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No. 35349-4-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL DUNBAR,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

---

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A. INTRODUCTION

Daniel Dunbar and Victoria Enright were friends, but had a falling out. When Ms. Enright found her car was missing, she claimed Mr. Dunbar took it and he was charged with possession of a stolen motor vehicle, as well as witness tampering based on phone calls he made to Ms. Enright from jail regarding her allegations against him.

Ms. Enright testified for the State. When Mr. Dunbar gave notice he would seek to impeach Ms. Enright with evidence of a perjured diversion agreement, she asserted her Fifth Amendment privilege against self-incrimination, and refused to answer any defense questions on cross-examination. The court failed to either strike her testimony after she asserted her Fifth Amendment privilege, or make an individual determination that the questions were in fact incriminating.

The court then limited Mr. Dunbar from asking his own witness about evidence that negated his culpability. The court also instructed the jury it could convict Mr. Dunbar of witness tampering without unanimously agreeing on the conduct. These violations of Mr. Dunbar's constitutional rights require reversal and remand for a new trial.

The court also imposed consecutive sentences when it was statutorily required to impose concurrent sentences.

**B. ASSIGNMENTS OF ERROR**

1. The trial court denied Mr. Dunbar's confrontation right under the state and federal constitutions by allowing Ms. Enright to invoke her privilege against self-incrimination on cross-examination without either striking direct examination testimony or making an individualized inquiry into whether the questions were incriminating. U.S. Const. amend. VI; Const. art. I, § 22.

2. Mr. Dunbar's right to present a defense was impinged by the trial court's limitation of witness testimony that tended to negate Mr. Dunbar's guilt.

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

4. The trial court erred in imposing a consecutive sentence for current offenses.

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

1. The accused has a constitutional right to confront the witnesses against him. This right to confrontation is exercised primarily through cross-examination of the State's witnesses. Was Mr. Dunbar's right to confront and cross-examine witnesses violated by the court's error in allowing the prosecutor's primary witness to testify on direct, but then

assert her Fifth Amendment privilege, refusing to answer any questions on cross-examination, without either striking her direct examination testimony or determining whether Mr. Dunbar's questions elicited an incriminating response before allowing her to refuse to answer questions on cross-examination?

2. The accused has a right to due process, which includes the right to present his own witnesses to establish a defense. U.S. Const. amend. V; Const. art. I, sec. 3. Did the court violate Mr. Dunbar's due process right by refusing to let him ask his own witness, Ms. Shelly, about what she saw Ms. Enright do with the license plates after she retrieved her car, and refused to let Mr. Dunbar ask Ms. Shelly about how she asked Mr. Dunbar to help retrieve Ms. Enright's car, which would have been evidence in support of Mr. Dunbar's defense at trial that he was intending to return Ms. Enright's car, not deprive her of it?

3. Article I, § 21 of the Washington Constitution requires the jury to unanimously agree on which act constitutes the crime charged. The prosecution presented three different acts to support the charge of witness tampering. The "to convict" instruction allowed the jury to convict Mr. Dunbar based on one or two of these acts, but there was no unanimity

instruction provided. Did this violate Mr. Dunbar's right to a unanimous jury verdict?

4. RCW 9.94A.589(1)(a) requires that when a person is sentenced on more than one felony offense on the same day, the sentences are to run concurrently unless the court makes findings in support of an exceptional sentence under RCW 9.94A.535. Here, the court sentenced Mr. Dunbar in the same sentencing hearing, imposed consecutive sentences, but not as an exceptional sentence. Does this sentence violate the SRA?

D. STATEMENT OF THE CASE

**1. Ms. Enright's car, which has an open window and faulty ignition, was taken from a high crime area.**

The driver side window of Victoria Enright's car does not roll all the way up or down, and if pushed, it falls down. RP 430. The ignition hangs out of the dashboard. RP 430. The car was parked outside of the house she was staying, which is known to be a high crime area. RP 322. She went to bed around 3a.m., and discovered her car was gone later in the morning. RP 242-243. Ms. Enright did not see anyone take it. RP 321. She called the police to report it stolen. RP 245.

Ms. Enright and Mr. Dunbar were friends. RP 246, 255. She did not have any proof Mr. Dunbar took her car, but told police she thought he took it because they were not on the best of terms at the time. RP 245-246,

322. She told police that she called Mr. Dunbar to ask him if he took the car, and he said no. RP 319. The officer who investigated Ms. Enright's report did not try to call Mr. Dunbar or name him as a suspect. RP 323-324.

