

NO. 34576-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC ANDREW ANDERSON,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

Assignments of Error

1. Defense counsel was ineffective for failing to object to previously excluded testimony about appellant's outstanding warrant.
2. Defense counsel was ineffective in proposing a jury instruction referencing appellant's prior conviction when appellant did not testify and no evidence of a prior conviction was admitted.

Response to Assignment of Errors.

1. Because Anderson did not object at the time of trial this alleged error has not been preserved, there is no basis for this court to consider it for the first time on appeal. Trial counsel's failure to object is not fatal to this conviction.
2. Counsel was not ineffective for proposing the instruction regarding Anderson's prior criminal history. The use of that instruction was not fatal to this conviction any possible error was harmless, the evidence was overwhelming.

II. STATEMENT OF THE CASE

Ms. Gloria Morales-Silva was the owner of a blueish 2005

Toyota Highlander that was stolen on Christmas Eve in 2015. RP 170-21.

She testified that on Christmas Eve she was leaving to take some presents

to her nephew's home. She had to return to her house and had left this

SUV unlocked and running in her driveway. RP 169. She estimated that

she was gone for about 2 minutes and when she returned her Highlander

was gone along with the contents. This occurred at about 6:00 PM on Christmas Eve.

Early on the morning of Christmas, around 1:00 or 2:00 Mrs. Morales-Silva received a call from the police indicating that they had found her Highlander. RP 170. When she went to retrieve her vehicle the items that were inside when it was stolen were missing and items that were not hers were found within. RP 170-1. Her Highlander was located at 24th Avenue in Yakima, she believed it may have been on Logan. RP 171.

When asked by the State, Mrs. Morales-Silva stated she had never seen or met the defendant, Eric Anderson before. RP 172-3.

Officer Philip Amici testified that while on duty in the early morning hours of December 25, 2015 he observed a vehicle roll through a stop sign and that this vehicle had defective tail light and brake lights. This vehicle, a SUV, that he believed to be a Toyota Highlander, was observed at the corner of 48th Avenue and Viola. RP 72. Prior to turning on his lights and siren the vehicle began to accelerate away from the officer. Due to the fresh snow on the roadway, as well as the existing packed snow and ice, the officer was not able to keep up with the vehicle. The officer was able to continue to observe the vehicle and noted that it was traveling at a high rate of speed, well above the posted speed limit.

The officer continued to follow the vehicle as best he could considering the bad road conditions. RP 72-4. The officer was able to follow the vehicle onto 24th but eventually lost sight of the vehicle. He continued to check for the vehicle and was soon notified by an assisting officer, Officer Schilperoort, that he had found the vehicle abandoned at a location on 24th Avenue.

Officer Amici testified that the fleeing vehicle appeared to be a dark blue Toyota Highlander. RP 74. When he arrived at the abandoned vehicle he found that it was a Toyota Highlander with license plate number AXN 5732. When he ran the license plate the vehicle came back as reported stolen. RP 74-5.

When Officer Amici began his investigation he observed that the Highlander had numerous items inside that “really didn’t seem to fit” such as tools, CD’s, ammunition, a magazine to a handgun and a rifle, and a lot of women’s cosmetics and a purse.

He also observed that there were footprints in the fresh snow that led off from the car and onto the sidewalk and into the grass. RP 75, 89. He testified that the shoe prints that he observed had a “honeycomb” print in the tread and a large circle in the heal. RP 76. Sargent Cavin took pictures of the footprints. RP 81.

Soon thereafter Officer Amici heard radio traffic that other

officers, Sargent Cavin and Officer Gillette had observed a man running through a yard and eventually Sargent Cavin contacted a man on 22nd avenue. RP 76

The registered owner of the Highlander was contacted and she came to the location where it had been abandoned. She was able to point out to the officers which items inside did not belong to her, such as a music instrument box containing four boxes of ammunition of various calibers, a pistol magazine, two AR style magazines, a firearm cleaning kit, a Pioneer CD player with an auxiliary cable, a black and gray sub-woofer, a brown purse, a black hat that said NY on it, a small cigarette powered air compressor, and a Chicago electric battery charger. These were some of the items in the Highlander which did not belong to the registered owner. RP 77. Officer Amici met with the owner and identified her as Mrs. Morales. RP 78.

