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Division III
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No. 35349-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL DUNBAR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF SPOKANE

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. Mr. Dunbar did not waive his right to confront and cross-examine Ms. Enright.

The prosecutor's claim on appeal that Mr. Dunbar waived his right to confront and cross-examine Ms. Enright or that it was a tactical decision to have her refuse to answer the entirety of his questions on cross-examination does not have merit.

a. The prosecutor's claim that Mr. Dunbar waived his right to confront Ms. Enright is not supported by the record.

The hearing on Ms. Enright's right to invoke her Fifth Amendment privilege against self-incrimination was lengthy and turned largely on the assertions of Ms. Enright's counsel who the court appointed after the prosecution issued a material witness warrant for her to appear at Mr. Dunbar's trial. RP 267-308; CP 376-377.

The prosecutor now argues that a comment made by Mr. Dunbar's attorney regarding her understanding of how a witness may invoke her right to remain silent somehow waived Mr. Dunbar's unequivocal motion to strike Ms. Enright's blanket assertion of her Fifth Amendment right as a violation of Mr. Dunbar's right to confront and cross-examine the witness. RP 277-278; Brief of Respondent at 21, 25.

The statement the prosecutor bases its argument on was made in the context of Ms. Enright's counsel expressing his "anecdotal

understanding” that his client had the right to assert a blanket Fifth Amendment right against self-incrimination, in light of the court’s initial ruling:

THE COURT: I mean, I have decided that since Ms. Enright has started to testify; she is going to continue until cross-examination and redirect, if any, or done. And in the course of that, if there are things that legitimately are, would incriminate her, then she can invoke her Fifth Amendment.

MR. SCHMIDT: Then I would indicate that my inclination, what I would advise my client is to not testify -- that she would just generally invoke her right against incrimination. My understanding is that’s a blanket assertion. It’s not something that typically you can say I answer these questions but not these questions because I believe --

THE COURT: Not every question is going to incriminate her.

RP 303-304.

The court had ruled that it would require Ms. Enright to testify and determine if she had a right to assert her right against self-incrimination on a question by question basis. Based on Ms. Enright’s insistence that she would refuse to answer all questions, the court then asked, “Do you have authority that you just blanket assert the Fifth Amendment and don’t testify at all?” RP 304. Ms. Enright’s counsel responded,

MR. SCHMIDT: [M]y understanding is that once a defendant has invoked the Fifth Amendment, they are not allowed to do it. [...] once they asserted the Fifth, they are not allowed to then selectively use it, which is to say I will

answer what my name is, but I won't answer what, you know, the other possible questions. That's been my understanding of it, Your Honor. I have not briefed it for today's purposes. That is just, I understood it was not a selective right. It was more of a you testify or you do not. But that is just based on my anecdotal understanding of the Fifth Amendment.

RP 305. The Court noted it had a "dearth of authority" regarding Ms. Enright's claim. RP 305.

The court then asked Mr. Dunbar: "Do you have anything else where you're going to try to impune [sic] her by another crime or bad act?" RP 306.

Mr. Dunbar's counsel responded that there were a "variety of different avenues" that could open the door to such questions. RP 306.

When the court asked for clarification, Mr. Dunbar's counsel responded as follows:

MS. FOLEY: What I'm hearing Mr. Schmidt saying is that his client is seeking to invoke her Fifth Amendment right, a blanket assertion.

That's my understanding as defense attorney, as well. So it's not that she can get up and I ask can her specific question and she can respond to it, but when she feels uncomfortable with, she can seek her Fifth Amendment right. So I think that there are some potential ways, depending on what some of her answers are to my questions. And I don't always know. I don't know what her answers are going to be, Your Honor, but it might be that once we get on the stand --

THE COURT: I don't know what the questions are.

MS. FOLEY: I don't think the defense has an obligation to have a list of questions that get reviewed by the court beforehand. Again, it's whatever she testifies to is what she testifies to.

RP 306-307.

