

IN THE COURT OF APPEALS  
OF THE  
STATE OF WASHINGTON

DIVISION THREE

---

STATE OF WASHINGTON,

Respondent,

v.

EDWARD W. TERRY,

Appellant.

---

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

The Honorable William D. Acey

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APPELLANT'S OPENING BRIEF

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## **A. SUMMARY OF ARGUMENT**

After a jury trial, where the trial court described evidence as “tenuous,” Edward Terry was convicted of theft of a stolen vehicle, possession of a stolen vehicle, trespassing and resisting arrest. The evidence at trial showed a 10-hour gap of evidence between the time the vehicle was last seen in Dayton, Washington, and the time of the defendant’s arrest. Moreover, the defendant was arrested at least two miles from the vehicle, which (it is undisputed) was crashed by an individual on farm land belonging to Angelia and Gordon Smith. The Smiths – the only witnesses to the accident – described the individual who left the scene to be as short as 5 foot 6 inches tall (the defendant is 6 feet 2 inches), with no white clothing (the defendant had a white shirt under his plaid jacket), and with long hair (the defendant had closely cropped hair). The arresting police officer testified regarding tread on photographs of shoe prints he took in the area and described them as consistent with the defendant’s shoes, but the trial court would not allow the officer to be cross-examined regarding expertise needed for an exact match. Other errors included: allowing testimony and comments on post-arrest silence; failing to order a mistrial after a juror saw the defendant in custody; coercing the jury into a verdict; and using a high offender score even though the prosecutor did not prove criminal history.

Even without error, the evidence was insufficient to convict on the first three counts, and the Court should remand this case with instructions to enter verdicts of not guilty on them. In the alternative, and at a minimum, the various trial errors require reversal of all four counts, especially in a case like this, where evidence was tenuous at best.

### **B. ASSIGNMENTS OF ERROR**

1. The evidence was insufficient to sustain convictions for theft of a motor vehicle, possession of a stolen vehicle and trespassing.
2. The trial court committed reversible error when it allowed comment on the defendant's post-arrest silence.
3. The trial court committed reversible error when it prohibited cross-examination of a police officer regarding the level of expertise needed for shoe print analysis and matching.
4. The prosecutor's argument was improper in that she misstated facts and law, improperly placed the burden on the defendant to present evidence, and impermissibly commented on his post-arrest silence.
5. The trial court erred when it failed to order a mistrial after one juror saw the defendant in custody in the courthouse, especially when a police officer testified that he knew the defendant previous to this case.

6. The trial court erred when it impermissibly coerced the jury into reaching a verdict both when instructing the jury regarding unanimity and when sending the jury to deliberate when one verdict form was blank.

7. The trial court erred when it sentenced Mr. Terry as if he had an offender score of eight when the State presented no evidence to prove the underlying criminal history.

8. Cumulative error requires reversal.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is a defendant's right to due process under the Washington Constitution, Article 1, § 3 and the United States Constitution, Fifth and Fourteenth Amendments violated when the State fails to prove all essential elements of the crimes of theft of a motor vehicle, possession of a stolen vehicle, and trespassing, especially when the State misstates facts and law during closing and places the evidentiary burden on the defendant?

2. Is flight from a vehicle (without police present) sufficient additional evidence to "mere possession" to sustain theft convictions?

3. Is a defendant's right against self-incrimination under the Washington Constitution, Article 1 § 9 and the United States Constitution, Fifth and Fourteenth Amendments violated when a court, over objection, allows a juror question on a defendant's post-arrest silence and that error

is compounded when the prosecutor uses that post-arrest silence in closing argument as evidence of guilt?

4. Is a defendant's right to confront witnesses under the Washington State Constitution, Article 1, § 22 and the United States Constitution, Sixth and Fourteenth Amendments violated when a trial court allows a prosecuting witness to testify regarding footprint analysis but prohibits defense counsel from cross-examining on the witness' lack of qualifications to so testify?

5. Does a prosecutor violate a defendant's right against self-incrimination under the Washington Constitution, Article 1 § 9 and the United States Constitution, Fifth and Fourteenth Amendments and right to due process under the Washington Constitution, Article 1, § 3 and the United States Constitution, Fifth and Fourteenth Amendments when the prosecutor comments negatively in closing on the defendant's post-arrest silence and places the burden of proof on the defendant?

6. Is a prosecutor's closing argument improper when she comments on a defendant's post-arrest silence, places the burden of proof on the defendant, and misstates salient facts?

7. Is a defendant's right to due process under the Washington Constitution, Article 1, § 3 and the United States Constitution, Fifth and Fourteenth Amendments and right to presumption of innocence violated when a juror sees him in the custody of the Department of Corrections?

8. Is a defendant's right to a fair jury trial under the State and Federal Constitutions violated when the trial court fails to give no verdict as an option in answer to a question from the jury as to whether its verdict is unanimous –and is that error compounded by the fact that the “to-convict” instructions state the jury had a “duty to return a verdict of guilty” if it found each element proven beyond a reasonable doubt and by the fact that the court sent back the jury to fill in the verdict form for Count C (trespassing) when the form wasn't yet filled out?

9. Is CrR 6.15(f)(2) impermissibly violated when a trial court instructs a jury that its verdict must be unanimous in response to a jury question of whether all jurors “must agree on a ‘not guilty’ verdict or if non-agreement on guilty results in a not guilty ruling”?

10. Does a trial court err when it sentences a defendant to an offender eight guideline when the State did not prove prior history?

11. Does the cumulative error of all the matters outlined above result in reversible error and the need for a new trial on all four counts?

