

FILED
Court of Appeals
Division III
State of Washington
6/17/2019 1:43 PM

NO. 36180-2-III

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

STATE OF WASHINGTON
PLAINTIFF/RESPONDENT,

v.

CHRISTOPHER ROBBINS
DEFENDANT/APPELLANT

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On June 7, 2018, after a trial on the merits, a jury of his peers convicted Mr. Robbins of Unlawful Imprisonment and Driving While License Suspended or Revoked in the Third Degree. [RP 375].

The State charged Mr. Robbins with two counts on October 24, 2017; Count 1: RCW 9A.40.030-Kidnapping in the Second Degree and Count 2: RCW 46.20.342(1)(c)-Driving While License Suspended or Revoked in the Third Degree. [CP 6-7]. After trial, the jury returned a verdict of guilty to the lesser included offense of Unlawful Imprisonment in Count 1, and guilty of Count 2 Driving While License Suspended or Revoked in the Third Degree. [RP 375]. The record demonstrates that after Mr. Robbins inquired whether Mr. Robbins and Ms. Perez would ever share an intimate relationship together, and Ms. Perez responded no, Mr. Robbins kidnapped Ms. Perez and would not let her leave the vehicle which he drove toward a secluded wooded area that was not part of the public event, the Barter Faire. [RP 133-138, 149-154, 166-172, 236-237, 240-241, 243-250, 289]. The State also set out to prove that Mr. Robbins, at the time he was driving, had a suspended license. [RP 153, 169-170, 222, 250].

The commonality between both Mr. Robbins and Ms. Perez was the use of drugs, specifically methamphetamine, marijuana, and heroin. [RP 236, 242, 288-289]. After knowing each other for a matter of hours in a span of three days, Ms. Perez agreed to go to the Barter Faire with Mr.

Robbins. [RP 235, 236, 289]. Once there, Mr. Robbins without permission touched or grabbed Ms. Perez's nipple. [RP 240]. Ms. Perez did not like the touching and told Mr. Robbins to stop touching her. [RP 240, 241]. Mr. Robbins did not like that response, and essentially inquired if the two would ever hook up sexually to which Ms. Perez emphatically stated no rejecting Mr. Robbins. [RP 240, 289]. The car became cold and Mr. Robbins had a sleeping bag. [RP 241]. He did not offer the sleeping bag to Ms. Perez despite her testifying that she was cold, and instead, Mr. Robbins repeatedly invited Ms. Perez to get into the sleeping bag with him, which she refused. [RP 241]. Mr. Robbins then drove Ms. Perez up a hill at the Faire that led to the woods. [RP 134-139, 149-154, 166-168, 243-250, 290-295]. Panicked by travelling in a vehicle against her will, Ms. Perez repeatedly screamed to Mr. Robbins to let her out of the car and to leave her alone. [RP 134-138, 149-154, 165-168, 243-250]. Mr. Robbins not only refused to stop the car to let Ms. Perez exit, he grabbed her legs and body to restrain her as she kicked and fought to get out of the car. [RP 243-246]. Eventually, Ms. Perez, overcome with fear from being assaulted produced a pocket knife and stabbed Mr. Robbins in the left hand to get away. [RP 245]. She was then able to exit the vehicle, run to freedom back towards the Barter Faire, and with the assistance of others, hid under blankets in their car until they felt safe enough to seek further assistance. [RP 133-138, 149-154, 166-171, 244-250, 290-299].

At trial, Mr. Robbins put forth a defense of general denial. He did not argue that Ms. Perez consented to being abducted in some way or that he had some legal privilege to kidnap her. Mr. Robbins testified that Ms. Perez would not get out of the car after he told her that he wanted her to leave because she rejected him, and he was tired of spending money on her. [RP 289-294]. He also stated that Ms. Perez kept demanding \$10.00 from Mr. Robbins or she would not get out of the car. [RP 290, 293]. Mr. Robbins testified that he did not know he was stabbed, and stated that Ms. Perez kept threatening to stab him if he did not pay her money. He also testified that she refused to leave the vehicle after numerous requests that she do so. [RP 294-295] Mr. Robbins testified that he recently met Ms. Perez and testified that they had used drugs together and Mr. Robbins felt like he supplied all of the narcotics and received nothing in return. [RP 285-291]. He testified that he supplied the drugs and had the expectation of eventually having sex with Ms. Perez. [RP 289-291]. He stated that once Ms. Perez indicated that she did not want intercourse or otherwise ever with Mr. Robbins, he decided he was “done with her” and would no longer provide her with free drugs. *Id.*

