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No. 35664-7-III

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

STATE OF WASHINGTON,
Respondent,
v.
DAVID WESTON MCCRACKEN,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY
The Honorable Henry A. Rawson

APPELLANT'S OPENING BRIEF

LAURA M. CHUANG, Of Counsel
KRISTINA M. NICHOLS
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 731-3279
admin@ewalaw.com

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A. SUMMARY OF ARGUMENT

David Weston McCracken was found guilty of unlawful possession of a firearm in the first degree in Count 1 and obstruction of a law enforcement officer in Count 6 following a jury trial. The jury found Mr. McCracken not guilty of Counts 2 through 5, all of which were charges for possession of a controlled substance. His conviction for unlawful possession of a firearm in the first degree should be vacated, and if not vacated, remanded for retrial.

The State presented insufficient evidence Mr. McCracken unlawfully possessed a firearm in the first degree. Relying on evidence admitted solely for the purposes of impeachment, the State used the very same evidence as substantive evidence in order to show Mr. McCracken unlawfully possessed a firearm. Mr. McCracken's conviction for unlawful possession of a firearm in the first degree should be vacated for insufficient evidence.

During trial defense counsel moved the court for limiting and curative instructions on evidence gathered from State's witness Ernesto Mendez Leon, because such evidence was only to be used for impeachment and not substantive purposes. The trial court refused to issue an instruction in both instances, yet an instruction should have been

issued and its absence affected the outcome of the trial. A new trial is warranted.

The trial court also refused to allow Mr. McCracken the opportunity to question Mendez Leon about a plea agreement he made with the State in exchange for his recorded statements. Because the plea agreement would have shown bias and ulterior motive, Mr. McCracken should have been afforded the opportunity to cross-examine Mendez Leon about it. The trial court erred by denying Mr. McCracken the constitutional right to confrontation and a new trial is appropriate.

Both parties agreed prior to trial that Mr. McCracken's prior assault conviction would be stipulated to as a prior conviction for a "serious offense." However, the trial court inadvertently informed the jury of the prior assault conviction when reading the charges to the jury and denied Mr. McCracken's motion for mistrial on that basis. The trial court abused its discretion and a new trial should have been granted; the case must be remanded.

The State committed prosecutorial misconduct by arguing impeachment evidence as substantive evidence, referring to evidence outside the record, and misstating the law on constructive possession in regard to unlawful possession of a firearm in the first degree. All of these errors affected the verdict. A new trial is warranted.

Where any of the errors above alone are not enough to warrant a new trial, the errors have the cumulative effect of denying Mr. McCracken his right to a fair trial and this case must be reversed and remanded.

Mr. McCracken also preemptively objects to being assessed any costs associated with this appeal, and challenges the jury demand fee ordered by the trial court for \$250.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. McCracken guilty of first degree unlawful possession of a firearm, where impeachment evidence was improperly used as substantive evidence to prove the conviction.
2. The trial court abused its discretion for failing to issue limiting and curative instructions as to the Mendez Leon impeachment evidence when it was improperly used as substantive evidence.
3. The trial court abused its discretion by denying Mr. McCracken his state and federal constitutional right to confrontation when it refused to allow impeachment of a witness via a plea agreement.
4. The State committed misconduct by improperly arguing during closing that the Mendez Leon impeachment testimony was substantive evidence.
5. The State committed misconduct by referring to evidence outside the record in closing and rebuttal closing argument.
6. The State committed misconduct by misstating the law on possession in closing argument.
7. Cumulative error existed at trial, depriving Mr. McCracken the right to a fair trial.
8. Mr. McCracken preemptively objects to any costs associated with this appeal.

9. The trial court erred in ordering the defendant pay \$250 in jury demand fees.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the mismanagement of Ernesto Mendez Leon's testimony led to several errors requiring vacation of the judgment, or in the alternative, remand for retrial.

- a. Whether insufficient evidence exists to prove unlawful possession of a firearm in the first degree where Mendez Leon's impeachment testimony was improperly used as the sole substantive evidence of the defendant's possession.
- b. In the alternative, whether the trial court erred by refusing to issue limiting and curative instructions where Mendez Leon's testimony was improperly used as substantive evidence.
- c. Whether Mr. McCracken's federal and state constitutional rights to confrontation were violated when the trial court denied defense counsel the opportunity to cross-examine Mendez Leon about his plea agreement with the State.

Issue 2: Whether the trial court abused its discretion by denying defense counsel's motion for mistrial after the trial court inadvertently disclosed to the jury the predicate crime of assault to the unlawful possession of a firearm charge, and the parties had previously stipulated otherwise.

Issue 3: Whether the State committed prosecutorial misconduct by arguing impeachment evidence as substantive evidence, referring to evidence outside the record, and misstating the law in closing argument.

- a. Whether the State committed misconduct by arguing impeachment evidence as substantive evidence.
- b. Whether the State committed misconduct by referencing evidence outside the record.
- c. Whether the State committed misconduct by misstating the law on constructive possession.

Issue 4: Whether cumulative error requires reversal for a new trial where several errors pertaining to the Mendez Leon testimony and the State's misconduct did not afford Mr. McCracken a fair trial.

Issue 5: Whether this Court should deny costs against Mr. McCracken on appeal in the event the State is the substantially prevailing party.

Issue 6: Whether the trial court abused its discretion by imposing a jury demand fee of \$250 against the defendant when the trial court found Mr. McCracken indigent.

D. STATEMENT OF THE CASE

On December 24, 2016, Officer Robbins in the City of Brewster was conducting traffic patrols when he attempted to stop a white four-door vehicle for a traffic violation. RP 63-64, 86-87, vol. II¹. Despite activating his siren and emergency lights, the vehicle fled from the officer and headed north on Route 97. RP 64, vol. II. During pursuit, the officer watched the vehicle drive into an orchard where a passenger exited from the rear passenger door of the car. RP 65, 91, 101-102, 203, vol. II. The officer later identified the passenger as Helidoro Xhurape. RP 65, 92, vol. II.

The Okanogan County Sheriff assisted the pursuit by setting up a spike strip across the roadway. RP 66-67, vol. II. After running over the spike strip the driver lost control of the vehicle and drove into an open field where it came to a stop. RP 67, vol. II. Officer Robbins observed

¹ 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).

three suspects exit the vehicle and run. RP 67-68, vol. II. He could not identify the individuals at that time but pursued one of the car's occupants. RP 68, vol. II. He located and identified one of the subjects as Ernesto Mendez Leon.² RP 68, 182, vol. II. Another subject, DeWayne Erickson, was also detained. RP 69, vol. II.

