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NO. 35664-7-III

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

STATE OF WASHINGTON,
PLAINTIFF/RESPONDENT,

v.

DAVID WESTON MCCRACKEN,
DEFENDANT/APPELLANT.

BRIEF OF RESPONDENT

BRANDEN E. PLATTER
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

Esther M. Milner
WSBA #33042
Deputy Prosecutor

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STATEMENT OF THE CASE

On December 24 of 2016 around 10 p.m. Officer Robbins of the Brewster City Police was on patrol in the city limits of Brewster. RP 64¹. There was a fresh blanket of snow on the ground; current conditions were clear and cold. RP 86, 126-127, 140. Officer Robbins was idling on the side of the road observing traffic when he noted a small four door passenger car pass his location with a loud muffler RP 64, 86-87. He attempted to stop the vehicle for an equipment violation. RP 64. Instead of stopping, the driver led Officer Robbins out of city limits on a high speed, lengthy pursuit northbound on Highway 97. RP 64-65, 87-88. Early in the pursuit, the vehicle left the road and detoured through an orchard. RP 65. Officer Robbins was able to get within approximately 30 feet of the vehicle as the driver slowed to make a turn. RP 65, 88, 101-102, 203. As the driver maneuvered the sharp right turn, an individual opened the rear passenger side door and bailed into the snow. RP 65, 91-92. The individual stood up and looked directly at Officer Robbins before fleeing.

¹ Amy Brittingham initially transcribed a volume, filed on March 4, 2018, that contains pretrial hearings (5/30/17, 7/31/17, 8/30/17, 10/02/17 and 10/04/17), the trial (10/05/17 and 10/06/17) and sentencing (11/01/07). Since most references are to this volume, I refer to it as "RP". Amy Brittingham transcribed a second volume, filed on June 3, 2018, that contains pretrial hearings (6/13/17, 7/17/17, 8/14/17 and 9/18/17) and the hearing on the motions in limine and the jury voir dire (10/05/17). I refer to this volume as "RP Supp."

RP 65, 92. Officer Robbins thought the individual looked familiar and later identified him as Heliodoro Xhurape. RP 65, 92, 203.

The vehicle returned to northbound 97 and the pursuit continued, at times exceeding 90 m.p.h. RP 88. Okanogan County Sheriff's Department responded to assist. RP 66, 108-109, 138. Sergeant Davis successfully deployed a spike strip between B&O road and the sand cuts. RP 66-67, 109. The driver hit the spike strip and lost control of the vehicle. RP 67. The vehicle left the road and ended up in a snowy field between Hwy 97 and B&O road. RP 67, 109, 139. Officer Robbins backed off as the spike strips were deployed. RP 67, 90. When he arrived at the scene of the accident, he observed three individuals fleeing the vehicle. RP 67, 90. Officer Robbins saw an individual heading towards the Okanogan River, so he turned down B&O road. RP 68. As he was pursuing that individual, he happened upon another individual at the Malott Bridge. RP 68, 110. That individual was identified as Ernesto Mendez Leon. RP 68, 110. Officer Robbins informed Sergeant Davis of the other individual he saw fleeing toward the river. RP 68, 110-111. Sergeant Davis and Deputy Shook, with the assistance of K9 Gunner (RP 107), located shoe prints in the fresh snow near the vehicle and a fresh snow track in the direction of the river. RP 117, 139-140. Sergeant Davis, Deputy Shook and Gunner successfully tracked and located the second individual on the bank of the

Okanogan River. RP 118-120, 141. The second individual was identified as the Defendant, David McCracken, RP 120, 142. Sergeant Davis observed that the tread on Defendant's shoes matched a set of prints next to the vehicle. RP 120-121, 125-126. A passerby reported a third individual walking northbound along the road. RP 68-69. Deputy Shook was able to locate the third individual, identified as Dwayne Erickson. RP 69.

Officer Robbins returned to the vehicle to secure it. RP 70. While securing the vehicle and preparing it for towing, he observed a rifle in plain sight sitting in the front passenger seat, partially resting on the center console. RP 70.

Mr. Mendez Leon gave a statement to Officer Robbins the night of the incident. RP 69. He told Officer Robbins he was in the rear driver's side seat, Mr. Xhurape was in the rear passenger seat, Mr. Erickson was driving and the Defendant was in the front passenger seat. RP 69, 194-195. He also told Officer Robbins that the gun in the front seat belonged to the Defendant. RP 195.

The vehicle was secured with evidence tape and towed to City of Brewster Secure Lot. RP 71. Officer Robbins obtained and executed a search warrant on the vehicle. RP 71. Officer Robbins took photos both the night of the incident and while executing the search warrant. RP 78-79.

He identified the firearm as a .22 caliber rifle, ATI, model GSG5. RP 76-77. The firearm was loaded. RP 85. Officer Robbins also located various suspected drugs in the front passenger seat area of the vehicle. RP 72-73.

The Defendant had prior felony history and was therefore charged with Unlawful Possession of a Firearm in the First Degree and Obstructing a Law Enforcement Officer. CP 232-233. On July 28, 2017, the State amended the Information adding a second count of Unlawful Possession of a Firearm in the First Degree (based on a shotgun located in the trunk of the vehicle (CP 164, 172-173)) and four counts of Possession of a Controlled Substance other than Marijuana. CP 172-175. On August 25, 2017 the Defense filed a Knapstead motion as to the second count of Unlawful Possession of a Firearm. CP 156-158. Based on case law, the State conceded the Knapstead motion and filed a Second Amended Information deleting the second count of Unlawful Possession of a Firearm. RP 26, CP 144-146.

Mr. Mendez Leon was also charged. RP 168, CP 138-139. Sometime in March 2017 Mr. Mendez Leon agreed to a plea deal; the actual plea agreement was entered on March 29, 2017. RP 177, RP Supp. 30-31. As a part of that deal he agreed to testify fully and truthfully at trial and make himself available for defense interviews. RP 178, CP138-139. On March 21, 2017 Mr. Mendez Leon cooperated with a recorded

interview at the prosecutor's office. RP Supp. 30. Present for that interview were Mr. Platter, the State's attorney, Ms. Lawson, Mr. Mendez Leon's attorney, and Officer Robbins. RP 176-177, 195. Mr. Mendez Leon gave a recorded statement that was consistent with his initial statement at the scene, again stating he was in the rear driver's side seat, Mr. Xhurape was in the rear passenger side seat, Mr. Erickson was driving, and Defendant was in the front passenger seat. RP 200-201.

Before Defendant's trial, Mr. Mendez Leon incurred new criminal charges and based on the new charges, the plea deal was withdrawn. RP 169, RP Supp. 25-26, CP 138-139. The State still called Mr. Mendez Leon to testify at trial, but Mr. Mendez Leon had no agreement with the State at the time of trial and was not receiving any consideration in exchange for his testimony. RP 182, RP Supp. 26, CP 139.