**2. Ms. Enright later called police to report that Mr. Dunbar was in her car, but then disappeared, making police unable to contact her further about the vehicle.**

About a week later, when Ms. Enright was driving around, she found Mr. Dunbar sitting in the car she had reported stolen. RP 248, 250, 255. She told Mr. Dunbar to get out of the car and punched him in the face. RP 256, 330. She then went to a nearby service station to call the police. RP 257.

Officer Wade Nelson went to where Ms. Enright reported seeing the car. RP 327. Mr. Dunbar was in a yard located about ten feet from the car. RP 328-329. Officer Nelson called Mr. Dunbar over to talk to him. RP 328. Mr. Dunbar identified himself and the car. RP 328-329. He let the officer know he had found the car and heard it had been taken from Ms. Enright. RP 329. Mr. Dunbar intended to return it to her but ran out of gas where the car was located. RP 329. Mr. Dunbar had been trying to contact

Ms. Enright to tell her about the car prior to her finding him asleep in the car earlier that day. RP 330-331.

Mr. Dunbar was very cooperative. RP 346. He let the officer search his phone for proof of these efforts to contact Ms. Enright, and was surprised when the officer did not see the phone record. RP 334. Mr. Dunbar told the officer that he must have called from his other phone. RP 334. Officer Nelson claimed he never saw a second phone. RP 334, 346. However, the jail booking records showed that Mr. Dunbar was booked into jail with two phones. RP 349.

The police attempted to contact Ms. Enright at least four times at the number she gave them. RP 345. The officer also had Mr. Dunbar try to reach her on his phone. RP 334. She did not respond to any of these calls. RP 334. They sent a deputy out to three gas stations near where she said she was calling from. RP 333, 345. Police looked, but were unable to locate her. RP 345.

Ms. Enright later admitted she left because she wanted to avoid law enforcement. RP 258. Unable to contact Ms. Enright, the car was towed away. RP 350. Ms. Enright's insurance company compensated her

\$1700 for the missing car. RP 256. Ms. Enright was later able to buy the car back for \$100. RP 256.

**3. The prosecution charged Mr. Dunbar with one count of witness tampering based on evidence of three phone calls; the court instructed the jury it could convict Mr. Dunbar based on one or two of instances of this conduct, with no unanimity instruction.**

Mr. Dunbar was charged with possessing Ms. Enright's stolen vehicle. CP 9. He was also charged with witness tampering for calls he made to Ms. Enright from the jail. CP 10. He called her when he was arrested on December 20 and again about a month later, on January 29. RP 206, 357. He left a voice mail on her phone in the beginning of January. RP 260, 373.

These three calls were played for the jury. RP 368, 371. In the December 20 phone call, Mr. Dunbar asks Ms. Enright if she is pressing charges. Ex. 10. She asks him if she should, and he says that she should decide. Ex. 10. In the January 29 phone call, he is apologetic to Ms. Enright and asks if she is coming to trial. Ex. 11. In the voicemail, Mr. Dunbar asks Ms. Enright if she is coming to court, says he believed she had given him permission to get her car back for her, and accuses her of insurance fraud. RP 373-374; Ex. 9.

The jury was instructed that it could convict Mr. Dunbar of inducing Ms. Enright to absent herself from any official proceeding based

on one or both of the December 20 or January 29 phone calls. CP 72.<sup>1</sup> The jury was not given a unanimity instruction. CP 56-74.

**4. Ms. Enright testified for the State, but then refused to answer any questions on cross-examination, asserting her Fifth Amendment privilege against self-incrimination, even though none of Mr. Dunbar's questions called for an incriminating response.**

Ms. Enright was held in custody on a material witness for Mr. Dunbar's trial. RP 27; RP 3/3/17 2; Supp. CP\_\_\_(Sub. no. 29). She testified on direct about her belief that Mr. Dunbar took her car, what happened when she saw him with her car, and Mr. Dunbar's phone calls from the jail. RP 242-266.

Mr. Dunbar gave notice, prior to cross-examination of Ms. Enright, that he would be asking her about a diversion agreement Ms. Enright signed under penalty of perjury stating that she had no pending felony charges, which was not true. RP 267-268.<sup>2</sup> The court had appointed Ms. Enright an attorney when she was arrested on the material witness warrant.

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<sup>1</sup> The voicemail was not included in the Information or the "to convict instruction" for the offense of witness tampering. CP 10; 72.

<sup>2</sup> The defense introduced this through ER 608(b) which provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness."