The fourth subject was tracked with a K-9. RP 69, vol. II. Sergeant Davis and the K-9 tracked the subject's scent and followed it to the river. RP 110-111, 115-120, 139, vol. II. There law enforcement found David Weston McCracken in the snow. RP 120, 142, vol. II. Mr. McCracken was not armed. RP 125, 142, vol. II.

Officer Robbins returned to the vehicle to secure it. RP 70-71, vol. II. The officer could see into the vehicle and saw a firearm on the front seat of the car. RP 70, vol. II. The firearm was located "partially on the center console" and "partially on the passenger seat." RP 70, 72, vol. II; State's Exhibits 5, 7-8. The officer inspected the firearm from the front seat of the car and found it to be an ATI GSG5 .22 caliber rifle. RP 76-77, vol. II. The firearm was never sent to a lab for fingerprints. RP 102, vol. II.

² The record refers to Mendez Leon as "Ernest" as well as "Ernesto." RP 182, vol. II.

The State charged Mr. McCracken with unlawful possession of a firearm in the first degree under Count 1, unlawful possession of a controlled substance in Counts 2 through 5, and obstruction of a law enforcement officer in Count 6. CP 144-146.

A jury trial was held on these counts. RP 62-206, vol. II.

During jury selection the trial court read the charges aloud to the venire. RP 41-42, vol. II. The court's statement included the following:

The defendant, David Weston McCracken, is charged by information in Count 1 with the crime of unlawful possession of a firearm in the first degree. It is alleged that on or about the date of the 24th day of December, 2016, the defendant having previously been convicted in this state, or elsewhere, of a serious offense as defined under Washington law, to wit an assault in the second degree on April 8, 2002, did knowingly own or have in his possession or under his control, a firearm to wit an ATI GSG-5 .22 caliber rifle, contrary to Washington law.

RP 41, vol. II.

Soon after, the court inquired as to the jury panel's prior personal experiences. RP 48-83, vol. I. The following exchange took place:

THE COURT: My next question will relate to a close friend or family member or relative. But, this relates to you personally. Have any of you had any personal experience with a similar or related type of case or incident, either as a victim, as a witness to a crime, or as an accused? This is you personally? No. 7, in what way?

JUROR 7: I heard you mention assault.

THE COURT: Okay, go ahead.

JUROR 7: I have had that happen.

THE COURT: Thank you. As a victim then?

JUROR 7: Yes.

...

THE COURT: . . . Would that experience that you've had, would that influence your consideration of this case?

No. 7?

JUROR 7: Um, maybe. Hard to tell. I'm not sure. I can't answer that.

RP 53, vol. I.

After a recess, defense counsel moved for a mistrial. RP 53-54, vol. II. Defense counsel noted Mr. McCracken had stipulated to the predicate offense of assault in Count 1 for the unlawful possession of a firearm in the first degree. RP 53-54, vol. II; State's Ex. 1. It appears by mistake the trial court was unaware of the stipulation, though the State acknowledged having the stipulation and its intention to file it prior to the jury's appearance. RP 55-56, vol. II. Defense counsel stated: "It was – I guess I – I actually thought we had entered it. I thought [the State] had handed it forward." RP 56, vol. II. The trial court explained it customarily reads the charging document to the jury, then inquired of counsel further:

THE COURT: . . . [W]hat I'm hearing you say, that I should have told them that you've only been convicted of a serious offense either in the State of Washington or elsewhere.

[DEFENSE COUNSEL]: Right.

RP 56, vol. II. The trial court denied the motion for mistrial, citing he was not made aware of the stipulation beforehand. RP 56, 58, vol. II. The following exchange also occurred:

THE COURT: ...I'll lay odds you ask every one of these 13 jurors, they'd never remember what the charge was, as such. And so, they're going to be advised that there is an element being a serious offense and if it's stipulated to, so be it. But as an element versus what the particular charge is.

[DEFENSE COUNSEL]: Thank you, Judge.

THE COURT: I just don't think that they'll remember that.

[STATE]: And I would also add to that, Your Honor, there was one juror in the panel who had mentioned the fact that the assault was an issue for him. He is not on our jury, he was stricken. That was -- I remember it was Juror Number 7.

THE COURT: Yeah. There was one juror talking about assault and I, quite frankly, I misunderstood, I guess. I was thinking that Mr. McCracken was not charged with an assault in my mind versus -- yeah, that may have been the result or the serious offense. But it just didn't click at that moment with me. But be that as it may, I'm not going to grant a mistrial. Thank you.

RP 58-59, vol. II.

Sergeant Davis testified at trial consistent with the facts above. RP 106-128. He noted the tread on Mr. McCracken's shoe matched the shoeprints in the snow outside the disabled vehicle. RP 120; State's Exhibit 3. Specifically, he testified the shoeprints led right up to the car. RP 120-121, State's Exhibit 3. The picture shows the driver's side of the vehicle. State's Exhibit 3 (shown below).



Before Mendez Leon testified, defense counsel informed the court he would object to any hearsay testimony regarding statements made by Mr. McCracken about the firearm. RP 99-100, vol. II. The parties and court agreed to revisit the issue later and discussed the impeachment of Mendez Leon more than once. RP 100-101, 153-157, 173-174, vol. II. The State made several representations that Mendez Leon's prior statements were to be used for impeachment purposes. RP 153, 172-173, 179, 185, 248, vol. II.

Defense counsel also sought to introduce Mendez Leon's plea agreement because he wanted to show Mendez Leon cooperated with the State at one point to receive a plea agreement, and that Mendez Leon made a recorded statement in this case as part of that agreement. CP 138-139; RP 168, 172-173, vol. II. Because the plea agreement had been subsequently withdrawn, the trial court, State and defense counsel

discussed whether questioning Mendez Leon regarding the plea agreement was permissible. RP 169, 165-181, vol. II; CP 138-139. Defense counsel argued the plea agreement was relevant because if Mendez Leon testified inconsistently with his two prior statements, then the State would seek to introduce a taped statement which had been recorded at a time when Mendez Leon was cooperating with the State in exchange for a lesser sentence. RP 168, 173, vol. II. Ultimately, the trial court denied the request to use the plea agreement to show motive, stating the plea agreement's admission was speculative:

THE COURT: . . . But I think it's too speculative for the Court to say that the only basis for giving the statement or interview was the plea agreement, as such. And now, he's giving an inconsistent statement because quote, unquote, the plea agreement is no longer effective. I just think it's too speculative from the Court to discern as such and, therefore, the Court will deny inquiry as to the plea agreement and the basis for the statement.