Mr. Robbins also listed Mr. Michael Sackman as a defense witness. [CP 89-91]. The substance of his proffered testimony was that Ms. Perez told Mr. Sackman at some point that she stabbed and attempted to rob Mr. Robbins and she made up the story that Mr. Robbins kidnapped her. [CP 43] [RP 306]. Mr. Robbins and Ms. Perez met at a

Michael Zackman's house. [RP 238, 304]. Mr. Michael Sackman, the defense's witness and Michael Zackman are not the same person and Mr. Sackman did not own the home where the two met, as that was Michael Zackman's home. *Id.* Nor was Mr. Sackman present for any of the events that occurred at the Barter Faire. [RP 142, 240]. The defense never interviewed Ms. Perez to determine whether any prior statements she made were inconsistent with what Mr. Sackman stated he was told. [RP 305]. Finally, Mr. Sackman had impeachable convictions that the State would have used against him in the event that he testified for Mr. Robbins. [CP 43-44] [RP 305-309]. The State interviewed Mr. Sackman prior to trial. [CP 43] [RP 305]. The State found inconsistencies in Mr. Sackman's testimony. [RP 305]. The defense attempted to subpoena Mr. Sackman for trial on the merits, but the defense only sent a subpoena in the mail. [CP 90]. It was sent uncertified and Mr. Sackman never filled out, signed, or return a Waiver of Personal Service. [RP 310, CP 90-91]. The State argued that Mr. Sackman was not a relevant and material witness. [CP 44] [RP 305]. The State submitted that Mr. Sackman's testimony was only cumulative or impeachment testimony at best. *Id.* Upon the defense's request, the court issued a material witness warrant. [CP43-44, 89-92] [RP 310]. At the time the warrant was issued, the State, Court, and defense did not know the whereabouts of Mr. Sackman. [CP 90] [RP 303] The parties knew the last known address of Mr. Sackman and presumed he was there, but no one really knew where the witness

was especially after the witness was present during the first day of trial. *Id.* The defense never expressly requested a postponement. [CP 44] [RP 305-309] Upon the conclusion of Mr. Robbins testimony, the Court did not postpone the case, and the jury returned a verdict of guilty to the lesser included offense of Unlawful Imprisonment of Kidnapping in the Second Degree and guilty of Count 2 Driving While Suspended or Revoked in the Third Degree. [RP 309, 375].

The State put on ample evidence to support the jury's verdict. The State called three witnesses in its case in chief that all testified that they saw Mr. Robbins' vehicle drive by them up the hill towards the woods and Ms. Perez screaming to be let out of the car. [RP 134-138, 149-154, 166-168, 243-250, 290-295]. They all testified that the road travelled on was not for ingress and egress and Mr. Robbins' testimony confirmed such. *Id.* They all testified that they heard Ms. Perez yelling "Let me out." *Id.* The witnesses further testified that they saw the female screaming and frantic, eventually falling out of the car, and ran down the hill hysterically begging for help; and Ms. Perez corroborated this version of events. *Id.* Furthermore, the Custodian of Records for the Washington Department of Licensing testified that the record the State entered into evidence was a true and certified driving record of Mr. Robbins and that it showed that on October 20, 2017 his privilege to drive was suspended. [RP 129]. Mr. Robbins admitted that he was driving on October 20, 2017 in his own testimony. [RP 290-291]. Finally, all witnesses also testified that Mr.

Robbins was driving the vehicle at the time that Ms. Perez was screaming to be let out of the car. [RP 130-138, 149-154, 166-168, 243-250, 290-291].

