

No.34881-4-III

IN THE COURT OF THE APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

---

THE STATE OF WASHINGTON, Respondent

v.

TOMMY D. CANFIELD, Appellant.

---

---

**BRIEF OF RESPONDENT**

---

---

BENJAMIN C. NICHOLS  
Asotin County  
Prosecuting Attorney  
WSBA #23006

P. O. Box 220  
Asotin, Washington 99402  
(509) 243-2061

**TABLE OF CONTENTS**

Page

<b>TABLE OF AUTHORITIES</b> .....	iii
<b>I. STATEMENT OF THE CASE</b> .....	1
<b>II. ISSUES</b> .....	10
A. <u>DOES THE ABSENCE OF A <i>PETRICH</i> INSTRUCTION AS TO THE OBSTRUCTION CHARGE CONSTITUTE REVERSIBLE ERROR?</u> .....	10
B. <u>DO THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS RISE TO THE LEVEL OF PROSECUTORIAL MISCONDUCT SUCH AS TO REQUIRE REVERSAL?</u> .....	10
C. <u>WHERE THE DEFENDANT IS IN ACTUAL POSSESSION OF A FIREARM AT THE TIME OF A CRIME, IS PROOF OF A NEXUS REQUIRED?</u> ..	10
D. <u>WAS THE UNCONTESTED STATEMENT OF CRIMINAL HISTORY ACKNOWLEDGED AT THE TIME OF SENTENCING?</u> .....	10
E. <u>SHOULD THIS COURT AFFIRM THE IMPOSITION OF DISCRETIONARY COSTS IN THIS CASE?</u> .....	10
<b>III. ARGUMENT</b> .....	10
A. <u>BASED UPON LEGITIMATE DEFENSE STRATEGY AND THE FACTS OF THIS CASE, THE ABSENCE OF A <i>PETRICH</i> INSTRUCTION WAS NOT REVERSIBLE ERROR</u> .....	11
B. <u>THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS EXPLAINING "INTENT TO DEPRIVE" AND CONCERNING LACK OF EVIDENCE TO SUPPORT THE DEFENSE THEORY OF THE CASE WERE NOT MISCONDUCT NOR DO THEY REQUIRE REVERSAL</u> .....	16

C. WHEN ACTUAL POSSESSION OF A FIREARM IS PROVEN NO SHOWING OF A NEXUS BETWEEN THE CRIME AND THE FIREARM IS REQUIRED 22

D. THE DEFENSE AFFIRMATIVELY ACKNOWLEDGED THE UNCONTESTED STATEMENT OF CRIMINAL HISTORY IN THIS CASE ..... 25

E. THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WAS PROPER AND ANY ERROR WAS NOT PRESERVED ..... 27

IV. **CONCLUSION** ..... 31

## TABLE OF AUTHORITIES

### State Supreme Court Cases

<u>In re Pers. Restraint of Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002) .....	26
<u>State v. Blazina</u> , 182 Wn.2d 827, 344 P.3d 680 (2015) .....	27, 28, 29, 30
<u>State v. Boyer</u> , 91 Wn.2d 342, 588 P.2d 1151 (1979) ....	13
<u>State v. Carson</u> , 184 Wn.2d 207, 357 P.3d 1064 (2015) .....	12 - 13
<u>State v. Clark</u> , 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) .....	20
<u>State v. Dennison</u> , 72 Wn.2d 842, 849, 435 P.2d 526 (1967) .....	19
<u>State v. Easterlin</u> , 159 Wn.2d 203, 149 P.3d 366 (2006)	24
<u>State v. E.J.J.</u> , 183 Wn.2d 497, 345 P.3d 815 (2015) ...	11
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009) ..	17
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995) .	16
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985) ..	21
<u>State v. Gurske</u> , 155 Wn.2d 134, 118 P.3d 333 (2005) ..	23
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990) .....	13
<u>State v. Hoffman</u> , 116 Wn.2d 51, 93, 804 P.2d 577 (1991) .....	16 - 17
<u>State v. Pacheco</u> , 107 Wn.2d 59, 726 P.2d 981 (1986) .	19
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984) .....	5, 11

<u>State v. Studd</u> , 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) .....	13
<u>State v. Williams</u> , 171 Wn.2d 474, 251 P.2d 877 (2011) .	11
<u>State v. Young</u> , 89 Wn.2d 613, 574 P.2d 1171 (1978) . .	20

State Court of Appeals Cases

<u>State v. Clark</u> , 191 Wn. App. 369, 362 P.3d 309 (2015) .....	29, 30
<u>State v. Corbett</u> , 158 Wn. App. 576, 242 P.3d 52 (2010) .....	13
<u>State v. Craven</u> , 69 Wn. App. 581, 849 P.2d 681 (1993) .....	15
<u>State v. Curry</u> , 62 Wn. App. 676, 814 P.2d 1252 (1991), <i>aff'd</i> , 118 Wn.2d 911 .....	29
<u>State v. Curtiss</u> , 161 Wn. App. 673, 250 P.3d 496 (2011) .....	20
<u>State v. Easterlin</u> , 126 Wn. App. 170, 107 P.3d 773 (2005) .....	23 - 24
<u>State v. Fiallo-Lopez</u> , 78 Wn. App. 717, 899 P2d 1294 (1995) .....	14
<u>State v. Graham</u> , 59 Wn. App. 418, 798 P.2d 314 (1990) .....	19
<u>State v. Hernandez</u> , 172 Wn. App. 537, 290 P.3d 1052 (2012) .....	24
<u>State v. King</u> , 113 Wn. App. 243, 54 P.3d 1218 (2002) ...	17
<u>State v. Love</u> , 80 Wn. App. 357, 908 P.2d 395 (1996) ...	15
<u>State v. Lyle</u> , 188 Wn. App. 848, 355 P.3d 327 (2015), <i>remanded</i> , 184 Wn.2d 1040, 365 P.3d 1263 (2016) . . . .	28