RP 268. The prosecutor had not notified Ms. Enright's attorney prior to calling her as its witness. RP 272. The court called in her attorney to consult with Ms. Enright prior to Mr. Dunbar's cross-examination. RP 272. Ms. Enright's attorney then advised the court she would be asserting her Fifth Amendment right against self-incrimination. RP 275.

Mr. Dunbar moved to strike Ms. Enright's previous testimony on confrontation clause grounds. RP 277. The court denied Mr. Dunbar's motion to strike Ms. Enright's testimony, allowing Ms. Enright to refuse to answer any of Mr. Dunbar's questions on cross-examination. Mr. Dunbar asked about forty-five questions about Ms. Enright's allegations against Mr. Dunbar. RP 309-314. He asked no question about the document containing Ms. Enright's perjured statements. RP 309-314.

Mr. Dunbar was convicted of possession of a stolen motor vehicle and witness tampering, and acquitted of making or possessing a motor vehicle theft tool. CP 75-77. Mr. Dunbar was sentenced on these offenses at the same time as a previous forgery conviction. RP 562. The court ran

the witness tampering and forgery sentences consecutively without imposing an exceptional sentence. RP 567-568; CP 359<sup>3</sup>.

E. ARGUMENT

**1. Mr. Dunbar was deprived of his right to cross-examination when the trial court allowed Ms. Enright to assert her Fifth Amendment privilege against self-incrimination to the entirety of Mr. Dunbar's non-incriminating questions on cross-examination.**

The trial court erred in allowing Ms. Enright to assert her Fifth Amendment right against self-incrimination to every question asked of her on cross-examination, rather than striking her testimony on direct once she asserted a blanket Fifth Amendment right against self-incrimination. The court compounded this error by allowing Ms. Enright to refuse to answer every question on cross-examination rather than making an individualized determination about whether the questions in fact elicited an incriminating response.

*a. The court erred in denying Mr. Dunbar's motion to strike Ms. Enright's testimony when she refused to answer defense questions on cross-examination.*

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<sup>3</sup> The court stated that it was sentencing Mr. Dunbar to 60 months for witness tampering in this matter, consecutive to his 22-month sentence for forgery in 16-1-03608-3, Court of Appeals number 35350-8-III. The Judgement and Sentence in this matter omits this case number from its order on consecutive sentences, but the record of proceedings states this intent. CP 359; RP 567-568.

When Ms. Enright informed the court that she would invoke her Fifth Amendment right and not answer defense questions on cross-examination after testifying on direct, the court erred in not striking her testimony. RP 275-277.

Mr. Dunbar has a constitutional right to confront the witnesses against him. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); U.S. Const. amend. VI; Const. art. I, § 22. The accused's ability to cross-examine the State's witnesses is "the principle means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). "The purpose is to test the perception, memory, and credibility of witnesses." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). This right to confrontation must be zealously guarded. *Id.* (citing *State v. Kilgore*, 107 Wn. App. 160, 184-85, 26 P.3d 308 (2001)).

Thus, 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). If the government's witness invokes a blanket Fifth Amendment privilege after testifying for the government, the accused is entitled to

either have the direct examination testimony stricken or have a mistrial declared. *Id.* at 819.

The accused is entitled to relief when this impediment to cross-examination creates a “substantial danger of prejudice,” by depriving the accused of the opportunity “to test the truth of the witness’s direct testimony.” *Lyons*, 703 F.2d at 819. A court’s decision that affects the accused’s right to cross-examination is of constitutional magnitude, and a court’s erroneous ruling that affects this right must be reversed unless the State establishes the error was not harmless beyond a reasonable doubt. *State v. Levy*, 156 Wn.2d 709, 732, 132 P.3d 1076 (2006).

In *Lyons* it was undisputed that the defendant was entitled to relief after the government’s witness invoked her Fifth Amendment right on cross-examination, after testifying for the government. *Lyons*, 703 F.2d at 819. When this happens, the only question is whether the court is required to strike the witness’s testimony and provide a limiting instruction, or declare a mistrial. *Id.* The court in *Lyons* determined that it was sufficient to strike the witness’s testimony rather than grant a mistrial because the witness’s testimony was short and primarily cumulative. *Id.*

Here, the court erred in not granting Mr. Dunbar's motion to strike Ms. Enright's testimony, instead allowing her to not answer questions on cross-examination after testifying for the State on direct. RP 277.<sup>4</sup>