#### **D. STATEMENT OF THE CASE**

On May 21, 2011, Edward Terry was arrested for theft of a vehicle, possession of a stolen vehicle, trespassing and resisting arrest. (CP 5-7) At the time of arrest, he asserted his right to remain silent. (CP 2)

At trial, evidence showed that, between 8:30 to 9 p.m. on May 20, 2011 and 7:30 to 8 a.m. the next day, a vehicle was stolen in the town of Dayton, Washington. (RP 203-204) It also showed that, at about 7 a.m. on May 21, two people (Angelia and Gordon Smith) witnessed a one-vehicle accident of what turned out to be that stolen truck. (RP 160, 171) Someone ran from the truck after the crash and the Smiths lost sight of him. (RP 162, 172) The Smiths reported that this individual was a man between 5 foot 6 inches and 6 feet tall, wearing dark clothing with long, dark hair, and no white. (RP 167, 173, 186-87) He turned towards them, so if he were wearing white, it would have been noticeable. (RP 167, 189) Mr. Smith saw the individual “turn around in a kind of swinging motion, looked like he threw something, or maybe he didn’t throw anything at all into the field...” (RP 172) Nothing was found in the area. (RP 215)

The accident occurred on a county road. (RP 214) The Smiths were only able to see shapes and colors as they were an eighth to a quarter mile away from the crash. (RP 166, 186) Mr. Smith could not see facial features, nor could he identify the defendant positively as the individual

who left the vehicle. (RP 186, 188) They reported the incident to police, who came to the scene. (RP 164) Mr. Smith accompanied the officer to search for the individual who had left the scene. (RP 164) Only 15 to 17 minutes had passed. (RP 188) At least two miles from the crash site (“as the crow flies”), Mr. Smith and the police officer saw the defendant walking slowly. (RP 188) The defendant is 6 foot 2 inches tall. He was wearing a white shirt under his jacket. (RP 255) He had very short hair. (RP 289) He was arrested at gunpoint. (RP 279) When told he was resisting arrest, he stated that he was not resisting. (RP 181) His handcuffs had to be adjusted for comfort. (RP 181) He exercised his right to remain silent. (CP 2) He had no bruises or cuts consistent with an accident. (RP 289) The officer stated he knew the defendant from previous contacts. (RP 225-226)

At that point, the truck had not been reported stolen. (RP 226) The officer testified that, in his experience, there were a myriad of things that could be happening. (RP 226) (“usually when people flee the scene of a collision, there’s something else going on – maybe they’re intoxicated, don’t have insurance, have warrants for their arrest, a myriad of things”).

During testimony, the arresting officer stated that he had taken photographs of footprints at the scene. (RP 236) The prosecutor asked if he had training in shoeprint analysis, and he answered that he had taken an

introductory class on tracking at the Police Academy where shoe print analysis was included. (RP 238-239) He testified that he was looking for marks to distinguish between boots and sneakers. and that different shoes leave similar patterns. (RP 239-240, 288) He testified that the shoe prints were “consistent” with defendant’s shoes, even though many of the prints had no noticeable tread mark, or were showing only a “v” wavy mark rather than a “w,” or were difficult to see overall because they did not hold their shape, and even though he lost the tracks three times and did not attempt to follow them into the second wheat field. (RP 239, 241, 249, 282-283, 284, 286)

On cross examination, defense counsel asked the officer whether shoe print matching was a forensic activity. (RP 287) The officer agreed that it was. (RP 287) Defense counsel asked if an expert would be needed to make an exact match. (RP 287) The prosecutor objected, saying that “the State has not required expert testimony.” (RP 287) The court acknowledged the officer’s testimony regarding his training but sustained the objection, apparently on the basis that the officer had not offered an opinion. (RP 287)

After the officer’s testimony, a juror had a question about whether the defendant had asked or wondered why he was being arrested. (RP 292) Defense counsel objected. (RP 292) His objection was overruled. (RP

293) The officer then testified that the defendant had not asked why he was being arrested. (RP 293) This came after the officer had brought up the fact that he had given the defendant *Miranda* warnings. (RP 230)

Prior to trial, the defendant – who was in the custody of the Department of Corrections on a different matter – won a motion in front of the court commissioner to have the DOC cover up their insignia. (CP 113-115) The trial court did not overturn that ruling, though it did opine that it would have made a different decision in that regard. (RP 65) During a break, however, a juror saw the defendant being led away by officers in shackles. (RP 299) The juror acknowledged that he saw this. (RP 201) The trial court denied defense counsel’s motion for a mistrial, finding that there was no prejudice to the defendant, and stated, “I don’t think it’s any secret to anybody that, ah, Mr. Terry is in custody.” (RP 303-304) This statement was made in spite of the fact that the fact of custody had been kept hidden from the jury due to the court commissioner’s ruling regarding uniforms and insignia. The court offered to give a curative instruction, but defense counsel already had indicated concern about bringing too much attention to the circumstance. (RP 68, 304)

At the end of the State’s case, the court denied the defendant’s motion to dismiss. The court stated the evidence was “tenuous,” and the State “did not prove that Mr. Terry knew [the vehicle] was stolen,” but

found that the time of ten hours was “sufficiently short” to allow inference of theft. (RP 297-298) He later referenced the individual’s flight from the vehicle, and that keys were never recovered. (RP 298)

During closing, the prosecutor misstated facts (e.g., that Mr. Smith positively identified the defendant as being at the truck), mis-stated law (e.g., saying her burden was met when Mr. Smith identified the defendant as that person), placed the burden on the defendant (saying the jury could consider the “lack of evidence”), and commented on post-arrest silence (raised by juror question). (RP 322, 329, 346)

As to instructions: the court instructed the jury (without objection), in “to-convict” instructions, that it “had a duty to convict” if it found the elements of the offense committed beyond a reasonable doubt. (CP 150, 152, 156, 159) Then during deliberations, the jury asked, “Do all 12 jurors need to fully agree on a not guilty verdict, or is non-agreement on guilty result in a not guilty ruling?” (CP 163) The court responded, “Your verdict, whether it is ‘not guilty’ or ‘guilty,’ must be unanimous.” (CP 163) Then when the court reviewed verdict forms, it sent the jury back to deliberate because Verdict Form C (trespassing) was not filled out. (RP 353)

As to the form, the prosecutor guessed “they weren’t able to reach a verdict on that and they did not know what to do.” (RP 353) The forms

had no instruction of what to do in case of a hung jury (i.e., leave it blank). (RP 354) The jury came back with “guilty” verdicts on all counts. (RP 355)

At sentencing, the court gave the defendant an offense score of 8 even though the State proved no criminal history, for a range of 33 to 43 months. (CP 206, RP 382) The court sentenced the defendant to high end of the range (i.e., 43 months). (CP 207) This appeal followed.

### **E. ARGUMENT**

1. The evidence was insufficient to sustain a conviction on theft of a motor vehicle, possession of a stolen vehicle, or trespassing.

There was insufficient evidence to convict Mr. Terry of theft of a motor vehicle, possession of a stolen vehicle, or trespassing based solely on “mere possession” evidence and inadequate witness identification.