<u>State v. Mayer</u> , 120 Wn. App. 720, 86 P.3d 217 (2004) .....	29 - 30
<u>State v. Nitsch</u> , 100 Wn. App. 512, 997 P.2d 1000 (2000) .....	25 - 26
<u>State v. Ramirez</u> , 49 Wn. App. 332, 742 P.2d 726 (1987) .....	17
<u>State v. Rooth</u> , 129 Wn. App. 761, 121 P.3d 755 (2005) .....	23 - 24
<u>State v. Silva</u> , 119 Wn. App. 422, 81 P.3d 889 (2003) ..	20
<u>State v. Zamudio</u> , 192 Wn. App. 503, 368 P.3d 222 (Div. III, Feb. 4, 2016) .....	26

Statutes

RCW 7.68.035(1)(a) .....	29
RCW 9A.20.021 .....	29
RCW 10.01.160 .....	27
RCW 36.18.020(2)(h) .....	29
RCW 43.43.690 .....	30
RCW 43.43.7541 .....	29
RCW 69.50.430(2) .....	29, 30

Court Rules

General Rule 14.1 .....	24
Rules of Appellate Procedure 2.5 .....	28

Washington Pattern Jury Instructions

WPIC 4.25 .....	12
-----------------	----

## I. STATEMENT OF THE CASE

On April 18, 2016, local law enforcement officers received information that the Appellant herein, Tommy D. Canfield, a wanted felon, was in the town of Asotin. Report of Proceedings page 9 (*Hereinafter* RP 9). As the officers approached the vehicle that had been associated with the Appellant, they noted a man reclining in the seat with a hat pulled over his face. RP 12. One of the officers yelled “Tommy” and the Appellant sat up. *Id.* The Appellant then initiated a campaign of obfuscation and delay. First, he reached for the keys in the ignition of the vehicle in an apparent effort to start the vehicle. RP 26. The officers took the Appellant out of the vehicle and he continued his efforts to frustrate the officers’ efforts: he denied that he was “Tommy Canfield.” RP 13. This pattern of behavior continued as he gave a false name to the officers. *Id.* When one of the officers tried to handcuff the Appellant, he “locked his hands” and was “squirming around” so as to frustrate the attempt and another officer had to assist in the cuffing. RP 30, 58.

Upon being placed in the officer’s vehicle for transport, the Appellant immediately began to “move around a lot” during the brief ride from the arrest location to the local jail. RP 42 - 43. The transporting officer was concerned that the Appellant was trying to hide evidence in the vehicle to further frustrate the investigation. RP 43, 64, 85. She repeatedly told the Appellant to stop moving and to

“sit still” but he continued to move about throughout the entire ride. *Id.* At one point his movements escalated to such a level that his head made contact with the partition between the rear seat of the vehicle and the officer. RP 96.

Upon arriving at the jail, the Appellant continued to move around and at one point attempted to put his cuffed hands into his back pocket. RP 44 - 45. An attending corrections officer at the jail tried to take a hold of the Appellant’s hand and he pulled away from the officer. RP 130. The corrections officer and the transport officer had to hold the Appellant’s hands to prevent him reaching into his pocket as they removed the handcuffs at the jail. RP 45, 131. The corrections officer searched the pocket that the Appellant had been trying to put his hand into and pulled out two small packages of a substance which was later determined to be methamphetamine. RP 132, 197. As the corrections officer continued his search of the Appellant, he located eight .357 caliber bullets his front pocket. RP 134. Upon discovery of the bullets, the Appellant, without being prompted, told the officers that he had the bullets “for another reason.” RP 48.

After the Appellant was taken into the “changeover room” for a strip search, the corrections officer and the transport officer went back to the police car and looked into the backseat area to check for any evidence that the Appellant may have secreted there. RP 48, 68,

138. The transport officer found a large pistol on the floor of the backseat area, partially slid under the divider between the front and back seats. RP 48. This pistol was determined to be a .357 caliber Colt Python revolver. RP 151. The officer was “shocked” by the discovery because she had searched the vehicle upon coming on duty and the Appellant had been the only person in the backseat since that search. RP 49 - 51. The pistol was loaded at the time of discovery and the officers unloaded it. RP 51. The bullets that came out of the gun were compared to those found in the Appellant’s pocket and, according to the officer, they were “identical.” *Id.* RP 140. The officer later determined that Tommy D. Canfield was a convicted felon. RP 52. The investigating officer was able to confirm that the Appellant had previously been convicted of Unlawful Possession of a Firearm in the Second Degree. *Id.*

Subsequent investigation linked the pistol to a burglary that had occurred just two days prior to the Appellant’s arrest. A home in a sparsely populated area just seven miles upriver from Asotin was broken into on April 16, 2016. RP 170. During this burglary a Colt Python revolver was stolen. RP 173. The owner of the stolen gun was able to provide a very exacting description of both the firearm and the bullets that were stolen. RP 174 - 175. All of the details matched those observed on the firearm and the bullets that recovered during the investigation of the Appellant. RP 175 - 176. The owner of the

gun testified that it was a “collector’s item” of significant value. RP 178.

The Appellant was subsequently charged with Possession of Methamphetamine, Unlawful Possession of a Firearm in the Second Degree, Possessing a Stolen Firearm, and Obstructing a Law Enforcement Officer. Clerk’s Papers 23 - 26 (*Hereinafter* CP 23 - 26). The Possession of Methamphetamine charge also carried a Firearm Enhancement pursuant to 9.94A.533(3). *Id.* The matter proceeded to jury trial. At trial all of the above described facts were supported by the testimony and exhibits produced by the Prosecution.<sup>1</sup> Throughout the State’s case Defense Counsel cross-examined many of the witnesses, some very extensively, concerning the bullets found in the Appellant’s pocket and those recovered from the gun: Cross of Ofr. Manchester RP 74 - 81; Cross of Chief Renzelman RP 108 - 118; Re-cross of Renzelman RP 123 - 124; Cross of Sgt. Anderson RP 145; Cross of Dep. Neely RP 155, 159 - 160; Cross of Kenneth New 184 - 186; Cross of Glenn Davis 220 - 237, Re-cross of Davis 239 - 240.