Officer Amici returned to the area where he first observed the Highlander, around 40th Avenue and Viola. He discovered that there was a vehicle there, a black four door sedan, with its doors open. RP 79. He subsequently located a second vehicle which also appeared to have been “prowled or gone through.” RP 80. The second vehicle that had been prowled was a white van. RP 85.

Office Amici testified that he had gone to this area because this

was the area from which the Highlander had come when he first observed it and before it fled. RP 82. During this part of the investigation the officer also found shoeprints that were on the ground outside one of the prowled cars. RP 82

Officer Amici made contact with the homes where the two vehicles were parked and determined from the owners that they had not left their cars sitting outside with the doors open. RP 83, 87. Both of the owners of these two vehicles, a dark colored sedan and a van, were shown the items that this officer had removed from the Highlander, items the owner of the Highlander indicted were not hers, they both identified some of these items as having been taken from their vehicles. RP 83-87, 88.

Officer Amici testified that the shoes worn by defendant Anderson were seized, that the pair of shoes that were admitted into evidence at trial were the shoes taken from Anderson and that they bore a very distinctive print with a honeycomb tread and a large circle on the heel. RP 147-8

Officer Amici testified that on the date to this crime, December 25, 2015 he met Mrs. Morales-Silva, the owner of the Highlander, when she came to 24th and Logan to recover her stolen SUV. RP 174. When called later in trial he testified again that he had observed this vehicle do a running stop out from Viola Avenue and that he observed the vehicle had a defective taillight and brake light. RP 175. The officer was never able

to get the license plate of this vehicle until he found it abandon on Logan near 24th Avenue. Once he obtained the license number he ran the plate and it was confirmed that the vehicle had been reported stolen. RP 175-6.

Office Adam Schilperoort testified that he was on duty in the early morning hours of December 25, 2015. RP 52. He heard over the radio that Officer Amici was attempting to catch up with a Toyota Highlander. He observed a vehicle go by and then saw Officer Amici following. He took an alternate route from that taken by Officer Amici and soon thereafter found the Highlander parked in the middle of the street with the driver's door open, the lights on and the motor still running. RP 53-55.

Office Casey Gillette also joined in on this call. He was told that the vehicle had been located abandon so he began to look for the person who had been driving the vehicle. RP 60. He began to look in the area of 24th and Lila. He observed an open security door and what he believed to be a male walking in the parking lot adjacent to this area. RP 61. The officer backed up but by that time the person was gone. He could tell that it was a male with a shaved head. He then made contact with a tenant of the building who told him that they had heard someone run behind the apartment. RP 61.

Officer Gillette went to that area and observed one set of footprints

that led over a fence. This was in the area between Logan and Viola. The footprints he observed led to the east. RP 62. He started to follow the prints into the backyard of a duplex when he got radio traffic from Sargent Cavin who said that he had observed a male over on 22nd Avenue and was asking for backup. RP 62. Officer Gillette identified the person to whom the Sargent was speaking as the defendant, Anderson. While waiting with the Appellant, Officer Gillette engaged him conversation. Anderson told Gillette that he was in the area to visit a friend named Jennifer who lived in one of the apartments. RP 63-4.

Officer Gillette testified that one of the reasons he engaged in this conversation was because of the proximity of the stolen vehicle and the fact that Anderson was the only person in the area. RP 64-5. During this conversation Sargent Cavin radioed Officer Gillette about the shoe tread on Anderson's shoes. Gillette looked at the pattern and identified a photograph of Anderson's shoe tread. RP 65. He described for Sargent Cavin that the pattern was a honeycomb with a big circle on the heel. RP 66.