Prior to trial, the Defense prepared a stipulation – that the Defendant had a prior serious offense. RP 54. The prepared stipulation was a Defense strategy to satisfy the second element of Unlawful Possession of a Firearm and avoid admission of the details of Defendant's prior conviction. RP 54. Defense did not file the stipulation with the court before the start of voir dire. RP 55-56. The trial judge, unaware of the stipulation read the Information per his usual practice. RP 54-56. The Information disclosed that Defendant had a prior Second Degree Assault

conviction. RP 54, CP 144. After the jury was sworn in, but before opening statements, Defense moved for a mistrial based on the disclosure of Defendant's Second Degree Assault conviction. RP 54. The court denied Defendant's motion for a mistrial, emphasizing that the jury was instructed that the Defendant had entered a plea of not guilty and that put the burden on the State to prove each and every element. RP 58.

The jury heard testimony from four of the officers who responded to the incident. RP 62-143. On day two of the trial the State called Mr. Mendez Leon to testify. RP 182. A significant issue involving Mr. Mendez Leon's testimony was whether Defense could introduce Mr. Mendez Leon's prior plea agreement as impeachment evidence. RP 165-181, RP Supp. 24-33. The State raised this issue in its written motions in limine. CP 138-139. Defense argued the prior plea agreement was relevant if the State introduced the recorded statement to impeach. RP Supp. 24. The State responded that the agreement was no longer in place and therefore irrelevant (RP Supp. 26-28):

The fact is that it is a prior inconsistent statement not being used for substantive purposes. So, the credibility of the statement is actually irrelevant. It's simply the fact of an inconsistent statement to impeach the witness's credibility.

RP Supp. 27. The court noted that there was no current consideration for Mr. Mendez Leon's testimony:

He's breached the agreement. In essence, there's no agreement is it not? Isn't that a fact? If he testifies today there's no agreement? . . . So, there's no consideration today for his testimony.

RP Supp. 26. The parties and the court had a lengthy discussion on the issue and ultimately the court reserved ruling. RP Supp. 32. The parties and the court picked up the issue again during preliminary matters on day two of the trial. RP 165-181. After more argument and discussion the court disallowed testimony of the plea agreement:

And now, he's [Mr. Mendez Leon] 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 180-181.

Mr. Mendez Leon testified on direct that Mr. Erickson gave Mr. Xhurape and him a ride. RP 183-184. He testified that he was sitting in the backseat behind Mr. Erickson, the driver. RP 184. He testified that the Defendant was sitting in the backseat behind the front passenger. RP 184. His answer as to who was the front seat passenger was unintelligible. RP 184. Mr. Mendez Leon denied knowing there was a gun in the car. RP 184-185. He said he couldn't remember telling Officer Robbins that Mr. Xhurape was sitting in the rear passenger side seat. RP 185-186. He admitted telling Officer Robbins that he thought the gun was the Defendant's, but said he told Officer Robbins that because he "was just

trying to get off of it". RP 186. He then said he didn't know whose gun it was. RP 186. Mr. Mendez Leon recalled giving a recorded statement, but didn't recall saying that he and Mr. Xhurape were in the back passenger seat and the Defendant was in the front passenger seat. RP 187-188. He couldn't recall making the recorded statement that the gun belonged to the Defendant or that the Defendant and Mr. Erickson talked about the gun and didn't want to stop for police because there was a gun in the car. RP 188-189. He also couldn't recall making the recorded statement that the Defendant tried to get him to take responsibility for the gun. RP 189.

The State recalled Officer Robbins to testify as to the statement Mr. Mendez Leon made the night of the incident and as to the statement recorded on March 21, 2017. RP 193. The State, after laying a foundation for the recording, sought to play some excerpts from it. RP 196. Since the recording was being used for impeachment, the State did not seek to admit the recording. RP 196. Defense objected as follows:

Well, I understand and I believe that the State is going to play some portions of the taped statement to show inconsistent statements by the witness. I would like the Court to limit some of that as consistent with what the State indicated earlier during our discussion of this with respect to not being offered for the substance of it. I believe it can be accomplished -- the impeachment can be accomplished without all the statements being heard.

RP 197. Defense wished to limit the amount of the recording that the jury heard, but had not transcribed the recording and did not specify which portions of the tape he didn't want the jury to hear. RP 198. The court, therefore, overruled the Defense's objection. RP 198. The Defense did not request a contemporaneous limiting instruction. RP 197-198.

Upon the conclusion of Mr. Robbins testimony, the State rested. RP 204. The Defense had no witnesses and also rested. RP 205-206. The jury was excused and the parties and court finalized jury instructions. RP 207-209. The Defense only proposed two instructions. RP 207. Defense did not request WPIC 5.30 (Evidence Limited as to Purpose) or propose any other limiting instructions. RP 207, CP 103-104. The court granted Defense's proposed instruction WPIC 6.05 (Testimony of Accomplice). RP 208-209. The trial court noted that Mr. Mendez Leon provided some key evidence and allowed the instruction over the State's objection. RP 208-209. After the discussion about the jury instructions Defense moved for a directed verdict on the four charges of Possession of a Controlled Substance and the charge of Unlawful Possession of a Firearm. RP 209-210. The court, interpreting the evidence most favorable to the State, denied the Defense's motion for a directed verdict. RP 211.

During closing the State reviewed the elements of the crimes charged. RP 234-236. The State discussed possession at length, actual and

constructive, and discussed the ability of others in the car to take actual possession as one of the factors of constructive possession. RP 237-239. The State reviewed the substantive evidence presented at trial: such as, Officer Robbins's testimony that he was one hundred percent sure that Mr. Xhurape exited from the rear passenger door during the chase (RP 233); Sergeant Davis and Deputy Shook's testimony about successfully tracking the Defendant with K9 Gunner's assistance by following Defendant's footprints in the snow leading from the car to the river (RP 233-234, 236); and their testimony matching Defendant's tread to a set of footprints found near the vehicle (RP 234).

The State reviewed the substantive evidence Mr. Mendez Leon provided on direct: testimony placing the Defendant as a passenger in the car (RP 234); testimony that Mr. Erickson was the driver (RP 237); and testimony that Mr. Mendez Leon was in the driver's side rear passenger seat (RP 237). The State argued the inference, based on substantive evidence, that the only seat left for Defendant was the front passenger seat. RP 237.

The State raised concerns about Mr. Mendez Leon's credibility. RP 244. The State noted that Mr. Mendez Leon winked at the Defendant when he took the stand. RP 244. The State highlighted the consistent portions of Mr. Mendez Leon's testimony and his prior statements and

then highlighted the inconsistencies between his testimony and prior statements. RP 244-245. The State noted that the consistent parts were the parts that didn't get the Defendant in trouble:

But anything that's going to make Mr. McCracken get in trouble or any of the charges that we're talking about, all of a sudden we have a different story. So, take that into consideration when you are thinking about his testimony. What can you believe and what can you not believe? I'm not saying that everything he said on the stand is true or isn't true or whatever. That's not for me to say. All I'm saying is take that into consideration.