During a brief break in the testimony the Trial Court took up the issue of jury instructions. RP 189. Both the Prosecution and the

---

<sup>1</sup> Contrary to the Appellant’s assertion, the involved officers did NOT testify that the only obstructive action of the Appellant was his use of a false name. (See: Appellant’s Brief, pages 6 - 7). In fact the officers testified at length about all of the Appellant’s continuous efforts to frustrate the process from the initial attempt to start the vehicle through his repeated physical efforts to hinder apprehension, and ongoing efforts to secret evidence. It was the Defense argument throughout the proceedings that the sole obstructive act was the use of a false name.

Defense submitted proposed instructions. *Id.* Neither party asked the court to give an instruction on unanimity instruction<sup>2</sup> as to the Obstructing charge. The Defense and the Prosecution agreed upon the final set of instructions and neither side took any exceptions to the proposed set and both attorneys said so, on the record, and initialed the bottom of a page to confirm this. *Id.*

Following the presentation of the State's case the Defense moved to dismiss the Obstructing charge, arguing that the Appellant's use of a false name was his sole act of obstruction. RP 241 - 242. The Prosecution replied that the use of a false name was not the only obstructive behavior, but that the obstructive behavior included "conduct" as well as speech - primarily focusing on the Appellant secreting evidence by hiding the gun in the vehicle. RP 242. The Trial Court agreed with the State's position and denied the motion to dismiss. RP 243 - 244. The Defense then moved to dismiss the Possession of Stolen Firearm charge arguing that there was insufficient evidence the Appellant knew that the gun was stolen. RP 244. The Court denied this motion as well. RP 245. The Defense declined to offer any evidence. RP 248.

During the State's closing argument the Prosecutor attempted to explain in layperson's terms the element of "intent to deprive the

---

<sup>2</sup> Generally referred to as a "*Petrich Instruction*" per State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)

true owner” as applicable to the Possession of a Stolen Firearm charge. RP 274. The Prosecutor explained that one who innocently comes into possession of an item which turns out to be stolen and seeks to return the item to the true owner would not be guilty of possessing stolen property. RP 274. He then pointed out that there was no evidence in the present case to support such a finding. *Id.*

During his closing argument Defense Counsel argued to the jury that there were “inconsistencies” in the State’s case. RP 277. Primary among these claimed inconsistencies, according to the Defense, were issues surrounding the bullets. RP 278. The Defense made a point of the number of bullets and questions as to where the bullets came from and stated:

all of the attempts by the, ah, investigators and by the State to link these bullets to Mr. Canfield and to the gun end up not telling us anything. The bullets really don’t have any meaning.

RP 278. Defense went on to argue that there was a “mystery bullet” and provided a rather complex theory:

Somehow someone somehow opened up that bag and either put in two bullets and then later removed them and put in three or had three bullets in there, removed two, and put in this one, and then put them back.

RP 279 - 280. The Defense did not tie these wild statements to any actual testimony or evidence but rather claimed that this unsupported characterization “means you have a reason to question the integrity of the chain of custody and the integrity of the investigation.” RP 280.

The Defense then highlighted the Appellant's statement at the time that the bullets were found in his pocket:

Mr. Nichols emphasized that the statement we heard from one of the officers that Tommy Canfield was asked where's the firearm and he said these bullets were for another purpose. That is the only evidence we have from [the Appellant] saying anything remotely related to the firearm.

RP 285. The Defense Attorney did not provide any further explanation of the "other reason" for the bullets.

In response to all of the Defense's unsupported arguments concerning the bullets, during rebuttal the Prosecutor took issue with the Defense efforts to attack the integrity of the investigation. RP 292. He also responded to the Defense Counsel's assertion that there was "no link" between the bullets found in the Appellant's pocket and the stolen gun. RP 294. The Prosecutor reminded the jury that both the Appellant himself and his attorney had admitted that he was in possession of the bullets but that both had claimed that there was some "other reason" for the possession of the bullets. *Id.* The Prosecutor went on to point out that although the Defense had asserted that there was some other reason for the bullets no evidence, and no testimony was ever offered to support some alternate explanation. *Id.* None of these comments drew any objection from the Defense.

The jury found the Appellant guilty as to all charges and the Firearm Enhancement as well as an aggravating factor of Rapid Recidivism. CP 109 - 114. Prior to sentencing the State filed a Sentencing Memorandum with the Court. CP 59. Therein the State provided a line by line summary of the Appellant's conviction history including the crimes, date of sentence, county and state of the sentencing court, date of crime, whether the crimes were adult or juvenile convictions, and finally a statement as to the type of crime. *Id.* at page 4. The Prosecution included the advisement that "Certified copies of the respective conviction records can be provided if requested prior to sentencing." *Id.* No such request has ever been made. At sentencing the Defense acknowledged that it had received the State's version of the Appellant's criminal history and acknowledged that it appeared to be correct: "I believe that the State has calculated properly the mandatory statutory, ah common – I'm sorry – ah, standard range and that is 11<sup>3/4</sup> to 14½ years." RP 328 - 329. At no point did either the Appellant or his attorney raise any question or objection to the State's recitation of the Appellant's criminal history as reflected in the Sentencing Memorandum and as set forth in the Judgment and Sentence. CP 60.