Ms. Perez essentially testified to the following; she had just met Mr. Robbins within the last forty-eight hours at Michael Zackman's house. [RP 235-238]. She testified that she did not know Mr. Robbins prior to meeting him there. [RP 235-237]. She testified that she agreed to go the Faire and that she did use drugs with Mr. Robbins and by herself. [RP 236-237, 240, 285-289]. Ms. Perez testified that Mr. Robbins made advances towards her, grabbed her nipple without permission, and she rejected him making him angry. [RP 240-241]. As a result, Mr. Robbins claimed to want to go smoke marijuana in the woods, and continued to drive away from the persons in the Barter Faire towards a more secluded area; Ms. Perez stated that she complied because she was scared; she testified that prior to Mr. Robbins stating he wanted to go smoke weed, he had just grabbed her breast and asked her to be intimate to which she said no. [RP 136-137, 149-151, 166-167, 240-241, 243-244, 291-294]. In fear, Ms. Perez kept requesting to be let out of the car to which Mr. Robbins refused. [RP 243-245, 294]. Ms. Perez then frantically yelled, panicked, and kicked to get out of the car. [RP 135-138, 149-151, 166-167, 243-245, 294]. Mr. Robbins still would not let her leave and in fact, held Ms. Perez physically against her will. [RP 243-245, 294]. Ms. Perez produced a knife and stabbed Mr. Robbins' left hand in order to get away.

[RP 244-245, 294-296]. She then testified that she ran down the hill seeking help and hid. [RP 135-138, 151-154, 166-169, 245-249].

ARGUMENTS

1. THE COURT'S DENIAL OF A CONTINUANCE DID NOT VIOLATE MR. ROBBINS' RIGHT TO PRESENT A DEFENSE

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. *Chambers v. Mississippi*, 410 US 284, 294, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973). The right to compel witnesses is guaranteed by the Sixth Amendment, which provides, among other things, in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor. *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). Although jealously guarded, the right is not absolute. *Id.* at 41. Evidence that a defendant seeks to introduce must be of at least minimal relevance. *Chambers* at 622. Defendants have a right to present only relevant evidence, with no Constitutional right to present irrelevant evidence. *Id.* A defendant's fundamental right to compel witnesses to appear on their behalf is restricted by the fact that the witness must be material and relevant to the defense's theory of the case. *Smith* at 41. A denial of a request for a continuance may violate a defendant's right to compulsory process if the denial prevents the defendant from presenting a witness material to his defense. *State v. Eller*, 84 Wn.2d 90, 95, 524

P.2d 242 (1974). The defendant “carries the burden of showing materiality.” *Smith* at 41. Furthermore, disturbing a decision to grant or deny a continuance will only be disturbed upon a “showing that the accused has been prejudiced and/or that the result of the trial would likely have been different had the continuance not been denied.” *Eller* at 95.

In both criminal and civil cases, the decision to grant or deny a continuance rests within the sound discretion of the trial court. *State v. Jones*, 87 P.3d 1169, 1172, 151 Wash.2d 265 (2004). Since 1891, the Court has reviewed trial court decisions to grant or deny motions for continuances under an abuse of discretion standard. *Id.* In exercising discretion to grant or deny a continuance, trial courts may consider factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. *Id.* Finally, a trial court’s decision will not be disturbed “unless the appellant or petitioner makes a clear showing...that the trial court’s discretion is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.*

A. MR. SACKMAN’S TESTIMONY WAS IMMATERIAL TO ROBBINS’ DEFENSE

The trial court’s denial of a continuance in this matter was within its discretion, the court did not abuse its discretion, because Mr. Robbins had no right pursuant to the Sixth Amendment to compel Mr. Sackman as a witness since Mr. Sackman’s testimony was neither relevant nor

material to the defendant's theory of the case. Mr. Sackman did not reside, own, or live at the realty where Ms. Perez stayed at the time that Mr. Robbins and Ms. Perez met. [RP 304-305]. Mr. Sackman was not present for the events that occurred the night prior to Robbins and Perez going to the Barter Faire. *Id.* Defense did not interview Ms. Perez prior to trial in order to call Mr. Sackman as a witness pursuant to ER 613. *Id.* Mr. Sackman did not attend the Barter Faire, and Mr. Sackman was not an eyewitness to the incident. *Id.* In addition, Mr. Sackman had impeachable convictions that the State would have exposed if he did testify, and the State would have also exposed the inconsistency in Mr. Sackman's proffered testimony that the State elicited while interviewing Mr. Sackman with an independent witness. *Id.* [See also: CP 43-44]. Mr. Sackman was allegedly going to testify under oath that Ms. Perez told him that she stabbed Mr. Robbins because he owed her money and she made up the story that she was kidnapped in order to avoid criminal charges for attempting to rob and assaulting Mr. Robbins. [CP 43-44]. This is exactly what the defendant testified to. [RP 289-295]. Mr. Robbins attempted to convince the jury that he was a victim and not the assailant in this case, but the evidence dictated otherwise. [RP 133-138, 149-154, 166-172, 236-237, 240-250, 289-295].