The State must prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). To determine whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in the light most favorable to the State to determine whether “any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Romero*, 113 Wn. App. 779, 797, 54 P.3d 1255 (2002) (quoting *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992)); *State v. Wilson*, 141 Wn. App. 597, 608-09, 171 P.3d 501 (2007) (citing *State v. Green*, 94 Wn. 2d 216, 220-21, 616 P.2d 628

(1980)). In the review for sufficient evidence, circumstantial evidence is considered equally as reliable as direct evidence. *Romero*, 113 Wn. App. at 798; *Wilson*, 141 Wn. App. at 608. “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *Id.* (quoting *State v. Myers*, 133 Wn. 2d 26, 38, 941 P.2d 1102 (1997)).

Constitutional violations are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wn. 2d 695, 702, 257 P.3d 570 (2011). This Court reviews insufficient evidence claims for whether, when viewing evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009). Sufficiency challenges admit the truth of the State's evidence and all reasonable inferences drawn from it. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn. 2d 385, 622 P.2d 1240 (1980).

As a part of the due process rights guaranteed under both the state and federal constitutions, the State must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn. 2d 487, 488, 670 P.2d 646 (1983).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499

P.2d 16 (1972). “Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745 (1986).

There must be at least substantial evidence that supports all elements of the crime charged. *State v. Cleman*, 18 Wn. App. 495, 498, 568 P.2d 832 (1977). While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn. 2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baez*, 100 Wn. 2d at 491.

Mere possession of a recently stolen vehicle is insufficient evidence to make out a prima facie case of theft or of possession of a stolen vehicle with the requisite malintent. See e.g., *State v. Ehrhardt*, 167 Wn. App. 933, 939-940, 276 P.3d 332 (2012). It is true that possession will be sufficient if coupled with “slight corroborative evidence” to prove knowledge. *State v. Womble*, 93 Wn. App. 599, 604, 696 P.2d 1097 (1999). Such additional evidence in a case of theft of a motor vehicle can

be “a damaged ignition, an improbable explanation, or fleeing when stopped.” *State v. L.A.*, 82 Wn. App. 275, 276, 918 P.2d 173 (1996).

None of this happened here. The defendant asserted his *Miranda* rights against self-incrimination so there was no explanation (and so no “improbable explanation”). There was no evidence of a damaged ignition. The flight of the individual in the truck was not in connection with an officer trying to stop him. Thus, “mere possession” was insufficient to sustain the conviction.

The State will argue that the individual’s generic flight from the truck was the additional evidence needed to prove its case.<sup>1</sup> However, it was not the crime scene and there was no officer in sight, so the “flight” was not the kind contemplated to suffice as additional evidence. Cf. *State v. Hudson*, 56 Wn. App. 490, 784 P.2d 533 (1990) (defendant’s flight from police while in possession of vehicle is sufficient to convict on theft); *In re Ness*, 70 Wn. App. 817, 855 P.2d 1191 (1993) (leaving work release

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<sup>1</sup> The State also argued that the Defendant lived near the home where the truck was stolen. But the “corroborating evidence” would be proximity to the scene of the crime at the time of the crime – not living near it. And this is Dayton – a small town where everyone lives close to everyone else. A review of the jury panel shows no less than 16 of its members either knew personally, were related to, or were neighbors with one (if not more) of the witnesses, the attorneys or the Defendant – and 3 of those 16 ended up on the jury. Only two – a current client of defense counsel and a relative of Defendant – were stricken for cause. (RP 82, 89) Even then, the client was stricken only because he was current (not past), and the relative was stricken only after he said he could not be fair to the Defendant (as it would be like a “skunk” in the jury box). (RP 82, 89) As the trial court stated: “I know better than to ask you how many of you know each other. I saw a lawyer do that once in Garfield County and everybody stood up.” (RP 91)

*program* was “flight,” and one piece of evidence that assisted in sustaining burglary guilty pleas). In fact, the officer testified there could be a “myriad” of reasons a person leaves the scene of an accident, irrespective of vehicle ownership. (RP 226) (“usually when people flee the scene of a collision, there’s something else going on – maybe they’re intoxicated, don’t have insurance, have warrants for their arrest, a myriad of things”).

The State of Washington takes seriously the need for corroborating evidence when the charge is theft or possession of stolen property and the evidence is “mere possession.” See e.g. *State v. Mace*, 70 Wn. App. 817, 855 P.2d 1191 (1993) (conviction vacated, even though evidence showed defendant possessed ATM card and had been present at ATM machine, because the prosecutor impermissibly relied upon defendant’s post-arrest silence as evidence that defendant did not have explanation for possessing the card, and the evidence was otherwise insufficient to prove theft); cf. *State v. L.A.*, supra (conviction of 14-year-old’s theft of a vehicle vacated even with evidence that glass was broken out in back, as defendant pulled over when police stopped her). This principle – that mere possession will not sustain a theft conviction – is especially important in cases where the evidence is circumstantial. See *Mace*, 70 Wn. App. at 843 (when vacating conviction, Court noted that “[t]he reason for the [‘mere possession’] rule is more evident when such possession is established by inference or

circumstantial evidence, as we have here, rather than direct evidence”). Therefore, the principle stated on page above (that circumstantial evidence is not sufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt, *Baez*, 100 Wn. 2d at 491) is especially important and applicable in a case where the evidence is circumstantial only and the evidence shows “mere possession.”

These are the facts here – that the evidence is circumstantial as to whether the driver had the *scienter* for this crime (if the defendant was even the driver of the vehicle in this first place). In fact, this case is eerily like *Mace*, as the State here also improperly commented on defendant’s post-arrest silence. (See RP 329) (“did the defendant ask why he was arrested? No. He knew. He knew that he had stolen the vehicle and would get caught ... He knew he trespassed ... That’s why he didn’t ask the question”).

And these circumstances were exacerbated further by the State’s decision to mischaracterize the law. For example, the State misstated the burden when it said there was “no dispute” that the person at the truck was also the one who had stolen the vehicle (even though mere possession is insufficient to prove that a theft was actually committed). (RP 320) The State then misrepresented the evidence needed (i.e., “I submit to you that, based on Mr. Smith’s identification alone, we can find beyond a

reasonable doubt that the defendant is the one who stole the vehicle”), and implicitly put the burden on the defendant to produce evidence (i.e., “lack of evidence, in addition to evidence is something you can consider” coupled with: “[i]s it reasonable that the defendant just happened to be in the stolen vehicle the morning when it was discovered stolen from the night before? No it’s not reasonable that someone else took that vehicle”). (RP 322, 346) The errors were substantial. The conviction is infirm.