The reasons the court supplied for denying the defense's motion to strike Ms. Enright's testimony were baseless. The court faulted Mr. Dunbar for not bringing the impeachment evidence to the court's attention earlier. RP 228, 297-298. But the court reserved ruling on the admissibility of impeachment evidence prior to trial. RP 223. As clarified by the defense, Mr. Dunbar did not know whether Ms. Enright would in fact testify for the prosecution, or what her answers would be on the stand; thus until she testified, Mr. Dunbar did not know whether he would be impeaching this witness. RP 289-290; 306-307. And contrary to the court's suggestion, Mr. Dunbar had no discovery obligation to provide impeachment evidence about the prosecutor's witness contained in a document prepared by that same prosecutor's office and in its control. CP 97; RP 285-288; 289-290; 298; CrR 4.7.<sup>5</sup>

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<sup>4</sup> The court threatened various grounds on which it could have excluded the impeachment evidence, such as Criminal Court Rule 4.7, or as an exercise of discretion to exclude the impeachment evidence under ER 608(b) and ER 403. The court ultimately did not exclude the impeachment evidence on any of these grounds. RP 298-299.

<sup>5</sup> CrR 4.7 provides that the prosecutor has extensive discovery requirements. The only the defense requirements are to provide the names

Mr. Dunbar was prejudiced by this inability to cross-examine Ms. Enright because, as established on direct examination, she accused him of the conduct he was on trial for, and she was the primary witness to establish the facts in support of the charges. RP 242-266. And much of Ms. Enright's behavior during the police investigation was subject to impeachment, such as making herself unavailable to officers and not retrieving the car when she reported it police. RP 257. She recovered the vehicle for \$100, after collecting \$1700 from the insurance company for the same car. RP 256. She denied that law enforcement called her, when law enforcement testified they called her numerous times. RP 257-258; 312-313; 332-333. Ms. Enright had a personal relationship with Mr. Dunbar, and they were not on good terms. RP 246. She said they were friends, but Officer Nelson testified Mr. Dunbar said they had dated in the past. RP 245, 330. The defense also sought information from her about the general state of the vehicle and other people she knew who had access to it. RP 310. The defense was unable to cross-examine Ms. Enright about her perception about Mr. Dunbar's phone calls. RP 365.

Mr. Dunbar's inability to question Ms. Enright about these central issues was most certainly prejudicial because Ms. Enright was the

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and addresses of defense witnesses, and written or recorded statements and the substance of any oral statements of such witness.

prosecution's primary witness against him. *Lyons*, 703 F.2d at 819.

Because this error was not harmless beyond a reasonable doubt, Mr.

Dunbar is entitled to reversal of his conviction and remand for a new trial.

*b. The court failed to make an individualized finding that Mr. Dunbar's questions incriminated Ms. Enright before allowing her to exercise her Fifth Amendment right against self-incrimination.*

The court misapplied the law in failing to determine whether the questions asked on cross-examination were in fact incriminating before allowing Ms. Enright to assert her Fifth Amendment privilege against self-incrimination.

In general, a witness who is called to testify is obligated to do so. *State v. Ruiz*, 176 Wn. App. 623, 635, 309 P.3d 700 (2013). However, a witness may invoke her Fifth Amendment privilege against self-incrimination if she "has 'reasonable cause to apprehend danger from a direct answer.'" *Levy*, 156 Wn.2d at 731-32 (quoting *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L.Ed. 1118 (1951)).

Unlike the defendant, a witness does not have the absolute right to remain silent when called to testify at trial. *State v. Lougin*, 50 Wn. App. 376, 381, 749 P.2d 173 (1988). The court must determine whether the privilege is applicable. *Levy*, 156 Wn.2d at 732. Once the court sustains the witness' Fifth Amendment claim, the trial court must then determine

the scope of the immunity. *Lougin*, 50 Wn. App. at 381. Generally, a claim of privilege can be raised in response to specific questions, “not as a blanket foreclosure of testimony.” *Id.* If the question does not “obviously and clearly incriminate the witness,” the witness cannot claim a privilege unless the court determines, aided by “use of ‘reasonable judicial imagination,’” that the questions creates a risk of self-incrimination. *Id.* (citing *Eastham v. Arndt*, 28 Wn. App. 524, 532, 624 P.2d 1159 (1981)).

The trial court must determine whether the witnesses’ silence is justified based on the particular facts of the case. *Lougin*, 50 Wn. App. at 382. If the silence is not warranted, the trial court must require the witness to answer. *Id.* (citing *Hoffman*, 341 U.S. at 486–87). This decision will be reviewed for abuse of discretion. *Ruiz*, 176 Wn. App. at 636. A court’s error is of constitutional magnitude because it impacts the accused’s Sixth Amendment right to compel attendance by witnesses. *Lougin*, 50 Wn. App. at 382.

