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Division III  
State of Washington  
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No. 35664-7-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID WESTON MCCRACKEN,

Appellant.

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

The Honorable Henry A. Rawson

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APPELLANT'S REPLY BRIEF

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**TABLE OF CONTENTS**

A. INTRODUCTION .....1

B. COUNTERSTATEMENT OF THE FACTS .....2

C. ARGUMENT IN REPLY .....3

    1. The State argues circumstantial evidence placed Mr. McCracken in the front passenger seat; yet the jury found Mr. McCracken not guilty of 4 counts of possession of a controlled substance for drugs that were located next to and under the front passenger seat.....3

    2. The State incorrectly faults the defense for not filing the agreed stipulation with the trial court. The State fails to acknowledge it had possession of the agreed stipulation and admitted on the record to its failure to file the stipulation in a timely manner. Also, the inadvertent disclosure of Mr. McCracken’s second degree assault conviction was not harmless.....5

    3. The State’s plea agreement with Mendez Leon was relevant to his state of mind and motivation for making the recorded statements which implicated Mr. McCracken. The State’s arguments that the plea agreement was irrelevant and that denial of Mr. McCracken’s right to present the plea agreement at trial are without merit.....7

D. CONCLUSION.....9

**TABLE OF AUTHORITIES**

Washington Appellate Courts

*State v. Askham*, 120 Wn. App. 872, 86 P.3d 1224 (2004).....5

*State v. Ortiz-Triana*, 193 Wn. App. 769, 373 P.3d 335 (2016).....6

## **A. INTRODUCTION**

Appellant David Weston McCracken accepts this opportunity to reply to the State's brief. Mr. McCracken requests the Court refer to his opening brief for issues not addressed in this reply.

## **B. COUNTERSTATEMENT OF THE CASE**

Mr. McCracken offers the following counterstatement of the case, in response to the State's Statement of the Case. *See* Respondent's Brief pg. 5.

The State first correctly asserts that a prepared stipulation as to Mr. McCracken's prior criminal history had been prepared. *See* Respondent's Brief pg. 5. The State then asserts "[d]efense did not file the stipulation with the court before the start of voir dire." *See* Respondent's Brief pg. 5 (citing RP 55-56, vol. II<sup>1</sup>). However, the record clearly indicates Mr. McCracken and his counsel signed the stipulation and provided it to the State for filing, which the State failed to do. (RP 55-56, vol. II). Though this was likely unintentional, the State admitted to having the stipulation in its possession but failing to file it:

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<sup>1</sup> Two volumes were transcribed in this case by transcriptionist Amy Brittingham. "Vol. I" refers to the volume containing pretrial hearings and jury voir dire (6/13/17, 7/17/17, 8/14/17, 9/18/17, and 10/05/17). "Vol. II" refers to the volume containing pretrial hearings, trial dates, and sentencing (5/30/17, 07/31/17, 8/30/17, 10/02/17, 10/04/17, 10/05/17, 10/06/17, and 11/01/17).

And I have those here and, actually, I was going to -- basically, was going to file them<sup>2</sup> and admit them prior to bringing the jury in.

(RP 55, vol. II). Mr. McCracken's counsel was in agreement, believing the stipulation had already been filed:

It was -- I guess I -- I actually thought we had entered it. I thought Mr. Platter had handed it forward. I think I -- I know that Mr. McCracken and I both signed two stipulations, one with respect the Crime Lab for the controlled substances and one with respect to the predicate underlying serious offense.

(RP 56, vol. II).

### C. ARGUMENT IN REPLY

**1. The State argues circumstantial evidence placed Mr. McCracken in the front passenger seat; yet the jury found Mr. McCracken not guilty of 4 counts of possession of a controlled substance for drugs that were located next to and under the front passenger seat.**

The State asserts circumstantial evidence placed Mr. McCracken in the front passenger seat in the vehicle, and therefore the evidence was sufficient to convict. *See* Respondent's Brief pp. 14-15. But the alleged circumstantial evidence fails to sustain the conviction for unlawful possession of a firearm in the first degree.