RP 181, vol. II.

Mendez Leon testified at trial. RP 183-194, vol. II. He stated during the car chase Mr. McCracken was sitting in the rear passenger seat beside him. RP 184, vol. II. Soon after direct questioning began, the State cross-examined Mendez Leon by impeaching him with his prior statements. RP 185-189, vol. II. The following exchange took place at trial between the State and Mendez Leon:

[STATE]: Didn't you also tell Officer Robbins that the gun was Mr. McCracken's?

[MENDEZ LEON]: Yes.

[STATE]: Okay. So, you did say that the gun was Mr. McCracken's?

[MENDEZ LEON]: Well, I was just saying what I thought and I was just trying to get off of it, you know?

[STATE]: Okay. So, you knew there was a gun in the car then?

[MENDEZ LEON]: Huh? No, because they told me there was a gun in the car.

[STATE]: Okay. So, the gun that you claim that you didn't know was in the car, you're now saying that you knew that that was Mr. McCracken's?

[MENDEZ LEON]: No, I did not know. And I did not -- I didn't say -- well, I did say it was McCracken's, but I said it because they were kind of telling me oh, there's persons -- there was a gun in the car. And it was a cop telling me. Yeah. I never -- they never -- I never said oh, there was a gun in the car. They told me there's a gun in the car. Who's is it? And this and that. And they asked is it McCracken's? And I -- well, I mean, I said yeah, but it was. I mean, I just was going along with whatever the cop was saying.

[STATE]: Did the Officer ask you if it was Mr. McCracken's or did you say it was Mr. McCracken's?

[MENDEZ LEON]: No, the Officer started asking me, so I mean, I just said, I just agreed, you know? I mean, I was, I was high.

RP 186-187, vol. II. Mendez Leon could not recall telling law enforcement McCracken was in the front passenger seat and Helidoro Xhurape was in the rear passenger seat. RP 186, vol. II.

Mendez Leon acknowledged making the additional recorded statements to law enforcement. RP 187, vol. II. He could not recall what he told law enforcement about the seating in the car during the recording. RP 188, vol. II. Mendez Leon did acknowledge he told law enforcement

the firearm belonged to McCracken, stating, “Yeah, but the reason I said it was because I felt kind of pressured, you know, like – they’re giving me an offer,” and adding he had children to care for and was trying to stay out of trouble. RP 189, 191, vol. II. He never saw McCracken with a firearm. RP 192, vol. II.

Providing rebuttal testimony, Officer Robbins testified Mendez Leon spoke to him following the car pursuit. RP 194, vol. II. Mendez Leon told the officer Mr. McCracken was sitting in the front passenger seat of the car. RP 194, vol. II. Mendez Leon also told the officer the gun belonged to Mr. McCracken. RP 194, vol. II.

Officer Robbins also testified he interviewed Mendez Leon on March 21, 2017, a few months after the incident, and recorded his statements. RP 195-196, vol. II. During the recording, Mendez Leon claims Mr. McCracken admitted to having a gun in the car. RP 200-201, vol. II. Mendez Leon stated Mr. McCracken was in the passenger seat. RP 201, vol. II.

Defense counsel renewed his objection to Mendez Leon’s impeachment testimony, specifically objecting to the recorded interview being used as substantive evidence. RP 197, vol. II. Thus defense counsel requested a limiting instruction. RP 197, vol. II. The court denied the motion. RP 198, vol. II.

After both parties rested, the trial court stated it believed the only evidence to show Mr. McCracken was sitting in the front passenger seat was from the Mendez Leon testimony. RP 208-209, vol. II.

During closing argument, the State discussed the meaning of possession. RP 237-239, vol. II. The State said the following:

. . . one of the main factors to consider is whether or not the Defendant had the ability to, basically, take actual possession.

Now, if that's sitting in the center console, if it's basically anywhere in that area, everybody basically had access to that gun. Everybody had the ability to grab it. It's a small vehicle. I mean, it's -- it's a big gun, it's a small car. Everybody in the vehicle, basically, had constructive possession of it. But we also know that Mr. McCracken was in this front seat, so he had the ability -- even if it wasn't in his hands, even if it was sitting in the center console -- frankly, even if he actually was in the backseat, which is not what the evidence suggests -- even if he was in the backseat, that firearm is somewhere in here, that's it. Easily able to grab and take possession of that firearm, that is constructive possession.

RP 238, vol. II. Defense counsel did not object. RP 238-239, vol. II.

The State made the following comment during closing argument:

Now, what's interesting is -- and I don't know if all of you saw it -- this is sort of up to you in your discussions. But when [Mendez Leon] sat down on the stand, he winked at Mr. McCracken.

RP 244, vol. II. The State also referred to the alleged wink in rebuttal closing. RP 262, vol. II. The "wink" was not in the record. RP 60-206.

Also during closing argument the State argued Mendez Leon's testimony was proof of Mr. McCracken's guilt. RP 244-246. Portions of the State's argument were:

[Mendez Leon] told the officer on two different occasions Mr. McCracken was in the front seat and the gun was with him. It was Mr. McCracken's gun

You have, basically, Mr. Mendez Leon supplementing what is some pretty significant and overwhelming evidence.

RP 245-246, vol. II. After the State's closing argument, defense counsel moved the court for a curative instruction regarding Mendez Leon's testimony. RP 247, vol. II. Defense counsel noted the "only direct evidence and substantive evidence from Mr. Mendez Leon was that the Defendant was in the backseat." RP 247, vol. II. After discussion over the issue, the trial court denied defense counsel's motion. RP 247-249, vol II.

The jury was instructed on the "to-convict" instruction for unlawful possession of a firearm in the first degree and the definition of possession. CP 65-66; RP 224-226, vol. II.

The jury found Mr. McCracken guilty as to Count 1, unlawful possession of a firearm in the first degree, and Count 6, obstruction of a law enforcement officer. RP 267-268; CP 53-54. The jury found Mr. McCracken was not guilty of Counts 2-5, which were all charges for possession of a controlled substance. RP 267-268; CP 53-54.

At sentencing, legal financial obligations (LFOs) were also briefly addressed. RP 292, vol.II; CP 33-34. The court found Mr. McCracken did not have the financial means to pay the fines and assessments, ordering the defendant pay \$1050 in LFOs after reducing them by \$460.50. RP 292, vol. II; CP 33-34. The LFOs included a jury demand fee for \$250. RP 292, vol. II; CP 33-34.