In *Lougin*, the trial court erred in not requiring the witness to take the stand and then claim the privilege as to specific questions. *Lougin*, 50 Wn. App. at 382. Likewise, in *Levy*, the witness asserted through her attorney, a “blanket declaration” that she could not testify without fear of self-incrimination. *Levy*, 156 Wn.2d at 732. The *Levy* court ruled that such a “blanket declaration” is insufficient without further inquiry. *Id.* at 732.

The Court noted that it was possible that since the witness could have answered some questions without incriminating herself, the trial court erred in not requiring her to personally assert the privilege in order for the trial court to inquire into the basis for the privilege. *Id.* at 732.

In Mr. Dunbar's case, the court abused its discretion in failing to make an individualized determination that the questions posed to Ms. Enright in fact created a risk of self-incrimination. *Lougin*, 50 Wn. App. at 381. When defense counsel first notified the court that it intended to impeach Ms. Enright with her perjured statement, Ms. Enright's counsel was called into court to advise her. RP 272. After consultation, Ms. Enright apprised the court that she would be asserting her Fifth Amendment right against self-incrimination. RP 275. Her attorney requested "to have questioning cease as it may lead into this incriminating area." RP 276. The court appeared to recognize the need for an individualized determination of each question before allowing Ms. Enright to invoke her privilege:

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.

RP 303.

Ms. Enright's attorney objected to this procedure, stating that unless the court limited the questions Mr. Dunbar could ask, he would advise his client to assert her Fifth Amendment right against self-incrimination to all questions asked or not testify further. RP 304. The court asked Ms. Enright's counsel if he had any legal support that Ms. Enright could assert a blanket claim Fifth Amendment claim and not testify. RP 304. Ms. Enright's counsel replied with an incorrect statement of the law:

My 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 [sic] 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" about Ms. Enright's claim. RP 305.

The court then summarized its ruling: "You ask your questions. If she wants to invoke her Fifth Amendment, she can." RP 307. Ms. Enright's counsel clarified the court's ruling: "I can instruct my client basically just to answer that she is not to invoke the 5th on every question I guess." RP 308. Ms. Enright's attorney then stated that he would be

advising his client to invoke the Fifth Amendment to any questions asked.  
RP 308-309.

Mr. Dunbar then attempted to cross-examine Ms. Enright, asking her more than 40 questions, none of which related to the perjured diversion agreement. RP 309-314. The defense questions probed Ms. Enright's allegations against Mr. Dunbar, including who else stayed at the house when the car was taken (RP 310), who else drove the car (RP 310), her relationship to Mr. Dunbar (RP 311), her communication with Mr. Dunbar (RP 312), her conduct in regards to Mr. Dunbar when she contacted police claiming he had her car (RP 312), her lack of follow up with police after reporting Mr. Dunbar to police (RP 313), her conversation with him from the jail (RP 313), her actions after she received the phone calls from the jail (RP 313), her knowledge about "Cody," a person mentioned in the jail phone calls (RP 314), and whether she asked Mr. Dunbar to assist her in recovering her vehicle (RP 314, 407). Ms. Enright invoked the Fifth Amendment, refusing to answer any question posed by the defense. RP 309-314.

The court failed to make a finding as to whether the questions "obviously and clearly" incriminated her as the court initially determined it would, and as it was required to do. *Lougin*, 50 Wn. App. at 381; RP 303; 309-314. The court's failure to implement its ruling that it would

conduct an individualized inquiry into whether the defense questions elicited an incriminating response was an abuse of discretion, because it failed to apply the correct legal standard. *Lougin*, 50 Wn. App. at 382. Because this error infringed on Mr. Dunbar's Sixth Amendment right, it was an error of constitutional magnitude.<sup>6</sup> *Id.*

The court violated Mr. Dunbar's constitutional right to cross-examination when it denied his motion to strike after Ms. Enright's direct testimony when she informed the court she would not answer defense questions on cross-examination. The court compounded this error by allowing Ms. Enright to refuse to answer any of defense questions on cross-examination without determining whether she was in fact entitled to assert this privilege. This error deprived Mr. Dunbar of his constitutional rights to cross-examine his accuser. Reversal and remand for a new trial is required.

**2. Mr. Dunbar was deprived of his right to present a defense when the court limited questioning of his own witness about issues material to his defense.**

Mr. Dunbar was barred from asking questions of his own witness that supported his defense at trial.

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<sup>6</sup> Mr. Dunbar subsequently moved for a new trial based on the court allowing Ms. Enright's refusal to testify on cross-examination, which the trial court denied. CP 78; 402.