The prosecutor on appeal focuses on this passing comment by Mr. Dunbar's attorney as the basis for arguing that Mr. Dunbar either waived or invited the trial court's error, describing: "Mr. Dunbar's attorney agreed that Ms. Enright could not selectively invoke her right against self-incrimination." Brief of Respondent at 8 (citing RP 306); that Mr. Dunbar's attorney "informed the court that witness must assert a 'blanket' privilege, rather than claim the privilege with respect to specific questions" Brief of Respondent at 21 (citing RP 303-306); and that Mr. Dunbar's attorney "*erroneously* inform[ed] the court that the witness was required to assert a "blanket privilege..." Brief of Respondent at 25 (emphasis in original). Finally, the appellate prosecutor describes that this single passing comment means that "the defendant materially contributed to the present issue by arguing that Ms. Enright had to assert a blanket privilege against self-incrimination..." Brief of Respondent at 29.

This passing statement by Mr. Dunbar's counsel about her "understanding" of an admittedly "anecdotal" belief asserted by Ms. Enright's attorney does not support the prosecutor's claims. This passing

comment on Ms. Enright's ability to assert a blanket immunity privilege about another witness's rights does not change *Mr. Dunbar's* unequivocal objection to the infringement of his constitutional right to confront and cross-examine that witness. Nor can it be characterized as a concerted effort to move, instruct, or mislead the court about Ms. Enright's assertion of her rights.

The prosecutor on appeal tries to frame this as a waiver of a clear trial court error, but this single passing comment cannot be construed as a waiver of his unequivocal assertion of his constitutional right to cross-examine Ms. Enright.

b. Mr. Dunbar was entitled to have Ms. Enright's direct-exam testimony stricken after he could not confront her through cross-examination.

The court erred in denying Mr. Dunbar's motion to strike Ms. Enright's direct-examination testimony. Ms. Enright did not invoke her privilege until she had testified fully for the government, then refusing to answer Mr. Dunbar's questions on cross examination. This violated Mr. Dunbar's right to confrontation and requires a new trial.

“When a prosecution witness invokes the Fifth Amendment after testifying on direct examination, the privilege against self-incrimination conflicts with the defendant's sixth amendment confrontation rights.”

United States v. Lyons, 703 F.2d 815, 819 (5th Cir. 1983).

It is important to note the procedural similarity between Mr. Dunbar's case and *Lyons*. The witness in *Lyons*, like in Mr. Dunbar's case, was a government witness who asserted her Fifth Amendment privilege against self-incrimination after testifying for the State. *Lyons*, 703 F.2d at 818. The appropriate relief when a witness asserts her Fifth Amendment privilege against self-incrimination that infringes on a defendant's confrontation right is to strike the direct-examination testimony. *Lyons*, 703 F.2d at 819.

In *Lyons*, during the witness's testimony, the district judge stopped the questioning and excused the jury. *Id.* The judge advised the witness of her privilege against self-incrimination. *Id.* After consultation with her newly appointed attorney, the witness invoked the Fifth Amendment privilege, refusing to answer questions by the defense. *Id.* The witness' attorney moved to strike her direct testimony and to prevent her from being called to the stand for cross-examination. *Id.* The defense moved for a mistrial which the judge denied, but did give the jury an "emphatic instruction to disregard [the witness's] testimony." *Id.*

As a result of this witness refusing to answer the defendant's questions on cross-examination after testifying for the State,

the government agrees that [the witness'] invocation of the privilege against self-incrimination prevented the defendant

from testing the truth of her direct testimony. Thus, it is undisputed that some form of relief was appropriate.

Id. at 849. The *Lyons* court found that striking the witness' testimony was adequate. *Id.* at 819.

Mr. Dunbar requested that Ms. Enright's direct testimony be stricken when she asserted her Fifth Amendment privilege against self-incrimination on cross-examination after she completed her direct examination. RP 277. This was the appropriate remedy. *Lyons*, at 819. The trial court erred in denying Mr. Dunbar's motion to strike Ms. Enright's testimony, and reversal is required.

c. The trial court erred by asking Mr. Dunbar to provide his cross-examination questions to the court in advance, and then when defense counsel refused, deny Mr. Dunbar his right to confront Ms. Enright.

