car and found drug paraphernalia and methamphetamine. *Id.* at 613.

At trial, the Defendant claimed that he was taking the car for a test-drive, and that he did not know that the vehicle contained methamphetamine. *Id.* at 614. After being convicted he appealed, in relevant part, on the admission of the evidence of his prior conviction.

The Georgia Court of Appeals affirmed, acknowledging that the prior conviction would be prejudicial, but held it part of the *res gestae*, noting that, “[t]he State is entitled to present evidence of the entire *res gestae* of a crime ... even if the defendant's character is incidentally placed in issue.” *Id.* (quoting *Corza v. State*, 273 Ga. 164, 166(2), 539 S.E.2d 149 (2000).)

Here, the police found documents bearing the Defendant’s name in a room they believed was the Defendant’s bedroom, near drugs they suspected were the Defendant’s drugs. Those documents bore the Defendant’s name, and so were evidence of the Defendant’s dominion and control. The documents incidentally documented the Defendant’s recent incarceration and criminal history.

Matching rubber bands, an ID or a photograph of the Defendant are easily explained away, especially when the Defendant’s witness claimed it was the Defendant’s girlfriend’s bedroom. But court paperwork and prison documents are more difficult to cast reasonable doubt upon, precisely because the information therein is something the average person would not want revealed to the world.

The Defendant chose to keep a document, which recounted his long criminal history, in an area which also contained his illegal narcotics

stash. It is difficult to understand how that decision should insulate him from the probative value of those documents in establishing his dominion and control. A decision by this Court that would limit use of such evidence would encourage drug dealers to keep records of their criminal history with their drugs, specifically to confound use of those documents to prove possession.

Put another way, if the Defendant does not wish his judgment & sentence to be used as evidence at a trial, he would be well-advised not to keep such documents near his methamphetamine. If this Court rules that the State cannot use indicia of dominion and control that contains records of a defendant's criminal convictions, then drug dealers would be well-advised that they should keep such records with their contraband, in order to frustrate attempts to link them with their nefarious wares.

This Court should rule that any evidence of prior bad acts included in the indicia the police seized is part of the *res gestae* and uphold the trial court.

Any error was harmless.

Error in admitting evidence of prior bad acts is nonconstitutional. *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220, 1229 (1991).

Therefore, any error is not reversible unless, within reasonable probabilities, it materially affected the outcome of the trial. *Id.*

In this case, it is unlikely that the document in question was what the jury relied upon to convict. As the State said in closing argument, the assault and kidnapping charges came down to the credibility of the victim, Brandon Craven. RP Vol. III at 556-57. Craven recounted a horrific incident wherein the Defendant brutally beat him because he believed that Craven had stolen his narcotics. As it related to the possessory charges, the Defendant had an even larger amount of narcotics with him in his car when he was arrested seventeen days later. RP Vol. I at 209-10. This evidence was more prejudicial than the cryptic recitation of the Defendant's criminal history on page two of a 16 page document folded up in a bag of paper.

Because the evidence against the Defendant was overwhelming, any error in the inadvertent inclusion of the criminal history table on the judgment & sentence was harmless. Even if this Court rules that there was error, it should rule it was harmless and affirm the conviction.

There is no evidence the jury considered the list.

As the State has noted, the judgment & sentence was not admitted as an exhibit by itself. It was one of several pieces of indicia that the

police collected in the middle bedroom. *See* Exhibit #72. The criminal history table the Defendant complains of was on the second page of the judgment & sentence, which was folded-up document as though it had been in the envelope.⁵

The first page of the judgment & sentence bears the Defendant's name. Although it is possible the jury could have looked through the document, the record is silent as to whether they did.

“[I]n cases involving the admission of evidence of prior misconduct, the absence of a record precludes effective appellate review.” *State v. Gould*, 58 Wn. App. 175, 184, 791 P.2d 569, 574 (1990) (citing *State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981).)

In this case, no witness mentioned the Defendant's criminal history, not even the crime listed on the front page of the judgment & sentence. The State did not argue that the document proved anything but the Defendant's dominion and control over the room and the drugs. In the absence of any record that the jury relied upon it, this Court should decline to even consider the issue.

⁵ When the State examined Exhibit #72 prior to designating it for this appeal, the judgment & sentence was inside the envelope addressed to the Defendant at Coyote Ridge. It is unknown if it was like that at trial.

2. **The Defendant's impeachment witness' testimony was inadmissible.**

The Defendant next claims that his right to present a defense was violated when his trial attorney was not allowed to elicit hearsay from a defense witness. This argument fails because the right to present a defense does not allow a criminal defendant to admit inadmissible evidence.

Matthew Price's evidence was inadmissible hearsay.