Officer Gillette detained Anderson and inquired of Anderson what his name was. Anderson told him that he was Michael A. Anderson. He ran this name in his computer and the picture for Michael Anderson did not match the person in his car. Officer Gillette looked at a "near match"

Eric Anderson and observed the photograph to match the person in his car. This is when Officer Gillette testified "...I ran Michael Anderson's name, it came back with a near hit of a warrant for an Eric Anderson..." RP 67. Subsequent conversation between the officer and the defendant resulted in Anderson admitting that he had lied to the officer and that he was actually Eric Anderson not Michael A. Anderson. RP 67-8

Officer Gillette testified on cross-examination that the location where Sargent Cavin made contact with the defendant was about "a block and a half" from the stolen Highlander. RP 68-9. This officer further testified that the contact with Anderson occurred "maybe five minutes at the most" from the time Officer Amici had been pursuing the stolen vehicle and that this final location was close enough that Anderson would have had plenty of time to get there from the stolen Highlander. RP 70-1.

Sargent Ira Cavin was the officer in charge of the shift that night RP 97. The Sargent heard radio traffic indicting that Officer Amici was attempting to catch up to a vehicle. The fleeing vehicle was a Toyota Highlander or similar type SUV. RP 97-8.

He testified that he was moving toward the scene of this chase when he heard that the vehicle was found abandon in the roadway still running with the lights on and the driver's door open. This vehicle was found near 48th Avenue and Logan. RP 99. Sargent Cavin drove his

police car and set up north and east of the abandon vehicle because the assumption was that the driver had abandon the stolen car and was running somewhere in the neighborhood. RP 99-100. He stopped in his patrol car and sat with the lights off, just observing what was going on in the area, he was just watching movement in the area. The Sargent noticed some movement in the periphery of his vision, the movement was a subject moving from the carport area of two duplexes'. The Sargent observed this person look left and right and then go back into the carport area. RP 100-1.

Sargent Cavin exited his patrol car so he could approach this person better. He observed the subject exit the same area again, at this time the subject saw Sargent and he turned and walked back into the carport area. The subject eventually came back out of the carport area and back to the road. At that time Sargent Cavin made contact with this person. The subject, who had not been identified yet, told the Sargent that somebody had jumped the fence and that they had heard a noise. RP 101-2. The person in the carport speaking to Sargent Cavin was subsequently identified as the Appellant, Eric Anderson. RP 102-3

Anderson indicated to the Sargent that he was there to visit a female friend and that his home address was on 18th, an address which was significantly to the east of his present location. When the person

contacted was asked his name, he told the Sargent that his name was Michael Anderson. RP 103-4.

Sargent Cavin went to the location where Anderson indicated someone had jumped the fence and located a set shoe prints, a single set of shoe prints, that went from the sidewalk to the fence. The shoe prints the Sargent observed in the snow were “a very distinctive large honeycomb type shape...” Sargent Cavin asked Officer Gillette about the shoe print of Anderson’s shoes. The tread on Anderson’s shoes was determined to have this same distinctive pattern. RP 105-6.

There was only one set of shoe prints that led to the wooden fence. Sargent Cavin then went over to Logan street looking for more evidence, shoe prints, and discovered more prints with this distinctive pattern in the backyard of the duplex. The Sargent continued to track the shoe prints back and he tracked them across from one of the duplex’s, as well as finding the same tread pattern in the carport area, as well as the middle of the roadway on 23rd Avenue and then up a driveway. RP 108-9.

Sargent Cavin continued to follow these distinctive shoe prints that went along the side of another duplex and then over another fence. On the opposite side of this second fence there were two clear shoe prints that both had this distinctive honeycomb pattern. When Sargent Cavin looked over this second fence he was able to see Officer Schilperoort

standing by the abandon Highlander. There were additional prints with this pattern that lead over in the direction of the SUV but none that lead directly to the SUV. RP 109.