The prosecutor on appeal tries to fault Mr. Dunbar for the court's error in allowing Ms. Enright to refuse to answer all of his cross-examination questions. Brief of Respondent at 21-25. But it is the trial court's duty to protect the Fifth Amendment rights of witnesses, not Mr. Dunbar's. *See Lyons*, 703 F.2d at 818 (citing *Alford v. United States*, 282 U.S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624 (1931)) ("The trial court...has a duty...to protect the Fifth Amendment rights of witnesses."). After Mr. Dunbar's requested relief of striking Ms. Enright's direct examination testimony was denied, it was not his duty to ensure that Ms. Enright's

Fifth Amendment rights were properly secured when the court allowed her to testify over his objection.

The court's ruling that allowed Ms. Enright to assert a blanket privilege against self-incrimination came immediately after Mr. Dunbar refused to comply with the court's request for the defense to provide its questions to the court in advance of asking them.

MS. FOLEY: I don't think the defense has an obligation to have a list of questions that get reviewed by the court beforehand...I can't tell you specifically what my questions are going to be.

THE COURT: I see. Anything further, Mr. Lindsey?

MR. LINDSEY: No, Your Honor.

THE COURT: I'm going forward with my ruling, then. Ms. Enright can take the stand. We'll bring the jury back. You ask your questions. If she wants to invoke her Fifth Amendment, she can.

RP 306-307.

Mr. Dunbar's justified rejection of the court's remedy to Ms. Enright's blanket Fifth Amendment assertion of immunity is central to the prosecutor's flawed argument that Mr. Dunbar's "lack of cooperation" with the trial court's misguided request means that Mr. Dunbar waived his objection to Ms. Enright's refusal to answer his cross-examination questions. Brief of Respondent at 21, footnote 6, 23-25.

It is uncontroverted that Mr. Dunbar had the right to confront and cross-examine Ms. Enright. U.S. Const. amend. VI; Const. art. I, § 22; *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). There is no authority for the proposition that a defendant must provide cross-examination questions in advance when an adverse witness invokes her privilege against self-incrimination. The cases cited by the prosecutor certainly do not support this proposition.

The prosecutor cites to *State v. Nelson* as providing “the procedure which a trial court should ascertain if a privilege would be invoked by a witness.” Brief of Respondent at 22. In *Nelson*, the State intended to call the defendant’s charged accomplice, knowing that he would assert his Fifth Amendment privilege against self-incrimination while on the witness stand. *State v. Nelson*, 72 Wn.2d 269, 277, 432 P.2d 857 (1967). Notably, in *Nelson*, the State elected to call a witness knowing he would assert his privilege against self-incrimination. Thus the State profited from its choice to call a witness knowing this witness would assert his privilege against self-incrimination. By contrast, here, Mr. Dunbar did not call Ms. Enright to testify. She was the State’s witness. Mr. Dunbar opposed Ms. Enright’s testimony, asking that her testimony on direct be stricken, but the trial court overruled the defense’s motion. RP 277, 307.

Here, the prosecutor confuses the preferred procedure in *Nelson*, in which the witness is questioned outside the presence of the jury and the court determines whether the questions are incriminating. *Nelson*, at 283. This was not what the court proposed in Mr. Dunbar’s case. Rather, Mr. Dunbar was asked to provide his cross-examination questions to the court in advance rather than asking the witness his questions through voir dire. RP 306-307. The court’s suggested procedure omits the crucial right of a defendant to “meet the witnesses against him face to face.” Const. art. I § 22; see also *Davis*, 415 U.S. at 316 (Cross-examination is the “principal means by which the believability of a witness and the truth of his testimony are tested”). The prosecutor cites no legal authority in support of the court’s proffered procedure. Thus, the prosecutor’s description of Mr. Dunbar’s failure to comply with the court’s erroneous request as a “lack of cooperation” that waived Mr. Dunbar’s right to cross-examine Ms. Enright is baseless. Brief of Respondent at 25.

