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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

DANIEL H. DUNBAR, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court denied Mr. Dunbar's confrontation right under the state and federal constitution 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.

## **II. ISSUES PRESENTED**

1. Did the defendant waive his right to confront a witness or otherwise invite error, when counsel (1) informed the court the witness could assert a blanket privilege against self-incrimination, (2) refused to tell the court what questions she intended to ask the witness so the court could determine whether the privilege was validly invoked and (3) tactically desired the witness to claim the privilege before the jury to discredit her testimony, and whether any error was harmless beyond a reasonable doubt?
2. Whether the trial court abused its discretion in limiting a defense witness's testimony where that testimony was irrelevant, and whether, even if the limitation on the testimony was in error, considering the other evidence adduced at trial, any error was harmless?
3. Whether an alleged unanimity error is a manifest constitutional error, and whether, under the circumstances, the facts supporting the charge of witness tampering constitute a continuing course of conduct, obviating the need for a *Petrich* instruction?

4. Did the trial court err when it expressly ordered that the concurrent sentences it imposed for the convictions of possession of a stolen motor vehicle and witness tampering were to run consecutively to the defendant's prior convictions, where such discretion is allowed pursuant to RCW 9.94A.589(3)?

### **III. STATEMENT OF THE CASE**

The defendant was charged by amended information in the Spokane County Superior Court with one count of possession of a stolen motor vehicle and one count of possession of motor vehicle theft tools, both occurring on or about December 20, 2016; and one count of tampering with a witness occurring between December 20, 2016 and January 29, 2017. CP 9-10. The defendant's case proceeded to trial before the Honorable Raymond Clary.

#### Factual history.

Victoria Enright owned a white 2001 Pontiac Grand AM, which she reported stolen on December 13, 2016. RP 242.<sup>1</sup> The Grand AM was taken from the outside of the residence where she was living, and was taken some time between 3:00 a.m. and 1:00 p.m. RP 242-43. The keys to the car remained in her pocket. RP 244. She had not given anyone permission to

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<sup>1</sup> Deputy Ryan Smith responded on December 13, 2016 to Ms. Enright's report of her stolen vehicle. RP 317. She told Deputy Smith that she and Mr. Dunbar had a disagreement, and suspected him of taking her car. RP 319. She told the deputy that she had confronted the defendant by telephone and the defendant had denied taking her car. RP 319. She also told the deputy that her vehicle had the correct license plates affixed to it before it had been taken. RP 324. When it was located, Ms. Enright's car had switched license plates. RP 330.

take the car, including Mr. Dunbar. RP 243. Although she knew Mr. Dunbar, and had allowed him to drive her car in the past, he did not have permission to drive it at the time it was stolen. RP 244. Ms. Enright suspected Mr. Dunbar took the vehicle because he was upset with her. RP 245.

Ms. Enright sent a text message to Mr. Dunbar telling him to bring back her car. RP 247. Mr. Dunbar did not respond immediately, but when he did, he denied stealing the car, but admitted he knew who had it. RP 247. Over the course of the next few days, Ms. Enright and Mr. Dunbar argued over the car and their belongings. RP 248.

On December 20, 2016, Ms. Enright was driving a rental car,<sup>2</sup> looking for her Grand AM. RP 250, 256. She located her car near 7<sup>th</sup> Avenue and Fox Road, with Mr. Dunbar sleeping in the driver's seat. RP 249, 255. The license plates had been changed. RP 249. She opened the driver's side door to the Grand AM, told him to get out of the car, and punched him in the face. RP 255.

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<sup>2</sup> Ms. Enright testified on direct examination that when her car was stolen, she filed a claim with her insurance company, and received \$1700 as a result of that claim. The insurance company paid for the rental vehicle she was driving at the time she located Mr. Dunbar and her car. RP 256-57. She then "bought back" her car for \$100. RP 256.

Ms. Enright returned to the rental car, and drove to a gas station on Pines Road to call the police. RP 257. Because she was with her boyfriend, who had previously been ordered to have no contact with Ms. Enright, she left the gas station before police arrived. RP 257.

Deputy Wade Nelson responded to Ms. Enright's call. RP 327. He located Ms. Enright's vehicle in the area where she said it would be, and the defendant was walking away from the car. RP 327-28. Mr. Dunbar agreed to speak with Deputy Nelson, and told him that he had been sleeping in Ms. Enright's car, he knew that it belonged to her, that he heard that she thought he might have taken it, that someone named "Cody" had actually taken it, and that he had taken it from "Cody" to drive to a friend's house in the Valley, but had run out of gas. RP 329. Mr. Dunbar stated that Ms. Enright had come to his location, had found him asleep in the vehicle, that she said, "So you have my car" and punched him in the face. RP 330. Mr. Dunbar claimed that, although he knew the car was stolen, he had not reported finding it because he "needed to get to a buddy's out in the Valley, so he decided to drive it out there." RP 330.

Deputy Nelson placed the defendant under arrest for possession of a stolen motor vehicle because, based on his statements, "he knew whose car it was. He heard it was stolen, but he still made a decision to get into the car and drive it from where it was taken in the city, which was a considerable

distance to the Valley.” RP 332. Officers were unable to contact Ms. Enright after they had recovered her car. RP 345.

However, Ms. Enright received a call from the Spokane County Jail, placed by Mr. Dunbar on the day of his arrest, December 20, 2016. RP 260, 355. She also received and accepted a call from him on January 29, 2017. RP 355. Ms. Enright believed that Mr. Dunbar’s purpose in placing the telephone calls was to convince her to not testify against him. RP 261. She believed that Mr. Dunbar was threatening to have her investigated for insurance fraud if she testified against him. RP 261. He asked her to call law enforcement to tell them that he had not stolen her car. RP 263.

Mr. Dunbar also left a message on Ms. Enright’s phone on January 4, 2017, in which he asked her if she was coming to testify against him, told her she didn’t need to make a statement, acknowledged she had punched him in the face, stated, “just don’t show up for trial on the 13<sup>th</sup> next month,” and stated they could go “one of two ways with this” – she could “lose her truck” or he “could just get out.” RP 264, 369, 374. The message also accused Ms. Enright of having given Mr. Dunbar permission to “get her car back for her”; Ms. Enright denied having done so. RP 264. Ms. Enright saved the message and emailed it to law enforcement. RP 265. Recordings of each of the three calls were admitted at trial. Ex. P-9, P-10, P-11.

Procedural history.

*Ms. Enright's invocation of the Fifth Amendment.*

After Ms. Enright testified, the jury was excused, and defense counsel advised the court that she intended to ask Ms. Enright if she had ever previously lied under penalty of perjury. RP 267. If Ms. Enright testified that she had not lied under penalty of perjury, defense counsel intended to offer a diversion agreement, signed under penalty of perjury, in which Ms. Enright indicated she had never been previously convicted of a felony offense, and had no felony offenses pending against her. RP 267. When she signed the diversion agreement, Ms. Enright apparently had pending felonies in Stevens County, as reflected by a review of Ms. Enright's criminal history.<sup>3</sup> RP 267, 271.