Sargent Cavin took numerous pictures of these shoe prints. RP 109-111, 112-32. These photographs memorialized the investigation done by the Sargent tracking this distinctive shoe pattern from the location where Anderson was caught wearing shoes with this very distinctive shoe pattern back to very near the location where the Highlander was found abandon. PR 109-111, 112-32

Sargent Cavin testified on cross-examination that the location where he made contact with Anderson was a little shy of two blocks from the location of the abandon, stolen, Highlander. RP 132.

Both Ernesto Perez the owner of the black car that was prowled and Pedro Ortiz, the owner of the van, testified that they were contacted by police on the 25th of December, they both testified that their vehicles had been prowled and that they were missing items. They identified some of their stolen goods which were at that time in the patrol car. Both men testified that they did not know Anderson. RP 139-46.

III. ARGUMENT.

Appellant states in his brief that “[c]ounsel’s deficient performance resulted in **repeated references** to Anderson’s criminal history...”

(Appellant's brief at 16) (Emphasis added). However, Anderson does not cite to one instance in the record, other than the actual statement by the officer regarding the warrant and the trial court reading the jury instruction, where anyone, the court, counsel or witness, testified about or spoke about any of Anderson's criminal history. There is no reference to the record because there are NO other references to the defendant's record anywhere in this trial. Not one single word.

Response to Assignment of Error 1 – Defense counsel was not ineffective for not objecting to the testimony regarding Anderson's outstanding warrant.

Anderson now argues that this court should, for the first time on appeal, address this error. As indicated throughout this brief there was no objection to the officer's statement therefore the error was not preserved. Further, Appellant has not explained to this court how pursuant to RAP 2.5 this court should even address the allege error.

The State will address this alleged error for the purposes of this response, without conceding this issue.

Even if Anderson had objected and had gone so far as to then ask for a mistrial at the next break this court would still have no reason to remand this case for retrial. If there had been an objection and motion this court would review the denial of such a motion for an abuse of discretion. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). A

trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A trial court should grant a motion for mistrial only when an irregularity has so prejudiced the defendant that only a new trial can remedy the error. Greiff, 141 Wn.2d at 920-21.

Here, the irregularity occurred when the Officer testified that Anderson had a warrant, this was contrary to the court's order in limine. That order excluded all testimony about the fact that when the officer ran the defendant's name he found that Anderson had an outstanding warrant. During the State's direct examination about the actions the officer took to ascertain who the actual person was whom he had detained and who was seated in his police car the following colloquy occurred:

A. I looked up Michael A. Anderson myself. I was able to view a photo of Michael Anderson, and I observed the photo not to match the gentleman that was in the back seat of the car.

Q. What did you do as a result of that?

The Officer's response, set forth below, to the question was more of a continuation of the previous answer and not truly responsive to the question;

A. When I ran Michael Anderson's name, it came back with a near hit of a warrant for an Eric Anderson, 12-21-1987. I ran his name, and I was able to observe a photo. It matched the gentleman that was seated in the back seat of my car.

RP 67

This statement is the sum total of the references throughout this entire trial to Anderson's possible criminal history. In determining whether an irregularity caused prejudice warranting a mistrial, this court will examine (1) the seriousness of the irregularity, (2) whether the irregularity involved cumulative evidence, and (3) whether the trial court gave a proper curative instruction. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

1) Seriousness- Here the statement was made in passing, it was not in response to the State asking a question which elicited this response. The officer merely stated "a warrant" which does not in and of itself indicate that Mr. Anderson had "criminal history" a warrant can issue for very minor offenses such as failure to pay fines for a driving offense; **2)** The statement was not repeated, there was absolutely nothing ever mentioned of Anderson's actual extensive criminal history. This includes the fact that defense counsel did not object thereby reinforcing to the jury that this warrant existed; **3)** There was no objection, therefore the court never had a chance to give a curative instruction.

Even if there had been an objection, and a motion for mistrial that was denied, this court would have no basis to find the trial court abused its discretion in denying the motion.