The trial court erred by requiring Mr. Dunbar to provide his cross-examination questions to the court in advance, and then when the defense objected, allow Ms. Enright to refuse to answer all of his questions on cross-examination.

d. It was not a waiver of Mr. Dunbar’s confrontation right or a trial tactic to not object to Ms. Enright’s testimony that conformed to the court’s ruling.

The prosecutor next argues that because Mr. Dunbar did not object to each of Ms. Enright’s answers that conformed to the court’s ruling, that this can be characterized as either “waiver” of the issue or a “trial tactic.” Brief of Respondent at 25.

The prosecutor cites no authority to support this argument. In *State v. Mason*, cited by the prosecutor, the Court determined a defendant forfeited his confrontation rights by causing the witness to be unavailable at trial by killing him. *State v. Mason*, 160 Wn.2d 910, 924, 162 P.3d 396 (2007) (cited in Brief of Respondent at 25). No such waiver exists here.

State v. Nelson as described in section (c), supra, does not support the prosecutor’s position, because in *Nelson*, the State called a witness who it knew would assert his privilege against self-incrimination. *Nelson*, 72 Wn.2d at 277. Mr. Dunbar’s case is the opposite—he sought to strike Ms. Enright’s testimony on direct and prohibit her from testifying when she refused to answer defense questions on cross-examination. RP 277.

The prosecutor on appeal tries to impute nefarious intent to Mr. Dunbar’s exercise of his constitutional right to confront Ms. Enright with her perjured statement on cross-examination. Brief of Respondent at 26 (“[T]he State is unaware of any authority which holds that defendant

cannot pressure a witness into invoking the Fifth Amendment and use the witness's subsequent silence to his or her advantage.”) (emphasis added).

This “pressure,” is Mr. Dunbar’s constitutional and statutory right to confront and cross-examine his accusers and to impeach their credibility with evidence of untruthfulness. ER 608; U.S. Const. amend VI; Const. art. 1 § 22; *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (“The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses,” with the purpose of testing “perception, memory, and credibility of witnesses”). It cannot be argued that Mr. Dunbar’s lawful attempt to impeach Ms. Enright constitutes any form of undue “pressure” that can be interpreted as waiver or trial tactic.

The fact that Mr. Dunbar did not object to every answer provided by Ms. Enright on cross-examination was not a “trial tactic.” Mr. Dunbar expressly sought to prohibit Ms. Enright from testifying on cross-examination after she informed the court she would assert her Fifth Amendment privilege against self-incrimination to every question on cross-examination. Brief of Respondent at 26-28; RP 277.

Nor can this be characterized as “invited error.” The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Mercado*, 181 Wn. App. 624, 630,

326 P.3d 154 (2014). To be invited, the error must be the result of an affirmative, knowing, and voluntary act. *Id.* (citing *State v. Lucero*, 152 Wn. App. 287, 292, 217 P.3d 369 (2009), *rev'd on other grounds*, 168 Wn.2d 785, 230 P.3d 165 (2010)). The defendant must materially contribute to the error challenged on appeal by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error. *Id.* (citing *In re Pers. Restraint of Call*, 144 Wn.2d 315, 328, 28 P.3d 709 (2001)). The State bears the burden of proof on invited error. *Id.* (citing *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004)).

The prosecutor's argument that Mr. Dunbar invited the court's error fails for the same reasons that its waiver argument fails. As discussed in section (a) *supra*, the record does not support the prosecutor's contention that the "defendant materially contributed to the present issue by arguing that Ms. Enright had to assert a blanket privilege against self-incrimination." Brief of Respondent at 29. Mr. Dunbar's passing comment on another attorney's "anecdotal" belief about his witness's rights is not an "affirmative action" that "knowingly and voluntarily sets up the error." *Mercado*, 181 Wn. App. at 630.

Mr. Dunbar could only have created this error if he called Ms. Enright as his witness, knowing she would assert her Fifth Amendment privilege against self-incrimination, but this is not what occurred. Mr.