And the above is true *even if* the Court assumes that the evidence connecting the defendant as the driver of the vehicle was sufficient (which we assert it was not). In fact, all that the evidence showed was that a male drove the vehicle and the defendant was a male located at least two miles from the crash site about 20 minutes after the crash. The description – a male as short as 5 feet 6 inches tall (the defendant is 6 feet 2 inches), with no white clothing (the defendant had a white shirt under his jacket), with long hair (the defendant had a nearly shaven head) – was *inconsistent* with the defendant otherwise. Moreover – and even if the shoeprints were presented properly (which they were not, see E.3 *infra*), the most that can be said about them is that the State was attempting to show whether the individual leaving the truck was wearing boots or sneakers. (RP 239-240) A conviction may not be sustained on shoeprint evidence alone. See *State v. Strandy*, 49 Wn. App. 537, 543, 745 P.2d 43 (1987) review denied, 109

Wn. 2d 1027 (1988) (holding that shoe print evidence was admissible as to its consistency to the defendant's shoe tread, but would be insufficient to sustain the conviction on its own). The lack of proper identity makes this conviction infirm as on this basis as well.

As to trespassing: as explained in the preceding paragraph, the evidence was insufficient to find that the defendant was the individual who left the vehicle and thus it was insufficient to convict him of trespassing on the Smiths' land (the trespassing count), as Mr. Smith specifically testified that the defendant was not arrested on his land. (RP 183)

Given the above, and the evidence needed to prove these alleged offenses, we ask that the Court vacate and dismiss with prejudice the convictions of theft, possession of a stolen vehicle, and trespass.

2. The trial court committed reversible error when it allowed comment on the defendant's post-arrest silence.

It was constitutional error to permit, over objection, a juror's question of whether the defendant asked why he was being arrested – error compounded when the prosecutor argued in closing that the defendant did not ask because he knew he was guilty of the crimes charged.

*A. Standard of Review*

Constitutional violations are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wn. 2d 695, 702, 257 P.3d 570 (2011). Constitutional

error is presumed to be prejudicial and the State bears the burden of proving the error was harmless. *State v. Stephens*, 93 Wn. 2d 186, 190-91, 607 P.2d 304 (1980). The test is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. See *State v. Brown*, 147 Wn. 2d 330, 341, 58 P.3d 889 (2002). Eliciting testimony about and commenting on a defendant's post-arrest silence or partial silence is constitutional error and subject to the stringent constitutional harmless error standard. *State v. Easter*, 130 Wn. 2d 228, 236-37, 242, 922 P.2d 1285 (1996). A constitutional error is harmless beyond a reasonable doubt only if the untainted evidence is so overwhelming that any rational trier of fact would necessarily have found the defendant guilty. See *State v. Fuller*, 282 P.3d 126, 169 Wn. App. 797 (2012) (citing *Easter*, supra).

#### *B. Argument*

The State may not act in a manner that would unnecessarily chill the exercise of a constitutional right, and may not draw unfavorable inferences from the exercise of a constitutional right. *State v. Rupe*, 101 Wn. 2d 664, 705, 683 P.2d 571 (1984); *State v. Frampton*, 95 Wn. 2d 469, 627 P.2d 922 (1981); *State v. Mace*, 97 Wn. 2d 840, 650 P.2d 217 (1982)). “Calling the defendant's post-arrest silence to the attention of the jury, or suggesting that an unfavorable inference might be drawn therefrom

violates due process.” *Mace*, 97 Wn. 2d at 844. “Similarly, this court cannot, consistent with due process, view a defendant's post-arrest silence as evidence of his guilt.” *Id.*

Here, a juror posed a question as to whether the defendant asked why he was being arrested, or if he had wondered about it. Over the defendant’s objection, the court allowed the question. The question necessarily asked for statements made by defendant after the defendant had been told he was arrested. Moreover, the officer already had impermissibly volunteered during testimony that he had read the defendant his rights. There is no dispute that defendant exercised his right to remain silent, and any question regarding whether he asked why he was being arrested would necessarily elicit a comment on his post-arrest silence. This was error of constitutional magnitude.

During closing, the prosecutor referenced this very exchange, thus compounding the error. Specifically the prosecutor said:

“One more item I want to talk about in regards to resisting arrest, and actually applicable, ah, to all the charges here is: when Deputy Loyd was asked, did the defendant ask why he was being arrested? No. He knew. He knew that he had stolen a vehicle and he was going to get caught. He knew that he possessed that vehicle and wrecked it. He knew that he trespassed. That’s why he didn’t ask the question.”

(RP 329)

Thus, by allowing the question regarding post-arrest silence over defense objection, the court erred. By asking the question and by using the evidence during closing, the State erred. Each error is of constitutional magnitude. Given the insufficiency of the evidence, the error cannot be remedied. This is especially true because the officer had commented on giving *Miranda* warnings, and had stated he knew the defendant from previous contacts. (RP 226, 230) Thus, while the convictions should be reversed because of insufficient evidence, we argue, in the alternative, that the paucity of evidence in the first place makes these circumstances, and comments on defendant's post-arrest silence, reversible error. The State cannot prove harmless error here (i.e., that the untainted evidence was so overwhelming as to sustain the conviction).

This is so not just for the first three convictions (theft, possession of a stolen vehicle, and trespassing) but for the charge of resisting arrest as well. While the defendant's behavior during arrest was not laudable (e.g., he mooned the officer and witness), he did drop to the ground and put his hand behind him to be handcuffed. (RP 229) And while the evidence (taken in the light most favorable to the government) may be sufficient for the conviction, there were other inferences that the jury could have made that could easily have resulted in a not-guilty verdict. For instance, the very fact that the handcuffs had to be adjusted for comfort, gives a

plausible explanation for the defendant's movements while being handcuffed. These comments on post-arrest silence should result in reversal of the conviction for resisting arrest as well.

3. The court committed reversible error when it prohibited cross-examination of a police officer regarding the level of expertise needed for shoe print analysis and matching.

It was reversible error for the trial court to limit cross examination of a police officer on the level of expertise needed to make a proper shoe print analysis when the officer had testified on direct examination as to whether the defendant's shoe tread matched shoe prints, and as to the officer's training in that regard.