Mr. Dunbar's right to present a defense is guaranteed by the state and federal constitution. Const. art. I, sec. 22; U.S. Const. amend. VI; XIV. This right entitles the accused to present his "version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *State v. Lizarraga*, 191 Wn. App. 530, 552, 364 P.3d 810, 822 (2015) (citing *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)). This right is a fundamental element of due process of law. *Id.*

If the evidence the accused seeks to introduce has at least minimal relevance the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Darden*, 145 Wn.2d at 622). The court must properly consider "the integrity of the truthfinding process and a defendant's right to a fair trial." *Jones*, 168 Wn.2d at 720 (citing *Hudlow*, 99 Wn.2d at 14).

Mr. Dunbar's claim that the trial court deprived him of his constitutional right to present a defense is reviewed de novo. *Jones*, 168 Wn.2d at 719.

Mr. Dunbar called Leanne Shelly to testify on his behalf. RP 427. Prior to her testimony the prosecutor objected to Ms. Shelly testifying that she saw Ms. Enright changing the license plates on her car after it had been recovered. RP 402-404; 409-410. The prosecutor also objected to

Ms. Shelly testifying that she had asked Mr. Dunbar to help Ms. Enright retrieve her car. RP 413.

The defense argued this was relevant because Ms. Shelly's testimony would help establish that Ms. Enright might have changed the plates on her own vehicle, not Mr. Dunbar, as insinuated by the prosecutor. RP 410-411. And Ms. Shelly's testimony that she asked Mr. Dunbar to assist in retrieving Ms. Enright's car was certainly relevant to Mr. Dunbar's intent. RP 413. The defense reiterated that it was unable to elicit this testimony from Ms. Enright on both of these points during cross-examination, because Ms. Enright refused to testify. RP 411, 414.

The court barred Mr. Dunbar from asking Ms. Shelly about the license plates, finding that the prejudice of this evidence outweighed its probative value under ER 403. RP 412. The court also prohibited Mr. Dunbar from eliciting from Ms. Shelly that she asked for Mr. Dunbar's assistance in finding Ms. Enright's car, finding it had limited probative value and was "fraught with danger for confusion." RP 413.

The court did not elucidate how this evidence prejudiced the State. This was error. There is simply no basis to conclude that this evidence was so prejudicial that it would disrupt the fairness of the fact-finding process at trial as is required for exclusion. *Jones*, 168 Wn.2d at 720.

The opposite conclusion must be drawn where the change in license plates was emphasized in the prosecutor's opening (RP 228, 230, 233), testified to on direct by Ms. Enright (RP 249, 250, 252), and established through officer testimony as evidence that was part of their investigation. RP 324, 329-330, 335. And where the charge of possession of a stolen motor vehicle required proof that Mr. Dunbar withheld the vehicle from the true owner, this evidence that he was asked to retrieve the vehicle was crucial to his defense that he intended to return the car to Ms. Enright. CP 9.

Error of constitutional magnitude must be proved harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Reversal is required unless the State can show, beyond a "reasonable doubt that any reasonable jury would have reached the same result without the error." *Jones*, 168 Wn.2d at 724 (citing *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)). The State cannot meet that burden here, where Mr. Dunbar was denied the opportunity to cross-examine Ms. Enright about the license plates on the car and prior permission she had given to Mr. Dunbar, and the jury was permitted to infer, without rebuttal, that Mr. Dunbar sought to hide the vehicle's true identity by possessing it with a different set of license plates and possessed

the car without permission. This constitutional error requires reversal and remand for a new trial.

**3. The State presented three separate acts of witness tampering without a unanimity instruction, depriving Mr. Dunbar of his constitutional right to a unanimous jury verdict.**

The prosecutor charged Mr. Dunbar with witness tampering for two separate phone calls he made to Ms. Enright from the jail. CP 9-10. The jury was instructed that it could convict Mr. Dunbar for both or either of the charges, without being provided a unanimity instruction. CP 72 (to-convict instruction); 56-74 (jury instructions). The jury was also presented with evidence of a voicemail that the prosecutor relied on to support its charge of witness tampering, but which was not charged in the Information, or included in the “to convict” instruction. CP 9-10; 72; RP 259-263, 368, 451, 453.

People accused of crimes in Washington have a right to a unanimous jury verdict. Const. art. I, § 21; *State v. Ortega–Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the prosecution presents evidence of multiple acts of misconduct, any of which could be relied on to find the defendant committed the charged crime, the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act. *State v. Bobenhouse*, 166

Wn.2d 881, 893, 214 P.3d 907 (2009) (citing *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984)).