The Defendant called Matthew Price, who was incarcerated with TJ Seward, to testify. RP Vol. II at 387. The Defendant attempted to elicit testimony from Mr. Price that Seward had said he would "would lie to the Court, would lie to the jury, would lie to anybody to make sure that he got off of his charges and make sure that [the Defendant] was convicted of the underlying offenses." RP Vol. II at 388.

However, Seward had not been cross-examined about any such statements. RP Vol. II at 394. The trial court ruled that such testimony was hearsay, and sustained the State's objection to it. RP Vol. II at 395. The Defendant's trial counsel conceded that the testimony was inadmissible hearsay. RP Vol. II at 395.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted.” ER 801(c). Hearsay is inadmissible unless an exception applies. ER 802. Appellate courts review a trial court’s evidentiary decisions on an abuse of discretion standard. *State v. McWilliams*, 177 Wn. App. 139, 147, 311 P.3d 584, 588 (2013) (citing *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).) Abuse of discretion means that no reasonable person would have decided the matter as the trial court did. *Id.* (citing *Thomas*.)

In *State v. Harmon*, the Washington State Supreme Court held that questioning a witness about his or her out-of-court statements was necessary foundation before using those statements to impeach or show bias or prejudice. *Harmon*, 21 Wn.2d 581, 590-91, 152 P.2d 314, 318-319 (1944). In *Harmon* the trial court’s decision to prohibit the defense from calling a witness to impeach the State’s witness was upheld because such foundation had not been laid. *Id.* at 591.

Here, as in *Harmon*, the Defendant failed to lay the foundation to impeach Seward with Matthew Price’s testimony. Price wanted to testify that Seward had said he would lie, which was clearly offered to try to prove Seward had lied to the jury.

Although the right to present a defense is guaranteed by both the State and Federal constitutions, the right to present a defense “does not extend to the introduction of otherwise inadmissible evidence.” *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669, 675 (2010).

The Defendant claims ER 607 makes the hearsay admissible. But that rule simply states the now-uninteresting maxim that a witness may be impeached by either party - enacted to eliminate the previous prohibition on impeaching one’s own witness. *State v. Allen S.*, 98 Wn. App. 452, 459, 989 P.2d 1222, 1226 (1999). And extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same. ER 613(b).

Defendant cites to the U.S. Supreme Court case *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 110, 539 L.Ed.2d 347 (1974) for the proposition that the constitution compels the admission of the inadmissible hearsay in the name of the right to present a defense. But that case is inapposite because its ruling is based on the right to confront.

In *Davis*, the defendant was on trial for burgling a bar. *Davis* at 309. 17-year-old Richard Green testified that he witnessed two men near his house, and identified the defendant as one of the men, and said he had had a crowbar. *Id.* at 310. Apparently, the safe stolen from the bar was

found on Green's property. *Id.* at 312. Green was on probation to the juvenile court for having burgled two cabins. *Id.* at 310-11.

The prosecutor moved to exclude evidence of Green's juvenile record. *Id.* The defendant argued that he should be able to use Green's probation status to show that Green may have made a hasty and faulty identification, was trying to divert attention away from himself as a potential suspect, or was subject to undue pressure for fear of having his probation revoked. *Id.* at 311. However, the trial court excluded the evidence that Green was on probation. *Id.*

The U.S. Supreme Court reversed, finding that the defendant's Sixth Amendment right to *confrontation* had been violated by the *limitation on cross-examination*. *Id.* at 315.

This differentiates *Davis* from the instant case because here the Defendant's attorney never asked TJ Seward about the alleged out-of-court statements about his intent to lie. Had he done so, the testimony of Price may have been proper impeachment evidence, as the trial court indicated. *See* RP Vol. II at 394.

The case of *Massey v. United States* is on point. In *Massey*, a rape case, the 9th Circuit Court of Appeals held that the defense could not call a witness to testify about out-of-court statements made by a witness who

wasn't asked about those statements. *Massey v. United States*, 407 F.2d 1126, 1127-28 (9th Cir. 1969). In that case the defense asked the victim, Evangeline, if she had ever gone out with someone named Sherman Wool. *Id.* Her answers were inconclusive. *Id.* The defense then proceeded to call a nurse from a hospital Evangeline had recovered at. *Id.* at 1128. The defense asked the nurse if Evangeline had said she had lived with Sherman Wool. *Id.* The nurse answered yes. *Id.* The court struck this testimony. *Id.*

The defendant assigned error to this ruling, claiming that it was probative evidence of prior acts of unchastity. *Id.* But the 9th Circuit ruled that the nurse's testimony was hearsay, and not admissible for impeachment because the proper foundation, that of asking Evangeline about the statements, had not been laid. *Id.*

Just like *Massey*, without questioning Seward about the alleged statements, Price's testimony lacks foundation to be impeachment evidence, and is inadmissible hearsay. The trial court was right to exclude it. This Court should affirm that ruling.