In regards to the financial obligations the trial judge engaged in the following inquiry:

Mr. Canfield, imposing the fines, fees, and assessments, I don't see anything that would prevent you from working if you were out and available to do so; is that accurate?

RP 339. To which the Appellant responded "That's true." *Id.* He went on to explain that he trained horses for a living and that he had been doing so since a young age. RP 339 - 340. Based upon the Appellant's statements the Court then imposed legal financial obligations totaling \$4,910.00. Judgment and Sentence, page 3 of 10. Of these costs only the \$750.00 court appointed attorney's fees and the \$260.00 sheriff's service fees are considered discretionary costs.

## II. ISSUES

- A. DOES THE ABSENCE OF A *PETRICH* INSTRUCTION AS TO THE OBSTRUCTION CHARGE CONSTITUTE REVERSIBLE ERROR?
- B. DO THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS RISE TO THE LEVEL OF PROSECUTORIAL MISCONDUCT SUCH AS TO REQUIRE REVERSAL?
- C. WHERE THE DEFENDANT IS IN ACTUAL POSSESSION OF A FIREARM AT THE TIME OF A CRIME, IS PROOF OF A NEXUS REQUIRED?
- D. WAS THE UNCONTESTED STATEMENT OF CRIMINAL HISTORY ACKNOWLEDGED AT THE TIME OF SENTENCING?
- E. SHOULD THIS COURT AFFIRM THE IMPOSITION OF DISCRETIONARY COSTS IN THIS CASE?

## III. ARGUMENT

- A. BASED UPON LEGITIMATE DEFENSE STRATEGY AND THE FACTS OF THIS CASE THE ABSENCE OF A *PETRICH* INSTRUCTION WAS NOT REVERSIBLE ERROR.
- B. THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS EXPLAINING "INTENT TO DEPRIVE" AND CONCERNING LACK OF EVIDENCE TO SUPPORT THE DEFENSE THEORY OF THE CASE WERE NOT MISCONDUCT NOR DO THEY REQUIRE REVERSAL.
- C. WHEN ACTUAL POSSESSION OF A FIREARM IS PROVEN NO SHOWING OF A NEXUS BETWEEN THE CRIME AND THE FIREARM IS REQUIRED.
- D. THE DEFENSE AFFIRMATIVELY ACKNOWLEDGED THE UNCONTESTED STATEMENT OF CRIMINAL HISTORY IN THIS CASE.

E. THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WAS PROPER AND ANY ERROR WAS NOT PRESERVED.

DISCUSSION

A. BASED UPON LEGITIMATE DEFENSE STRATEGY AND THE FACTS OF THIS CASE, THE ABSENCE OF A *PETRICH* INSTRUCTION WAS NOT REVERSIBLE ERROR.

The Appellant's first assignment of error is that the failure of the Court to give a unanimity, or Petrich,<sup>3</sup> instruction as to the Obstruction charge constitutes reversible error. This argument fails on two distinct and compelling bases. First: the Defense decision to not seek such an instruction was at the very root of their strategy as to that charge. As the record clearly demonstrates, the Defense steadfastly maintained that the sole "obstructive" behavior by the Appellant was his use of a false name or denial that he was in fact "Tommy D. Canfield." This position was the heart and soul of the pre-trial motion to dismiss and the mid-trial motion to dismiss the Obstruction charge. Based upon cases cited by the Defense, it is clear that an Obstructing charge cannot be based solely on "speech": State v. Williams, 171 Wn.2d 474, 251 P.2d 877 (2011); State v. E.J.J., 183 Wn.2d 497, 345 P.3d 815 (2015). It is equally clear that the very language of a Petrich instruction would be disadvantageous

---

<sup>3</sup> State v. Petrich, *supra*.

to the Defense position in the present case. The standard Petrich instruction provides:

The State alleges that the Defendant committed acts of \_\_\_\_\_ (identify crime) on multiple occasions. To convict the Defendant [on any count] of \_\_\_\_\_ (identify crime), one particular act of \_\_\_\_\_ (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the Defendant committed all the acts of \_\_\_\_\_ (identify crime).

WPIC 4.25. When it is considered that the Defense insisted that this was a “single act” case, to request an instruction from the court that referred to plural acts on “multiple occasions” would be fatal to the argument. By focusing on the “single act” consisting of speech the Defense would have solid grounds for vacation of the charge in the event of conviction. On the other hand, to instruct the jury that there were “acts” committed on “multiple occasions” would highlight the State’s position and a verdict following such an instruction would be immune from the “speech only” avenue of attack.

This situation calls to mind the case of State v. Carson, 184 Wn.2d 207, 357 P.3d 1064 (2015). In Carson the State proposed a Petrich instruction and the defense successfully persuaded the trial court not to give it. *Id.* at 214. As with the present case, the defense strategy would not be advanced by such an instruction. The State Supreme Court, in affirming the conviction, found that the absence of the instruction was not reversible error:

At best, then, the Petrich instruction was irrelevant to the defense's broader trial strategy; at worst, it could have actively undercut that strategy. This further underscores the reasonableness of defense counsel's decision to object to the reading of the State's proposed instruction.

Carson, at 220. If active resistance to a Petrich instruction proposed by the opposition, as part of a defense strategy is not error, how can failure to propose such an instruction be error?

Moreover, the Defense in the current case agreed upon the jury instructions which were given and made a clear record that there were no objections or exceptions to the instructions. In so doing the Defense raised no challenge to the lack of a Petrich instruction. As has been noted:

The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involves constitutional rights. State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990) (*quoting State v. Boyer*, 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979)). This doctrine applies to alleged failures to provide a Petrich unanimity jury instruction.

State v. Corbett, 158 Wn. App. 576, 592, 242 P.3d 52 (2010). The Defense in the present case purposefully did not seek a Petrich instruction as a legitimate strategic move and should not now be heard to complain.