The trial court found Mr. McCracken indigent, and entered an Order of Indigency, granting him a right to review at public expense. CP 1-2. Mr. McCracken's Report as to Continued Indigency, dated 11/28/17, and filed contemporaneously with this brief, indicates he owes an unknown amount in LFOs, that he owns no assets, and is not receiving any income. Report as to Continued Indigency.

Mr. McCracken timely appeals. CP 6-18.

E. ARGUMENT

Issue 1: Whether the mismanagement of Ernesto Mendez Leon's testimony led to several errors requiring vacation of the judgment, or in the alternative, remand for retrial.

Mendez Leon's witness testimony was a key piece for both the State and defense. Several errors surrounding his testimony require vacation of the judgment, or in the very least, remand for retrial.

- a. Whether insufficient evidence exists to prove unlawful possession of a firearm in the first degree where Mendez Leon's impeachment testimony was improperly used as the sole substantive evidence of the defendant's possession.**

Insufficient evidence was presented to support Mr. McCracken’s conviction for unlawful possession of a firearm. The State improperly relied upon impeachment testimony—not substantive testimony—to show Mr. McCracken possessed the firearm. Here, the key piece of evidence at trial was the impeachment testimony of Mendez Leon, which was represented by the State to be used for impeachment purposes only. RP 172-173, vol. II. Without the improperly used impeachment material, the evidence would have been insufficient. Mr. McCracken’s conviction must be vacated.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.*

“Circumstantial evidence and direct evidence are equally reliable.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence “is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt.” *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004). The appellate court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

“[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal.” *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff’d*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating “a party may raise the following claimed errors for the first time in the appellate court... failure to establish facts upon which relief can be granted....”). “A defendant challenging the sufficiency of the evidence is not obliged to

demonstrate that the due process violation is ‘manifest.’” *Sweany*, 162 Wn. App. at 228.

To find Mr. McCracken guilty of unlawful possession of a firearm in the first degree, the jury had to find he knowingly owned or had in his possession or control a firearm and had previously been convicted of a serious offense. CP 65; *see also* RCW 9.41.040(1)(a)(unlawful possession of a firearm in the first degree).

The jury was also instructed as to the definition of “possession”:

Possession means having a firearm in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

CP 66.

“The credibility of a witness may be attacked by any party, including the party calling the witness.” ER 607. Oral or written statements may be used to impeach a witness, as well as extrinsic evidence if preceding rules are followed. ER 613. A party may impeach its own witness, but “it may not call a witness for the primary purpose of eliciting testimony in order to impeach a witness with testimony that would be otherwise inadmissible.” *State v. Lavaris*, 106 Wn.2d 340, 345, 721 P.2d 515 (1986).

It is well known “impeaching evidence should effect only to the credibility of the witness . . . [and it] . . . is incompetent to prove the substantive facts encompassed in such evidence.” *State v. Fliehman*, 35 Wn.2d 243, 245, 212 P.2d 794 (1949) (citation omitted). To use impeachment evidence as substantive evidence may be prejudicial. *Id.* Because impeachment evidence cannot be used as “substantive proof of guilt, the State may not use impeachment as a guise for submitting to the jury substantive evidence that would otherwise be inadmissible.” *State v. Clinkenbeard*, 130 Wn. App. 552, 569-70, 123 P.3d 872 (2005) (citations omitted). The concern is the State may exploit a jury’s difficulty in understanding the distinction between impeachment and substantive evidence. *Id.*

State v. Clinkenbeard, also a Division III case originating from Okanogan County, is analogous to this case and provides an example. 130 Wn. App. 552, 569-570, 123 P.3d 872 (2005). There, the victim denied sexual intercourse occurred between herself and the defendant, but statements previously made by the victim “to others were used as the sole proof of the element of sexual intercourse” in the case. *Id.* at 569. In closing argument the State told the jury the impeachment evidence was proof of sexual intercourse between the alleged victim and the defendant. *Id.* at 571. Because no other evidence in the record showed the two engaged in sexual intercourse, the court vacated the conviction for insufficient evidence. *Id.* at 571-72.

Mendez Leon’s testimony was a key piece for the State’s case against the defendant. RP 164, vol II. Mendez Leon was the only testifying witness who could place Mr. McCracken in the front seat where the gun was located. RP 62-206, vol. II. Even one of the State’s witnesses said Mr. McCracken’s shoe prints led from the driver side of vehicle—not the front passenger side of the car where the gun was located. RP 120-21; State’s Ex. 3. And the trial court noted the only evidence of Mr. McCracken’s location in the car was from Mendez Leon’s testimony. RP 208-209, vol. II.

Mendez Leon’s testimony was riddled with impeachment evidence—the State cross-examined him using his prior statements to law enforcement. RP 185-189, vol. II. These prior statements, however, were not substantive evidence. RP 185-189, vol. II. *Clinkenbeard*, at 569 (“A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court, even if such a statement would otherwise be inadmissible as hearsay . . . [i]mpeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed by the evidence”). Moreover, the State repeatedly referred to Mendez Leon’s prior statements as being used for impeachment purposes. RP 153, 172-173, 179, 185, 248, vol. II. Yet during closing the State argued the impeachment evidence substantively. RP 244-246, vol. II. And the trial court refused to issue a curative instruction on the impeachment evidence. RP 247-249, vol. II.

No substantive part of Mendez Leon’s testimony placed Mr. McCracken in the front passenger seat of the car. RP 183-194. Even the trial court acknowledged Mendez Leon’s testimony was the only testimony which placed McCracken in the front seat. RP 208-209, vol. II. Without more, the State only had enough evidence to prove Mr. McCracken was somewhere in the car. Separating out the impeachment evidence from the substantive evidence in the case leaves a rational trier of

fact with insufficient evidence to prove Mr. McCracken possessed the firearm, which was found sitting on the front passenger seat. RP 70, 72, vol. II; *see Clinkenbeard*, 130 Wn. App. at 571-72.

The conviction for unlawful possession of a firearm in the first degree should be vacated and dismissed with prejudice. *Clinkenbeard*, 130 Wn. App. at 572 (setting forth this remedy).

b. In the alternative, whether the trial court erred by refusing to issue limiting and curative instructions where Mendez Leon's testimony was improperly used as substantive evidence.

Despite the State's improper use of Mendez Leon's impeachment testimony as substantive evidence, and defense counsel's motion for limiting and curative instructions, the trial court refused to issue either one. RP 197-198, 247-249, vol. II.