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<sup>2</sup> Two stipulations were signed by both parties. (RP 56, vol. II). One stipulation was an agreement that crime laboratory results in regards to drug testing were accurate, which is not at issue here. (State's Ex. 2; RP 56, vol. II). The other stipulation, which is at issue in this case, was a stipulation that Mr. McCracken's prior criminal history of second degree assault qualified as a serious offense. (RP 56, vol. II).

The jury found Mr. McCracken not guilty of 4 counts of possession of a controlled substance. (CP 53-54; RP 267-268, vol. II). All of the controlled substances that Mr. McCracken was charged with unlawfully possessing were actually located next to and partially underneath the front passenger seat of the vehicle. (RP 72-76, vol. II; CP 144-146). Basically, the drugs were found “between the doorframe and the front passenger seat.” (RP 72-73, vol. II; State’s Exs. 8 and 9). The State argued Mr. McCracken constructively possessed those drugs because he allegedly sat in that seat (RP 241-242, vol. II), but the jury decided otherwise.

Thus, the inference can be made that the Mendez Leon impeachment evidence presented was used as substantive evidence by the jury. The jury did not find Mr. McCracken constructively possessed the drugs, and yet it found he possessed the firearm. This is likely due to Mendez Leon’s prior statements to an officer indicating the gun was Mr. McCracken’s, statements which were supposed to only be admitted for impeachment purposes. (RP 153, 172-173, 179, 185-186, 195, 248, vol. II). Clearly the jury considered those impeachment statements as much more. Otherwise, it is difficult to reconcile how a jury could find Mr. McCracken not guilty of possessing drugs found right next to the passenger seat, but guilty of possessing a gun found on the same seat.

Without the improperly utilized Mendez Leon impeachment testimony, no reasonable juror could infer guilt beyond a reasonable doubt. *See* Appellant's Brief pp. 16-23; *see State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004).

**2. The State incorrectly faults the defense for not filing the agreed stipulation with the trial court. The State fails to acknowledge it had possession of the agreed stipulation and admitted on the record to its failure to file the stipulation in a timely manner. Also, the inadvertent disclosure of Mr. McCracken's second degree assault conviction was not harmless.**

The State claims the defense did not file the stipulation with the trial court prior to the court's disclosure of the predicate offense to the crime of unlawful possession of a firearm. *See* Respondent's Brief p. 39. However, the record clearly reflects both parties anticipated the State would be filing the stipulation. (RP 55-56, vol. II). When the trial court questioned the parties about a stipulation, the State admitted to its failure to file the document:

And I have those here and, actually, I was going to -- basically, was going to file them and admit them<sup>3</sup> prior to bringing the jury in.

(RP 55, vol. II; State's Ex. 1). Then defense counsel explained it originally believed the State had already filed the stipulation:

It was -- I guess I -- I actually thought we had entered it. I thought Mr. Platter had handed it forward. I think I -- I know that Mr. McCracken and I both signed two

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<sup>3</sup> See fn. 2.

stipulations, one with respect the Crime Lab for the controlled substances and one with respect to the predicate underlying serious offense.

(RP 56, vol. II). The failure to file the stipulation rests with the State, and not the defendant, as the State suggests. *See* Respondent’s Brief p. 32. The State had the stipulations in its possession, admitted to its failure to file those, and defense counsel stated it anticipated the State would file them. Because this error was the State’s, it should not be permitted to benefit from an error it invited. *See State v. Ortiz-Triana*, 193 Wn. App. 769, 777, 373 P.3d 335 (2016) (citations & internal quotations omitted) (“The invited error doctrine is strictly enforced to prevent “parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally”).

The State also argues that because the inadvertent disclosure of the predicate offense of second degree assault was a violent offense, but Mr. McCracken was only charged with unlawful possession of a firearm in the first degree, which is a nonviolent offense, the error of disclosure was harmless. *See* Respondent’s Brief pp. 33-35. However, it would be very easy for a jury to believe a suspect’s prior assault conviction would also tend to show a suspect’s propensity to unlawfully possess a weapon with which he could harm others. There is no question the error affected the jury’s verdict.