The State requested that Ms. Enright's attorney be contacted, as "to allow somebody to claim that somebody has perjured themselves, in other words, accuse them of a crime that would then be actionable by the State, Ms. Enright has rights." RP 268. Defense counsel for Ms. Enright was informed of the situation by the parties. RP 272-74. Defense counsel for Ms. Enright advised her to invoke her right to remain silent and not to make

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<sup>3</sup> The court expressed concern over "the timing of this revelation," characterizing defense counsel's decision to wait to raise the issue of the alleged perjury until after Ms. Enright had already testified on direct examination as an "ambush." RP 297.

any potentially incriminating statements. RP 275. He indicated it would be his “preference to not have her testify further.” RP 276.

The prosecutor requested Mr. Dunbar’s counsel provide “the condition precedent” that would allow her to examine Ms. Enright about the diversion agreement, indicating that there could be multiple bases upon which the State could object to the questioning. RP 276.

Citing *Crawford v. Washington*,<sup>4</sup> the defendant moved to strike Ms. Enright’s testimony. RP 277. The State suggested that, rather than striking Ms. Enright’s testimony in its entirety, the court determine that defense counsel’s proposed impeachment by the use of the diversion agreement be excluded, as such was extrinsic evidence. RP 279-80. The State argued that the defense’s offer of proof was insufficient to demonstrate Ms. Enright “understood what she was signing, knew what it meant” and was insufficient to support charging Ms. Enright with perjury; the State also reminded the court that the allegation lodged by defense counsel was not a conviction for a crime of dishonesty, and would, therefore, be inadmissible. RP 281-83. The State also argued that if the court excluded questioning regarding the diversion agreement, Ms. Enright could still testify regarding the circumstances of Mr. Dunbar’s case. RP 283-84.

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<sup>4</sup> 541 U.S. 36, 124 S.Ct 1354, 158 L.Ed.2d 177 (2004).

The court acknowledged that there was no “finding of perjury. We have an argument, a theory of perjury.” RP 292. The court ruled that it would not grant a mistrial (which was not requested by the defense) and that Ms. Enright could “assert the Fifth Amendment with respect to the diversion.” RP 300.

However, despite this ruling, Ms. Enright’s attorney advised the court that his advice to Ms. Enright was to make a blanket assertion of her right against self-incrimination, and that individuals are not permitted to selectively invoke the privilege. RP 303, 305. Mr. Dunbar’s attorney agreed that Ms. Enright could not selectively invoke her right against self-incrimination. RP 306. Mr. Dunbar’s attorney advised the court that Ms. Enright’s attorney’s advice to answer no other questions put the parties in a different posture than his advice to answer no questions regarding the diversion agreement. RP 302.

The court indicated:

I have decided that since Ms. Enright has started to testify, she is going to continue until cross-examination and redirect, if any, [are] 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 reiterated his advice was for Ms. Enright to answer no further questions, even though not every question would incriminate Ms. Enright, because “if there is no prohibition on that specific

line of questioning, anything could potentially lead into that or could buttress that issue creating the possibility that any possible question or follow up or response could lead to that place which we are trying to stay away from..." RP 303-04. Ms. Enright's counsel expressed concern that there was no limitation on what could be asked, and therefore, he advised her to assert her privilege. RP 304. Ms. Enright's attorney also indicated that, if the court were to limit the scope of cross-examination, "then we might not have a Fifth Amendment grounds to invoke." RP 305.

In response, the court indicated that the only topic of which it was aware that would be the subject of cross-examination, was the allegedly perjured diversion agreement. RP 306. The court asked Mr. Dunbar's attorney whether "there was anything else" that would be the subject of cross-examination. Defense counsel indicated, "I guess I can't say because I don't know what Ms. Enright's answers are going to be until we get there." RP 306. The court asked again, "Do you have anything else where you're trying to impune her by another crime or bad act?" RP 306. Again, defense counsel deflected the question, "I think if she gets up there and says she's telling the truth, I think there is a door that gets opened there, too. I think there's a variety of different avenues." RP 306. The court asked for

clarification. RP 306. In response, defense counsel, for a third time, evaded the court's questions:

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, its whatever she testifies to is what she testifies to. And if I think that there is relevance in my questions in response to her answers, I am allowed to ask those. But I don't know exactly. I have some topic areas. I have some ideas, thoughts based on his, but I don't have everything written out, Your Honor. I can't tell you specifically what my questions are going to be.*

RP 306-07 (emphasis added).

The court subsequently ruled that Ms. Enright would be questioned by defense counsel, but that, if she wanted to invoke the Fifth Amendment, she could do so. RP 307. However, it ruled that the invocation would be addressed during a recess:

MR. SCHMIDT: May I, Your Honor, ask one question procedurally. I would like Ms. Enright, if there is an issue requesting or something that comes along that I believe she

should invoke her right for, how would the court like me to handle that? Obviously, I don't want to create an issue or distraction. I'm not a party to the action, so it wouldn't be like a motion in limine violation. I can instruct my client basically just to answer that she is not to invoke the 5th on every question. I guess.

*THE COURT: I guess you can pose an objection and I can take a recess and we'll lay it.*

MR. SCHMIDT: All right, Your Honor.

THE COURT: I tried a civil case like that.

RP 308 (emphasis added).

Mr. Dunbar's attorney asked Ms. Enright over 40 questions, and Ms. Enright invoked her privilege against self-incrimination as to each question. RP 310-14. These questions included asking about Ms. Enright's address, when she noticed her car was missing, how long she had known Mr. Dunbar, the circumstances surrounding her discovery of Mr. Dunbar in her car on December 20, 2016, and the circumstances surrounding the telephone calls she received from Mr. Dunbar. RP 310-14. At no time during the questioning did defense counsel request the court to order Ms. Enright to answer her questions, and at no time did defense counsel request a recess to have the court make a finding as to whether Ms. Enright validly invoked the privilege.

*Ms. Shelley's testimony.*

Leanne Shelley was a witness for the defendant. The State moved to exclude some of Ms. Shelley's testimony. RP 402. Ms. Shelley was expected to testify that she witnessed Ms. Enright switch the plates on the car after she recovered it. RP 403. To this testimony, the State objected on relevancy grounds, as the alleged action occurred after Mr. Dunbar was in possession of the vehicle and after his arrest for the offense. RP 404. The Court questioned whether Ms. Shelley could even testify that the plates she witnessed Ms. Enright affix to the vehicle were not the vehicle's original license plates. RP 404.