Harmless error.

Even if the trial court's decision was error, it was harmless in context of the entire trial. A reviewing court evaluates hearsay in the

context of all the other evidence presented at trial. *State v. Watt*, 160 Wn.2d 626, 633, 160 P.3d 640 (2007).

Even if this were a constitutional error, as the Defendant alleges, confrontation clause errors are subject to harmless error analysis. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640, 644 (2007).

In the end, Craven's testimony was vastly more important than Seward, who was an unwilling, almost hostile witness for the State. And Craven's testimony was corroborated by the physical evidence, including the fact that his blood was found smeared in the house, Erick Knight's testimony, weapons matching his description found in the house, and most compellingly, his injuries, which were observed by both Ms. Heath, Mr. Dawson and photographed by Officer Blundred.

Questionable testimony by Price, an admitted felon, that Seward, another admitted felon, had said he would lie while in jail, was relatively unimportant. Even if the Court rules that it was error to exclude the testimony, it should rule that the error is harmless and uphold the conviction.

3. Allowing the testimony of Brandon Craven in rebuttal was not error.

Brandon Jenkins, the Defendant's witness, testified that TJ Seward was the one who had had tied up and assaulted Brandon Craven,

contradicting Seward's testimony completely. He also testified that TJ Seward threatened everyone in the house with the .22 revolver, and forced him to lie to the police about what had happened. Jenkins' testimony completely refuted everything that had been presented to incriminate the Defendant. In rebuttal, the State presented the only other person present for the events who had not yet testified: Brandon Craven. Craven's testimony corroborated the evidence produced during the case-in-chief. The Defendant's trial counsel only objected to Craven's testimony because he had wanted to depose Craven, but had not had the opportunity.

Despite this, the Defendant now claims it was error to allow the State to present this rebuttal evidence because he had to change his defense, which he never alleged below. But rebuttal evidence may consist of evidence that could have been introduced during a case-in-chief. There was no error.

This alleged error is not preserved for appeal.

The Defendant claims that, “[o]ver Mr. Airington's objection, the court allowed the government to reopen its case and to allow Craven to testify.” This is not exactly the case.

When Craven appeared in the State's rebuttal case, the Defendant asked 1) for the trial court to grant a previously denied motion to dismiss

for government mismanagement for losing track of Craven; or, in the alternative 2) for a mistrial. RP Vol. III at 457-58. The Defendant's trial counsel never said that the defense, which had been a total denial of all criminal conduct, had changed. Craven did not bring any new allegations against the Defendant. He simply gave another account of what had already been presented.

However, for the first time on appeal, the Defendant now claims that he had only two hours to "alter his defense, which had substantially changed" due to the testimony of Craven. Brief of Appellant at 37.

"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). "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a).

Because the Defendant did not object on the basis that he now assigns error, this Court should not entertain this, but instead rule it unpreserved for appeal.

Rebuttal evidence may overlap with evidence from the case-in-chief.

Even if this Court reaches the issue, there was no error, as allowing Craven's testimony was well within the trial court's discretion.

“[T]he admission and determination of the propriety of rebuttal testimony rests largely in the discretion of the trial court.” *State v. Fairfax*, 42 Wn.2d 777, 780, 258 P.2d 1212, 1214 (1953). Error in allowing rebuttal evidence can only be predicated upon a manifest abuse of discretion. *State v. White*, 74 Wn.2d 386, 395, 444 P.2d 661, 667 (1968).

“Frequently true rebuttal evidence will, in some degree, overlap or coalesce with the evidence in chief.” *White* at 395. “[R]ebuttal evidence will frequently overlap with the evidence in chief.” *State v. Swan*, 114 Wn.2d 613, 653, 790 P.2d 610, 631 (1990), *as clarified on denial of reconsideration* (June 22, 1990) (citing *White, supra.*) Once a Defendant presents evidence denying acts of misconduct, the door is opened to the State presenting evidence to impeach such assertions. *Id.*

Craven's testimony in large part corroborated what had already been presented through the testimony of TJ Seward, Erick Knight, Jonni Heath and Ryan Dawson. Just because his testimony *could* have been presented in the State's case-in-chief does not mean it *had* to be.

The Defendant's assignment of error appears largely predicated on his designation of Brandon Craven as the State's "chief" witness. This term has no legal significance. The Defendant cites to no case that stands for the proposition that a defendant's designation of one witness' relative importance governs how a plaintiff presents its case.

Here, the trial court ruled that, since the Defendant's evidence completely contradicted pretty much everything the State had presented, there would be no limitation to Brandon Craven's rebuttal testimony. RP Vol. III at 455. This was well within the court's discretion. This Court should rule there was no abuse of discretion and affirm the trial court.