A trial court can restrict the scope of a jury's consideration of evidence by issuing a limiting instruction. *See* ER 105. When error may be obviated by an instruction to the jury, the error is waived unless an instruction is requested. *State v. Ramirez*, 62 Wn. App. 301, 305-06, 814 P.2d 227 (1991). ER 105 states:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

If evidence is offered for a limited purpose and a limiting instruction is requested, the court is usually obligated to give the instruction. *See State v. Redmond*, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003); *State v. Aaron*, 57 Wn. App. 277, 281, 787 P.2d 949 (1990).

If inconsistent statements are admitted to “aid the jury in judging the credibility of a witness and are not admissible as substantive evidence, the party whose witness is impeached generally has the right to an instruction limiting the admissibility of the inconsistent statement to that purpose.” 5A Wash. Prac., Evidence Law and Practice § 613.17 (6th ed.) (citing ER 105). *See also, State v. Fliehman*, 35 Wn.2d 243, 245, 212 P.2d 794 (1949) (impeachment evidence is not suitable for use as substantive evidence).

Admission of evidence by a trial court is reviewed for abuse of discretion. *Redmond*, 150 Wn.2d at 496 (trial court abused discretion when court failed to issue limiting instruction). A trial court abuses its discretion when its decision was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *State v. Horn*, ___ Wn. App. ___, 415 P.3d 1225, 1230 (2018).

Whether a trial court’s failure to issue a limiting instruction is prejudicial error depends on the circumstances of the case. *See State v. Gilmore*, 42 Wn.2d 624, 630, 257 P.2d 215 (1953). “Erroneous admission

of evidence is not reversible unless the appellant can show prejudice... Improperly admitted evidence is prejudicial when it materially affects or presumptively affects the outcome of the trial.” *Aaron*, 57 Wn. App. at 282–83 (1990); *see also State v. Fliehman*, 35 Wn.2d 243, 245, 212 P.2d 794 (1949) (court finding reversible error where jury was permitted to consider impeachment testimony as substantive evidence).

The State impeached Mendez Leon with prior statements. RP 185-189, vol. II. The trial court itself opined that without Mendez Leon’s testimony, there was not enough evidence to place Mr. McCracken in the front passenger seat. RP 208-209. And it is generally well-accepted jurors struggle with understanding the subtle distinction between impeachment testimony and substantive testimony. *See Clinkenbeard*, 130 Wn. App. At 569-570. Despite these factors, the trial court denied defense counsel’s request for a limiting and curative instruction to clarify the difference between impeachment and substantive testimony for the jury. RP 197, 247-249, vol. II. The trial court abused its discretion. These refusals to properly instruct the jury were manifestly unreasonable because the rulings were “outside the range of acceptable choices, given the facts and the legal applicable legal standard” *State v. Dye*, 178 Wn.2d 541, 555, 309 P.3d 1192 (2013). The request by defense counsel to

instruct the jury should not have been denied. *Redmond*, 150 Wn.2d at 496; *Aaron*, 57 Wn. App. At 281.

Failure to issue limiting and curative instructions was also not harmless. The facts do not provide enough evidence to place Mr. McCracken in the front passenger seat of the car—and even the trial court recognized the presence of this deficiency without Mendez Leon’s testimony. The danger the jury would convict purely on impeachment evidence was realized in this case, as the jury was never instructed as to the difference between the two types of testimony.

The trial court’s error was prejudicial and materially affected the outcome of the trial. *Aaron*, 57 Wn. App. at 282–83 (1990). The case must be remanded for a new trial.

c. Whether Mr. McCracken’s federal and state constitutional rights to confrontation were violated when the trial court denied defense counsel the opportunity to cross-examine Mendez Leon about his plea agreement with the State.

The trial court erred and violated Mr. McCracken’s federal and state constitutional rights to confrontation by denying him the opportunity to cross-examine Mendez Leon about a prior plea agreement with the State. Mendez Leon was a key witness and the plea agreement was essential to the defendant’s ability to thoroughly cross-examine the witness for bias and ulterior motive.

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution “to be confronted with the witnesses against him.” U.S. Const. amend. XI; *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The Washington Constitution affords the same right. Const. Art. 1, sec. 22. Our State Supreme Court has “consistently rejected arguments that the state confrontation clause provides greater protection than the federal confrontation clause.” *State v. Lui*, 179 Wn.2d 457, 469, 315 P.3d 493 (2014).

The right to confrontation includes the right to cross-examination. *Davis*, 415 U.S. at 315. “Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Id.* at 316. In particular, introducing evidence of a witness’s prior criminal conviction is one of several methods for discrediting a witness to reveal possible bias or ulterior motive. *Id.* at 316. “[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *Id.* at 316-317.

A defendant may “impeach a witness on cross-examination by referencing any agreements or promises made by the State in exchange for the witness's testimony.” *State v. Ish*, 170 Wn.2d 189, 198, 241 P.3d 389 (2010). In general, evidence of plea agreements are admissible “to allow

the jury to be privy to any possible bias” a witness may have in testifying against a defendant. *Washington v. Farnsworth*, 185 Wn.2d 768, 781-782, 374 P.3d 1152 (2016). Exclusion of a plea agreement is reversible error if the error prejudiced the defendant, such that if the error “had not occurred, the outcome of the trial would have been materially affected.” *Id.* at 784 (internal quotation marks and citations omitted).

In *Washington v. Farnsworth*, the jury was well-informed as to the existence of a plea agreement and the underlying potential bias of the witness to which it pertained. *Id.* at 784. The Washington Supreme Court thus found no reason to reverse merely because the plea agreement was not admitted into evidence. *Id.* at 784-785. However, in *dicta*, the Court suggested “[i]t would be different if the plea agreement was excluded and the jury did not otherwise learn of the plea deal.” *Id.* at 784.

Mendez Leon originally agreed to record statements in exchange for a reduced charge, but the trial court would not allow cross-examination regarding this fact during trial. RP 177-181. Though the plea agreement ultimately fell through, Mendez Leon recorded statements implicating Mr. McCracken prior to the agreement being revoked. RP 169, 173; CP 138-139. Defense counsel planned to impeach Mendez Leon with the plea agreement and stated his intention to do so. RP 167-168, 179. Yet the trial court ruled the defendant would not be permitted to cross-examine

Mendez Leon regarding the statement because it was too “speculative.”

RP 179-181, vol. II.

Mendez Leon was the only witness who could place Mr. McCracken in the front passenger seat of the car where the firearm was located. RP 183-194, vol. II. The trial court also acknowledged this fact. RP 208-209, vol. II. Without Mendez Leon’s testimony, no other witness testified as to Mr. McCracken’s exact seating location. Thus, the inability to cross-examine Mendez Leon regarding his personal bias and motive for making the recorded statements implicating the defendant was a violation of Mr. McCracken’s constitutional right to confrontation. Mr. McCracken’s defense counsel should have been afforded the opportunity to impeach the witness based on his prior statements and the consideration he was receiving from the State to testify. The trial court’s error was not harmless, it was inordinately prejudicial, and the error materially affected the outcome of the trial. *Farnsworth*, 185 Wn.2d at 784.