A second reason that this Court should not give credence to the Appellant's argument concerning a unanimity instruction is that

evidence produced at trial clearly established that the Obstruction charge was based upon a continuing course of conduct. The officers involved in the initial arrest testified to ongoing obstructive conduct from first contact up to the point that the Appellant was placed in the car for transport to the jail. The transporting officer testified to an unbroken course of obstructive behavior by the Appellant that extended from arrest through the transport and even into entry of the jail. The corrections officer at the jail testified to the obstructive acts that occurred at the jail from the very arrival of the Appellant and finally culminated in the discovery of the pistol that the Appellant secreted in the police car. This was a continuous course of conduct and does not give rise to the requirement of a Petrich instruction pursuant to the very holding in that seminal case itself. Petrich, supra at 571.

The “continuous course of conduct exception” to Petrich has been applied in a case where there were two distinct deliveries, of differing amounts of a controlled substance, at different locations, and at different times. See: State v. Fiallo-Lopez, 78 Wn. App. 717, 899 P2d 1294 (1995). In another case the Court held that no unanimity instruction was required when a single count of possession with intent to deliver cocaine was based upon the defendant’s possession of a quantity of cocaine on his person at the time of his arrest and the subsequent discovery of a larger quantity of the drug at his residence.

See: State v. Love, 80 Wn. App. 357, 908 P.2d 395 (1996). In State v. Craven, 69 Wn. App. 581, 849 P.2d 681 (1993) the Court addressed a three-week long period of abuse to a child that included and bruising of the child's arms, "loop marks" on the child's back, broken arm bones, swelling of head, skull fractures, burn marks, a rectal fissure, ankle abrasion, and a scrape under the nose. Craven, at 583. The evidence was clear that these injuries occurred at various time throughout the three-week period. *Id.* The Court concluded these repeated assaults on the child would not give rise to the requirement of a Petrich instruction because, like the present case, "Where the evidence indicates a continuous course of conduct our courts have recognized an exception to the Petrich rule." *Id.* at 587.

If multiple beatings of a child resulting in injuries to various parts of his body - literally from head to foot - over a three-week long period satisfy the "continuous course of conduct" exception, then the Appellant's course of conduct over a fairly brief period which was all designed to delay the investigation of this case must surely do so as well. As such a Petrich instruction was not required and the Defense's decision not to request one was not error.

Because the Defense had a clear strategic reason for not requesting a unanimity instruction to the Obstructing charge and because the facts of this case demonstrate that the Appellant's behavior constituted a continuous course obstructive acts, the failure

of the Defense to request a Petrich instruction cannot constitute reversible error.

B. THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS EXPLAINING "INTENT TO DEPRIVE" AND CONCERNING LACK OF EVIDENCE TO SUPPORT THE DEFENSE THEORY OF THE CASE WERE NOT MISCONDUCT NOR DO THEY REQUIRE REVERSAL.

The Appellant's second claim of error concerns comments made by the Prosecutor during closing arguments. The first of these was during the Prosecutor's colloquy regarding the jury instructions. In an effort to reduce the legal concept of "intent to deprive the true owner," as applicable to the Possession of a Stolen Firearm charge, into laymen's terms, the Prosecutor explained:

Basically, that means that if I find a stolen firearm and I go, oh my gosh, I've got to get this to whoever [*sic*] it belongs to, that's an excuse. That's, yes, I possessed and, yes, I knew it was stolen, but I was trying to get it back to the person who it belonged to.

RP 274. The Prosecutor went on to point out that "innocent possession" was not at issue in the present case and no evidence had been offered to support such a position. *Id.* This comment did not draw any objection by Defense.

As is the often-stated rule, a prosecutor has wide latitude in closing arguments to draw reasonable inferences from the evidence. State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995). Challenges to remarks made in closing argument must be judged

within the context in which they are made. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). In fact, a prosecutor may go so far as to “comment that evidence is undisputed when these comments are so brief and so subtle that they do not emphasize the defendant’s testimonial silence.” State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). The comment made by the Prosecutor in his efforts to explain “intent to deprive” was clearly in this vein and was not so egregious as to draw any objection or request for curative instruction from the Defense.

The fact that the comment did not draw an objection should preclude a claim of prosecutorial misconduct on appeal:

Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction.

State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Clearly, neither the Defense Attorney nor the Trial Judge, who were present when the comment was made, felt that the Prosecutor’s explanation was objectionable or ill-intentioned. The fact that Defense Counsel did not request a mistrial or curative instruction provide a strong suggestion that the Prosecutor’s comments “did not appear critically prejudicial in the context of the trial.” State v. King, 113 Wn. App. 243, 290, 54 P.3d 1218 (2002). This Court should not find to the contrary.

The second comment which the Appellant asserts constitutes misconduct, concerns the Prosecutor's response, during rebuttal, to the Defense theory concerning "mystery bullets." As set forth in the factual summary and as supported by the transcript of the trial, the central argument made throughout trial was that the bullets found in the Appellant's pocket were not linked to the firearm at issue in the case. This Defense theory began with the Appellant's own statement when the bullets were initially found in his pocket, that he had them "for another reason." This theory was advanced by Defense Counsel's questioning of many of the witnesses regarding the circumstances of the discovery of the bullets, their subsequent handling, their appearance, photos taken of the bullets, and the expert's examination of the bullets.

The center-pole of the defense continued to be offered up into closing argument. The Defense Attorney drew the jury's attention to the Appellant's statement concerning "another purpose" and stated that there was "no link" between the bullets found in the Appellant's possession and the firearm. He went on to provide the jury with an in-depth discussion of his own doubts and questions about the bullets. During his closing argument Defense Counsel went so far as to postulate that there was a "mystery bullet" and offered up a rather convoluted take on the evidence presented:

Somehow someone somehow opened up that bag and either put in two bullets and then later removed them and put in three or had three bullets in there, removed two, and put in this one, and then put them back.