Dunbar did not call Ms. Enright to testify. Mr. Dunbar objected to Ms. Enright's blanket assertion of immunity on cross-examination and correctly requested that Ms. Enright's direct examination testimony be stricken if she refused to answer Mr. Dunbar's questions on cross-examination. RP 277. The court allowed Ms. Enright to do the opposite of what defense counsel requested. RP 307. There was no waiver or invited error. RP 277. Mr. Dunbar's subsequent effort to mitigate the damage of the court's erroneous ruling through closing argument can in no way be construed as an intentionally designed "benefit" of not being able to meaningfully cross-examine the State's primary witness. Brief of Respondent at 26.

Finally, the prosecutor on appeal argues that because Mr. Dunbar does not claim ineffective assistance of counsel based on his attorney's questioning of Ms. Enright, he must believe "counsel's decisions" were "strategic, rather than deficient." Brief of Respondent at 31. This claim is predicated on the prosecutor's failed argument that Mr. Dunbar is responsible for the trial court's erroneous ruling allowing Ms. Enright to refuse to answer Mr. Dunbar's cross-examination questions, which, for all of the reasons argued by Mr. Dunbar above, is without merit.

e. The court's error was not harmless beyond a reasonable doubt because Ms. Enright was the State's primary witness against Mr. Dunbar.

The prosecutor on appeal tries to minimize the import of the trial court's denial of Mr. Dunbar's constitutional right to meaningfully cross-examine the State's primary witness by arguing that this was harmless error. Brief of Respondent at 31-32. The trial record establishes otherwise.

Ms. Enright was the State's primary witness against Mr. Dunbar. If Ms. Enright's testimony were not crucial to the State's case, the State would not have issued a material witness warrant for her appearance at trial. CP 376-377; *See State v. Hartley*, 51 Wn. App. 442, 446, 754 P.2d 131 (1988) (the issuance of a material witness warrant is "a drastic step.")

And even if the prosecutor now believes that Ms. Enright's testimony was not important, Mr. Dunbar emphasized his constitutional right to confront and cross-examine the State's primary witness, maintaining that this was crucial to his constitutional trial rights. RP 277; *See Darden*, 145 Wn.2d at 620 (citing *Davis*, 415 U.S. at 315) (In the constitutional sense, "confrontation" means more than mere physical confrontation); *State v. Foster*, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998) ("The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses").

The State cannot meet its burden to establish that Mr. Dunbar's

inability to meaningfully cross-examine his accuser was harmless error beyond a reasonable doubt.

2. The trial court abused its discretion in limiting the testimony of Mr. Dunbar's witness, Ms. Shelley.

The prosecutor on appeal is simply unable to show a justifiable basis for exclusion of Ms. Shelley's testimony. *Darden*, 145 Wn.2d at 622.

The prosecutor now claims that Ms. Shelley's testimony was "speculative" and therefore inadmissible under ER 602. But Mr. Dunbar offered that Ms. Shelley's testimony was limited to her own firsthand observations. RP 410. Though the prosecutor on appeal might not think that Ms. Shelley's witnessing of Ms. Enright changing the license plates on her car was relevant to Mr. Dunbar's defense, Mr. Dunbar clearly asserted it was, especially in light of the fact that he was not able to meaningfully cross-examine Ms. Enright. RP 410-411.

The prosecutor on appeal argues that Ms. Shelley's proposed testimony about asking Mr. Dunbar to help her retrieve Ms. Enright's vehicle was not admissible on hearsay grounds. Brief of Respondent at 36. But as argued by Mr. Dunbar, this was *Ms. Shelly's* own statement and conduct; and this is not the grounds upon which the trial court excluded her testimony. RP 414-415. This line of inquiry went to Ms. Enright's credibility, and the element of knowledge, both of which were relevant to

Mr. Dunbar's defense. This evidence was not overly prejudicial to the State and was relevant to the defense. The court erred in excluding it. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

3. Mr. Dunbar was deprived of his right to a unanimous jury verdict.

The "to convict" instruction elected by the trial court did not require the jury to unanimously agree on which of the three alleged acts of witness tampering Mr. Dunbar committed in order to find him guilty of the charged offense.

a. Mr. Dunbar requested a jury instruction that would have required the jury to reach a unanimous verdict.