This court will review ineffective assistance claims de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish an ineffective assistance claim, a defendant must show deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

Counsel's performance is deficient if it falls " below an objective standard of reasonableness." State v. Townsend, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001). To establish deficient performance, the defendant must show the absence of any " conceivable legitimate tactic" supporting counsel's action. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). This court will strongly presume counsel's performance was reasonable. Strickland, 466 U.S. at 690; State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To establish prejudice, Anderson must show there is a reasonable probability that, but for the alleged deficient performance, the outcome would have been different. Nichols, 161 Wn.2d at 8. " A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Failure to establish either prong of the test is fatal to an ineffective assistance of counsel claim. *Id.* at 700.

Further, the alleged failure to object can easily be considered a trial tactic. If Anderson's attorney were to object to this very minimal statement it would only bring attention to the fact that the statement was made. State v. Embry, 171 Wn.App. 714, 762, 287 P.3d 648 (2012) "Not requesting a limiting instruction can be a legitimate tactic to avoid reemphasizing damaging evidence. Yarbrough, 151 Wn.App. at 90, 210 P.3d 1029. Thus, an appellant must rebut this strong presumption of reasonable performance by demonstrating that counsel's tactical choice would have been unreasonable given the circumstances. See Grier, 171 Wash.2d at 34, 246 P.3d 1260."

This court should not use the extraordinary powers of RAP 2.5 in this instance. For this court to exercise that power the courts have set forth very specific tests. State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)

Defendant next claims he was deprived of a fair trial because his trial counsel was ineffective. The test in Washington is whether "[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial". State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). This court has refused to find ineffective assistance of counsel when the actions of counsel complained of go to the theory of the case or to trial tactics. State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980); see also State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error.

Response to Assignment of Error 2 – Defense counsel was not ineffective for proposing the instruction referring to Anderson’s prior criminal history. If this was error, it was harmless.

The sum total of “references” to this instruction was the reading of the jury instruction one time, which was proposed by the defendant as well as the State. The court read the following to the jury: “Instruction No. 5. "You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony and for no other purpose."” RP 188. CP 15, 46, 101

This instruction has no meaning in the context of this trial. It states that the jury is to only consider criminal history if the defendant testified, he did not. Therefore, the jury would by and through the other instructions and the rest of this instruction be under restriction even if he testified and criminal history was divulged. He did not testify so this instruction, the law to the jury, charged that jury not to disregard criminal history. Which obviously, there was none admitted. The jury was instructed to rely only on the testimony and evidence as given by the witnesses, they are presumed to follow all instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)

While the use of this instruction was unnecessary it did not prejudice the defendant.

Anderson, as well as the State, proposed this instruction and when given a chance Anderson did not object to the inclusion of his proposed instruction. Even if a party proposes an instruction if it is later perceived to be error to include that instruction that party has a duty to object. CP 15, 46, 101. Even at the conclusion of this trial the judge asked the parties again about instructions. RP 221-2.

As with the first alleged error Appellant does not explain to this court the legal basis that would allow him to raise this issue for the first time on appeal. RAP 2.5(a) provides that this court "may refuse to review any claim of error which was not raised in the trial court." State v.

Kirwin, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009):

Although not raised at trial, Kirwin may submit for review a "'manifest error affecting a constitutional right'." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting RAP 2.5(a)(3)). Kirwin must "identify a constitutional error and show how, in the context of the trial, the alleged error actually affected [his] rights." *Id.* (citing State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). It is proper to "preview" the merits of the constitutional argument to determine whether it is likely to succeed. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (citing State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

To overcome RAP 2.5(a) and raise an error for the first time on

appeal, an appellant must first demonstrate the error is "truly of constitutional dimension." State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). This Court will not assume an error is of constitutional magnitude. *Id.* at 98. Rather Appellant must identify the constitutional error. *Id.* (citing State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). Even if a claimed error is of constitutional magnitude, an appellate court must then determine whether the error was manifest. *Id.* at 99. "Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice." ... "To demonstrate actual prejudice there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case."