RP 279 - 280. This permutation of the “mystery bullet” Defense theory was never tied to any substantive evidence and drew the Prosecutor’s response which the Appellant asserts is misconduct.

As set forth above, a prosecutor is afforded wide latitude in his closing arguments. This is even more so applicable to rebuttal:

As a general rule, remarks of the prosecutor, including such as would otherwise be improper, are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel and where they are in reply to or retaliation for his acts and statements, unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them

State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). Further, it is a well-founded rule that it is “not misconduct for a prosecutor to argue that the evidence does not support the defense theory.” State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), *citing* State v. Pacheco, 107 Wn.2d 59, 71, 726 P.2d 981 (1986). In Graham, as in the present case, the defense:

argued at trial that the State's proof failed because it was incredible. The State turned this argument around, saying the defense argument was not credible. Each side tied its competing interpretation of the evidence to the trial testimony.

*Id.* As the Court found in Graham, so too this Court should conclude that the Prosecutor did not commit misconduct by pointing out to the jury that the Defense's take on the evidence, and the "mystery bullet" theory of the case, were not supported by the evidence.

It should be also noted that this is not a case where the Appellant remained silent at the time of his arrest. In such a case, a prosecutor's comment on that silence could well be improper. State v. Silva, 119 Wn. App. 422, 429, 81 P.3d 889 (2003). However, when a defendant, as is the case herein, does not remain silent and instead talks to police, it is not misconduct for the prosecution to comment on what the defendant **does not say**. State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (*emphasis added*); State v. Young, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978). See also State v. Curtiss, 161 Wn. App. 673, 691-92, 250 P.3d 496 (2011). The jury in this case heard testimony from witnesses that the Appellant made a statement about some "other reason" - not related to the stolen firearm - for the bullets found in his pockets. This statement was highlighted by the Defense during closing argument, and by the Prosecution. Pursuant to the case law cited above, the Prosecutor's comment about what the Appellant did not say, cannot support a claim of misconduct.

Finally the Prosecutor's comments, in light of the mass of undisputed evidence produced at trial, cannot possibly be seen as so

prejudicial as to merit reversal. The initial comment, intended to help the jury understand “intent to deprive,” was related to the stolen firearm. The evidence was overwhelming that the Appellant possessed this stolen firearm. It was found in the back seat of the vehicle that only he had occupied since it was routinely searched by the officer. Bullets matching those in the gun were found in the Appellant’s pocket at the time of his arrest. The Prosecutor’s comment concerning the firearm cannot be seen as so flagrant and ill-intentioned as to have rendered the trial process unfair. Similarly, the Prosecutor’s comment concerning the failure of the Defense theory regarding the bullets is of little import in light of all of the evidence that the Appellant actually possessed the firearm.

Even were this Court to conclude that the Prosecutor’s statements constituted misconduct AND that the claim of misconduct was not waived by the Defense failure to object or request a curative instruction AND that the misconduct rose to such a level as to impact the Appellant’s rights, in light of all the evidence presented at trial, reversal would not be appropriate. Even a constitutional error, as the Appellant asserts in the present case, must be considered “harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The “untainted evidence” in the present case would surely

convince any jury that the Appellant was truly guilty of all the charges herein.

C. WHEN ACTUAL POSSESSION OF A FIREARM IS PROVEN NO SHOWING OF A NEXUS BETWEEN THE CRIME AND THE FIREARM IS REQUIRED.

Contrary to the Appellant's mischaracterization, this case was never about "constructive possession." (See: Appellant's Brief, Issues Pertaining to Assignments of Error, Issue 4, page 4). Rather, the evidence produced at trial in this matter was sufficient to convince the jury, beyond a reasonable doubt, that the Appellant was in *actual* possession of the stolen firearm. This is clearly borne out by the guilty verdicts on the charges of Unlawful Possession of a Firearm in the Second Degree and Possessing a Stolen Firearm as charged in Counts 2 and 3, respectively. All of the evidence produced at trial supported the State's theory of the case, that the Appellant was in actual possession of the firearm and in actual possession of the methamphetamine at the time of his arrest. This evidence established that the Appellant, through his strenuous efforts, was able to remove the firearm from his pants and deposit on the floor of the police car, but that similar efforts to remove the methamphetamine prior to its discovery, were unsuccessful. As such, this was not a "constructive possession" case.

All of the cases cited by the Appellant which require proof of a nexus between the weapon and the crime, **without exception**, are constructive possession cases. The Appellant cannot cite to a single case where a Court has reversed an actual possession case based upon failure to establish a nexus. In all fairness, it appears that there are no such cases, so the Appellant's failure to locate support for his position is excusable. The Appellant claims that State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005) is "most similar" to the present case. Appellant's Brief, page 20. Gurske can easily be distinguished as it, like all of the other cases cited by the Appellant, involved "constructive possession." Gurske, at 138.

In point of fact, State v. Easterlin, 126 Wn. App. 170, 107 P.3d 773 (2005), is a case with a strikingly similar facts to the case now at bar. The fact pattern in Easterlin was as follows:

...Tacoma Police responded to a call regarding a suspicious car. Police arrived to find the defendant asleep in the driver seat of the car. The defendant and car matched the description given. The defendant had a 9mm pistol in his lap. There was a loaded 9mm magazine on the seat next to him. Police recovered the gun and woke the defendant.

... Booking search found rock cocaine (field test positive) in his sock.

Id. at 171. In response to a claim that the State had not demonstrated a nexus between the weapon and the possession of the drugs the Court stated:

When a defendant actually possesses a weapon during the commission of a crime, the protections of the nexus requirement become irrelevant.