MS. FOLEY: Your Honor, again, Ms. Shelly, this just came up. I hadn't talked to her about anything like this before. Actually, the first time I contacted Ms. Shelly was a number, probably six or seven weeks ago. And she just mentioned out in the hallway that since this time, about three weeks ago, she was getting in the car, in this Grand AM with Ms. Enright and another individual, and that Ms. Enright was putting what she thinks were dealer plates on the car or she was changing the plates out on the car, but they weren't the plates that were supposed to be on the vehicle.

THE COURT: How does she know that?

MS. FOLEY: Well, I think it's from what she witnessed, Your Honor. Again, she was sitting in Ms. Enright's car while Ms. Enright and another individual were changing the plates. So she has firsthand knowledge.

THE COURT: All right.

MS. FOLEY: But it's an essential element, I believe, or a key point that the State has made so far that when Mr. Dunbar was found in the car, there were plates that weren't the original plates on the vehicle. I think that that bolsters their argument about the stolen motor vehicle. I think there's been an assumption or inference that one can make between that and Mr. Dunbar's possession that potentially Mr. Dunbar did that. But I think it's highly relevant that Ms. Enright herself has changed the plates on her car; that she hasn't always used the licensed or the authorized plates on the vehicle, and that it's highly probative of the facts that potentially the plates that were on the vehicle that Mr. Dunbar was found in were those -- she could have put them there. It doesn't mean that Mr. Dunbar put them there. Again, Your Honor, this is something I attempted to elicit out of Ms. Enright in cross-examination, but was unable to.

THE COURT: Okay. So, again, your basis for the Court a[llowing] that is [ER] 402.

RP 409-11.

The State responded:

MR. LINDSEY: Only that if, in fact, the testimony from Ms. Shelly would be that she saw Ms. Enright doing anything with the plates three weeks ago, that's the end of February. The charge date is the 20th of December. So we're three months later she says something, going to have to her testify that she saw something three months later? I just don't think -- the State doesn't believe it's relevant or material at this point in time.

RP 411.

The Court ruled, based upon the parties' agreement, that Ms. Shelley could not opine that Mr. Dunbar did not steal the car, but that she could testify that she had seen him drive it before, both with and without

Ms. Enright also present. RP 412. As to the issue of the license plates, the court ruled “with respect to changing of the plates or at any other time, that to me goes a bit too far. Whatever probativeness there might be there is outweighed by unfair prejudice under ER 403.” RP 412.

Then, defense counsel indicated that Ms. Shelley would also testify that she (Ms. Shelley) had asked Mr. Dunbar to get Ms. Enright’s car back, sometime between the time it was stolen and the time it was recovered. RP 413. The court excluded this testimony on the basis that it was “too tangential,” of limited probative value, and “fraught with danger for confusion, because the key here is did Ms. Enright give Mr. Dunbar permission.” RP 414. The court further ruled:

Whether Ms. Shelley asked Mr. Dunbar to help Ms. Enright get her car back, it isn’t probative of whether or not Ms. Enright gave Mr. Dunbar permission to drive her car. And to the degree that she would have to say that she had authority on behalf of Ms. Enright, then she would be relying on hearsay and it all becomes too confusing and potentially unfairly prejudicial.

RP 415.

*Jury instructions.*

The State proffered jury instructions for the court’s consideration. RP 382. Defense counsel requested two specific instructions as well. RP 382. During the first jury instruction conference, defense counsel had no objections to the jury instructions as prepared by the court. RP 389.

During a second jury instruction conference, the court proposed a change to the elements instruction for the crime of witness tampering. RP 425. The court inquired whether it would not be more appropriate to state, “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; RP 25 (emphasis added). The State agreed with the court’s proposed language, and the defendant did not object to the revision. RP 426.

The defendant was convicted after trial of possession of a stolen vehicle and witness tampering, but the jury acquitted him of possession of motor vehicle theft tools. CP 75-77.

*Sentencing.*

On May 25, 2017, the defendant was sentenced on two cases; the first involved one count each of possession of a stolen motor vehicle and witness tampering (the instant case, case number 16-1-04019-2), and the second involved one count each of theft of a motor vehicle and forgery (case number 16-1-03608-3).

The defendant had previously been sentenced for three other offenses. On May 1, 2017, Judge Cooney sentenced the defendant to 57 months incarceration for one count of possession of a stolen motor vehicle (Spokane Superior Court cause number 16-1-02252-0). RP 661. On May 3,

2017, Judge Fennessey sentenced the defendant to 57 months incarceration for a second count of possession of a stolen motor vehicle (Spokane Superior Court cause number 16-1-04019-6), and ordered that sentence to run concurrently with the sentence earlier imposed by Judge Cooney. RP 661-62. On May 19, 2017, Judge Fennessey imposed 12 months and a day for one count of possession of a controlled substance, methamphetamine (Spokane Superior court number 16-1-03524-9), and ordered that sentence to run consecutively to the two earlier sentences. RP 662.

On the instant case (number ending in 4019-2), Judge Clary imposed 60-month sentences for both the witness tampering and possession of stolen motor vehicle offenses, to run concurrently with each other, but consecutively to the sentences from Judge Cooney and Judge Fennessey. RP 665.

On case number 16-1-03608-3, Judge Clary sentenced the defendant to 57 months for first degree theft of the trailer camper, and 22 months for forgery. CP 302. The 57 months was ordered to run concurrently with the witness tampering and possession of stolen motor vehicle charges under the instant case (number ending 4019-2). RP 665. The 22 months ordered for the forgery was ordered to run consecutively to the witness tampering and possession of stolen vehicle. RP 665; CP 302. The total amount of

confinement ordered was 151 months for all five cases. RP 666. However, the trial court did not enter written findings of fact and conclusions of law in pronouncing its sentence.<sup>5</sup>

The defendant timely appealed.

#### IV. ARGUMENT

**A. MR. DUNBAR WAIVED HIS RIGHT TO CONFRONT MS. ENRIGHT ON CROSS-EXAMINATION BY AGREEING THAT SHE COULD CLAIM A BLANKET PRIVILEGE AND BY FAILING TO PROVIDE THE COURT THE QUESTIONS HE INTENDED TO ASK ON CROSS-EXAMINATION SUCH THAT THE COURT COULD DETERMINE WHETHER THE PRIVILEGE COULD BE LAWFULLY INVOKED; FURTHER, DEFENDANT FAILED TO ASK THE COURT TO INSTRUCT MS. ENRIGHT TO ANSWER THOSE QUESTIONS WHICH WERE CLEARLY NOT INCRIMINATING, AND DID SO TACTICALLY TO DISCREDIT HER TESTIMONY BEFORE THE JURY; IN ANY EVENT, ANY ERROR IS HARMLESS BEYOND A REASONABLE DOUBT.**

The defendant argues on appeal that the trial court erred by allowing Ms. Enright to invoke her privilege against self-incrimination on cross-

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<sup>5</sup> However, the court did find substantial and compelling reasons to depart from the SRA. The court indicated that the SRA allows a trial court to impose consecutive sentences for multiple current convictions where a defendant's high offender score results in no sentence or time for some of the current offenses, citing RCW 9.94A.535(2)(c). The trial court found that in his allocution, the defendant "frequently blamed or made attribution to others for his choices to commit crimes ... did not appear to accept responsibility for his actions [and] has not appeared to present himself as remorseful or contrite." RP 664. Although Mr. Dunbar's attorney explained the costs associated with lengthy incarceration, the sentencing court determined that the defendant's previous 63-month sentence on an unrelated charge "does not appear to have changed his course of conduct or choices as evidenced by the current cases." RP 664.

examination, without either striking her direct examination testimony or determining that the privilege was validity invoked by Ms. Enright as to each of the questions asked by defense counsel. Appellant’s Br. at 2.