The trial court should have allowed defense counsel to cross-examine Mendez Leon regarding his plea agreement with the State. Mendez Leon was the State’s key witness as to the charge for unlawful possession of a firearm in the first degree. Moreover, the jury was not instructed as to the difference between impeachment evidence and substantive evidence, making it even more crucial the defendant be

permitted to impeach Mendez Leon. *See* RP 173-174, vol. II. The outcome of the trial was materially affected and the case should be remanded for a new trial.

Issue 2: Whether the trial court abused its discretion by denying defense counsel’s motion for mistrial after the trial court inadvertently disclosed to the jury the predicate crime of assault to the unlawful possession of a firearm charge, and the parties had previously stipulated otherwise.

At some point before trial, the parties agreed Mr. McCracken’s prior conviction for assault would be stipulated to as part of the unlawful possession of a firearm charge. RP 53-57, vol. II. For unknown reasons and by apparent accident which no party intended, the trial court was not informed of the stipulation until after the trial court had already informed the jury of Mr. McCracken’s prior assault conviction. RP 41, 53-57, vol. II. Defense counsel moved for a mistrial on the basis the jury had been informed of the prior assault conviction, but the trial court denied the motion. RP 53-54, 58, vol. II. The trial court abused its discretion when it denied Mr. McCracken’s motion for mistrial.

Use of prior crimes as evidence to prove elements of crimes during trial has generally been considered prejudicial. *See Old Chief v. United States*, 519 U.S. 172, 191, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997); *State v. Johnson*, 90 Wn. App. 54, 950 P.2d 981 (1998). In *Old Chief*, the defendant wanted to stipulate to a prior felony conviction, but the

prosecution rejected the offer and the trial court denied the request. *Id.* at 174-177. The Supreme Court determined a trial court abuses its discretion when it denies a defendant's offer to stipulate and "admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction." *Id.* at 174.

To determine whether an irregular occurrence at trial affected a trial's outcome, the appellate courts examine three factors: "(1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." *State v. Young*, 129 Wn. App. 468, 473, 119 P.3d 870 (2005). A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. *Id.* at 473. The denial will be reversed only if "there is a substantial likelihood the prejudice affected the jury's verdict." *Id.* at 472-73 (internal quotation marks and citations omitted).

In *State v. Johnson*, the trial court erred by admitting a prior rape conviction to prove the defendant had a prior conviction for a violent offense when the defendant had offered to stipulate. 90 Wn. App. 54, 62-63, 950 P.2d 981 (1998). The defendant offered to stipulate to a "prior felony conviction" so as to avoid disclosing the nature of the felony. *Id.* at

62-63. Because there was little probative value of the prior rape conviction, but the danger of unfair prejudice was significant, the appellate court reversed. *Id.* at 63. The court determined “there was a significant risk that the jury would declare guilt on the two assault charges based upon an emotional response to the rape conviction rather than make a rational decision based on the evidence.” *Id.* at 63.

Also, in *State v. Young*, the defendant was prosecuted for unlawful possession of a firearm. 129 Wn. App. at 470. All parties agreed the defendant could stipulate to the underlying predicate offense for unlawful possession of a firearm—that the defendant had previously been convicted of a “serious offense.” *Id.* at 474-75. However, when addressing the jury venire, the trial court read directly from the charging information which stated the defendant’s prior conviction of second degree assault was an element of the unlawful possession of a firearm charge. *Id.* at 475. The defendant moved for a mistrial (after the jury was excused) and the trial court denied the motion. *Id.* at 475. Addressing the trial irregularity factors, the appellate court first noted that although it was “clear from the court’s explanation and the record that the court inadvertently disclosed the nature of the prior conviction, it is equally clear that the disclosure was inherently prejudicial.” *Id.* at 475. Second, the court noted no other evidence disclosed to the jury the nature of the prior offense. *Id.* at 476.

Third and finally, the trial court had not issued a curative instruction beyond the traditional instruction which directs a jury not to consider the “filing of the Information or its contents as proof of the crimes charged.” *Id.* at 476-77. The court concluded the error was not harmless and reversed and remanded for a new trial. *Id.* at 479.

To convict Mr. McCracken of the crime of unlawful possession of a firearm in the first degree, the State had to prove he possessed a firearm and he had previously been convicted of a serious offense. RCW 9A.040(1)(a); CP 65. Here the parties stipulated prior to trial that Mr. McCracken had been previously convicted of a “serious offense.” RP 53-61; State’s Ex. 1. Defense counsel pointed out the intent was to prevent the jury from hearing evidence of his prior conviction for second degree assault. RP 54-55. The trial court inadvertently disclosed the prior assault conviction. RP 53-61, vol. II. However, examining the trial irregularity factors in *Young* proves this case must be remanded for a new trial.

Under the first factor, it should be noted the seriousness of the irregularity has been previously litigated in *Young* under almost the exact same circumstances. *See id.* at 474-479. The *Young* defendant was also facing a first degree unlawful possession of a firearm charge, with the underlying predicate offense of second degree assault. *Id.* at 470-471; RP 41, vol. II. This alone meets the first of the *Young* factors—the

irregularity at trial was serious and prejudicial. *Id.* Also, in this case a potential juror specifically mentioned the assault during voir dire, noting he had been a victim of assault. RP 53, vol. I. The trial court later realized and acknowledged this at the point defense counsel moved for mistrial. RP 58-59, vol. II. The irregularity was serious and prejudicial, and the disclosure of the assault was obviously memorable to the juror such that the juror could not definitely state whether that factor would influence a decision on the case. RP 53, vol. I.

Second, the evidence here was not cumulative. *Young*, 129 Wn. App. at 473. No other evidence at trial exposed Mr. McCracken's second degree assault conviction to the jury. RP 62-206, vol. II.

Third, the trial court did not issue a curative instruction addressing the specific evidence at issue. RP 62-206, vol. II. While the trial court did issue a standard instruction admonishing the jury not to consider the information as evidence of proof of the charges, this was not enough to cure the error. RP 42-43, vol. II. The *Young* court found this same instruction was inadequate to "address the problem of the prejudicial impact of the inherently prejudicial disclosure." 129 Wn. App. at 477.