*Id.* at 173. The Supreme Court agreed with the State and affirmed the Court of Appeals noting:

The State is likely correct that in actual possession cases, it will rarely be necessary to go beyond the commonly used “readily accessible and easily available” instruction.

State v. Easterlin, 159 Wn.2d 203, 209, 149 P.3d 366, 369 (2006).

The Court of Appeals holding concerning the irrelevance of nexus in actual possession has been cited by the Courts of Appeals in subsequent decisions:

We have previously held that the “nexus” requirement is not applicable to firearm enhancements when there is actual, not constructive, possession of a firearm. State v. Easterlin, 126 Wn. App. 170, 173, 107 P.3d 773 (2005), *aff'd on other grounds*, 159 Wn.2d 203, 149 P.3d 366 (2006) (our Supreme Court has affirmed this concept); see Easterlin, 159 Wn.2d at 209 (*concluding that in actual possession cases, it will rarely be necessary to go beyond the commonly used “readily accessible and easily available” instruction*). So even if we were considering a firearm enhancement, a “nexus” finding is not required because the possession was actual, not constructive.

State v. Hernandez, 172 Wn. App. 537, 544, 290 P.3d 1052, 1055-1056 (2012); and:

We have recently held that “the State need not prove a nexus between the defendant, the weapon, and the crime when the defendant actually possesses the firearm.”

State v. Rooth, 129 Wn. App. 761, 773, 121 P.3d 755, 761 (2005).

In addition the Court of Appeals decision in Easterlin has been cited as controlling authority in several unpublished decisions which will not be cited here in accord with General Rule 14.1.

The present case involved the actual possession of a firearm at the time that the Appellant was in actual possession of methamphetamine. The actual possession the firearm and the drugs render some additional showing of a nexus between the gun and crime unnecessary.

D. THE DEFENSE AFFIRMATIVELY ACKNOWLEDGED THE UNCONTESTED STATEMENT OF CRIMINAL HISTORY IN THIS CASE.

The Appellant asserts that he “did not acknowledge or stipulate to any prior criminal history” at the time of sentencing. Appellant's Brief, page 28. This is contrary to the record. At sentencing the Defense acknowledged that it had received the State's version of the Appellant's criminal history and acknowledged that it appeared to be correct:

I believe that the State has calculated properly the mandatory statutory, ah common – I'm sorry – ah, standard range and that is 11<sup>3/4</sup> to 14½ years.

RP 328 - 329. In State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (2000) the Court of Appeals held that a defendant who “affirmatively alleged his standard range” to be identical to the range based upon

the State's recitation of his criminal history, had "acknowledged" the criminal history. *Id.* at 522. This precedent should foreclose the issue.

This is not a case where even a perfunctory challenge has been raised, below or here on appeal, that the Appellant's offender score was improperly calculated. In the event that the Appellant could raise a challenge that his criminal history had in fact been miscalculated, the claim herein might have some worth. As this Court very recently explained:

But cases following Goodwin have clarified that his clear showing that a sentencing error had been made—not just might have been made—was also critical to his right to raise the issue for the first time on appeal.

State v. Zamudio, 192 Wn. App. 503, 509, 368 P.3d 222 (Div. III, Feb. 4, 2016) (*citing* In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)). The Zamudio Court went on to cite prior case law for the proposition that:

Goodwin turned on the fact that defendant's sentence contained obvious errors," and that "[t]o invoke the waiver analysis set forth in Goodwin, a defendant must [either] show on appeal or by way of a personal restraint petition that an error of fact or law exists within the four corners of his judgment and sentence.

And:

[s]ince neither defendant could show ... an obvious error in his sentence, it was not miscalculated, and any objection to the inclusion of acknowledged criminal history was waived[.]"

Zamudio, at 509 (*internal citations omitted*). No actual error has been asserted, much less shown in the present case.

E. THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WAS PROPER AND ANY ERROR WAS NOT PRESERVED

The Appellant's final complaint is that the sentencing court improperly imposed legal financial obligations. The Appellant relies upon RCW 10.01.160 and State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), and claims that the sentencing court failed to adequately consider his ability to pay before imposing non-mandatory legal financial obligations.

As a starting point it must be noted that the sentencing court DID inquire concerning the Appellant's ability to be gainfully employed:

Mr. Canfield, imposing the fines, fees, and assessments, I don't see anything that would prevent you from working if you were out and available to do so; is that accurate?

RP 339. To which the Appellant responded "That's true." *Id.* He went on to explain that he trained horses for a living and that he had been doing so since a young age. RP 339 - 340. This then, is not a case where NO inquiry was made, rather, on appeal it is asserted that the inquiry did not go far enough. Appellant's Brief, pages 32 -33.

It must further be noted that no objection was raised to the imposition of any fees at the time of sentencing. Because the Appellant failed to object to the imposition of any of the fines, fees, costs or other assessments imposed, he has failed to properly preserve the issue. Further, because most of the assessments either are mandatory, or may be imposed without regard to ability to pay, this Court should exercise its discretion and decline to reach the issue.

Rule of Appellate Procedure (RAP) 2.5 requires that the Appellant raise an issue in the trial court, in order to preserve appellate review. Here, the Appellant did not object to his characterization as able-bodied and in fact agreed that he was. The sentencing court relied upon the Appellant's own representations that he had been employed training horses. At no point did the Appellant object or claim he would not be able to pay.

While recognizing that RAP 2.5 vests in this Court the discretion to consider this issue although raised for the first time on appeal, under the current facts, the Court should decline to do so. The Appellant was tried and sentenced well after the Supreme Court's decision in Blazina. See: State v. Lyle, 188 Wn. App. 848, 850, 355 P.3d 327 (2015), *remanded*, 184 Wn.2d 1040, 365 P.3d 1263 (2016).<sup>4</sup>

---

<sup>4</sup>The State further recognizes that the fact that sentencing occurred after the decision in Blazina was issued is not dispositive, it is certainly fair game for consideration as to whether or not the Appellant should have preserved the issue

It would be difficult to imagine that trial counsel would not have been aware of the Supreme Court's decision, which had been issued over a year before.