*A. Standard of Review*

The appellate court reviews a trial court's limitation of cross examination for abuse of discretion. *State v. Campbell*, 103 Wn. 2d 1, 20, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094 (1985). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn. 2d 276, 283-84, 165 P.3d 1251 (2007). A trial court also abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies an incorrect legal standard, or bases its ruling on an erroneous legal view. *Lord*, 161 Wn. 2d at 284.

### *B. Argument*

The trier of fact is the sole and exclusive judge of the evidence. *State v. Bencivenga*, 137 Wn. 2d 703, 709, 974 P.2d 832 (1999). No witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or inference. *State v. Black*, 109 Wn. 2d 336, 348, 745 P.2d 12 (1987). But someone with knowledge beyond the ken of the jury may testify as to that knowledge. Cf. *Reese v. Stroh*, 128 Wn. 2d 300, 208, 907 P.2d 282 (1995). Nonetheless, on cross examination, that individual's qualifications may be challenged. "The right to cross-examine in a criminal case is basic and is zealously guarded by the courts." *State v. Swenson*, 62 Wn. 2d 259, 279, 382 P.2d 614 (1963). Great latitude must be allowed in the cross examination an essential prosecution witness. *State v. Tate*, 2 Wn. App. 241, 247, 469 P.2d 999 (1970); see also *Davis v. Alaska*, 415 U.S. 308, 948 S. Ct. 1105 (1974) (reversing where defendant not prevented from exposing facts that undermined witness' credibility).

Here, the officer testified that he took a class on tracking which included identifying shoe prints. (RP 238-239) He testified as to the tread left in photographs even though the jury had the photographs to review. He was allowed to conclude that the photographed treads were "consistent" with the defendant's shoes even though, without his testimony, the jury may well have concluded there were inconsistencies

(such as a wavy “v” rather than “w”). By eliciting substantive testimony regarding the photos, and having the officer identify his education in tracking, the State used the officer as an expert and opened the door to the cross examination of him on this point. Cf. *United States v. Ford*, 481 F.3d 215, 220 (3rd Cir. 2007) (and cases cited therein) (job of shoe print expert was to compare prints to shoes). By stopping the cross examination on this point, the trial court created the worst of both worlds – it allowed the officer to testify as if he had knowledge beyond the juror’s ken, but then prohibited challenge on whether he had sufficient knowledge to so testify.

As *Strandy* holds, shoe print evidence is inherently weak. See *State v. Strandy*, 49 Wn. App. 537, 543, 745 P.2d 43 (1987) review denied, 109 Wn. 2d 1027 (1988) (fact that shoe print was consistent with defendant’s shoe was admissible evidence, albeit insufficient to sustain conviction on its own). And certainly this shoe print evidence was pivotal since there otherwise was no witness who could positively identify the defendant as the individual in the truck. (RP 188) (witness admitted that he could not positively identify the defendant as the person at the truck); see also Section E.1, *supra*, outlining weakness of State’s evidence).

Under these circumstances, it was reversible error to prohibit the defendant from cross examining the State’s witness on the strength of the State’s evidence (and the abilities of the witness the State chose to present

that evidence). This is especially true because someone with more expertise would have been able to provide more insight into the shoe print analysis, cf. *United States v. Sellers*, 566 F.2d 884 (4th Cir. 1977) (shoe expert was able to compare class characteristics of size, shape, and design of print versus shoe), and possibly exonerate the defendant on this point. By prohibiting the defendant from exploring where this witness was lacking, the court was prohibiting him from fully developing reasonable doubt and thus was unconstitutionally relieving the State of its burden of proving its case beyond a reasonable doubt. As such, it was error.

4. In closing, the prosecutor misstated facts and commented on the defendant's post-arrest silence.

The convictions must be reversed because of the prosecutor's closing argument, which impermissibly (a) commented on the defendant's post-arrest silence (outlined above in E.2, supra), (b) placed the burden of proof on the defendant, and (c) misstated both facts and law.

*A. Standard of Review*

The constitutional harmless error standard applies to direct constitutional claims involving prosecutors' improper arguments. See *State v. Fricks*, 91 Wn. 2d 391, 396-97, 588 P.2d 1328 (1979) (post-arrest silence); see Section E.2 above (outlining "harmless error standard"). Issues of constitutional magnitude may be reviewed initially on appeal. *State v. Scott*, 110 Wn. 2d 682, 688, 757 P.2d 492 (1988).

If a defendant establishes the State made improper statements that are not of constitutional magnitude, then the appellate court reviews whether those statements prejudiced the defendant under one of two standards of review. *State v. Emery*, 174 Wn. 2d 741, 760, 278 P.3d 653 (2012). If the defendant preserved the issue by objecting at trial, the court reviews whether there was a substantial likelihood the improper comments prejudiced the defendant by affecting the jury. *Emery*, at 760. Failure to object to improper argument waives any claim of error on appeal “unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn. 2d 24, 86, 882 P.2d 747 (1994).

#### *B. Argument*

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgerson*, 172 Wn. 2d 438, 448, 258 P.3d 43 (2011), a prosecutor must “seek convictions based only on probative evidence and sound reason.” *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991); *State v. Huson*, 73 Wn. 2d 660, 663, 440 P.2d 192 (1968). Here the prosecutor’s closing argument did not follow that rule, and was improper in three areas: first, for commenting on post-arrest silence; second, for switching the burden; third, for misstating facts and law.

*As to commenting on post-arrest silence (an objection preserved when the evidence was first admitted):* It is well settled that commenting on a defendant's post-arrest silence or partial silence is constitutional error and subject to the stringent constitutional harmless error standard. *State v. Easter*, 130 Wn. 2d at 236-37; see also E.2, and argument contained therein. Here, as noted above in section E.2, the prosecutor made a special point of commenting on the defendant's post-arrest silence. (RP 329) As such, and for this reason alone, the conviction should be reversed.

*As to switching the burden (done without objection):* "A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." *State v. Traweck*, 43 Wn. App. 99, 107, 715 P.2d 1148, review denied, 106 Wn. 2d 1007 (1986), disapproved on other grounds by *State v. Blair*, 117 Wn. 2d 479, 491, 816 P.2d 718 (1991) (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970))." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). "It is proper for the State to comment on its own evidence. It is not proper for the State to comment on a failure of the defense to do what it has no duty to do." *Traweck*, 43 Wn. App. at 107 (where prosecutor's comments regarding defendant's lack of evidence required constitutional "harmless error" review).