**3. The State's plea agreement with Mendez Leon was relevant to his state of mind and motivation for making the recorded statements which implicated Mr. McCracken. The State's arguments that the plea agreement was irrelevant and that denial of Mr. McCracken's right to present the plea agreement at trial are without merit.**

The State asserts that because Mendez Leon was not receiving consideration for the plea agreement at the time of trial, the plea agreement was irrelevant to Mr. McCracken's defense. *See* Respondent's Brief pp. 23-27. However, the agreement was relevant to Mendez Leon's state of mind and motive while making the recorded statements, and because the State used impeachment testimony for substantive purposes, Mr. McCracken's ability to present his defense was severely hampered. (RP 188-189, 190-191, 200-201, vol. II; CP 138-139).

Although Mendez Leon did not receive consideration at trial for his testimony, he believed he would be receiving consideration for his testimony at the time that he taped statements implicating Mr. McCracken. (RP 24-33, vol. I; 169, 173, vol. II; CP 138-139). Because Mendez Leon believed he would be receiving consideration at the time of recording, Mendez Leon's taped statements were heavily influenced by the plea agreement. (*Id.*) While the State asserts Mendez Leon was not receiving consideration for his testimony at the time of trial, all that matters is that Mendez Leon believed he was receiving consideration at the time statements were recorded. In Mendez Leon's state of mind, he was

performing to the best of his ability to benefit from the State's plea offer, and he briefly alludes to this fact before the State and trial court stop him from providing any more information. (RP 188-189, 190-191, vol. II; CP 138-139). Thus, it would in no way have been irrelevant or too speculative to question Mendez Leon regarding his prior plea agreement with the State. This is particularly true because the State argued Mendez Leon's impeachment evidence as substantive evidence at trial (RP 244-246, vol. II), and because the plea agreement would have demonstrated to the jury why Mendez Leon's taped statements may have been falsely contrived and unreliable as impeachment evidence to being with.

Also, although the State argues Mendez Leon's taped statements were similar in content to his original statements made to the police (*see* Respondent's Brief p. 26), in both instances a reasonable person could infer Mendez Leon would have wanted to avoid implicating himself and was falsely implicating Mr. McCracken in order to avoid his own penalties. Mendez Leon began to admit as much, but was stopped by the court and the State from providing further clarification. (RP 188-189, 190-191, vol. II; CP 138-139). There is nothing novel about the fact that Mendez Leon repeated the same information twice—once immediately after the incident and the second time when under the influence of a plea

deal—when both times Mendez Leon had much to gain by doing so: self-preservation from criminal penalties, and bargaining power.

### C. CONCLUSION

Based upon the arguments set forth above and those set forth in Mr. McCracken's opening brief, Mr. McCracken requests his conviction for unlawful possession of a firearm in the first degree (Count 1) be vacated for insufficient evidence.

In the alternative, as requested in his opening brief, Mr. McCracken respectfully requests a new trial based on several errors throughout trial, including: the trial court's failure to issue limiting and curative instructions, the trial court's failure to allow witness impeachment with a plea agreement, and the trial court's denial of a motion for mistrial. Also remand for a new trial is necessary due to the State's misconduct for improperly arguing impeachment evidence as substantive evidence, its references to matters outside the record, and its misstatement of the law in closing. If one of those errors on its own is not sufficient grounds for reversal, Mr. McCracken requests this Court find cumulative error as the total effect of the multiple errors denied him a fair trial.

Mr. McCracken further requests this Court deny any of the State's requests for appellate costs and remand to strike the \$250 jury fees. The State has not responded in opposition to these requests.

Respectfully submitted this 28th day of November, 2018.

/s/ Laura M. Chuang

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/s/ Kristina M. Nichols

Kristina M. Nichols, WSBA #35918

Eastern Washington Appellate Law

Attorneys for Appellant

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 35664-7-III  
vs. )  
DAVID WESTON MCCRACKEN ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 28, 2018, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's opening brief to:

David Weston McCracken, DOC No. 964071  
Monroe Correctional Complex  
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Monroe, WA 98272

Having obtained prior permission from the Okanogan County Prosecutor's Office, I also served the Respondent State of Washington at [bplatter@co.okanogan.wa.us](mailto:bplatter@co.okanogan.wa.us) and [sfield@co.okanogan.wa.us](mailto:sfield@co.okanogan.wa.us) using Division III's e-service feature.

Dated this 28th day of November, 2018.

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