1. A witness may exercise a privilege against self-incrimination.

Both the sixth amendment to the United States Constitution and the Washington Constitution protect a defendant’s right to compel the testimony of witnesses. *See Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). However, a “valid assertion of the witness’ Fifth Amendment rights justifies a refusal to testify despite the defendant’s Sixth Amendment rights.” *United States v. Goodwin*, 625 F.2d 693, 700 (5th Cir. 1980).

In *State v. Ruiz*, 176 Wn. App. 623, 309 P.3d 700 (2013), this Court explained that this privilege may be asserted on a blanket basis, as in *State v. Dictado*, 102 Wn.2d 277, 867 P.2d 172 (1984) and *State v. Lougin*, 50 Wn. App. 376, 749 P.2d 173 (1988). However, in most situations, a claim of privilege must be raised against specific questions, and not as a blanket foreclosure of testimony. *Eastham v. Arndt*, 28 Wn. App. 524, 532, 624 P.2d 1159 (1981). Where the claim of privilege is raised against specific questions, the claim must be “supported by facts which, aided by the ‘use

of “reasonable judicial imagination” show the risk of self-incrimination.”

*Id.*

It is the trial court’s function to determine whether silence is justified. The trial court must require the witness to answer if, based upon the particular facts of the case, it clearly appears that silence is not warranted. *Hoffman v. United States*, 341 U.S. 479, 486–87, 71 S.Ct. 814, 95 L.Ed. 1118 (1951). Such determination is “vested in the trial court to be exercised in its sound discretion under all of the circumstances then present.” *State v. Parker*, 79 Wn.2d at 332, 485 P.2d 60.

*Lougin*, 50 Wn. App. at 382.

Our Supreme Court has held that the Fifth Amendment privilege is only applicable where the witness has “reasonable cause to apprehend danger from a direct answer.” *State v. Levy*, 156 Wn.2d 709, 731-32, 132 P.3d 1076 (2006) (citing *Hoffman*, 341 U.S. at 486.) However, if the judge “has specialized knowledge of the likely testimony, and can determine whether the privilege is properly asserted for that witness, the judge may allow the witness to refuse to answer all questions.” *Id.*

Complicating this inquiry are those situations where a prosecution witness has testified for the State, but invokes the privilege against self-incrimination before or during cross-examination, the situation presented here. In such situations, the witness’s Fifth Amendment privilege conflicts with the defendant’s Sixth Amendment right to confrontation, as the defendant is deprived of his ability to inquire into the witness’ credibility

through cross-examination. *United States v. Lyons*, 703 F.2d 815, 819 (5th Cir. 1983). Where this “impediment to cross-examination creates a substantial danger of prejudice by depriving the defendant of the ability to test the truth of the witness’s direct testimony, relief is warranted.” *Id.* Where the witness refuses to answer cross-examination questions on “direct,” as opposed to “collateral” matters, the testimony must be excised. *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981); *United States v. Diecidue*, 603 F.2d 535, 552 (5th Cir. 1979).

Ordinarily, in such cases, the appropriate relief is for the trial judge to strike the direct testimony of the witness, although, under some circumstances a mistrial may be appropriate. *Lyons*, 703 F.2d at 819; *see also, United States v. Cardillo*, 316 F.2d 606, 613 (2d Cir. 1963) (court could strike all testimony, parts of testimony or none of the witness’s testimony, dependent on the particular circumstances).

2. Proper procedure when a witness invokes the Fifth Amendment.

While the court heard extensive oral argument in this case regarding whether the allegedly perjured diversion agreement was admissible to impeach Ms. Enright, it did not hear any argument, whatsoever, that would support Ms. Enright’s assertion of her privilege against self-incrimination regarding *all* of the questions that were asked of her by defense counsel. While Ms. Enright asserted the privilege to each specific question, rather

than expressing she was asserting a “blanket” privilege, it is clear that Ms. Enright’s counsel advised her to answer no questions on cross-examination, and apprised the court of this fact. Both Ms. Enright’s attorney and Mr. Dunbar’s attorney informed the court that a witness must assert a “blanket” privilege, rather than claim the privilege with respect to specific questions. RP 303-06.

In this case, the trial court could have held a hearing, outside the presence of the jury, wherein defense counsel asked Ms. Enright the questions she intended to ask during cross-examination.<sup>6</sup> Upon hearing the questions, and whether Ms. Enright intended to invoke her privilege as to each of those questions, the trial court could then determine whether Ms. Enright had “reasonable cause to apprehend danger” by answering each question. It could then have ruled appropriately as to whether Ms. Enright could validly invoke the privilege against self-incrimination as to some or all of the defense’s questions. However, as explained below, defense counsel decided not to request this procedure, foregoing this type of inquiry.

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<sup>6</sup> Defense counsel’s claim that she had no duty to apprise the court of her list of questions for Ms. Enright, RP 307, is not true. In order to conduct a proper hearing on the extent to which the witness could assert her Fifth Amendment privilege, defense counsel should have been obligated to share with the court those questions, or, at a minimum, those topics regarding which she intended to ask the witness in order to assist the court in its determination of which questions Ms. Enright would be required to answer.

In *State v. Nelson*, 72 Wn.2d 269, 432 P.2d 857 (1967), our Supreme Court explained the procedure by which a trial court should ascertain if a privilege would be invoked by a witness:

Had there been a genuine doubt in the mind of the prosecutor that the witness, Patrick, would again claim his privilege as he contended he would, the wisest solution, it seems to us, was that suggested by appellant's attorney:

If there is any doubt about what this man is going to testify to, I can ask the Court to call him in the absence of the jury and let the prosecutor ask him questions. This is a very critical thing in this case and I don't want the prosecutor getting their point to the jury by unanswered questions.

*Id.* at 282.