Mr. Robbins testified to this and was subject to rigorous cross-examination. [RP 313-320]. It is safe to infer that the jury did listen to his defense as it did not find him guilty of the most serious offense in this

case. [RP 373-375]. Mr. Sackman's testimony was intended to be used to impeach Ms. Perez by attempting to demonstrate to the jury that at some point after Ms. Perez was kidnapped, she admitted to attempting to rob and stabbing Mr. Robbins. [CP 43-44] [RP 304-305]. Mr. Robbins' council never once interviewed Ms. Sackman. [RP 305]. Therefore, Mr. Robbins' council could not truly know whether Ms. Perez made any inconsistent statements at any time prior to trial. At trial however, the overwhelming evidence demonstrated that Mr. Robbins kidnapped Ms. Perez and she defended herself. [RP 133-138, 149-154, 166-172, 240-250, 289-295]. Mr. Sackman's testimony would not have changed the verdict even if he had been found. [CP 43-44] [RP 304-305].

Also, the material witness warrant should never have issued in the first place because Mr. Sackman was not served properly and there was no return of service in the record. [CP 89-95] At the Readiness hearing it was defense counsel's duty to inform the court that they were not ready if they did not properly summons all of their witnesses. Mr. Robbins' counsel did not do this and announced that Mr. Robbins was ready to proceed to trial. This was strategy to do so. Mr. Sackman was never served and therefore, could not have been validly arrested even if he was found. [CP 44, 89-95]. The Subpoena was mailed but no return of service or waiver of service was ever returned or filed pursuant to CrR 4.8. *Id.*

B. DEFENSE COUNSEL ACTED RECKLESSLY IN
ATTEMPTING TO COMPEL THE PRESENCE OF MR.
SACKMAN

CrR 4.8(a) governs the process for issuing subpoenas to command persons to attend and give testimony in Court. The subpoena must "state the title of the action, the case number, name of the court in which the action is pending, and, if different, the name of the Court from which the subpoena is issued; and (ii) command each person to whom it is directed to attend and give testimony at a specified time and place. CrR 4.8(a)(1)(A). Once the subpoena is drafted, there are specific rules to serve the subpoena to the person who will be commanded to testify in court. "A subpoena for testimony may be served by any suitable person over 18 years of age, by giving the witness a copy thereof, or by leaving a copy at the witness' dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." CrR 4.8(a)(3). The subpoena does not have to be served by an officer authorized to serve process, but in the event that one serves process and is not an authorized officer, "proof of service shall be made by affidavit or declaration." CrR 4.8(a)(3). An alternative to personal service does exist, and one can serve a subpoena through first-class mail, but if the subpoena requires one to appear in court for testimony, the service of the subpoena through mail is not complete until the person who received the subpoena also receives and returns a "waiver of personal service and

instructions for returning such waiver to the attorney of record of the party to the action in shoe behalf the witness is required to appear. CrR 4.8(a)(3). In considering whether to grant a material witness warrant for failure to appear in court to provide testimony, “the warrant shall issue only on a showing by affidavit or on the record in open court, that the testimony of the witness is material and that (2) the witness refused to obey a lawfully issued subpoena.” CrR 4.10(a)(2).

In this case, the defense should never have requested a material witness warrant for Mr. Sackman based upon two reasons. First, Mr. Sackman was not properly served a subpoena to testify. [CP 90-95]. Mr. Robbins' attorney candidly admitted that he mailed the subpoena to Mr. Sackman at his last known address. *Id.* Mr. Robbins' counsel did not state that Mr. Sackman ever mailed, nor did the defense state that they possessed a valid signed waiver of personal service from Mr. Sackman. The record does not provide such evidence either. [CP 89-95] [RP 303, 309]. Therefore, Mr. Sackman was never properly served, which means the subpoena was not lawfully issued. The Court had no power to issue the warrant and abused its discretion when it did. Defense counsel should have been clear to the court when asked that a waiver of service was filled out and sent back to the defense or the Court. That is the only way to perfect service so that the subpoena was lawfully issued in this case. There is no evidence that this was done in this case.