RP 245. The State cautioned the jury to be careful with Mr. Mendez Leon's testimony and not base their verdict on his testimony alone. RP 246.

At the close of the State's argument, Defense moved for a curative instruction "with respect to the evidence of Defendant being in the front seat". RP 247. Defense claimed that the State had argued Mr. Mendez Leon's inconsistent statements as substantive evidence and therefore a curative instruction was necessary. RP 247-248. The court disagreed with Defense's argument and found the State was merely focusing on the inconsistency and how it affected Mr. Mendez Leon's credibility. RP 249.

The jury returned a verdict of Guilty on count 1, Unlawful Possession of a Firearm in the First Degree, and count 6, Obstruction of a Law Enforcement Officer, and returned a verdict of not guilty on counts 2-5, Possession of a Controlled Substance. RP 267-268, CP 53-54.

ARGUMENT

I. There is sufficient substantive evidence in the record that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The test for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wash.2d 1, 8, 133 P.3d 936 (2006). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Hosier*, 157 Wash.2d at 8. When a defendant challenges the sufficiency of the evidence, he or she admits the truth of all of the State's evidence. *State v. Homan*, 181 Wash.2d 102, 106, 330 P.3d 182 (2014). Circumstantial and direct evidence are to be considered equally reliable. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). When reviewing a challenge to the sufficiency of the evidence, the reviewing court gives great deference to the jury's decision, and does not consider “questions of credibility, persuasiveness, and conflicting testimony.” *In re Pers. Restraint of Martinez*, 171 Wash.2d 354, 364, 256 P.3d 277 (2011).

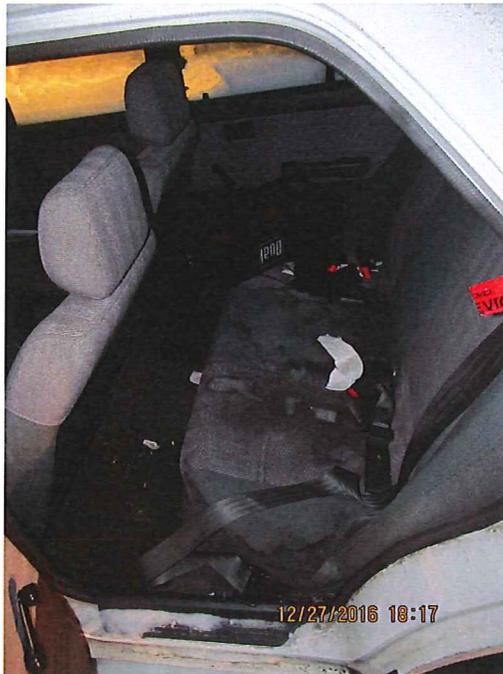
To convict the Defendant of the crime of Unlawful Possession of a Firearm, the State had to prove the following beyond a reasonable doubt:

- (1) That on or about December 24, 2016, the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control, to wit: ATI GSG-5 .22 caliber rifle;
- (2) That the defendant had previously been convicted of a serious offense;
- (3) That the ownership or possession or control of the firearm occurred in the State of Washington.

CP 65. Defense stipulated that the Defendant had previously been convicted of a serious offense and there is no dispute that the crime occurred in the State of Washington. The question then before this Court is whether, after viewing the evidence in the light most favorable to the State, the jury had sufficient substantive evidence to find that the Defendant knowingly owned a firearm or knowingly had a firearm in his possession or control.

Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the firearm. *State v. Echeverria*, 85 Wn.App. 777, 783, 934 P.2d 1214 (1997). Exclusive control is not necessary to establish constructive possession. *State v. Hagen*, 55 Wash.App. 494, 498-499, 781 P.2d 892 (1989). The ability to reduce an object to actual possession is an aspect of dominion and control. *Echeverria*, 85 Wn.App. at 783.

Mr. Mendez Leon testified on direct (prior to any line of questioning intended to impeach) that he was sitting in the rear driver's side seat. RP 184. He also testified that Mr. Erickson was driving the car and placed Defendant in the car. RP 184. Sergeant Davis testified that Defendant's shoe prints matched a set of shoe prints found near the car. RP 120. Officer Robbins testified that he was one hundred percent sure that during the chase he saw Mr. Xhurape jump out of the rear passenger side seat. RP 203. State's Exhibit 6 shows a large speaker on the rear seat leaving limited seating capacity in the rear of the car.



EX 6., RP 79.

Based on the foregoing described substantive evidence presented at trial and when viewing the evidence in the light most favorably for the State,

any rational trier of fact could have found that Defendant was in the car and that the only location left for him in the car was in the front passenger seat in actual possession of the firearm. The statements used to impeach Mr. Mendez Leon were not necessary for the jury to find beyond a reasonable doubt that Defendant was sitting in the front seat right next to the firearm.

A rational trier of fact could also have found that the Defendant had constructive possession. The vehicle was a small compact car. EX 3. The gun was an ATI GSG-5 .22 caliber rifle. RP 76-77. It was resting against the center console of the vehicle. RP 70. Even if Defendant had been in the back seat, the firearm was within easy reach and the jury could have reasonably found based on the small size of the vehicle, the large size of the firearm and the firearm's central location, that anyone in the vehicle would have been aware of the firearm, could have reached it and could have easily reduced it to actual possession.

Contrary to Appellant's arguments, the trial court did not suggest there was a lack of substantive evidence. Appellant Brief on page 14, 21, 22, 25 and 37 asserts that the trial court suggested there was insufficient substantive evidence to find that Defendant was in the front seat. The statement Appellant is referencing was made in context of the trial court's ruling allowing Defendant's proposed jury instruction WPIC 6.05:

I don't think there's any other testimony other than this witness that places Mr. McCracken in the passenger as well as Mr. Erickson as driving, as such. There is clear testimony from the officer that Heliodoro Xhurape exited from the passenger side rear seat area. That's the only thing the officer observed thereafter. I think it's important in this regard. So, therefore, the Court will give the instruction.

RP 208. The trial court noted that Mr. Mendez Leon was the only witness who identified Mr. Erickson as the driver and Defendant as a passenger. This comment was in response to the State's argument that WPIC 6.05 was unnecessary because the State was not relying on an accomplice's uncorroborated testimony. The trial court was not noting the only evidence of Defendant's location in the car was based on impeachment evidence as Appellant misleadingly suggests. Instead it was placing value on Mr. Mendez Leon's substantive testimony which placed Defendant in the car, identified the driver and identified Mr. Mendez Leon's location in the car. Furthermore, the trial court's belief of whether there was sufficient evidence or not is irrelevant. The jury, not the judge is the trier of fact. Appellant's argument also disregards the fact that the trial court, interpreting the evidence most favorable to the State, denied Defense's motion for a directed verdict. RP 211.