A number of other cases also involve the proper procedure by which a trial court may determine the scope and validity of a witness's assertion of their Fifth Amendment privilege. For example, in *United States v. Wilcox*, 450 F.2d 1131 (5th Cir. 1971), the court held a hearing outside the presence of the jury, and the witness, who was represented by counsel, "was subjected to an examination by the Court and counsel or the Government and Wilcox." Following the advice of his attorney, the witness invoked the Fifth Amendment to "virtually all of the questions." Based on this hearing, the trial court was able to make findings that "(i) [the] witness would claim the Fifth Amendment privilege against self-incrimination at the prospective

trial ... (ii) that he could validly do so without being contemptuous, (iii) as a result, the witness need not take the witness stand.” In *Gray v. State*, 368 Md. 529, 796 A.2d 697 (2002), the trial court held a hearing, outside the presence of the jury, in which the witness was questioned about his role in a murder, so the court could “determine whether the claim of the Fifth Amendment privilege [was] in good faith or lack[ed] any reasonable basis.” The witness invoked his Fifth Amendment privilege, and the Court determined the invocation was proper. *Id.* at 548.

Here, the trial court did not hold such a hearing. However, the trial court’s failure to hold such a hearing was attributable to defense counsel’s calculated lack of cooperation with the court, rather than the court’s oversight. During the very lengthy conference in which the court and trial counsel discussed how to handle the potential invocation of Ms. Enright’s Fifth Amendment privilege, RP 267-97, the trial court attempted to ascertain what questions defendant sought to ask of Ms. Enright. Twice, the court asked defense counsel what questions she intended to ask of Ms. Enright, other than questions relating to the allegedly perjured diversion agreement.<sup>7</sup> RP 306. The court attempted, for a third time, to

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<sup>7</sup> THE COURT: But the only issue I know of that the defense is going to raise is that she allegedly perjured herself in receiving the benefit of a diversion.

determine what questions defense counsel would ask, but defense counsel indicated she was under no obligation to inform the court as to what questions she intended to ask of Ms. Enright:

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, its whatever she testifies to is what she testifies to. And if I think that there is relevance in my questions in response to her answers, I am allowed to ask those. But I don't know exactly. I have some topic areas. I have some ideas, thoughts based on his, but I don't have*

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MR. SCHMIDT: In which case we would assert our Fifth Amendment right not to testify.

THE COURT: All right. *Is there anything else?*

MS. FOLEY: Your Honor, I guess I can't say because I don't know what Ms. Enright's answers are going to be until we get there.

THE COURT: *Do you have anything else where you're going to try to impune her by another crime or bad act?*

MS. FOLEY: Your Honor, I think if she gets up and says she's telling the truth, I think there is a door that gets opened there, too. I think there's a variety of different avenues.

RP 306 (emphasis added).

everything written out, Your Honor. I can't tell you specifically what my questions are going to be.

RP 306-07 (emphasis added).

Not only did defense counsel *erroneously* inform the court that the witness was required to assert a “blanket” privilege, defense counsel’s lack of cooperation with the trial court precluded the court from effectively determining whether Ms. Enright could assert that privilege against self-incrimination as to some or all of the defendant’s cross-examination questions. The trial court simply did not know what the defense questions would be – other than those regarding the allegedly perjured diversion agreement. As discussed below, this lack of cooperation with the trial court waived the defendant’s right of cross-examination and was a strategic decision by defense counsel.

### 3. Waiver/trial tactics.

The right to confrontation is subject to waiver and forfeiture. *See e.g., State v. Mason*, 162 Wn.2d 910, 162 P.3d 396 (2007). As with decisions implicating trial strategy, the decision to raise a confrontation clause objection is a determination that is reserved to the discretion of competent defense counsel. *See Gonzalez v. United States*, 553 U.S. 242, 256, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008) (Scalia, J., concurring in the judgment) (“I doubt many think that the Sixth Amendment right to confront

witnesses cannot be waived by counsel”). The State does not dispute that counsel properly *raised* a Confrontation Clause question at trial; rather, counsel’s subsequent argument and conduct *waived* that right in order to discredit Ms. Enright’s testimony from direct examination. This was a trial strategy.

In *Nelson, supra*, 72 Wn.2d 269, the prosecutor asked a witness a series of questions which he knew the witness would refuse to answer based upon the same witness’s invocation of his Fifth Amendment privilege at a previous trial. In the concurring opinion, Judge Hill, stated: “Upon retrial of the case, the state made the shield of protection granted by the Fifth Amendment to the witness a weapon for getting its case before the jury by means of impermissible inferences. The use of such a prejudicial trial tactic amounts to reversible error.” *Id.* at 286.

While the State is not allowed to use a witness’s silence as a weapon against a criminal defendant, the State is unaware of any authority which holds that a defendant cannot pressure a witness into invoking the Fifth Amendment and use the witness’s subsequent silence to his or her advantage. Here, in an effort to undermine Ms. Enright’s credibility, defendant utilized Ms. Enright’s claimed privilege and her refusal to answer defense counsel’s cross-examination questions to his benefit. The jury heard the witness invoke the privilege as to nearly all of defense counsel’s

questions, even those which were innocuous or cumulative with Ms. Enright's testimony during direct examination.<sup>8</sup> Defense counsel's tactic is buttressed by the fact that counsel made no attempt, whatsoever, during the robust 40-plus question cross-examination, to request the court order Ms. Enright to answer the questions, use its contempt power to coerce Ms. Enright to answer, or, otherwise determine whether any of Ms. Enright's answers were legitimately privileged.

After Ms. Enright's testimony concluded, defense counsel spent a great deal of time attempting to convince the court to allow argument during closing that would address Ms. Enright's reticence upon defense

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<sup>8</sup> Examples of counsel's innocuous questions include, but are not limited to:

Q. On December 13, where were you staying?

A. I invoke my Fifth Amendment right.

Q. Did you have a permanent address at Desmet?

A. I invoke my Fifth Amendment right.

...

Q. Whose house was it?

A. I invoke my Fifth Amendment right.

RP 310.

Examples of questions calling for answers which would presumably be cumulative with Ms. Enright's direct testimony include, but are not limited to:

Q. You called law enforcement on December 13?

A. I invoke my Fifth Amendment right.

Q. Do you remember what you told law enforcement when he arrived?

A. I invoke my Fifth Amendment right.

RP 311.

questioning. RP 419-24. Ultimately, she was permitted to do so in closing.

The defense argued:

Ms. Enright testified she had known Mr. Dunbar for roughly two years. But then Ms. Enright only answers the State's questions. She doesn't answer mine. Without that information and additional context, this is merely just a he said/she said and we don't know.

RP 461.