In this case, the defendant presented no evidence, and argued that the State did not prove its case beyond a reasonable doubt. The prosecutor, in rebuttal, argued not only inaccurate law (e.g., that whoever stole the truck was guilty of theft on mere possession alone), but also stated that the jury could consider the “lack of evidence” for conviction:

“What this case really comes down to is whether the defendant was the person that crashed that car. That’s what this case comes down to. Defense Counsel asked you, “Well, are you really sure it couldn’t have been someone else who stole that vehicle? We just don’t have any evidence.” Well, you were instructed that lack of evidence, in addition to evidence, is something you can consider. Is it reasonable that the defendant just happened to be in the stolen vehicle the morning when it was discovered stolen from the night before? No, it’s not reasonable that someone else took that vehicle.”

(RP 346)

The comment “lack of evidence” was said in conjunction with the prosecutor’s characterization of the defendant’s argument that “we just don’t have any evidence,” thus inferring that it was the defendant who failed to marshal evidence, not the State – and thus is not a comment on the State’s evidence, but a comment on the defendant’s evidence, which is error. See *Traweck*, supra; *Fleming*, supra (impermissible comment on defendant’s failure to present evidence required reversal) . Cf. *State v. Charlton*, 90 Wn. 2d 657, 585 P.2d 142 (1978), cited with approval in *In re Glasmann*, \_\_\_ Wn. 2d \_\_\_, 286 P.3d 673 (2012) (prosecutor’s comment

on failure of defendant's wife to testify, despite marital privilege, sufficient for reversal even though no objection lodged).

*As to misstating facts and law (done without objection):* It can be reversible error for a prosecutor during argument to misstate the law, see *Fleming*, 83 Wn. App. at 215, or to misstate the facts. Cf. *State v. Stover*, 67 Wn. App. 228, 230-31, 834 P.2d 671 (1992), review denied, 120 Wn. 2d 1025 (1993) (prosecutor improperly comments when encouraging jury to render verdict on facts not in evidence).

Here the prosecutor made several of these errors. She misstated the law when she stated that witness "Smith's identification alone" of the defendant was sufficient to convict (thus erroneously assuming that "mere possession" is sufficient to convict on theft counts). This claim also misstated facts because it implied Mr. Smith's identification was positive when, in fact, Mr. Smith stated he could not positively identify the defendant as the driver of the truck, and that all he saw were shapes and colors. (RP 186, 188) She also misstated facts when she said there was "no dispute" that the person who crashed the vehicle was the thief when in fact the details of where this person obtained the vehicle were unknown (and unproven by the State). (RP 320) She reiterated this misstatement of facts and law when she said, in rebuttal, "What this case really comes down to is whether the defendant was the person that crashed the car...."

(RP 346) Each of these statements is error in a case where the evidence was “tenuous” (according to the judge). (RP 297)

*As to the entire argument, taken as a whole:* The appellate court will review the argument in its entirety to determine if reversible error has occurred. See e.g., *Fleming*, 83 Wn. App. at 215 (cumulative effect of prosecutor’s comment on defendant’s lack of evidence, taken together with prosecutor’s earlier misstatement of law, rose to level of manifest constitutional error and required reversal).

Here, we submit that all these errors, separately or taken together, require reversal on this case where the evidence was “tenuous” at the outset.

5. The trial court should have ordered a mistrial after a juror saw the defendant in custody.

It was reversible error for the trial court to deny the defendant’s timely motion for mistrial after a juror saw him shackled outside the courtroom as the prejudice could not be cured.

*A. Standard of Review*

This court applies an abuse of discretion standard in reviewing the trial court’s denial of a mistrial. *State v. Hopson*, 113 Wn. 2d 273, 284, 778 P.2d 1014 (1989). A trial court also abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies an incorrect legal standard, or bases its ruling on an erroneous

legal view. *Lord*, 161 Wn. 2d at 284. A trial court's denial of a motion for mistrial will only be overturned when there is a “substantial likelihood” that the error prompting the mistrial affected the jury’s verdict. *State v. Russell*, 125 Wn. 2d 24, 85, 882 P.2d 747 (1994). In evaluating the irregularity, courts “examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.” *Hopson*, 113 Wn. 2d at 284.

When a mistrial motion is based on a violation of a legal right, the ruling is reviewed like other questions of law, i.e., de novo. 1 Childress & Davis, *Federal Standards of Review* § 4.01 (3d ed.1999); 2 Washington State Bar Ass'n, *Washington Appellate Practice Deskbook* §§ 18.3, 18.7(9) (1993). And when a defendant's constitutional right to a fair trial has been violated and he moves for mistrial, the motion should be granted. *State v. Weber*, 99 Wn. 2d 158, 165, 659 P.2d 1102 (1983); *State v. Essex*, 57 Wn. App. 411, 415, 788 P.2d 589 (1990).

#### *B. Argument*

The presumption of innocence guarantees every criminal defendant all "the physical indicia of innocence," including that of being "brought before the court with the appearance, dignity, and self-respect of a free and innocent man.” *State v. Finch*, 137 Wn. 2d 792, 844, 975 P.2d 967 (1999). The Washington Supreme Court has held that the appearance of

shackles or other restraints “‘may reverse the presumption of innocence by causing jury prejudice,’” thus denying due process. *State v. Hutchinson*, 135 Wn. 2d 863, 887, 959 P.2d 1061 (1998) (quoting *Jones v. Meyer*, 899 F.2d 883, 885 (9th Cir.1990)).

“It is the duty of the court to give effect to the presumption by being alert to any factor that could ‘undermine the fairness of the fact-finding process.’” *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005) (quoting *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691 (1976)). “Due process requires the trial judge to be ‘ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.’” *Gonzalez*, 129 Wn. App. at 901 (quoting *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940 (1982)). The court's duty to shield the jury from routine security measures is a constitutional mandate. *Hutchinson*, 135 Wn. 2d at 887-88. A preemptive instruction will only heighten the problem. *Gonzalez* at 901.