Second, Mr. Sackman was not a material witness for the defense. [RP 304-305] As pointed out earlier, Mr. Sackman's testimony was cumulative and mainly for impeachment. [RP 304-309] CrR 4.10(a)(2) states that material witness warrants only issue if the witness is material and the witness is refusing to obey the subpoena after service, and these facts must be supported by affidavit. The Court, wanting Mr. Robbins to have the fairest possible trial and to procure his witnesses, still should not have issued the material witness warrant because the State, the Court, and the Defendant did not truly know the whereabouts of Mr. Sackman with any degree of high probability; Mr. Sackman was not properly served in this matter, and yet, the parties simply assumed that he would be at his last known address despite being transient having no actual fixed mailing address. [CP 90]. Also, Mr. Robbins did not adequately establish that his missing witness was material to his case since he was merely an impeachment witness. [RP 304-309].

C. THE COURT ACTED ZEALOUSLY IN ATTEMPTING TO
PROCURE MR. ROBBINS' WITNESS FOR TRIAL

As mentioned above, the Court did everything in its power to procure Mr. Robbins witness short of leaving the bench and procuring the witness itself. A defendant's fundamental right to compel witnesses to appear on their behalf is restricted by the fact that the witness must be material and relevant to the defense's theory of the case. *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). The defendant "carries the

burden of showing materiality." *Smith* at 41. The trial court's denial of the request for a continuance was not a constitutional error because the testimony of the witness sought by the defense would have been merely cumulative of the evidence already adduced at trial. *State v. Eller* 84 Wn.2d 90, 98, 524 P.2d 242 (1974). In *Eller*, service was never perfected because the witness purposefully evaded service. *Id.* All parties and the Court knew exactly where Thorson was located; Bellevue, Washington. *Id.* All parties and the Court knew that Thorson was reluctant to come to court and evading service. *Id.* The defense argued that Thorson was a necessary and material witness because The Court did not find her testimony to be material. *Id.* Because Ms. Thorson's testimony only had a cumulative effect, the Court did not err in failing to issue a material witness warrant or granting a continuance. *Id.*

As stated earlier, Mr. Sackman's testimony was not material. The Court attempted to accommodate Mr. Robbins, but its decision to ultimately proceed was within its sound discretion.

D. THE COURT DID NOT ERR IN CONSIDERING ALL FACTORS AND RELEVANT LAW PRIOR TO DENYING MR. ROBBINS A CONTINUANCE

A motion for a continuance is addressed to the sound discretion of the trial court, whose decision will only be reversed for abuse of discretion, that is, only "if no reasonable person would have taken the view adopted by the trial court." *State v. Henderson*, 26 Wn. App. 187,

190, 611 P.2d 1365 (1980); *State v. Barker*, 35 Wn. App. 388, 397, 667 P.2d 108 (1983). Moreover, the decision to deny a continuance will be disturbed only if the defendant shows he was prejudiced or that the result of the trial would likely have been different had the motion for a continuance been granted. *State v. Peters*, 47 Wn. App. 854, 737 P.2d 693 (1987); citing *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); *State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982).

Once again, in this case Mr. Sackman was immaterial to Mr. Robbins defense. In addition, if he was present the first day of trial, but failed to return the second day, it is safe to infer that he did not want to return and was reluctant. No warrant should have ever issued as no subpoena was properly served on Mr. Sackman as evidenced by no Waiver of Service being in the record. [CP 90]. Yet, the Court still issued a warrant and did all it could under the circumstances to provide time for Mr. Sackman to be arrested or appear on his own. Ultimately, in exercising its discretion, opted to deny the continuance because Mr. Sackman was an irrelevant witness as his testimony was immaterial, the defense rested its case, and the trial was over. [RP 304-309].

E. MR. ROBBINS SUFFERED NO PREJUDICE

Mr. Robbins suffered no prejudice from the denial of his request for continuance for the absence of Mr. Sackman. A defendant cannot avail himself of error as a ground for reversal unless it has been

prejudicial. *State v. Cunningham*, 93 Wn.2d 823, 832 (1980) citing *State v. Rogers*, 83 Wn.2d 553 (1974).

Appellate courts long ago rejected the notion that reversal is necessary for any error committed by a trial court. Our judicial system is populated by fallible human beings, and some error is virtually certain to creep into even the most carefully tried case. The ultimate aim of the system, therefore, is not unattainable perfection, but rather fair and correct judgments When a court blindly orders reversal of a judgment for an error without making any attempt to assess the impact of the error on the outcome of the trial, the court encourages litigants to abuse the judicial process and bestirs the public to ridicule it As a practical response to the realities of the trial process, therefore, appellate courts have developed a series of doctrines for analyzing whether error in various types of cases was harmless. The fundamental premise of this sort of analysis is that a defendant is entitled to a fair trial but not a perfect one.