Rather than assisting the court in its determination of whether Ms. Enright could validly assert her privilege against self-incrimination, defense counsel strategically opted to use Ms. Enright's claimed Fifth Amendment privilege as a weapon by which to allow the jury to infer that she must be less than candid since she answered only the State's questions, and refused to answer defense counsel's questions. In doing so, defense counsel strategically and tactically waived Mr. Dunbar's right to cross-examine Ms. Enright in the traditional sense, in favor of attempting to undermine the witness's credibility by allowing the jury to witness her repeated assertion of her Fifth Amendment privilege to all defense questions during trial.

4. Error, if any, was invited.

A party may not set up an error at trial and then claim on appeal that the trial court erred on that basis. Under the invited error doctrine, a party cannot raise a claim of trial court error "if the party asserting such error

materially contributed” to it. A material contribution may include acquiescence as well as direct participation. The invited error doctrine bars claims that impact a constitutional right, including claims arising under the Confrontation Clause. *See, e.g., City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002); *see also United States v. Reyes–Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992), *as amended* (June 15, 1992) (nontestifying codefendant’s statements elicited by defendant cannot be basis for claim on appeal), *cert. denied*, 506 U.S. 890, 113 S.Ct. 258, 121 L.Ed.2d 189 (1992).

As discussed above, the defendant materially contributed to the present issue by arguing that Ms. Enright had to assert a blanket privilege against self-incrimination, rather than invoke the privilege to specific questions. The record is not clear, however, that the court was convinced that the witness could actually assert a blanket privilege.<sup>9</sup>

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<sup>9</sup> MR. SCHMIDT: May I, Your Honor, ask one question procedurally. I would like Ms. Enright, if there is an issue requesting or something that comes along that I believe she should invoke her right for, how would the court like me to handle that? Obviously, I don't want to create an issue or distraction. I'm not a party to the action, so it wouldn't be like a motion in limine violation. I can instruct my client basically just to answer that she is not to invoke the 5th on every question. I guess.

*THE COURT: I guess you can pose an objection and I can take a recess and we'll lay it.*

MR. SCHMIDT: All right, Your Honor.

Defense counsel also materially contributed to the trial court's inability to inquire into whether Ms. Enright validly asserted her privilege against self-incrimination in two ways. As explained above, defense counsel refused to provide the trial court with any questions or topics that would be asked of Ms. Enright during cross-examination. This significantly hindered the trial court's ability to hold a meaningful hearing as to whether Ms. Enright could assert the privilege.

Second, defense counsel failed to ask the trial court to make a finding that the privilege was not validly asserted and also failed to ask the court to order Ms. Enright to answer those questions which had no likelihood of incriminating her. When it became apparent that Ms. Enright would heed her counsel's advice, and refuse to answer any questions during cross-examination, including seemingly innocuous questions, defense counsel should have requested another hearing outside the presence of the jury for the court to engage in further inquiry into the validity of the privilege – a hearing Mr. Dunbar now claims it was error for the trial court to fail to hold – or in the alternative, counsel should have asked the court to order Ms. Enright to answer the question. But, as discussed above, counsel astutely calculated that it would undercut Ms. Enright's direct testimony if

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THE COURT: I tried a civil case like that.

RP 308.

Ms. Enright claimed the privilege against self-incrimination in front of the jury as to each of defense counsel's questions.

In this respect, Mr. Dunbar set up the circumstance he now complains about on appeal. Interestingly, the defendant does not claim on appeal that his attorney's conduct at trial amounted to ineffective assistance of counsel. Thus, it must be that Mr. Dunbar believes that counsel's decisions in this regard were strategic, rather than deficient.<sup>10</sup>

5. Error, if any, was harmless beyond a reasonable doubt.

Assuming the trial court erred by not striking Ms. Enright's testimony, or in allowing her to assert her Fifth Amendment privilege against self-incrimination, notwithstanding the above-discussed tactical decisions, any error was harmless beyond a reasonable doubt. With errors of constitutional magnitude, the court will affirm where the error was harmless beyond a reasonable doubt; not every trial error, even those of constitutional dimension, requires reversal. *Levy*, 156 Wn.2d at 732.

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<sup>10</sup> Because review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984), a defendant claiming ineffective assistance of counsel must demonstrate the absence of any "*conceivable* legitimate tactic explaining counsel's performance," *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (emphasis added). Mr. Dunbar presumably does not claim ineffective assistance of counsel because he recognizes that the manner in which his trial attorney attempted to undercut Ms. Enright's testimony was, in fact, legitimate strategy.

The trial court's failure to excise Ms. Enright's testimony from trial was harmless beyond a reasonable doubt because the defendant, himself, admitted that he knew that the vehicle was stolen, and that he had possessed it. The jury could determine from the defendant's own statements and his telephone calls to Ms. Enright that he possessed the stolen car with the intent to withhold it from her. Additionally, the evidence of witness tampering was not evidenced by Ms. Enright's testimony, but rather, by the audio recordings of the defendant's calls to Ms. Enright. The most damaging evidence admitted against the defendant was not Ms. Enright's testimony, but rather the incriminating statements he made to police upon his arrest and the content of his telephone calls to Ms. Enright. Furthermore, much of Ms. Enright's testimony was cumulative to the defendant's statements to law enforcement and with his recorded telephone calls and messages to Ms. Enright. Any error was harmless beyond a reasonable doubt.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING MS. SHELLEY'S TESTIMONY.**

On appeal, the defendant claims that it was error for the trial court to exclude Ms. Shelley's testimony that (1) two<sup>11</sup> months after the defendant

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<sup>11</sup> The State argued at trial that three months had passed between the offense date and the date Ms. Enright allegedly switched the license plates on her vehicle. It

was in possession of Ms. Enright's car, Ms. Shelley observed Ms. Enright putting license plates on her car that she thought were dealer plates, and (2) that Ms. Shelley had asked Mr. Dunbar to get Ms. Enright's vehicle back for Ms. Enright. RP 409-12.

Appellate courts review decisions by the trial court to admit or exclude evidence for abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). The trial court abuses its discretion if its "discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* at 5 (alteration in original).

Relevant evidence is evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence is generally admissible. ER 402. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

The right to present evidence.

The right to present testimony in one's defense is guaranteed by both the United States and the Washington Constitutions. U.S. Const. amend VI;

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appears from the record, that the elapsed time between the two events was approximately two months.

Const. art 1, § 22. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

However, these rights are not absolute. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). Evidence that a defendant seeks to introduce must be minimally relevant; there is no constitutional right to present irrelevant evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006). Even if relevant, evidence may still be excluded if the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Darden*, 145 Wn.2d at 622. The State’s interest in excluding the evidence must be balanced against the defendant’s need for the information sought to be admitted, and relevant evidence may only be excluded if “the State’s interest outweighs the defendant’s need.” *Id.* Both the integrity of the truth-finding process and the defendant’s right to a fair trial are important considerations. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983).