The failure to provide a *Petrich* instruction in multiple acts cases is constitutional error which the appellate court reviews de novo.

*Bobenhouse*, 166 Wn.2d at 888; *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010).

a. *The prosecution presented evidence of multiple acts without a unanimity instruction.*

A *Petrich* instruction is required in cases such as Mr. Dunbar's, where evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred. *State v. Brown*, 159 Wn. App. 1, 14, 248 P.3d 518, 524 (2010) (citing *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995)).

The prosecutor accused Mr. Dunbar of calling Ms. Enright from the jail on December 20 and then over one month later, on January 29. CP 10; Ex. 10, 11. The prosecutor referred to both of these calls in opening and closing argument, in addition to a voicemail that was not specified in the Information or the "to convict" instruction. CP 10, 72; RP 234, 236, RP 451, 454, 456; Ex. 9. Both Ms. Enright and Officer Kiehn testified to the two calls and the voicemail, and the jury heard evidence of each of them. RP 259-263, 368-369, 371; Ex. 9-11.

Defense counsel asked the court to adopt a “to convict” instruction that used the conjunctive “and” between the two allegations as was originally proposed by the prosecution. RP 425-426. However, the court declined, expressly instructing the jury that to convict Mr. Dunbar of tampering with a witness, the jury had to find, beyond a reasonable doubt:

That on or about December 20, 2016 and/or January 29, 2017, the defendant attempted to induce a person, Victoria Enright, to absent herself from any official proceeding.

CP 72.

Because there was no unanimity instruction provided, the use of the disjunctive allowed the jury to convict Mr. Dunbar even if only half the jurors thought the December 20 phone call established the elements of witness tampering, but not the January 29 call, while the other half of the jury found the evidence established the opposite. The court’s instruction that the jury could convict Mr. Dunbar based on two separate acts without a unanimity instruction deprived him of his right to a unanimous jury verdict.

*b. The presentation of multiple acts without a unanimity instruction prejudiced Mr. Dunbar.*

Prejudice is presumed where there is neither an election nor a unanimity instruction in a multiple acts case. *State v. Coleman*, 159 Wn. 2d 509, 512, 150 P.3d 1126 (2007). This presumption of error can only be

overcome if no rational juror could have a reasonable doubt as to the alleged acts. *Id.* (citing *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)). Reversal is required in a multiple acts case where the defendant is prejudiced and there is a risk that the jury was not unanimous. *Coleman*, 159 Wn.2d at 515.

Here, rational jurors most certainly would disagree on which call established witness tampering. In closing argument, the prosecutor emphasized the different tone of the calls. He described the December 20 call as Mr. Dunbar trying to tell Ms. Enright to call the sheriff and say he did not take her vehicle. RP 451-452. The defense theory was that Mr. Dunbar was urging Ms. Enright to tell the truth—that he did have permission to retrieve her vehicle. RP 463. And he explicitly tells Ms. Enright that it is up to her to press charges, but he believes she shouldn't, because he was getting her car back for her. Ex. 10.

The prosecutor contrasts this call with Mr. Dunbar's apologetic tone in the January 29 call. RP 454. The substance of this call was very different from the December 20 call. Mr. Dunbar was asking Ms. Enright if she was coming to court on the date of trial, and letting her know the sentence he faced. Ex. 11. A reasonable juror could find this did not meet the elements of witness tampering, just as a reasonable juror could find

that Mr. Dunbar's explanations in the first call did not amount to witness tampering.

And Ms. Enright did not specify in which call Mr. Dunbar asked her not to press charges. RP 260. Nor did Ms. Enright distinguish in which call Mr. Dunbar asked her not to appear at court. RP 261, 263-264.

The voicemail that was played for the jury, and discussed by the prosecutor in opening and closing was not included in the "to-convict" instruction. CP 72; RP 236, 453; Ex. 9. This further muddied the waters, because the jury could have easily relied on this conduct to generally find there was inducement to have Ms. Enright not appear at trial, without unanimously agreeing on the specific alleged act as is required for a unanimous verdict.

Because the jury could have convicted Mr. Dunbar of witness tampering without unanimously agreeing on which act constituted the charged offense, reversal and remand for a new trial is required.

**4. The court's imposition of consecutive sentences for forgery and witness tampering, sentenced in the same proceeding, was not authorized by the SRA.**

Mr. Dunbar was sentenced on the same day, in the same sentencing hearing, for this matter, Superior Court #16-01-04914-2

(witness tampering, possession of a stolen motor vehicle), and Superior Court #16-1-03608-3 (theft I, forgery).<sup>7</sup> RP 562.