5 Wash. Prac., Evidence Law and Practice § 103.24 citing *US v. Blevins*, 960 F.2d 1252 (1992).

A prejudicial error may be defined as one which affects or presumptively affects the final results of the trial. When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial. But, where the defendant's guilt is conclusively proven by competent evidence, and no other rational conclusion can be reached except that the defendant is guilty as charged, then the conviction should not be set aside because of unsubstantial errors.

State v. Jamison, 93 Wn.2d 794, 800-801 (1980) citing *State v. Martin*, 73 Wn.2d 616 (1968). Exclusion of witnesses is subject to harmless error review. *Jones v. City of Seattle*, 179 Wn.2d 322, 356 (2013).

If the error is of a constitutional nature, the error will be deemed harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Watt*, 160 Wn.2d 626, 636 (2007). A constitutional error does not require reversal when it is clear beyond a reasonable doubt that the jury verdict is unattributable to the error. *Id.* citing *Neder v. US*, 527 U.S. 1, 19 (1999). The appellate court looks at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.* citing *State v. Guloy*, 104 Wn.2d 412 (1985).

If the error is not of a constitutional magnitude, the error is not prejudicial unless, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Cunningham*, 93 Wn.2d at 832 citing *Rogers*, 83 Wn.2d 553; *State v. Rhoads*, 35 Wn.App. 339, 343 (Div.3 1983), *aff’d*, 101 Wn.2d 529 (1984).

In this case even if Mr. Sackman were deemed to be a relevant or material witness, and he were produced at the trial, there is no indication based upon the overwhelming evidence in this matter that the verdict would have been any different. [RP 133-138, 149-154, 166-172, 240-250, 289-295]. Therefore, Mr. Robbins cannot meet his burden of proof that he suffered substantial prejudice that was not harmless even if it did occur.

2. THE COURT CORRECTLY DENIED ROBBINS' MOTION FOR A NEW TRIAL

A motion for new trial was made in this matter pursuant to CrR 7.5(a)(3), alleging new evidence discovered post-conviction. It is well established that a trial court has broad discretion in granting or denying a motion for new trial. *State v. Williams*, 96 Wash.2d 215, 221, 634 P.2d 868 (1981). "The exercise of that discretion will not be disturbed on appeal absent an abuse of discretion." *Id.* citing *State v. Marks*, 71 Wash.2d 295, 301-02, 427 P.2d 1008 (1967). "A court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds." *State v. Larson*, 160 Wash.App. 577, 586, 249 P.3d 669, citing *State v. Roche*, 114 Wash.App. 424, 435, 59 P.3d 682 (2002). "A 'discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" *Larson*, 160 Wash.App. at 586, 249 P.3d 669, citing *State v. Quismundo*, 164 Wash.2d 499, 504, 192 P.3d 342 (2008). "A trial court's ruling on a motion for new trial will not be disturbed absent a manifest abuse of discretion, and a much stronger showing of abuse of discretion is ordinarily required to set aside an order granting a new trial than one denying new trial." *State v. York*, 41 Wash.App. 538, 543, 704 P.2d 1252 (1985).

When a defendant's substantial right has been materially affected by one of the causes listed in CrR 7.5(a)(5), a court will grant a new trial.

If none of the enumerated grounds exist, the grant of a new trial would constitute an abuse of discretion as being based on untenable grounds. *State v. Blight*, 89 Wn.2d 38, 40-41, 569 P.2d 1129 (1977). "Moreover, a new trial is not warranted unless the moving party can demonstrate that the new evidence will probably change the results of the trial." *State v. Sellers*, 39 Wash.App. 799, 807, 695 P.2d 1014 (1985) review denied, citing *State v. Koloske*, 100 Wash.2d 889, 898, 676 P.2d 456 (1984). "Where...the state has produced strong and convincing evidence of guilt and the defendant little or no evidence of innocence, a new trial should not be granted on unsupported, uncorroborated testimony of an accomplice or codefendant, nor upon the offer of any new evidence unless it appears that the newly discovered evidence is of such significance and cogency that it will probably change the results of the trial." *State v. Peele*, 67 Wash.2d 724, 732, 409 P.2d 663 (1966). A new trial is necessitated only when the defendant "has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly." *State v. Russell*, 125 Wash.2d 24, 85, 882 P.2d 747 (1994); see also *State v. Lemieux*, 75 Wash.2d 89, 91, 448 P.2d 943 (1968) ("Something more than a possibility of prejudice must be shown to warrant a new trial."). The granting or denial of a new trial is a matter primarily within the discretion of the trial court, and the decision will not be disturbed unless there is a "clear abuse of discretion." *State v. Bartholomew*, 98 Wash.2d 173, 211, 654 P.2d 1170 (1982). An abuse of