Here, the trial court did not abuse its discretion in excluding Ms. Shelley’s testimony that she observed Ms. Enright changing the license plates on her vehicle two months after the defendant had been found in possession of it. This evidence was not relevant under ER 402, as it made

no fact of consequence at trial any more or less likely. Whether Ms. Enright put new plates or different plates on her vehicle two months after Mr. Dunbar was accused of unlawfully possessing it, did not bear on whether Mr. Dunbar knowingly possessed a stolen motor vehicle on the day of the offense.

Furthermore, this testimony was speculative under ER 602. Defense counsel advised the court that Ms. Shelley would testify that she believed Ms. Enright “was putting what she thinks were dealer plates on the car or she was changing the plates out on the car, but they weren’t the plates that were supposed to be on the car.” RP 410. When the trial court asked defense counsel Ms. Enright’s basis of knowledge for that testimony, defense counsel merely offered that Ms. Shelley was present at the time, but made no offer of proof as to how Ms. Shelley knew that the plates did not belong on the car. RP 410. And, as the trial court observed, there was no evidence that law enforcement did not recover Ms. Enright’s correct license plates and give them back to her. RP 404. The trial court did not err in excluding this evidence on relevancy grounds. This evidence had no bearing, whatsoever, on whether Mr. Dunbar unlawfully possessed Ms. Enright’s vehicle on December 20, 2016, two months earlier.

The trial court also did not err in excluding Ms. Shelley’s testimony that she had asked Mr. Dunbar to recover Ms. Enright’s vehicle, based on

relevancy and hearsay grounds. As the trial court observed: “whether Ms. Shelley asked Mr. Dunbar to help Ms. Enright get her car back isn’t probative of whether or not Ms. Enright gave Mr. Dunbar permission to drive her car. And to the degree she would have to say she had authority on behalf of Ms. Enright, then she would be relying on hearsay.” RP 415.

Even assuming, arguendo, that it was in error for the trial court to exclude Ms. Shelley’s testimony that she asked Mr. Dunbar to get Ms. Enright’s car back, the error was harmless. Mr. Dunbar’s own statements to law enforcement indicated (1) he knew the car was stolen, (2) he possessed the car, and (3) he decided to drive the car to the Spokane Valley, rather than return it to Ms. Enright. Thus, even if Ms. Shelley, or anyone else,<sup>12</sup> had asked Mr. Dunbar to retrieve Ms. Enright’s vehicle, he exceeded the scope of whatever limited permission he had been given (or thought he had been given) by driving the vehicle to the Valley, knowing it was stolen, and keeping it from Ms. Enright while doing so. Any potential error in this regard is harmless.

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<sup>12</sup> In the late January 2017 telephone call to Ms. Enright, Mr. Dunbar claimed that Ms. Enright’s aunt had solicited his assistance to retrieve her car, a claim that Ms. Enright indicated in the recording was false. Ex. P-11. There was no evidence presented at trial that Ms. Shelley was Ms. Enright’s aunt. Instead, defense counsel described her as “a friend” of both Ms. Enright and Mr. Dunbar, RP 393, and Ms. Shelley testified to the same, RP 428-29.

**C. THE DEFENDANT’S CLAIMED UNANIMITY ERROR WAS NOT PRESERVED AND IS NOT MANIFEST; IN ANY EVENT, THE EVIDENCE DEMONSTRATES A CONTINUING COURSE OF CONDUCT.**

1. The appellant, alleging for the first time on appeal that his constitutional right to a unanimous verdict was violated, has not demonstrated the existence of a manifest error affecting a constitutional right pursuant to RAP 2.5(a)(3).

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5.

RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the

prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

*Strine*, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.<sup>13</sup> Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Here, defendant alleges that the trial court erred by failing to give a *Petrich*<sup>14</sup> instruction even though such an instruction was neither proposed by the defendant nor did he take any exception to the court’s instructions, which did not include a unanimity instruction. RP 426. The failure to assert

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<sup>13</sup> An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

<sup>14</sup> *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), requires that in cases presenting evidence of several acts, any of which could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *Petrich*, 101 Wn.2d at 570, 683 P.2d 173).

this issue at the trial court is not reviewable on appeal, because there is not a showing that the alleged error is manifest.

*Manifest error.*

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.” Here, any error relating to the trial court’s failure to *sua sponte* supply a *Petrich* instruction was not manifest or obvious, as is required by RAP 2.5.

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. See *Harclaon*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

*State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

There is nothing in defendant’s claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have clearly noted a *Petrich* violation and remedied it. Contrary to the defendant’s claims, no election or

unanimity instruction is required in cases like the instant one, where the evidence establishes a “continuing course of conduct.”<sup>15</sup> *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984). The fact that the defendant attempts to argue that this case is a “multiple acts” and not a “continuing course of conduct” case demonstrates that the issue is *debatable* and therefore not *manifest* – not obvious or flagrant, as is required by RAP 2.5, for this court to grant review absent preservation of the issue for appeal by timely objection at trial. This Court should decline the invitation to address the unpreserved argument that the trial court should have *sua sponte* supplied a *Petrich* instruction to the jury.

2. Here, the evidence establishes that the defendant’s acts were a continuing course of conduct.

An election or unanimity instruction is not required in all cases where there are multiple acts, any of which could support a criminal charge. Where the State presents evidence of multiple acts that constitute a “continuing course of conduct,” no election or unanimity instruction is required. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether criminal conduct constitutes but one continuing act, the court reviews the facts in a commonsense manner. *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996); *see also State v. Fiallo-Lopez*,

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<sup>15</sup> That this case is a continuing course of conduct case is argued below.

78 Wn. App. 717, 724, 899 P.2d 1294 (1995) (two discrete acts of delivering cocaine where purchaser was the same and acts occurred close in time was a continuing course of conduct).

In distinguishing between distinct criminal acts and a continuing course of conduct, courts have held that “evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred . . .,” while “evidence that a defendant engages in a series of actions intended to secure the *same objective* supports the characterization of those actions as a continuing course of conduct...” *State v. Brown*, 159 Wn. App. 1, 13-15, 248 P.3d 518 (2010) (emphasis added); *see also, Love*, 80 Wn. App. at 361 (“Multiple acts tend to be show by evidence of acts that occur at different times, in different places, or against different victims”).

Here, the three phone calls placed by the defendant were one continuing act. The overall objective of the calls was to convince Ms. Enright to “drop” the charges against Mr. Dunbar and to absent herself from court proceedings. In his December 2016 telephone call, Mr. Dunbar asked Ms. Enright if she was pressing charges. Ex. P-10. He tells her she should not do so and asks her to call the deputy who arrested him to tell him that Mr. Dunbar did not steal her car. Ex. P-10.