The State wrongly asserts that Mr. Dunbar's stated preference for a jury instruction that would have required jury unanimity is not preserved. Brief of Respondent at 37-38. As described in his opening brief, Mr. Dunbar's attorney asked for the "to convict" instruction that used the conjunctive "and" between the separate allegations of witness tampering originally proposed by the prosecution, stating "we would go with it as it was approved last week when we did the jury instructions." RP 426; Appellant's Opening Brief at 26. This is sufficient to preserve the error. *See State v. Hood*, 196 Wn. App. 127, 134, 382 P.3d 710 (2016), *review denied*, 187 Wn.2d 1023, 390 P.3d 331 (2017) (a defendant has no duty to propose the instructions that will enable the State to convict him).

Even if Mr. Dunbar’s request for the “to convict” instruction was deemed an insufficient objection, the error is reviewable under RAP 2.5(a)(3) because it is a manifest constitutional error. *State v. O’Hara*, 167 Wn.2d 91, 102, 217 P.3d 756 (2009) (requiring analysis of whether the jury instruction shifted the burden or whether some other constitutional interest was at stake to determine whether the unpreserved error was of constitutional magnitude).

To be “manifest” the record must reflect the facts necessary to adjudicate the claimed error on appeal. *State v. Malone*, 193 Wn. App. 762, 767, 376 P.3d 443 (2016). In this case, the error is readily identifiable from the trial record. *See O’Hara*, 167 Wn.2d at 108 (“the error must have practical and identifiable consequences apparent on the record that should have been reasonably obvious to the trial court”).

b. The three acts were alleged to have occurred over a month apart and were not a continuing course of conduct.

To determine if separate acts constitute a continuing course of conduct, courts evaluate the facts in a commonsense manner considering (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose.” *State v. Brown*, 159 Wn. App. 1, 14, 248 P.3d 518 (2010). Here, the time span is over one month, from December 20 to January 29. RP 453. These separate phone

calls are far too separate in time to constitute a continuing course of conduct. See *Brown*, 159 Wn. App. at 15 (continuing course of conduct for repeated phone calls was “short”).

And as argued by the prosecutor, the ultimate purpose of each call appeared to be very different. RP 451-453. The prosecutor argued in closing, that on December the 20th, Mr. Dunbar called to say, “you shouldn’t press charges.” RP 452. The prosecutor alleges that the January voicemail indicates Mr. Dunbar is trying to say, “Hey, I fixed this for you. I took care of this.” RP 453. And the second phone call on January 29 expressed an apologetic tone. Ex. P-11.

These calls were separated in time and tone, which would have led a jury to disagree about which call constituted the charged offense of witness tampering. The court’s failure to provide a unanimity instruction deprived Mr. Dunbar of his right to a unanimous verdict.

4. The court was not authorized to impose consecutive sentences for this offense and the forgery conviction in Court of Appeals case number 35350-8.

Insofar as the prosecutor on appeal concedes that this sentence is not a consecutive sentence to the forgery conviction addressed in COA 35350-8-III, Mr. Dunbar agrees there is not error. Brief of Respondent at 43.

However, should this Court find that the trial court ordered this as a consecutive sentence to the forgery conviction in that cause number, he maintains that the court was unauthorized to impose this as an exceptional sentence as argued in the Appellant's Opening Brief, p. 28-31, and adopts the same argument from Appellant's Reply Brief in COA 35350-8-III.

B. CONCLUSION

Mr. Dunbar was deprived of his constitutional right to confront and cross-examine his accuser. The denial of this foundational trial right requires reversal and remand for a new trial. Additionally, Mr. Dunbar's constitutional right to present a defense and right to a unanimous jury verdict were violated by the trial court's errors, which provide a separate basis for reversal and remand for a new trial. And should this Court determine Mr. Dunbar's witness tampering conviction is a consecutive sentence, he is entitled to remand for a concurrent sentence.

DATED this 21st day of May 2018.

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