When a jury views a shackled defendant, his constitutional right to a fair and impartial trial is impaired. *State v. Elmore*, 139 Wn. 2d 250, 273, 985 P.2d 289 (1999). When the jury's view of the defendant in shackles is brief or inadvertent, the defendant must make an affirmative showing of prejudice. *Elmore*, 139 Wn. 2d at 273. Visible shackling or

handcuffing a defendant during trial is likely to prejudice a defendant. *In re Davis*, 152 Wn. 2d 647, 694, 101 P.3d 1 (2004).

In a case such as this one, where the trial court acknowledged the State's limited evidence, even an inadvertent view of the defendant in shackles was prejudicial and the trial court erred in failing to recognize that prejudice and grant the motion for mistrial.

In addition, there was a charge of resisting arrest where the officer admitted that he needed to adjust the defendant's handcuffs for comfort, thus bringing into question whether the defendant resisted arrest or whether the arrest circumstances caused what appeared to the State as resistance. If, however, the jury knew the defendant was in shackles, this could lead to an impermissible inference that he needed restraints due to a pattern of resisting arrest and/or flight. In such circumstances, and given the underlying charge here, there was prejudice. This is especially true when combined with the lack of evidence on all charges.

Instead of recognizing this issue, the trial court simply stated, "I don't think it's any secret to anybody that, ah, Mr. Terry is in custody." (RP 303-304) This is not proper analysis.<sup>2</sup> In fact, this only adds to the

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<sup>2</sup> The judge also did question the juror who saw the Defendant in shackles who stated it did not concern him. However, the juror was not forthcoming when asked at the outset until he was prompted by the judge regarding the totality of the circumstances, bringing into question the forthrightness of the juror during the remainder of the very-short questioning. (RP 303)

issue of prejudice. If there actually was “no secret” that the defendant was in custody, then the very fact that the custody is confirmed via a view of him in shackles – combined with the State’s lack of evidence at the outset – creates a presumption of prejudice that cannot be overcome by a simple curative instruction. Mistrial should have been granted.

6. The trial court impermissibly coerced the jury into reaching a verdict in violation of the defendant’s State and Federal constitutional rights to a fair trial and in violation of CrR 6.15.

The trial court improperly informed the jury during the instructional phase, and separately during deliberations, that the jury must continue deliberating to reach a unanimous verdict even though the jury specifically inquired as to the consequences of failing to reach an agreement, and then required the jury to return to deliberations when one of its forms was not filled out, all of which violated the defendant’s constitutional rights to a fair trial and was in violation of CrR 6.15.

#### *A. Standard of Review*

Jury instructions are reviewed de novo. *State v. Bashaw*, 169 Wn. 2d 133, 140, 234 P.3d 195 (2010). “We review alleged violations of the right to an impartial jury and the presumption of innocence de novo.” *State v. Johnson*, 125 Wn. App. 443, 457, 105 P.3d 85 (2005). “Whether a particular practice had a negative effect on the judgment of jurors receives ‘close judicial scrutiny.’” *State v. Gonzalez*, 129 Wn. App. at 900 (quoting

*Williams*, 425 U.S. at 504). “We evaluate the likely effects ‘based on reason, principle, and common human experience.’” *Gonzalez*, *supra* (quoting *Williams*).

Judicial coercion must include an instance of actual conduct by the trial judge during jury deliberations that could influence the jury's decision. *State v. Ford*, 171 Wn. 2d 185, 193, 250 P.3d 97 (2011). To make such a claim, a defendant must make a threshold showing that the jury was still within its deliberative process; must show the jury was at that point still undecided; that there was judicial action designed to force or compel a decision; and that it was improper. *Id.* If raised for the first time on appeal, a defendant must show that such interference rises to the level of manifest error – that it actually prejudiced the constitutional right to a fair trial. *Id.*

#### *B. Argument*

Every criminal defendant is entitled to a fair trial by an impartial jury. U.S. CONST. amends. VI, XIV § 1; Wash. CONST. art. I, §§ 3, 21, 22. “The right to a fair trial includes the right to the presumption of innocence.” *State v. Gonzalez*, 129 Wn. App. at 900 (and cases cited therein). “This constitutionally guaranteed presumption is the bedrock foundation in every criminal trial.” *Gonzalez*, 129 Wn. App. at 900. “It is the duty of the court to give effect to the presumption by being alert to any

factor that could ‘undermine the fairness of the fact-finding process.’”

*Gonzalez*, 129 Wn. App. at 900 (quoting *Williams*, 425 U.S. at 503).

A trial judge must “use great care when he questions jurors about the status of their deliberations, so that his questioning does not constitute an impermissible coercion to reach a verdict.” *State v. Jones*, 97 Wn. 2d 159, 165, 641 P.2d 708 (1982). See also CrR 6.15(f)(2) (“After jury deliberations have begun, the court *shall not instruct the jury in such a way as to suggest the need for agreement*, the consequences of no agreement, or the length of time a jury will be required to deliberate”) (emphasis added). To prevail on a claim of improper judicial interference with a verdict, the defendant must make an affirmative showing (not mere speculation) that there is a reasonably substantial possibility the verdict was improperly influenced by the court’s intervention. *Ford*, at 188-189.

Here, we submit that coercion in fact occurred. There was no place on the jury form indicating that the jury could choose not to reach a verdict (even though the prosecutor erroneously believed that there was). When the jury question arrived during deliberations, it asked, “Do all 12 jurors need to fully agree on a not guilty verdict, or is non-agreement on guilty result in a not guilty ruling?” (CP 163) The court responded (without agreement of the parties), “Your verdict, whether it is ‘not guilty’ or ‘guilty,’ must be unanimous.” (CP 163) In reaching the decision to

instruct this way, the court specifically noted that it did not want to give the jurors the option of a hung jury. (RP 351) (“I don’t want to plant that seed”). This, however, violated CrR 6.15, in that it was an instruction to the jury after deliberation that suggested the need for an agreement. It would appear that the coercion was effective, as it was only a half hour later before there was a verdict. (RP 353)

The error was exacerbated when the court reviewed verdict forms, saw that Verdict Form C (the trespassing charge) was not filled out, and sent the jury back to the jury room. The judge worried that this could result in coercion, and the prosecutor guessed that “they weren’t able to reach a verdict on that [count] and they did not know what to do.” (RP 353) As noted earlier, the forms had no instruction of what to do in case of a hung jury (i.e., leave it blank). The jury then came back with “guilty” verdicts on all counts.