The *Young* factors have been met in this case. The trial irregularity wherein the court inadvertently disclosed Mr. McCracken's second degree assault conviction to the jury venire is reversible error. The inherent

prejudice was substantial, no cumulative evidence existed, and the standard limiting instruction could not cure the error. The trial court abused its discretion by failing to grant the defendant's motion for a mistrial as there is a substantial likelihood the prejudice affected the jury verdict. A new trial is warranted.

Issue 3: Whether the State committed prosecutorial misconduct by arguing impeachment evidence as substantive evidence, referring to evidence outside the record, and misstating the law in closing argument.

The State committed misconduct by arguing impeachment evidence as substantive evidence, by referencing evidence outside the record, and by misstating the law of the case in closing argument. This Court should reverse Mr. McCracken's conviction for first degree unlawful possession of a firearm and remand for a new trial.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks and citation omitted); *see also State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012) (when raising prosecutorial misconduct, the appellant “must first show that the prosecutor's statements are improper.”). “[P]rosecutorial misconduct is grounds for reversal

where there is a substantial likelihood the improper conduct affected the jury.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

If the defendant fails to properly object to the misconduct, “a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.” *State v. O’Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks and citation omitted). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). “Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762.

a. Whether the State committed misconduct by arguing impeachment evidence as substantive evidence.

As noted previously in this brief under Issue 1, the State argued in closing the impeachment evidence from Mendez Leon’s testimony was substantive evidence. RP 244-246, vol. II. The State committed misconduct by doing so.

It is impermissible for the State to use impeachment “as a guise for submitting to the jury substantive evidence that would otherwise be inadmissible” because there is a concern the prosecution will take advantage of the jury’s inability to distinguish between the two. *State v. Clinkenbeard*, 130 Wn. App. at 569-570. As noted above, in *Clinkenbeard*, the State used prior inconsistent statements to impeach the victim. 130 Wn. App. at 570-71. However, in closing argument, the State asserted the impeachment evidence was substantive proof of criminal conduct. *Id.* at 570-71. The court determined the prosecution’s use of impeachment testimony as substantive evidence was improper. *Id.* at 571.

Here, because the State used the Mendez Leon impeachment evidence to make a substantive argument as to Mr. McCracken’s guilt, and as proof he was sitting in the front passenger seat of the car, the State committed misconduct. RP 244-247, vol. II. This type of conduct was improper, as noted in *Clinkenbeard*. 130 Wn. App. at 571. The State’s conduct was also prejudicial, as no other evidence could place Mr. McCracken in the front passenger seat of the car, as acknowledged by the trial court. RP 62-206, 208-209, vol. II; *see Thorgerson*, 172 Wn.2d at 442. There is a substantial likelihood the improper conduct affected the jury, which is why defense counsel requested a curative instruction at the

end of the State’s closing argument. RP 247, vol. II ; *Fisher*, 165 Wn.2d at 747.

The State committed misconduct by arguing impeachment testimony as substantive evidence, and there is a substantial likelihood the improper conduct affected the jury. The case must be remanded for a new trial. *See Thorgerson*, 172 Wn.2d at 443 (reversal as remedy).

b. Whether the State committed misconduct by referencing evidence outside the record.

During closing argument, the State claimed Mendez Leon “winked” at Mr. McCracken, yet there is no evidence on the record this occurred. The State committed misconduct by referring to evidence outside the record.

A prosecutor's arguments calculated to appeal to the jurors' passion and prejudice and encourage them to render a verdict on facts not in evidence are improper. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); *see also State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (counsel may not “make prejudicial statements that are not sustained by the record.”). “[T]he prosecutor's duty is to ensure a verdict free of prejudice and based on reason.” *State v. Clafin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). A party cannot use closing argument to make prejudicial statements not sustained by the record. *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963). In *State v. Clafin*, “allusions to

matters outside the actual evidence” were so prejudicial no instruction could have cured the error. 38 Wn. App. at 851.

Here there was no evidence on the record that Mendez Leon “winked” at Mr. McCracken. RP 62-206, vol. II. Yet the State in its closing argument said as much: “Now, what’s interesting is -- and I don’t know if all of you saw it -- this is sort of up to you in your discussions. But when he sat down on the stand, he winked at Mr. McCracken.” RP 244, vol. II. Also, the State referred to the alleged “wink” in rebuttal closing, as well. RP 262, vol. II. The reference to matters outside the record was prejudicial. Nothing on the record reflected Mendez Leon winked at Mr. McCracken, the State’s reference to the wink was an appeal to the jury’s passion and prejudice, and the State was essentially inserting evidence into the record. Though defense counsel did not object, the references to evidence outside the record were so flagrant and ill-intentioned that no curative instruction would have cured the prejudice. *O’Donnell*, 142 Wn. App. at 328. The State’s misconduct had a substantial likelihood of affecting the jury’s verdict. *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). The case should be remanded for a new trial.

c. Whether the State committed misconduct by misstating the law on constructive possession.

In closing argument, the State took license to explain possession, and in so doing misstated the law. The case must be remanded for a new trial.

“A prosecuting attorney commits misconduct by misstating the law.” *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015) (citation omitted). A prosecutor’s arguments to the jury must be confined to the law contained in the trial court’s jury instructions. *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). If a prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. *State v. Gotcher*, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). If a defendant fails to object to the misstatements of the law, “the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *Allen*, 182 Wn.2d at 375 (citation omitted).

Under RCW 9.41.040, a felon may not possess a firearm. RCW 9.41.040. Possession can be either actual or constructive, and constructive possession may be shown by proving a defendant had dominion and control over the firearm. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) (citation omitted). Yet “[m]ere proximity to the firearm is insufficient to show dominion and control.” *Id.* at 899 (citation

omitted). “[K]nowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession.” *Id.* at 899 (citation omitted). Courts are hesitant to find vehicle passengers have dominion and control when charged with constructive possession. *Id.* at 900 (citations omitted). However, if a defendant is the owner of a premises or is the driver and/or owner of a vehicle, courts have found sufficient evidence of constructive possession. *Id.* at 899-900 (citations omitted).

Here the jury was instructed on the element of possession. CP 66; RP 225-225, vol. II. The instruction includes the following language:

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

CP 66.

In closing, the State misstated the law when it argued:

“Everybody had the ability to grab [the gun]. It’s a small vehicle. I mean, it’s – it’s a big gun, it’s a small car. Everybody in the vehicle, basically, had constructive possession of it. . . even if [McCracken] actually was in the backseat, which is not what the evidence suggests – even if he was in the backseat, that firearm is somewhere in here, that’s it. Easily able to grab and take possession of that firearm, that is constructive possession.”