The record reflects there was never an objection and in fact trial counsel for Anderson, as well as the State, offered this instruction. State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995):

As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be "manifest" - i.e., it must be "truly of constitutional magnitude". The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review. *If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest....*

It is not enough that the Defendant allege prejudice - actual prejudice must appear in the record.
(Footnote omitted, citation omitted, emphasis mine.)

See also, State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673
(2008)

As stated above RAP 2.5(a)(3) requires that a defendant raising a constitutional error for the first time on appeal show how the alleged error actually affected his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). This court will employ a two-part analysis to determine whether an asserted error is a manifest error affecting a constitutional right. See State v. Holzkecht, 157 Wn.App. 754, 760, 238 P.3d 1233 (2010), review denied, 170 Wn.2d 1029, 249 P.3d 623 (2011).

First, this court will determine whether the error is truly constitutional, as opposed to another form of trial error. Holzkecht, 157 Wn.App. at 759-60.

Second, this court will decide whether the error is manifest. Holzkecht, 157 Wn.App. at 760 "Manifest" error requires a defendant to demonstrate actual prejudice. Holzkecht, 157 Wn.App. at 760. Actual prejudice arises if the asserted error had practical and identifiable consequences at trial. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting Kirkman, 159 Wn.2d at 935).

Once again, Anderson does not mention RAP 2.5 in his brief. He

has therefore obviously not demonstrated to this court a valid basis to allow this issue to be raised for the first time on appeal under RAP 2.5. The finding of the court in State v. Trout, 125 Wn. App. 313, 317, 103 P.3d 1278 (2005) are applicable herein, “This exception is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal. Indeed, criminal law has become so largely constitutionalized that any error can easily be phrased in constitutional terms.”

Even if this court were to determine there was some sort of error, this was an invited error. As stated in State v. Barnett, 104 Wn.App. 191, 200, 16 P.3d 74 (Div. 3 2001) “The doctrine of invited error precludes review of Mr. Barnett's assigned error. The doctrine of invited error prevents a party from setting up an error at trial and then complaining of it on appeal. A potential error is deemed waived "if the party asserting such error materially contributed thereto.” (Citations omitted.)

State v. Bradley, 96 Wn. App. 678, 681-1, 980 P.2d 235 (1999);

The doctrine of invited error applies when an instruction given by the trial court contains the same error as the defendant's proposed instruction. State v. Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989); see also State v. Jacobsen, 74 Wn. App. 715, 724, 876 P.2d 916 (1994), review denied, 125 Wn.2d 1016 (1995); State v. Ahlquist, 67 Wn. App. 442, 447-48, 837 P.2d 628 (1992); State v. Miller, 40 Wn. App. 483, 486, 698 P.2d

1123, review denied, 104 Wn.2d 1010 (1985).

The courts of this State have indicated that this type of error must be something that the defendant brought upon himself, In re Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000) “In these invited error doctrine cases, the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, the court did not apply the doctrine.”

Anderson proposed this instruction and it is clear why Anderson’s trial counsel had this instruction in his packet. When asked by the trial court if he was going to testify Anderson stated “[w]ell, I try to weigh the positives and negatives on that. I mean, I want to so bad. It's hard not saying anything, but I think it might hurt me more than benefit me, your Honor.” RP 180. The instruction was proposed because the defendant wanted to testify and his counsel wanted to address the possibility if he, Anderson, did take the stand. The best action would have been for this instruction to be pulled from the packet, it was not, but its inclusion did not affect the outcome of this trial.

As is the case in so many appeals the totality of the evidence must be addressed to determine if the case should stand even if this court determines that there was error. In this trial the allege error or errors are overwhelmed by the facts presented.