discretion occurs only "when no reasonable judge would have reached the same conclusion." *Id.* at 1129; citing *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989).

Mr. Sackman's testimony was immaterial. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceedings would have been different. A 'reasonable probability...is a probability sufficient to undermine confidence in the outcome.'" *State v. MacDonald*, 122 Wash. App. 804, 809-810, 95 P.3d 1248 (2004) (citation omitted). The defense concludes that Mr. Sackman's trial results would have somehow been different if he were allowed a continuance or opportunity to force the testimony of Mr. Sackman. [Appellant's Brief at 11]. The record demonstrates that there was more than enough evidence to convict, and Mr. Sackman's testimony would have changed nothing. [RP 133-138, 149-154, 166-172, 240-250, 289-295]. First, numerous independent witnesses corroborated and bolstered the testimony of Ms. Perez, which in turn discredited Mr. Robbins version of events. [RP 133-138, 149-154, 166-172]. Second, the independent evidence also supported, corroborated, and bolstered Ms. Perez's version of events as Mr. Robbins was stabbed in the left hand and not the right hand (the left hand would have been farthest from Ms. Perez), which is important in attempting to infer whether Ms. Perez robbed Mr. Robbins or was defending herself attempting to exit the vehicle. [CP 3] [RP 243-248, 289-295, 350]. Additionally, all witnesses

testified that Ms. Perez looked hysterical from fear, and almost immediately hid under a blanket. [RP 136-138, 150-152, 166-168].

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceedings would have been different. A 'reasonable probability...is a probability sufficient to undermine confidence in the outcome." *State v. MacDonald*, 122

Finally, the evidence Mr. Robbins claimed he was denied due to irregularities was merely cumulative or impeaching. [CP 44] [RP 305]. "When the only purpose of new evidence is to impeach or discredit evidence produced at trial, a new trial cannot be properly granted." *Sellers*, 39 Wash.App. at 807, 695 P.2d 1014 (1985) review denied, citing *State v. Edwards*, 23 Wash.App. 893, 898, 600 P.2d 566 (1979). The evidence that would potentially be produced would only be used to impeach the credibility of the victim and attempt to cast doubt onto her testimony and her identification of Mr. Robbins as the man who would not let her leave a vehicle as he held her inside of it while driving despite her demands to be let out. [CP 44] [RP 305, 243-248]. Despite the assertion that this evidence is critical and not merely impeaching, this evidence is merely impeachment evidence. Based on the above reasoning, it is clear that the trial court did not abuse its discretion when it denied Mr. Robbin's motion for new trial.

3. THE PROSECUTOR COMMITTED NO MISCONDUCT MERITTING REVERSAL OF THE CONVICTIONS BECAUSE MR. ROBBINS DID NOT SUFFER PREJUDICE OR OBJECT TO THE ALLEGED MISCONDUCT

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*, 258 P.3d 43, 172 Wash.2d 438 (2011), citing *State v. Magers*, 164 Wash.2d 174, 191, 189 P.3d 126 (2008). Reversal for misconduct will not occur “unless within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Weber*, 149 P.3d 646, 655, 159 Wash.2d 252 (2006). If the defendant does not object to the alleged misconduct at trial, the issue of prosecutorial misconduct is usually waived unless the misconduct was so flagrant and ill-intentioned that it evinces an enduring resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.* at 655.