RP 238, vol. II. In summary, the State essentially argued merely being within arm’s reach of the firearm was enough to prove possession. RP

238, vol. II. However, the law states mere proximity alone is not enough to prove constructive possession. *Chouinard*, 169 Wn. App. at 899. The State misstated the law on constructive possession, and because the issue of whether Mr. McCracken was in the front passenger seat was such a contentious portion of this trial, the error was prejudicial. Although defense counsel did not object to the erroneous statement of the law, the State's argument was so flagrant and ill-intentioned no instruction could have cured the prejudice. *Allen*, 182 Wn.2d at 375.

The case should be remanded for a new trial because the State committed prosecutorial misconduct by misstating the law.

Issue 4: Whether cumulative error requires reversal for a new trial where several errors pertaining to the Mendez Leon testimony and the State's misconduct did not afford Mr. McCracken a fair trial.

Even if this Court could determine that one or more of the errors are not prejudicial enough to warrant reversal, the cumulative effect of the prejudicial errors in this case warrants reversal. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (noting that several trial errors "standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial").

"It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless." *State v. Lopez*, 95 Wn.

App. 842, 857, 980 P.2d 224 (1999). Constitutional error requires reversal unless the court is certain beyond a reasonable doubt a jury would have reached the same conclusion in absence of the error. *Id.* at 857.

“Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.” *Id.*

The trial court erred in its handling of the Mendez Leon impeachment testimony by refusing to issue limiting and curative instructions, as well as denying defense counsel’s request to impeach Mendez Leon with a prior plea agreement. The trial court also should have granted the defendant’s motion for mistrial when it inadvertently erred and informed the jury of the underlying predicate offense to the charge of first degree unlawful possession of a firearm. The State committed misconduct by improperly arguing impeachment testimony as substantive evidence, referring to evidence outside the record, and misstating the law in closing. The cumulative effect of these errors was exceptionally harmful given that the State's case was dependent upon witness testimony. This was particularly true of the conviction for first degree unlawful possession of a firearm, where Mendez Leon was the only person who could link Mr. McCracken to possession of the gun. These errors individually and as a whole materially affected the outcome of the trial.

Issue 5: Whether this Court should deny costs against Mr. McCracken on appeal in the event the State is the substantially prevailing party.

Mr. McCracken preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court’s General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

The court acknowledged Mr. McCracken did not have the financial means to pay all of the fines and assessments. RP 292, vol. II. An order finding Mr. McCracken indigent was entered by the trial court, and there has been no known improvement to this indigent status. CP 1-2. To the contrary, Mr. McCracken’s report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. McCracken remains indigent. The report as to continued indigency shows he may owe an unknown amount in legal financial obligations, owns no property, and has no source of income.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. *See State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To

confront these serious problems, the Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without

determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, the trial court entered an order of indigency, and Mr. McCracken's Report as to Continued Indigency demonstrates a continued inability to pay costs. CP 1-2.

Furthermore, the *Blazina* court instructed *all* courts to "look to the comment in GR 34 for guidance." *Blazina*, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The *Blazina* court said, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Mr. McCracken met this standard for indigency. CP 1-2

This Court receives orders of indigency "as a part of the record on review." RAP 15.2(e); CP 1-2. "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this

Court to “seriously question” an indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

Mr. McCracken’s report as to continued indigency, filed contemporaneously with this brief, shows Mr. McCracken remains indigent.

This Court is asked to deny appellate costs at this time. Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence that Mr. McCracken’s current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. To the contrary, there is a completed report as to continued indigency showing that Mr. McCracken remains indigent. Appellate costs should not be imposed in this case.

Issue 6: Whether the trial court abused its discretion by imposing a jury demand fee of \$250 against the defendant when the trial court found Mr. McCracken indigent.

The sentencing court ordered Mr. McCracken pay mandatory LFO's of \$800, as well as \$250 for a jury demand fee. CP 33-34; RP 292, vol. II. Mr. McCracken requests this Court remand for resentencing and direct the trial court to strike the \$250 jury demand fee, as the trial court erred when it imposed the fee despite also finding Mr. McCracken indigent. RP 292, vol. II; CP 1-2.

“RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right . . . [and] [e]ach appellate court must make its own decision to accept discretionary review.”

Blazina, 182 Wn.2d 827 at 834-35.

“Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant's present or likely future ability to pay.” *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original). Before imposing discretionary LFOs, the sentencing court must consider the defendant's current or future ability to pay based on the particular facts of the defendant's case. *Blazina*, 182 Wn.2d at 834. “[T]he court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will

impose.” *Blazina*, 182 Wn.2d at 838 (quoting RCW 10.01.160(3)). “[T]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.” *Id.* (quoting RCW 10.01.160(3)).³ If a defendant is found indigent, courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839.

Under current and former RCW 10.01.160, it appears jury fees are not mandatory costs. RCW 10.01.160(2). “Expenses incurred for . . . jury fees under RCW 10.46.190 *may* be included in costs the court *may* require a defendant to pay.” RCW 10.01.160(2); *but see State v. Diaz-Farias*, 191 Wn. App. 512, 524, 362 P.3d 322 (2015).

The court considered Mr. Williams’ financial position and his ability to pay LFOs. CP 31; RP 292, vol. II. Though the trial court was aware Mr. McCracken was indigent and knew he would be incarcerated for 108 months, it still imposed the cost of jury demand fees (\$250). RP 292, vol. II; CP 1-2, 31, 33-34. The court erred by imposing this fee when under RCW 10.01.160(3) a defendant shall not be ordered to pay discretionary costs when a defendant will be unable to pay them (i.e., is indigent). The \$250 fee should be stricken from Mr. McCracken’s judgment and sentence.

³ This statute has since been amended, effective June 7, 2018, to state “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent” RCW 10.01.160(3) (2018).

F. CONCLUSION

Mr. McCracken requests his conviction for first degree unlawful possession of a firearm (Count 1) be vacated for insufficient evidence.

In the alternative, 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.

Respectfully submitted this 3rd day of July, 2018.

/s/ Laura M. Chuang
Laura M. Chuang, WSBA #36707

/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 July 3, 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
PO Box 777
Monroe, WA 98272

Having obtained prior permission from the Respondent, I also served the same at bplatter@co.okanogan.wa.us and sfield@co.okanogan.wa.us using Division III's e-service feature.

Dated this 3rd day of July, 2018.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 731-3279
admin@ewalaw.com

NICHOLS AND REUTER PLLC / EASTERN WASHINGTON APPELLATE LAW

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