Appellant incorrectly relies on *Clinkenbeard, State v. Clinkenbeard*, 130 Wn.App. 552, 123 P.2d 872 (2005). In *Clinkenbeard*, impeachment evidence was the only evidence presented of sexual

intercourse between the alleged victim and defendant. *Id* at 570. Here, there is sufficient substantive evidence – direct and circumstantial – placing Defendant in the vehicle and identifying the other individuals’ locations in the vehicle, to permit a rational trier of fact to infer that Defendant was sitting in the front passenger seat in actual possession firearm. A rational trier of fact could also have found based on the substantive evidence presented that the Defendant had constructive possession of the firearm even if he was in the rear seat.

In *Echeverria*, there was gun under the driver’s seat. *Echeverria*, 85 Wn.App. at 780. About three inches of the gun barrel was sticking out. *Id*. The court found that Mr. Echeverria was guilty of the crime of unlawful possession of a firearm. *Id*. at 782. The appellate court upheld the verdict stating:

Given the unchallenged finding the gun was in plain sight at Mr. Echeverria's feet and the reasonable inference that he therefore knew it was there, a rational trier of fact could find Mr. Echeverria possessed or controlled the gun that was within his reach.

Id. at 783.

Here, the firearm was in plain sight. It was in the center of the vehicle in easy reach, not only of those in the front, but also those in the back of the vehicle. Not only is there sufficient evidence for a reasonable trier of fact to find Defendant was sitting in the front passenger seat in

actual possession of the firearm, there is also sufficient evidence to find he had constructive possession of the firearm regardless of his location in the vehicle.

II. The trial court properly denied Defense's request for a curative instruction as the State merely highlighted inconsistencies in Mr. Mendez Leon's testimony in its closing argument to question Mr. Mendez Leon's credibility.

The trial court is generally in the best position to perceive and structure its own proceedings. *State v. Dye*, 178 Wash.2d 541, 547, 309 P.3d 1192 (2013). Accordingly, a trial court has broad discretion to make a variety of trial management decisions, ranging from “the mode and order of interrogating witnesses and presenting evidence,” to the admissibility of evidence, to provisions for the order and security of the courtroom. *Dye*, 178 Wash.2d at 547-548. When a trial court's refusal to issue a requested instruction is based on a factual dispute, the trial court's decision is reviewed for an abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998). An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *Dye*, 178 Wash.2d at 548.

Parties can request limiting instructions when evidence has been admitted for a limited purpose:

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.

ER 105, (italics added). Such instructions are often called “limiting” or “cautionary” instructions. They are to be distinguished from so-called “curative” instructions. 5 Wash. Prac., Evidence Law and Practice § 105.1 (6th ed.).

A limiting instruction regarding the limited use of prior inconsistent statements is available in the Washington Pattern Jury Instructions. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 5.30 (4th ed.). The trial court has no responsibility to give a limiting instruction when neither side requests a limiting instruction. *State v. Russell*, 171 Wash.2d 118, 124, 249 P.3d 604 (2011).

In *Ramirez*, defense counsel requested a limiting instruction contemporaneous with the admission of the evidence for a limited purpose. *State v. Ramirez*, 62 Wn.App. 301, 304, 814 P.2d 227 (1991). The trial court refused to provide a contemporaneous instruction. *Id.* The *Ramirez* court found that defense could have submitted a limiting instruction to be read with the other jury instructions. *Id.* at 305. Because

the defense failed to do so, the court held that he waived the error. *Id.* at 306.

A prosecutor has “wide latitude” during closing argument to draw reasonable inferences from the evidence and may freely comment on a witness's credibility based on the evidence. *State v. Fisher*, 165 Wash.2d 727, 747, 202 P.3d 937 (2009). The burden rests on the defendant to show the prosecuting attorney's conduct was both improper and prejudicial. *Id.*

Appellant is incorrect when he argues that Defense requested “*limiting and curative instructions*” and “the trial court refused to issue *either one*”. Appellant Brief, Page 23 (italics and underline added). The record does not reflect that Defense ever requested a limiting instruction. When the recorded statement was played for the jury, Defense requested that the court limit what was played for the jury:

Well, I understand and I believe that the State is going to play some portions of the taped statement to show inconsistent statements by the witness. I would like the Court to limit some of that as consistent with what the State indicated earlier during our discussion of this with respect to not being offered for the substance of it. I believe it can be accomplished – the impeachment can be accomplished *without all the statements being heard*.

RP 197 (italics added). When read within context, Defense requested that the trial court limit how much of the statement was heard. The record does not reflect that Defense made any request for a contemporaneous limiting instruction.

At the conclusion of testimony prior to closing arguments, the parties and trial court finalized the jury instructions. RP 206. Defense requested WPIC 6.05 (Testimony of Accomplice), which the trial court allowed. CP 79, RP 208. Defense did not request WPIC 5.30 (Evidence Limited as to Purpose) or propose any other limiting instructions. RP 207.

During closing argument the State highlighted the consistencies and inconsistencies between Mr. Mendez Leon's testimony and his prior statements introduced under ER 613 for impeachment. RP 244-245. The State raised concerns about Mr. Mendez Leon's credibility and cautioned the jury when considering Mr. Mendez Leon's testimony:

“[S]omething that is sort of neutral, that Mr. Mendez Leon thinks won't necessarily get Mr. McCracken in trouble, those are all consistent statements. But anything that's going to make Mr. McCracken get in trouble or any of the charges that we're talking about, all of a sudden we have a different story. So, take that into consideration when you are thinking about his testimony. What can you believe and what can you not believe? I'm not saying that everything he said on the stand is true or isn't true or whatever. That's not for me to say. All I'm saying is take that into consideration. You can believe some of what he says and not believe other parts he said. There's an instruction that actually tells you to be careful about it. That's Instruction 21. Yep, the State put Mr. Mendez Leon on. You, as a jury, cannot find Mr. McCracken guilty based only on his testimony – or should not.”

RP 245. At the conclusion of the State's closing argument, Defense moved for a curative instruction:

My motion is to have the Court issue a curative instruction with respect to the evidence of the Defendant being in the front seat.

The only direct evidence and substantive evidence from Mr. Mendez Leon was that the Defendant was in the backseat.

RP 247. Defense requested a curative instruction, not a limiting instruction. Defense's motion for a curative instruction was based on Defense's claim that the State was arguing Mr. Mendez Leon's prior inconsistent statements as substantive evidence. It is clear from the record, that the State was using Mr. Mendez Leon's prior statements to highlight the inconsistencies in the Defendant's testimony and to caution the jury to be careful with his testimony.² The trial court understood that the State was using the prior inconsistent statements to demonstrate Mr. Mendez Leon's lack of credibility:

STATE: And I argued in closing – I argued it as an inconsistent statement. My focus was on the inconsistency and how that affects Mr. Mendez Leon's credibility, not for the substance of it.
THE COURT: That's the way I heard his argument.