Further, the nature of the individual assessments imposed herein should weigh against review. Only a portion of the Appellant's legal financial obligations fall within the purview of Blazina. The Appellant was assessed the five-hundred dollar (\$500.00) Crime Victim Assessment which is required by RCW 7.68.035(1)(a). He was further ordered to pay the one-hundred dollar (\$100.00) DNA collection fee is required by RCW 43.43.7541, and a two-hundred dollar (\$200.00) criminal filing fee is required by RCW 36.18.020(2)(h). These assessment are mandatory irrespective of the defendant's ability to pay. State v. Curry, 62 Wn. App. 676, 680-81, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911. The Appellant was further assessed a fine of one-thousand dollars (\$1,000.00) pursuant to RCW 9A.20.021. This fine, while discretionary, may be imposed without regard to the offender's ability to pay. State v. Clark, 191 Wn. App. 369, 375-76, 362 P.3d 309 (2015). The Appellant was further fined two-thousand dollars (\$2,000.00) as a mandatory fine pursuant to RCW 69.50.430(2).<sup>5</sup> See also: State v. Mayer, 120 Wn. App. 720,

---

by objecting and allowing the sentencing court an opportunity to further inquire.

<sup>5</sup> RCW 69.50.430(1) establishes a mandatory one-thousand dollar (\$1,000.00) fine for all felony violations of 69.50, but the fine is doubled pursuant to section (2) if, as here, the offender has one or more prior convictions under the act.

726, 86 P.3d 217, 220 (2004) (*RCW 69.50.430 sets forth mandatory minimum fines for the enumerated offenses*). The court further imposed a one-hundred dollar (\$100.00) crime lab assessment pursuant to RCW 43.43.690. This assessment is also mandatory and may only be suspended upon verified petition by the offender that they lack the ability to pay. RCW 43.43.690. The Blazina ruling is only applicable to assessments imposed pursuant to RCW 10.01.160 which, by its terms, requires the court to consider the offender's future ability to pay when imposing **costs**. Clark, supra. It is therefore inapplicable to the above legal financial assessments.

The only costs imposed were the seven-hundred fifty dollars (\$750.00) for court appointed counsel, and one-hundred twenty dollars (\$260.00) costs for sheriff service fees. His arguments now raised for the first time on appeal are, at best, only applicable to one-thousand one-hundred dollars (\$1,100.00). The remaining three-thousand nine-hundred dollars (\$3,900.00) would remain unaffected. Considering the availability and notoriety of the Blazina decision, his apparent and undisputed ability to perform labor, and the relative size of the total legal financial assessments at issue, this Court should exercise its discretion and decline to review this unpreserved issue for the first time on appeal.

#### IV. CONCLUSION

Based upon the facts of this case, as proven at trial and the clear dictates of the law, this Court should affirm the verdict of the jury and the Judgment entered by the trial court.

The Defense made a legitimate strategic decision to not seek a Petrich instruction and based upon the proven "continuing course of conduct" as to the Obstruction charge the absence of such an instruction is not error.

The Prosecutor's comments during closing argument were not objectionable and were permissible based upon the law and the facts of the case. They were not misconduct and cannot support the Appellant's demand for reversal.

In those cases where the defendant is in **actual possession** of a firearm at the time of the commission of a crime - such as the instant case - the law does not require an additional showing of a nexus between the crime and the firearm.

The Defense, at the time of sentencing affirmatively acknowledged the uncontested statement of the Appellant's criminal history. There is no indication whatsoever that his criminal history is inaccurate. As such he should not be allowed to raise the issue on appeal.

The imposition of all of the legal financial obligations was proper in this case. The sentencing court inquired, the Appellant agreed, and the issue was not preserved.

Based upon the foregoing the Court should reject all of the Appellant's claims and affirm the Judgment and Sentence entered in this matter.

Dated this 28<sup>th</sup> day of July, 2017.

Respectfully submitted,



---

BENJAMIN C. NICHOLS, WSBA #23006  
Attorney for Respondent  
Prosecuting Attorney For Asotin County  
P.O. Box 220  
Asotin, Washington 99402  
(509) 243-2061

**COURT OF APPEALS OF THE STATE OF  
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

Respondent,

v.

TOMMY D. CANFIELD,

Appellant.

Court of Appeals No: 348814-4-III

**DECLARATION OF SERVICE**

**DECLARATION**

On July 28, 2017 I electronically mailed, through the portal, a copy of the Brief of Respondent in this matter to:

ANDREA BURKHART  
andrea@burkhartandburkhart.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on July 28, 2017.

  
SHARLENE J. TILLER  
Office Assistant

**ASOTIN COUNTY PROSECUTOR'S OFFICE**

**July 28, 2017 - 10:38 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34881-4  
**Appellate Court Case Title:** State of Washington v. Tommy D. Canfield  
**Superior Court Case Number:** 16-1-00063-2

**The following documents have been uploaded:**

- 348814\_Briefs\_20170728103402D3227554\_6337.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Tommy Canfield Brief of Resp.pdf*

**A copy of the uploaded files will be sent to:**

- Andrea@BurkhartandBurkhart.com

**Comments:**

---

Sender Name: Sharlene Tiller - Email: stiller@co.asotin.wa.us

**Filing on Behalf of:** Benjamin Curler Nichols - Email: bnichols@co.asotin.wa.us (Alternate Email: )

Address:  
135 2nd Street  
P.O. Box 220  
Asotin, WA, 99402  
Phone: (509) 243-2061

**Note: The Filing Id is 20170728103402D3227554**