In the January voice mail message, Mr. Dunbar claimed that Ms. Enright asked him to get her car back.<sup>16</sup> Ex. P-9. He stated, “all you have to do is not show up for trial.” Ex. P-9. In that call, he told Ms. Enright he would call her insurance company and that she “could lose her truck or I can just get out and call to thank you.” Ex. P-9.

In the January telephone call, Mr. Dunbar apologized to Ms. Enright for taking her car. Ex. P-11. Immediately thereafter, he asked her if she was coming to his trial, indicating that if she did not come, one of his charges would be dismissed. Ex. P-11.

In reviewing the calls collectively, it is clear that they were made with one purpose, to procure Ms. Enright’s absence from court. First Mr. Dunbar simply asked her not to press charges. When that request failed, he threatened to report Ms. Enright to her insurance company for fraud. When that tactic also failed, he apologized for his behavior and told Ms. Enright his sentence would be reduced if she did not appear for court. The three telephone calls were a continuing course of conduct, and no *Petrich* instruction was necessary. This claim fails.

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<sup>16</sup> In the December telephone call, the defendant claimed that Ms. Enright’s aunt asked him to retrieve the car. Ex. P-10.

**D. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT IMPOSED CONCURRENT SENTENCES FOR THE POSSESSION OF STOLEN MOTOR VEHICLE AND WITNESS TAMPERING CHARGES AND EXPRESSLY ORDERED THAT SENTENCE TO RUN CONSECUTIVELY TO THE DEFENDANT’S PRIOR CONVICTIONS.**

RCW 9.94A.535 states: “Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.” In *State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015), our Supreme Court held “the entry of written findings is essential when a court imposes an exceptional sentence.” In so holding, the court reasoned (1) permitting verbal reasoning to substitute for written findings ignores the plain language of RCW 9.94A.535, (2) a written judgment and sentence affords a defendant finality, and (3) the absence of written findings hampers public accountability as both “the Sentencing Guidelines Commission and the public at large [cannot] readily determine the reasons behind exceptional sentences.” *Id.* at 394-95. Applying these principles, the *Friedlund* court remanded the case for entry of written findings and conclusions as the record was “devoid of written findings.” *Id.* at 395.

A court may impose an exceptional sentence above the standard range if it finds “[t]he defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current

offenses going unpunished.” RCW 9.94A.535(2)(c); *State v. Mutch*, 171 Wn.2d 646, 660-61, 254 P.3d 803 (2011). Such an exceptional sentence may be imposed without a finding of fact by the jury. RCW 9.94A.535(2).

RCW 9.94A.589(1) states in pertinent part:

Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score... *Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.*

(Emphasis added.)

However, relevant to the case here, RCW 9.94A.589(3) states in pertinent part:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced *unless the court pronouncing the current sentence expressly orders that they be served consecutively.*

(Emphasis added.)

Although the sentencing court expressly ordered that the forgery was to run consecutively to the other charges, this situation is governed by

RCW 9.94A.589(1) rather than RCW 9.94A.589(3).<sup>17</sup> The State agrees with the defendant, that, to the extent no written findings of fact were entered by the trial court when it imposed consecutive sentences in *the forgery* case, the sentence violated the statutory requirements set forth above and the holding in *Friedlund*.<sup>18</sup> For this reason, remand of *the forgery* case for entry of such findings is appropriate. *Friedlund*, 182 Wn.2d at 397. However, this Court need only remand the case involving the forgery conviction, currently pending appeal in this court under COA 35350-8-III. However, it was the forgery conviction, alone, that was ordered to run consecutive to any other “current offense.”

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<sup>17</sup> On appeal, defendant claims the witness tampering charge was run consecutively to the forgery from case number 16-1-03608-3. The record belies this contention:

In Case No. 16-1-03608-3, Mr. Dunbar is sentenced to 57 months for first-degree theft of a trailer camper and this will, however, run concurrent with his sentences in case number ending 4914-2 for witness tampering and possession of a stolen motor vehicle.

In case number 16-1-03608-3, Mr. Dunbar is sentenced to 22 months for his conviction for forgery. This sentence will run consecutive to his sentences in case number ending 4914-2 for witness tampering.

RP 567-68; *see also*, CP 358-59 (indicating witness tampering and possession of stolen motor vehicle would run consecutively to earlier sentenced offenses).

<sup>18</sup> Before *Friedlund*, the failure to enter written findings of fact upon imposition of an exceptional sentence could potentially be excused if the court’s oral ruling was sufficient to establish substantial and compelling reasons for the exceptional sentence. *See, e.g., State v. Bluehorse*, 159 Wn. App. 410, 423, 248 P.3d 537 (2011). The holding in *Friedlund* makes it clear that written findings are required.

The trial court acted well within its discretion in ordering the offenses involved in this case, possession of a stolen motor vehicle and witness tampering, to run concurrently with each other, but consecutively to the defendant's *prior* convictions. This discretion was properly exercised under RCW 9.94A.589(3), because the court, as required by law, expressly ordered that the sentence be served consecutively to the defendant's prior offenses. The trial court did not err when it sentenced the defendant for the crimes at issue in this case.

## V. CONCLUSION

Defendant invited error or otherwise waived his right to confront Ms. Enright when counsel refused to inform the court as to the questions she intended to ask Ms. Enright, and then proceeded to ask multiple questions of the witness without requesting the court order Ms. Enright to answer the questions or determine Ms. Enright's privilege was validly invoked. Counsel tactically did so in an attempt to discredit Ms. Enright in front of the jury.

Additionally, the trial court did not err in excluding Ms. Shelley's testimony, which was of minimal relevance.

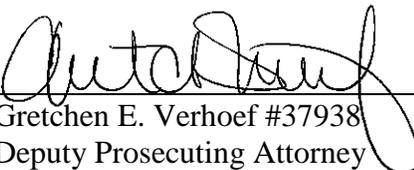
The defendant's three telephone calls to Ms. Enright while he was held in jail after his arrest for possessing her stolen vehicle were all made

for one purpose, to induce Ms. Enright to not appear for court, and were a continuing course of conduct; no *Petrich* instruction was necessary.

Regarding sentencing, the trial court properly exercised its discretion to impose concurrent sentences for the defendant's convictions in this case. The court properly exercised its discretion and expressly ordered those sentences to run consecutively to the defendant's prior convictions. The only case that must be remanded to the sentencing court for findings supporting an exceptional sentence, is the case involving the forgery conviction, currently pending appeal under COA 35350-8-III.

Dated this 23 day of April, 2018.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL DUNBAR,

Appellant.

NO. 35349-4-III

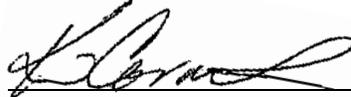
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 23, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kate Benward  
wapofficemail@washapp.org

4/23/2018  
(Date)

Spokane, WA  
(Place)

  
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(Signature)