RP 248

² The State's argument is similar to the argument the prosecutor made in *State v. Graham*, 168 Wash.App. 1011, 2012 WL 1721244 (unpublished and pursuant to WA R GEN GR 14.1 has no precedential value and is not binding upon any court). In *Graham*, the prosecutor highlighted inconsistencies between witness Jason's testimony and a prior statement and theorized as to why Jason testified inconsistently with the prior statement. *Id.* at *4. The issue before the court in *Graham* was whether there was ineffective assistance of counsel due to counsel's failure to object to the prosecutor's argument. *Id.* at *1. The *Graham* Court found any objection would have been overruled and *Graham*'s attorney's failure to object was not unreasonable:

"The State did not use Jason's testimony as substantive evidence. Rather, the State was arguing that the jury should look carefully at the testimony because he was down playing what happened out of self-interest. Because the State was not using this testimony for a substantive reason but rather to impeach Jason, any objection would have been overruled. Counsel's failure to object was not objectively unreasonable."

Id. at *4.

Defense's motion for a curative instruction was based on his erroneous claim that the State was arguing the prior inconsistent statements substantively. The trial court reasonably found that the State argued the prior statements to emphasize Mr. Mendez Leon's inconsistency and lack of credibility. The trial court has broad discretion as to the structure of its proceedings. *Dye*, 178 Wash.2d at 547-548. The trial court acted well within its discretion when it denied Defense's motion for a curative instruction to "cure" what Defense erroneously claimed to be State misconduct.

III. The trial court did not abuse its discretion or violate Appellant's rights to confrontation by excluding evidence of Mr. Mendez Leon's plea agreement that was no longer in effect and therefore irrelevant.

The Confrontation Clause of the Sixth Amendment (applicable to the states via the Fourteenth Amendment) guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. amends. VI, XIV. Cross-examination is the "principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347. (1974). In addition to testing a witness's perceptions and memory, the cross examiner has also traditionally been allowed to impeach – discredit – the witness by introducing evidence of prior criminal convictions or by

revealing possible biases, prejudices or ulterior motives of the witness.

Davis, 415 U.S.at 316.

However, impeachment evidence sought to be elicited must be material and relevant to the matters sought to be proved. Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative. *State v. Jones*, 67 Wash.2d 506, 512, 408 P.2d 247 (1965). The usual principles of relevance are applicable and give the court the authority to exclude evidence that is too ambiguous or remote to suggest bias in the present case. ER 401, 5A Wash. Prac., Evidence Law and Practice § 607.8 (6th ed.). The trial court has considerable discretion in this regard and, normally at least, will be reversed only for an abuse of discretion. *Id.*

Appellant argues that the trial court's refusal to allow discussion of Mr. Mendez Leon's prior plea agreement was reversible error. The plea agreement had been withdrawn prior to trial and at the time of trial there was no consideration for Mr. Mendez Leon's testimony. CP 139, RP Supp. 26-28. Typically, evidence that a witness is testifying pursuant to a plea agreement is admissible to show bias. *State v. Jessup*, 31 Wash. App. 304, 316, 641 P.2d 1185 (1982). However, at Defendant's trial, Mr. Mendez Leon was not testifying pursuant to a plea agreement. There was no plea agreement in effect that offered him anything in exchange for his

testimony. Mr. Mendez Leon had no motive to testify for State. His lack of motive to testify for the State is evident in his testimony. Mr. Mendez Leon was resistant to testifying for the State. Portions of his testimony on direct were inconsistent with his prior statements. RP 184, 186. He responded to many of the State's question with "I don't recall that" or "I don't remember". RP 186, RP 189. When asked if he wanted to be at trial testifying he responded "no". RP 190. If Mr. Mendez Leon had been testifying pursuant to a plea agreement with the State, the plea agreement would have been relevant and therefore admissible. It would have been relevant because a witness testifying pursuant to a plea agreement may be motivated to tailor his testimony to assist the State. Here, as is clear from the record, Mr. Mendez Leon had no such motive. Furthermore, the credibility of the recorded prior statements is irrelevant. It is the fact of inconsistency that is relevant. The fact that the plea was in effect at the time of the recorded statement is not relevant given the limited purpose of the recorded statement's use. The trial court's refusal to allow Defense to cross examine Mr. Mendez Leon about that plea agreement on relevancy grounds is not an error and was within the court's sound discretion.

Even if the trial court's refusal to allow Defense to cross examine Mr. Mendez Leon about the prior plea agreement was error, it was harmless. Erroneous exclusion of evidence is not grounds for reversing a

conviction unless the error prejudiced the defendant. *State v. Grenning*, 169 Wash.2d 47, 57, 234 P.3d 169 (2010). Such an error is prejudicial where, “had the error not occurred, the outcome of the trial would have been materially affected.” *State v. Cunningham*, 93 Wash.2d 823, 831, 613 P.2d 1139 (1980). Courts have often held that an erroneous admission or exclusion of evidence was harmless where the evidence merely provided additional evidence of something already shown by overwhelming untainted evidence. *State v. Gonzalez Flores*, 164 Wash.2d 1, 19, 186 P.3d 1038 (2008). Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative. *Id.* at 19 (quoting Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L.REV. 277, 319 (1995)).

Mr. Mendez Leon made several statements before testifying at trial. His testimony at trial was inconsistent with the statement he made to Officer Robbins after his arrest. RP 185. It was also inconsistent with the recorded statement he gave at a later date. RP 187. Mr. Mendez Leon gave the second statement pursuant to the plea agreement that was later withdrawn. RP 178. The two prior statements were consistent with each other, although the recorded statement contained greater detail. RP 176, 177. The State used both prior inconsistent statements to impeach Mr. Mendez Leon at trial. RP 185, 187.

Defense wished to cross examine Mr. Mendez Leon about the prior plea agreement to discredit the recorded prior inconsistent statement that the State used to discredit Mr. Mendez Leon's testimony at trial. RP 173. The prior statement was only used to impeach Mr. Mendez Leon; it was not used for substantive testimony. Defense essentially wanted to add another layer of impeachment evidence. Additional impeachment was unnecessarily cumulative. Mr. Mendez Leon's testimony was already thoroughly discredited. Also, the additional layer of impeachment testimony Defense wished to add only had the potential to discredit the second statement; it did not apply to the original statement Mr. Mendez Leon made to Officer Robbins at the time of his arrest. The trial court's exclusion of the prior plea agreement was not prejudicial to Defendant. Mr. Mendez Leon's testimony was already thoroughly discredited; further discrediting was unnecessary. The jury knew to be cautious with his testimony. Additional impeachment evidence would have had no impact on the jury's decision.

IV. The trial court properly denied the Defendant's motion for a mistrial based on the court's reading of the predicate offenses during voir dire.

Although not admissible as character evidence, evidence of prior criminal convictions may be admissible for other purposes (ER 404(b)),

such as when necessary to prove an essential element of crime for which defendant is presently charged. See *State v. Mayes*, 20 Wash.App. 184, 191, 579 P.2d 999 (1978).