As is set forth above in the facts section of this brief this was not a complicated trial. The entire chase, abandonment of the stolen Highlander and subsequent apprehension of Anderson took far less than half an hour. It was during this period that the officers observed the Highlander come out of the road where the prowled vehicles were later discovered; the actual flight and abandonment of the Highlander; the locating of the abandon Highlander; finding the fresh shoe prints that had that distinctive honeycomb and circle on them that lead from near the abandon stolen Highlander to the location where Sargent Cavin found the defendant lurking in a carport wearing shoes that had the very same distinctive prints that lead from the stolen Highlander across several backyards and fences.

There were no other persons observed anywhere near the scene of this crime, on this snowy Christmas Eve and early Christmas morning. And there were at best only very brief times where the officers were not able to observe this running vehicle.

None of those facts were contradicted in trial. The defendant chose to exercise his right to remain silent and he did not present any witnesses. It is clear from the record that Anderson relied on that which was not proven; that the defendant was not found in the Highlander; that none of the officers could place him in the Highlander and, that there was no “forensic” e.g. fingerprint evidence that tied him to the stolen Toyota

Highlander.

The evidence here was simple, straightforward and though quantitatively minimal, overwhelming. It is a fact that the trial court ordered the exclusion of the statement that Anderson had an outstanding warrant. And it cannot be denied that this information came into evidence. However, that statement was not intentionally elicited by the State, it was minimal and it did not impact the outcome of this trial.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "[W]hen the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

In order to convict Anderson of possession of a stolen vehicle the jury had to find the defendant was in possession of the stolen vehicle on the night Anderson was arrested. The other three counts were dependent on the facts elicited from the owners of the two cars that were prowled and the fact that Anderson himself lied to the arresting officer about who he really was.

The inclusion of the statement about Anderson's warrant and the jury instruction regarding the use of prior criminal history are nonconstitutional error at the most.

State v. Kindell, 181 Wn.App. 844, 853-4, 326 P.3d 876 (2014)

“Both constitutional and nonconstitutional errors may be subject to harmless error analysis. For a constitutional error, the State bears the burden of proving that the error is harmless beyond a reasonable doubt.

State v. Lynch, 178 Wn.2d 487, 494, 309 P.3d 482 (2013). A

nonconstitutional error requires reversal only if there is a reasonable probability that the error materially affected the outcome of the trial. State v. Gower, 179 Wn.2d 851, 854-55, 321 P.3d 1178 (2014). An error is constitutional if it implicates a constitutional interest as compared to another form of trial error. See State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Not every instructional error is constitutional. O'Hara, 167 Wn.2d at 101-04 (whether error in a self-defense jury instruction is constitutional requires a case by case analysis).

The improper admission of the warrant statement and the inclusion of an instruction regarding prior history and its use of that history in a limited fashion if in fact that defendant had testified are not of constitutional magnitude.

IV. CONCLUSION

The admission of the statement that Anderson had a warrant was in contradiction of the court previous order. This statement was not intentionally elicited by the State and there were no further mentions, absolutely none, throughout the rest of the trial of any of Anderson extensive criminal history. Defense counsel did not object to this statement, clearly a trial tactic that did not reinforce in the jury's mind what had been mistakenly uttered by the officer. The second factor that then must be addressed is, was this alleged error even preserved for appeal, it is the State's position that it was not.

Defendant and the State both proposed the instruction now challenged. There was never objection to its use in the trial. Further, the instruction was not harmful and if, as presumed, the jury follows the instruction given the jury would not have even considered that instruction because Anderson did not take the stand.

There were no errors in this trial that warrant reversal of the Anderson's convictions, this appeal should be dismissed.

Respectfully submitted this 1st day of May 2017,

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DECLARATION OF SERVICE

I, David B. Trefry, state that on May 1, 2017, I emailed a copy, by agreement of the parties, of the Respondent's Brief to: Eric J. Nielsen and Mary Swift at Sloanej@nwattorney.net

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of May, 2017 in Spokane, Washington.

s/ David B. Trefry
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