All the above was exacerbated by the “to-convict” language, which places a duty on the jury to convict if it finds each element of the crime proven beyond a reasonable doubt, when there is no constitutional “duty to convict” under either the state or federal constitutions, and thus this is an instruction that misstates the law.<sup>3</sup>

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<sup>3</sup> Division One of the Court of Appeals rejected this argument in its decision in *State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d, review denied, 136 Wn. 2d 1028 (1998), abrogated on other grounds by *State v. Recuenco*, 154 Wn. 2d 156, 110 P.3d 188 (2005).

The defense objected to none of the errors outlined above. As such, it is incumbent on the defendant to make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. *State v. O'Hara*, 167 Wn. 2d 91, 98-99, 217 P.3d 756 (2009).

We submit here that such error did occur. As noted above, the evidence was sparse as to all these charges (and we have argued that the evidence was insufficient with regard to the charges of theft, possession of stolen property, and trespassing). Moreover, there was not one but three errors in the instructions to the jury that had the likely effect of coercion. When taken in totality, we submit that this was reversible error.

7. The trial court erred in sentencing the defendant with an offender score of eight when the State presented no evidence to prove underlying criminal history.

In November 2012, the Supreme Court affirmed *State v. Hunley*, 161 Wn. App. 919, holding that the State retains the burden of proving a defendant's prior convictions and that it cannot rely on the prosecutor's written summaries or the defendant's silence at sentencing. *State v. Hunley*, \_\_\_ Wn. 2d \_\_\_, 287 P.3d 584, 587 (2012). Relying on the defendant's silence in these circumstances would "obviate the plain requirements of the SRA...[and] result in an unconstitutional shifting of

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Counsel respectfully contends *Meggysey* was incorrectly decided or would have been decided differently under circumstances such as these.

the burden of proof to the defendant.” Id. at 590. The Supreme Court stated in pertinent part:

“The burden to prove prior convictions at sentencing rests firmly with the State. While the burden is not overly difficult to meet, constitutional due process requires at least some evidence of the alleged convictions. A prosecutor's bare allegations are not evidence, whether asserted orally or in a written document. The State in this case could have established Hunley's prior convictions through certified copies of the judgment and sentences or other comparable documents. Our constitution does not allow us to relieve the State of its failure to do so simply because Hunley failed to object. In other words, it violates due process to base a criminal defendant's sentence on the prosecutor's bare assertions or allegations of prior convictions. And it violates due process to treat the defendant's failure to object to such assertions or allegations as an acknowledgment of the criminal history. The Court of Appeals held RCW 9.94A.500(1) and .530(2) cannot change this, and they are unconstitutional insofar as they attempt to do so. We agree and affirm.”

*State v. Hunley*, 287 P.3d at 590 (internal quotations omitted) (emphases added).

Here, the State offered its written summary of the defendant’s prior convictions on the proposed judgment and sentence, and the prosecutor verbally informed the court that the defendant’s offender score was “eight.” (RP 382; CP 221-230) But no certified copies of the prior convictions were ever offered, or any other comparable documents, to prove the existence of Mr. Terry’s alleged prior convictions. According to *State v. Hunley, supra*, this does not satisfy the State’s burden of proof at sentencing. The State also apparently relied on the defendant’s silence at

sentencing, citing RCW 9.94A.500 and .530. But the Supreme Court has since confirmed that such burden shifting, along with reliance on statutes that belie the constitution, impermissibly relieve the State of its burden to prove the prior convictions with at least some evidence. Like in *State v. Hunley*, the State here failed to prove the defendant's prior convictions by sufficient evidence, which constitutes a reversible, constitutional error.

The appropriate remedy here is remand for resentencing. See *Hunley*, 287 P.3d 588 (“judgment and sentence should reflect [the defendant's] accurate offender score”). This is especially important because the judgment and sentence could be offered in future sentencing hearings and must be accurate since it “could cause a future sentencing court to impose additional demanding conditions of community placement or sway a court to impose the high end of the standard range.” *Id.* (citing *State v. Raines*, 83 Wn. App. 312, 315, 922 P.2d 100 (1996)). In addition, Mr. Terry is currently serving a sentence on this matter, so that a remand could very well result in actual reduction of his time.

Accordingly, like in *State v. Hunley*, the proper remedy for the error in this case is to “remand for resentencing, requiring the State to prove [the defendant's] prior convictions unless affirmatively acknowledged.” *Hunley*, 287 P.3d at 592 (internal citations omitted).

8. Cumulative error requires reversal.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when the trial court's cumulative errors were fundamentally unfair. *In re Personal Restraint of Lord*, 123 Wn. 2d 296, 332, 868 P.2d 835 (1994) (citing *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir.1983)), clarified, 123 Wn. 2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849 (1994). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *Lord*, 123 Wn. 2d at 332.

Here, we have submitted several errors – some of constitutional magnitude and all affecting the outcome of this jury trial, where the evidence was tenuous at the outset and where we have argued that the evidence is insufficient as to three of the counts. As such, if this Court were to rule that the above errors, on their own, do not mandate reversal, then the errors, taken together, do.

#### F. **CONCLUSION**

For the foregoing reasons, the convictions of theft of a vehicle, possession of a stolen vehicle, and trespass should be vacated for lack of sufficient evidence, and the conviction of resisting arrest should be reversed and remanded due to individual and cumulative error, including improper evidence and improper prosecutorial comment on post-arrest silence; impermissible limitation of cross-examination; improper argument

by the prosecutor in addition to the comment on post-arrest silence; error in jury coercion regarding a unanimous verdict; and failure to order a mistrial after a juror saw the defendant in shackles. Alternatively, the convictions should all be reversed and remanded for new trial due to error on these individual or cumulative grounds. Finally, we ask that the Court remand for resentencing in accordance with *State v. Hunley*.

Respectfully submitted this 25<sup>th</sup> day of January, 2013.

\_\_\_\_\_/s/ Kristina M. Nichols  
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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 31094-9-III  
vs. )  
EDWARD TERRY ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on January 31, 2013, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief (only variation from originally filed brief being a correction to the name of appointed counsel on the cover sheet and signature at page 42), addressed to:

Edward W Terry  
607 WAGON ROAD  
DAYTON WA 99328

Having obtained prior permission from Columbia County Prosecutor's Office, I also served Rea Lynn Culwell at jkarl@wapa-sep.wa.gov by e-mail with the same.

Dated this 31<sup>st</sup> day of January, 2013.

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