When a prior conviction is an element of the crime charged, a defendant may offer to stipulate to the existence of the prior conviction in order to avoid having the details presented to the jury. 5 Wash. Prac., Evidence Law and Practice § 404.28 (6th ed.). The general rule is that the State need not accept the offer to stipulate and may instead press ahead with proof of the prior crime. *Id.*

As an exception to the general rule, courts have held in a narrow range of cases that if one party offers to stipulate to a certain fact, then evidence to prove that fact becomes inadmissible under ER 403 because it is unfairly prejudicial. This exception has become known as the *Old Chief* rule. 5 Wash. Prac., Evidence Law and Practice § 403.10 (6th ed.). See *Old Chief v. United States*, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997).

In *Old Chief*, the district court admitted the full judgement record of a prior conviction to prove the element of a crime. *Id.* at 177. The defendant objected to admission of the record and offered to stipulate to the element. *Id.* The United States Supreme Court acknowledged the general rule that the State is not required to accept an offer to stipulate. *Id.*

at 186. However, the Court held that a district court abuses its discretion if it denies a defendant's offer to stipulate and admits the full judgement record over the defendant's objection "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 172.

Old Chief was based upon the United States Supreme Court's interpretation of Federal Rule of Evidence 403; it was not based on constitutional principles or any other principles that would bind a Washington court. See *In re Detention of Turay*, 139 Wash.2d 379, 402, 986 P.2d 790 (1999).³ Still *Old Chief* has been found persuasive in multiple Washington cases. See *State v. Johnson*, 90 Wash.App. 54, 950 P.2d 981 (1998). *State v. Rivera*, 95 Wash.App. 132, 974 P.2d 882 (1999), review granted, cause remanded, 139 Wash.2d 1008, 989 P.2d 1142 (1999) and opinion withdrawn and superseded in part, 95 Wash.App. 132, 992 P.2d 1033 (2000).

In *State v. Young*, Young was charged with Unlawful Possession of a Firearm, Aggravate First Degree Murder and First Degree Assault. *State*

³ The Washington Supreme Court in *Turay* stopped short of saying *Old Chief* was inapplicable in Washington, but the court made it clear that the Washington courts may, and probably will, develop their own standards on the issue presented. *In re Detention of Turay*, at 402.

v. *Young*, 129 Wn.App. 468, 470-471, 119 P.3d 870 (2005). *Young* stipulated that he had been convicted of a serious offense to satisfy the predicate conviction element of Unlawful Possession of a Firearm; thereby avoiding the jury receiving evidence of his prior Second Degree Assault conviction. *Id.* at 472. The stipulation was filed with the trial court, but the judge hadn't reviewed it and inadvertently disclosed the Second Degree Assault conviction when he read the Information to the jury venire. *Id.* at 475. The trial court denied *Young's* request for a mistrial. *Id.* On appeal, Washington State Court of Appeals Division One held that the trial court erred in refusing to grant a mistrial, finding that the trial court's disclosure was inherently prejudicial:

When the sole purpose of the evidence is to prove the element of the prior conviction, revealing a defendant's prior offense is prejudicial in that it raises the risk that the verdict will be improperly based on considerations of the defendant's propensity to commit the crime charged. *This risk is especially great when the prior offense is similar to the current charged offense.*

Young, 129 Wn.App. at 475 (italics added).

A denial of a motion for a mistrial is reviewed for an abuse of discretion. *Id.* at 473. A trial court's denial of a motion for mistrial will be overturned only when there is a substantial likelihood the prejudice affected the jury's verdict. *Id.* at 472–473. Any error in a trial court's decision regarding the relevance or prejudicial effect of evidence requires

reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Barry*, 184 Wash.App. 790, 802, 339 P.3d 200 (2014). When a trial court makes an improper comment during venire, that irregularity is subject to harmless error analysis. *Young*, 129 Wash.App. at 478. A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. *State v. Wanrow*, 88 Wash.2d 221, 237, 559 P.2d 548 (1977).

In *Sivens*, the trial court inadvertently disclosed suppressed evidence while reading the Information. *State v. Sivens*, 138 Wash.App. 52, 57-58, 155 P.3d 982 (2007). The court found the inadvertent disclosure was not error, but held that even if it was error, it was harmless. *Id.* at 61. The *Sivens* court instructed the jurors that the charges were simply accusations, not evidence, and they were only to rely on evidence produced in court during trial:

Because jurors are presumed to follow the instruction of the court, it follows that they did not consider the suppressed items as evidence. Accordingly, we find the trial court's disclosure of the suppressed items harmless beyond a reasonable doubt.

Id. at 61 (relying on *State v. Stein*, 144 Wash.2d 236, 247, 27 P.3d 184 (2001)).

In Appellant's case, the trial court was unaware of the stipulation between the parties, because at the time of voir dire, Defense had not yet filed the stipulation with the court. RP 55-56. The trial court, unadvised, proceeded pursuant to its usual practice and read the Information. The Information referenced Defendant's prior Second Degree Assault conviction as the predicate offense for the charge of Unlawful Possession of a Firearm. RP 58. The trial court in denying the mistrial pointed out that the jury would be instructed that State must prove each and every element. RP 58. The jury was instructed that the charge is only an accusation and that they must make their decision solely upon the evidence presented during the proceedings:

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

CP 57. Also, until Defense filed the stipulation, the underlying offense was still an element the State had to prove. Had Defendant elected to not file the stipulation, which was still his right, the State would have been required to prove the very offense the judge mentioned. Essentially, Defense invited this alleged error. A party may not benefit from an error they invited. See *Wright v. Miller*, 93 Wash.App. 189, 195, 963 P.2d 934 (1998).

Appellant relies heavily on *State v. Young*. *Young*, 129 Wn.App. 468. Although Defendant's case has some similarities to *Young*, it is distinguishable. In *Young*, the stipulation had been filed, but the trial court had not yet reviewed the stipulation prior to reading the Information to the jury venire and inadvertently disclosed the prior conviction. *Id.* at 475. Here, the judge was completely unaware of the stipulation because it had not been filed prior to voir dire. There is also a significant difference in the charges Defendant and Young were facing. Young was charged with violent offenses, specifically Aggravated First Degree Murder and First Degree Assault (*Id.* at 470-471); Defendant was charged with only nonviolent offenses, Unlawful Possession of a Firearm, Possession of a Controlled Substance and Obstructing a Law Enforcement Officer. Because Young was charged with violent offenses, the disclosure of his prior violent offense raised the risk that the jury's verdict was based on Young's propensity to commit violent crimes. In *Young*, informing the jury of Young's prior assault conviction was a serious irregularity because the prior conviction and the current offenses were both for violent offenses. *Id.* at 476.