The Defendant fails to establish how the timing of Brandon Craven's testimony effected the defense.

The Defendant characterizes Brandon Craven's testimony as a rebuttal witness as the trial court "re-opening" its case. However, even allowing a party to re-open its case is within the discretion of the trial court. *State v. Brinkley*, 66 Wn. App. 844, 848, 837 P.2d 20, 22 (1992). Such a decision will be left undisturbed by an appellate court, except on a

showing of manifest abuse of discretion and prejudice to the complaining party. *Id.*

Here, the Defendant attempts to manufacture prejudice by claiming that he had to completely change his defense. If believed, the change appears to be from only impugning TJ Seward's testimony to having to impugn Brandon Craven's as well. It is not at all clear how this is such a substantive change in trial strategy, as it still amounts to a denial of all criminal conduct.

To make the issue one of constitutional magnitude, the Defendant raises the spectre of ineffective assistance of counsel. This appears to be based on the Defendant's trial counsel's conclusory remark that, "my job, the Court's job, and [the Prosecutor]'s job is to make sure that [the Defendant] has a fair trial and he's not going to get a fair trial with an ineffective counsel." RP Vol. III at 458.

The trial court, however, did not buy this argument because Craven had been expected to testify from all along. The trial court said,

[W]hen this trial started Tuesday morning you didn't know whether Craven was going to be here to testify or not. [The prosecutor] didn't know and certainly I didn't know. I mean so I think everyone came here prepared to hear testimony from Craven

RP Vol. III at 458. In other words, the Defendant's trial counsel could not be ineffective due to the *timing* of Craven's testimony. It made no difference if Craven was going to testify during the State's case-in-chief or in rebuttal; the Defendant's trial counsel would have prepared to attack Craven's testimony as part of routine trial preparation.

What the Defendant's trial counsel was alleging was prejudice because he had not been able to depose Craven in hopes of eliciting inconsistent statements from him. RP Vol. III at 460.

But what value a deposition would have had is unclear. The defense had been provided with transcripts of three interviews of Brandon Craven. CP at 118 *and see* RP Vol. III at 462. And these transcripts contained inconsistent statements by Craven. Craven admitted to lying to Officer Blundred at the hospital. RP Vol. III at 504. He was cross-examined about his inconsistent statements as well. RP Vol. III at 514.

Although a criminal defendant has a right to interview potential state witnesses, the right is not absolute. *State v. Wilson*, 108 Wn. App. 774, 778, 31 P.3d 43, 46 (2001), *aff'd*, 149 Wn.2d 1, 65 P.3d 657 (2003) (citing *State v. Hofstetter*, 75 Wn.App. 390, 397, 878 P.2d 474, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994).) It is within the discretion of the trial court to decide what course of action to take if an ordered

deposition is ineffectual. *State v. Peele*, 10 Wn. App. 58, 69, 516 P.2d 788, 794 (1973).

Finally, it is unclear how the timing of Craven's testimony was prejudicial because afterwards the Defendant was given an opportunity to continue with surrebuttal, but he declined. RP Vol. III at 521.

Because the trial court has discretion to allow the testimony the Defendant complains of, and there was no prejudice, this Court should reject the Defendant's assignment of error and affirm the conviction.

CONCLUSION

The Defendant assigns constitutional error to three evidentiary decisions of the trial court. But none of the alleged errors are constitutional in nature. The Defendant alleges that they are of constitutional magnitude because, no doubt, because if they were errors, they would be harmless. This Court should affirm the Defendant's convictions.

DATED this 26th day of June, 2020.

Respectfully Submitted,

BY 

JASON F. WALKER
Chief Criminal Deputy
WSBA # 44358

GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

June 26, 2020 - 4:52 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53173-9
Appellate Court Case Title: State of Washington, Respondent v. Jarrod A. Airington, Appellant
Superior Court Case Number: 18-1-00472-4

The following documents have been uploaded:

- 531739_Briefs_20200626165149D2389075_8024.pdf
This File Contains:
Briefs - Respondents
The Original File Name was BRIEF OF RESPONDENT 53173-9.pdf

A copy of the uploaded files will be sent to:

- appeals@co.grays-harbor.wa.us
- greg@washapp.org
- ksvoboda@co.grays-harbor.wa.us
- travis@washapp.org
- wapofficemail@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Jason McQuaid - Email: jmcquaid@co.grays-harbor.wa.us

Filing on Behalf of: Jason Fielding Walker - Email: jwalker@co.grays-harbor.wa.us (Alternate Email:)

Address:

102 West Broadway #102

Montesano, WA, 98563

Phone: (360) 249-3951 EXT 1619

Note: The Filing Id is 20200626165149D2389075