This case is completely distinguishable from *State v. Babich*, 68 Wn. App. 438. In *Babich*, in closing argument the prosecutor used the cross examination answers of a witness as actual evidence without substantiating the actual existence of any of the evidence. *Id.* That did not happen in Mr. Robbins’ case. The Deputy Prosecutor engaged in proper cross-examination. Mr. Robbins denied most of the accusations in Deputy Prosecuting Attorney’s leading questions. [RP 313-320]. In closing

argument, the prosecutor did just that, made proper argument. The prosecutor correctly pointed out the elements of each offense and the evidence that it believed that it elicited from witnesses and proved through admitted evidence in the record throughout the trial. [RP 349-355] Furthermore, the prosecutor merely argued that the defendant's version of events was not corroborated by the other testimony or physical evidence in the case [RP 353, 361-365]. In Babich, the defense witness testified that Babich was not a known cocaine dealer. 68 Wn. App. 438. The prosecutor then referred to wire recordings of the witness essentially stating that Babich was a known cocaine dealer. *Id.* The prosecutor then argued in closing argument that Babich was a known cocaine dealer even though the wire recordings were never admitted into evidence and the actual testimony by the witness was that Babich was not a cocaine dealer. *Id.* The prosecutor made argument in this case based upon the actual facts in the record, and even if error did occur it was harmless, because the court could immediately cure any harm that may have occurred. In fact, the defense did make a similar objection during closing argument, and the Court immediately sent curative instruction. [RP 362].

4. MR. ROBBINS DOES NOT SUFFER CUMULATIVE ERROR DENYING HIM A FAIR TRIAL

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wash.2d 910, 929, 10 P.3d 390 (2000). In this case though there was

not cumulative error requiring reversal. First, Mr. Sackman was not a material and relevant witness, and therefore, Mr. Robbins did not have a fundamental right to call him at trial. [RP 305-309]. Second, the facts of this case are distinguishable from *State v. Venegas*, 228 P.3d 813, 155 Wash App. 507 (2010). In that case, the defendant was robbed of an expert witness opinion testimony because the State claimed that it had no notice of the expertise the witness possessed, thereby depriving the State time to procure its own expert witness where the State actually had three weeks to obtain a witness. *Id.* An expert witness would be material and relevant for trial. *Id.* The trial Court exercising its broad discretion, denied the defense the use of the expert on the grounds of surprise to the State. *Id.*

In this case, Mr. Sackman was not material or relevant, and therefore, there was no error. Even if there was an error, combining it with the proper closing argument of the prosecutor does not substantiate the cumulative error established in *Venegas*, and Mr. Robbins cannot establish his burden that Mr. Sackman was a material witness.

5. THE COURT DID NOT ERR IN SENTENCING

RCW 9.94A.701(3) governs Community Custody and its terms regarding this case. The Statute states, "a court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for: (a) Any crime against persons under RCW 9.94A.411(2)."

In this case, in addition to imposing the sentence, the Court had authority to order Mr. Robbins to be on community custody. Unlawful Imprisonment counts in regards to whether one can be sentenced to community custody based upon committing said crime.

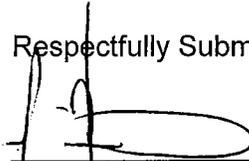
RCW 9.94A.701(9) states that "the term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." Therefore, Mr. Robbins is eligible for release as soon as he earns his good time credits. At the time of release, the Department of Corrections (DOC) is required to reduce his 12 months of community custody by an amount that will not in combination exceed sixty months. Therefore, if Mr. Robbins serves the full 55.5 months of prison time with not one day of good time credit, DOC cannot force Mr. Robbins to be on community custody for more than thirty days. However, if Mr. Robbins only served 25 months due to good time credit, then the DOC could still place Mr. Robbins on the entire 12 month term of community custody. If Mr. Robbins appears to be serving more time than the maximum sentence in this case, the State submits that the sentence is illegal and should be amended.

CONCLUSION

Based on the foregoing, Respondent requests that this court affirm Appellant's convictions and sentence.

Dated this 17th day of June, 2019.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Arian Noma', written over a horizontal line.

Arian Noma, WSBA: 47546
Prosecuting Attorney
Okanogan County, Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	COA No. 361802
)	
Plaintiff/Respondent)	
)	
v.)	CERTIFICATE OF SERVICE
)	
Christopher P. Robbins)	
)	
Defendant/Appellant.)	
_____)	

I, Shauna Field, do hereby certify under penalty of perjury that on the 17th day of June, 2019, 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:

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U.S. Mail
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Signed in Okanogan, Washington this 17th day of June, 2019.



Shauna Field, Office Administrator

OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

June 17, 2019 - 1:43 PM

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Appellate Court Case Title: State of Washington v. Christopher Paul Robbins
Superior Court Case Number: 17-1-00365-2

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