In the case of *Mortenson*, Mortenson was charged with felony DUI and attempt to elude. *State v. Mortenson*, 180 Wash.App. 1013, *1, 2014

WL 1286551 (unpublished⁴). The trial court read the Information to the jury venire disclosing that Mortenson had four prior DUI charges. *Id.* at *2. The appellate court applying *Young* found that the trial court's disclosure of the four prior DUI charges was inherently prejudicial given that it involved four prior convictions of the identical crime charged. *Id.* at *4. The appellate court reversed Mortenson's conviction of felony DUI, but it did not reverse his conviction for attempt to elude. *Id.* at *8. The *Mortenson* court found that the trial court's error in disclosing the prior convictions did not affect the attempt to elude charge. *Id.* It noted that the trial court did not inform the jury about any prior convictions for attempting to elude or reckless driving. *Id.* The trial court's error merely revealed prior convictions for unrelated crimes. *Id.* The *Mortenson* court concluded that Mortenson's four DUI convictions did not demonstrate that he had a propensity to elude police vehicles and thus was harmless error with respect to the attempt to elude charge. *Id.*

In Defendant's case, Defendant was charged with only nonviolent offenses. Disclosure of the Second Degree Assault conviction did not raise the risk that the jury's verdict would be improperly based on Defendant's propensity to commit the crimes charged because the prior conviction was completely unrelated to the current charges. Therefore,

⁴ Pursuant to WA R GEN GR 14.1 has no precedential value and is not binding upon any court.

even if the trial judge's disclosure of the Second Degree Assault conviction was error, it was harmless error.

V. The State's closing argument was proper.

A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. Hughes*, 106 Wash.2d 176, 195, 721 P.2d 902 (1986). Resolution of the issue is within the sound discretion of the trial court. *Id.* The trial judge is generally in the best position to determine whether the prosecutor's actions were improper and whether, under the circumstances, they were prejudicial. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). The court reviews a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Sublett*, 156 Wash.App. 160, 185, 231 P.3d 231 (2010). In determining whether prosecutorial misconduct occurred, the court first evaluates whether the prosecuting attorney's comments were improper. *Id.* If the prosecuting attorney's statements were improper and the defendant made a proper objection to the statements, then the court considers whether there was a substantial likelihood that the statements affected the jury's verdict. *Id.* Absent a proper objection and a request for a curative instruction, the

defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *Id.* In reviewing a prosecutorial misconduct claim, the court generally gives the State great latitude in making arguments to the jury. *Id.*

A. The State's closing argument, highlighting the inconsistencies in Mr. Mendez Leon's testimony to question credibility, was proper use of the impeachment evidence.

During closing the State questioned Mr. Mendez Leon's credibility by highlighting inconsistencies between Mr. Mendez Leon's testimony and his prior statements. RP 244-245. Appellant erroneously claims the State argued the prior inconsistent statements as substantive evidence. However, it is clear from the record that the State discussed the prior statements to merely emphasize the inconsistencies between those statements and Mr. Mendez Leon's testimony:

The evidence from all the statements consistently what he said on the stand was that Mr. McCracken was in the car. First, actually, he said when I got picked up, no, he wasn't there. Then all of a sudden when the chase starts, all of a sudden he's there. He put him in the backseat, which we know can't be correct because we know that's where Mr. Xhurape was sitting. He said today -- I never saw a gun. Well, then all of a sudden he's talking about the gun to the officer. He 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. Today, I don't -- I don't know anything about it.

RP 244-245. The State never argued that the prior inconsistent statements were substantive evidence. The State merely used those statements to raise concerns about Mr. Mendez Leon's credibility. The State even went on to caution the jury about Mr. Mendez Leon's testimony and told them to not rely solely on Mr. Mendez Leon's testimony. RP 245. The trial court understood the State's argument and recognized that the State was using the prior statements properly to question Mr. Mendez Leon's credibility. RP 248. Consequently, the trial court found the State's argument was proper and denied Defense's motion for a curative instruction. RP 249.

B. The State's reference to Mr. Mendez Leon's "wink" in its closing argument is a proper comment about witness demeanor.

Appellant didn't object to the State's reference to Mr. Mendez Leon's "wink" during closing argument. Absent a proper objection and a request for a curative instruction, a defendant waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *Sublett*, 156 Wash.App. at 185.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgeron*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). If he failed to

object at the time the misconduct occurred, he must establish that no curative instruction would have obviated any prejudicial effect on the jury and he must establish that prejudice resulted that had a substantial likelihood of affecting the jury verdict. *Id.*

The Washington Practice Series contains a list of objectionable comments that a prosecutor should not make in closing arguments. 13 Wash. Prac., Criminal Practice & Procedure § 4503 (3d ed.). Item 8 on the list states that a prosecutor may not comment on matters outside the evidence. *Id.* The cases cited to support this rule list examples of prosecutors referring to evidence from outside the court room, for example, a prosecutor's personal description of an organization when the description was not a part of the record (*State v. Belgarde*, 110 Wash.2d 504, 507, 755 P.2d (1988)); reference to a victim's unadmitted, inadmissible prior statements and reference to a dismissed rape count (*State v. Boehning*, 127 Wash.App. 511, 514, 111 P.3d 899 (2005)); reading a poem written by an anonymous rape victim (*State v. Caflin*, 38 Wash.App. 847, 849, 690 P.2d 1186 (1984)); speculation as to amount of force defendant used when disciplining contradicted by a witness's testimony on the issue (*State v. Schlichtmann*, 114 Wash.App. 162, 167, 58 P3d 901 (2002)). None involve an incident that occurred in the

courtroom in the jury's presence, albeit an incident, a "wink", that unless a video tape was running is non-recordable.

It is not prosecutorial misconduct to refer to a witness's demeanor on the stand during closing argument. *State v. Israel*, 113 Wash.App. 243, 272, 54 P.3d 1218 (2002). The jury is the sole judge of a witness's credibility and are instructed that one of the factors to consider is a witness's manner while testifying. CP. 58, WPIC 1.02.

In *Israel*, the court found it was permissible for the prosecutor to point out a witness's hesitant demeanor because the witness's credibility was in question. *Israel*, 113 Wash.App. at 272. In *King*, the court found it was permissible for the prosecutor to discuss the demeanor of two of the state's witnesses, specifically that one got "a little bit annoyed" during cross examination and another was "clearly nervous". *State v. King*, 173 Wash.App 1031, *5, 2013 WL 815617 (unpublished⁵).

Here, the State's reference to Mr. Leon Mendez's "wink" was a proper comment on his demeanor while testifying. The State acknowledged the jury is the judge of a witness's credibility by telling them it was up to them in their discussions:

⁵ Pursuant to WA R GEN GR 14.1 has no precedential value and is not binding upon any court.

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, [Mr. Mendez Leon] winked at Mr. McCracken.

RP 244. Even if the State's reference to the "wink" in closing arguments was objectionable, Appellant has failed to meet his burden that reference to the "wink" prejudiced him.