Mr. Dunbar's convictions for forgery and witness tampering were sentenced as "current offenses;" therefore RCW 9.94A.589(1)(a) controlled, and the court did not have authority to sentence him to consecutive sentences under RCW 9.94A.589(3).<sup>8</sup>

*a. Mr. Dunbar was sentenced on "current offenses."*

Felony offenses sentenced on the same day are "current offenses" and must be sentenced concurrently, unless sentenced under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a); *State v. Rasmussen*, 109 Wn. App. 279, 286, 34 P.3d 1235 (2001) (RCW 9.94A.400(1)(a)<sup>9</sup> controls and requires that a court make finding of aggravating circumstances warranting imposition of an exceptional sentence before sentences imposed on the same day may be served consecutively if appropriate.)).

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<sup>7</sup> This is a pending appeal in Court of Appeals number 35350-8-III. Mr. Dunbar makes the same argument in that case.

<sup>8</sup> Though this issue was not raised below, it is uncontroverted that "[t]his court may address for the first time on appeal the imposition of a criminal penalty that is not in compliance with sentencing statutes." *State v. Rasmussen*, 109 Wn. App. at 283 (citing *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996)).

<sup>9</sup> Recodified as § 9.94A.589 by Laws 2001, ch. 10, § 6.

While the SRA does not formally define “current offense,” the term is defined functionally as convictions entered or sentenced on the same day. *In re Finstad*, 177 Wn.2d 501, 507, 301 P.3d 450 (2013).

The court ran the charge of witness tampering in this case consecutive to the forgery count in case #16-1-03608-3. RP 567-568. Because Mr. Dunbar’s offenses in these cases were sentenced on the same day, in the same hearing they were current offenses. His cases fall squarely under RCW 9.94A.589(1)(a), and the trial court was required to impose concurrent sentences for those convictions unless it followed the exceptional sentence provisions of RCW 9.94A.535.<sup>10</sup>

*b. The court’s consecutive sentence is not permitted by law.*

The trial court sentenced Mr. Dunbar to consecutive sentences without imposing an exceptional sentence. RP 567-568; CP 359.<sup>11</sup>

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<sup>10</sup> The State argued that the court could impose an exceptional sentence under RCW 9.94A.535(2)(c) based on Mr. Dunbar’s offender score, but the court did not impose an exceptional sentence under this statutory authority. CP 104 (State’s sentencing memo); CP 357 (court did not enter exceptional sentence). *See* RCW 9.94A.535(2)(c) (where “the defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished,” the trial court may impose an aggravated exceptional sentence without a finding of fact by a jury).

<sup>11</sup> The Judgment and Sentence entered by the court does not reflect the court’s order. CP 359. Rather, it states in section 4.1 that this sentence is to run consecutive to #16-1-02252-0; #16-02252-0; and 16-1-04019-6. CP 359. The judgment and sentence in case number 16-1-03608-3 does correctly reflect the court’s oral ruling.

Because Mr. Dunbar was sentenced on “current offenses,” RCW 9.94A.589(1)(a) controls, and the court was required to sentence Mr. Dunbar to concurrent sentences unless it imposed an exceptional sentence.<sup>12</sup>

The trial court’s imposition of a consecutive sentence for the forgery and witness tampering convictions was not authorized by law, requiring his sentence be vacated and remanded for imposition of concurrent terms. *Rasmussen*, 109 Wn. App. at 286.

#### F. CONCLUSION

Mr. Dunbar was convicted of possession of a stolen motor vehicle and witness tampering based on the accusations of Ms. Enright, who he was not permitted to cross-examine in violation of his right to confront and cross-examine witnesses. Mr. Dunbar’s constitutional rights to a unanimous jury and his right to present a defense were also violated by the trial court’s errors. Each of these errors requires reversal and remand for a new trial. Mr. Dunbar is also entitled to remand for imposition of a concurrent sentence because of the court’s error in imposing a consecutive sentence for current offenses.

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<sup>12</sup> Under RCW 9.94A.535, the trial court must find “substantial and compelling reasons justifying an exceptional sentence” and “set forth the reasons for its decision in written findings of fact and conclusions of law.” The trial court did not make any such findings here.

DATED this 21st day of February, 2018.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 35349-4-III
v.	)	
	)	
DANIEL DUNBAR,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21<sup>ST</sup> DAY OF FEBRUARY, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2018.

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