In *Thorgerson*, the prosecutor referred to non-admitted consistent out of court statements of the victim. *Thorgerson*, 172 Wn.2d at 445. Other consistent statements of the victim were admitted into evidence. *Id.* The *Thorgerson* court noted that the prosecutor's references to the non-admitted evidence were not *additional* content, in other words, the evidence the prosecutor referenced did not form any additional basis on which to find the defendant guilty. *Id.* at 447. Thus the court found that Thorgeson failed to meet his burden that evidence not in the record prejudiced him. *Id.* at 448.

Here, even if objectionable, the State's reference to Mr. Mendez Leon's "wink" added to the other evidence discrediting Mr. Mendez Leon's testimony. It did not add anything to the record that the jury did not already have. Mr. Leon's credibility was already questionable. Therefore, the State's argument did not prejudice the Defendant and there is no substantial likelihood that it had an impact on the jury's verdict.

C. The State's argument on constructive possession was not improper because it was consistent with the jury instruction on possession.

During closing argument, the State discussed possession, both actual and constructive. RP 234-236. Defense did not object to the State's argument on possession or request a curative instruction. The State's argument to the jury on constructive possession was consistent with the instruction on possession given to the jury. CP 66. When deciding whether a defendant has possession, one of the factors for the jury to consider is whether the defendant had the ability to take actual possession of the item:

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 . . .

CP 66. The State's argument specifically went this factor.

In *Huckins*, the court addressed an argument that stopped short of making a complete statement of the law. *State v. Huckins*, 66 Wn.App. 213, 218-219, 836 P.2d 230 (1992)⁶. The *Huckins* court noted that the prosecutor's argument did not go beyond the scope of the jury instructions. *Id.* at 220. The *Huckins* court held that "given the entire context of the proceeding, the jury would not have been confused by the

⁶ Originally published at 831 P.2d 1116, but then withdrawn from bound volume and republished at 836 P.2d 230.

State's improper argument and Huckins was not deprived of a fair trial.”

Id.

Here, the State gave a good overview of the instruction on possession. RP 237-239. The State discussed actual and constructive possession and discussed the ability of others in the car to take actual possession as one of the factors of constructive possession. RP 238. Even if the State's argument did not fully state the entire law on possession, it was not beyond the scope of the jury instruction. Plus, the jury was given the full law on possession in the jury instructions. CP 66. Jurors are presumed to follow the instruction of the court. *Stein*, 144 Wash.2d at 247. Here, the trial court instructed the jury that “In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.” The court also reminded the jury that the lawyer's remarks were to be disregarded if they were not supported by the evidence or the law in the jury instructions:

The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions.

CP 58. Even if the State's argument was improper, it was not so flagrant or ill-intentioned that an instruction could not have cured the prejudice and

when taken in context and combined with the full jury instructions it was not prejudicial to the Defendant.

VI. Appellant is not entitled to reversal pursuant to the doctrine of cumulative error because errors, if any, are few and had no effect on the outcome of the trial.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when the trial court's multiple errors combine to deny the defendant a fair trial. *State v. Lazcano*, 188 Wash.App. 338, 370, 354 P.3d 233 (2015). The defendant bears the burden of proving an accumulation of error of sufficient magnitude to warrant a new trial. *Id.* A defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials. *Id.* The cumulative doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Weber*, 159 Wash.2d 252, 279, 149 P.3d 646 (2006).

Here Defendant was not denied a fair trial. There were no errors and the errors alleged by Defendant did not affect the outcome of trial. Defense did not request a limiting instruction as claimed. RP 197-198. A trial court has no duty to give a limiting instruction unless requested. *Russell*, 171 Wash.2d at 124. The curative instruction Defense requested was based on Defense's erroneous claim that the State argued the prior inconsistent statements of Mr. Mendez Leon as substantive evidence. The

record is clear that the State used the prior inconsistent statements properly to highlight Mr. Mendez Leon's credibility issues. RP 244-245. The trial court acted well within its discretion when it denied Defense's motion for a curative instruction to "cure" what Defense erroneously claimed to be State misconduct.

The trial court also acted within its discretion when it disallowed any discussion of Mr. Mendez Leon's prior plea agreement. The prior plea agreement was no longer in effect and had no relevancy or bearing on Mr. Mendez Leon's testimony. RP Supp. 26-28. It is evident from the record that Mr. Mendez Leon's had no motive to testify for the state. He did not want to testify and frequently avoided answering questions by saying he couldn't remember. RP 184-186. Even if the trial court's exclusion of the prior plea agreement is found to be an error, it was not prejudicial to Defendant; its inclusion would not have changed the outcome at trial. Mr. Mendez Leon's testimony was already thoroughly discredited; no additional discrediting was necessary.

The alleged State misconduct during closing argument, if misconduct at all, was not prejudicial to Defendant and did not deprive Defendant of a fair trial. Defendant erroneously claims the State argued Mr. Mendez Leon's inconsistent statements as substantive evidence. It is clear from the record the State used the prior inconsistent statements

properly to question Mr. Mendez Leon's credibility. RP 244-245. Defense did not object to the State's reference to Mr. Mendez Leon's "wink" or to his argument on possession. RP 244. The reference to the "wink" was a permissible comment on witness demeanor and went to Mr. Mendez Leon's credibility which was already in question based on his prior inconsistent statements. The State's argument on possession was consistent with the instructions and not erroneous when taken in context. Even if found to be erroneous, it was not prejudicial to Defendant because the jury was given the full law on possession in the jury instructions and also instructed to disregard the lawyer's remarks if not supported by the evidence or the law given in the instructions.

Issue 7. Imposition of costs on appeal

Respondent takes no position on the imposition of costs on appeal.

Issue 8. Imposition of the jury demand fee, criminal filing fee and DNA collection fee.

Respondent takes no position on the imposition of the jury demand fee, criminal filing fee and DNA collection fee.

CONCLUSION

Based on the foregoing, Respondent requests that this Court affirm Appellant's convictions.

Dated this 29th day of October, 2018

Respectfully Submitted:



Esther M. Milner, WSBA#33042
Prosecuting Attorney
Okanogan County, Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	COA No. 356647
Plaintiff/Respondent)	
)	
vs.)	CERTIFICATE OF SERVICE
)	
David Weston Mccracken)	
Defendant/Appellant)	
_____)	

I, Shauna Field, do hereby certify under penalty of perjury that on the 29th day of October, 2018, I caused the original Brief of Respondent to be filed in the Court of Appeals Division III and a true copy of the same to be served on the following in the manner indicated below:

E-mail: Admin@ewalaw.com

U.S. Mail
 Hand Delivery
 E-Service via Portal

Kristina M. Nichols
Laura Michelle Chuang
Jill Shumaker Reuter
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203

Signed in Okanogan, Washington this 29th day of October, 2018.



Shauna Field, Office Administrator

BRANDEN E. PLATTER
Okanogan County Prosecuting Attorney
P. O. Box 1130 • 237 Fourth Avenue N.
Okanogan, WA 98840
(509) 422-7280 FAX: (509) 422-7290

OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

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