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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL W. WITHEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Whether the trial court abused its discretion by refusing to allow the discovery of the confidential informant's identity when the court determined that such disclosure was unnecessary?
2. Whether Mr. Withey was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to admission of evidence at trial and to statements made during the State's closing argument?
3. Whether the State committed prosecutorial misconduct during its rebuttal closing argument?
4. Whether the \$200 court costs and a \$100 DNA collection fee should be stricken from the judgment and sentence due to retroactive changes in the law regarding legal financial obligations?

II. STATEMENT OF THE CASE

One morning in January 2017, Terrence Cochran woke to find his 2012 white Chevy Malibu missing from its parking spot outside his apartment building in Spokane County. RP 136-38.¹ He notified the authorities and his insurance company that his vehicle was stolen. RP 138.

¹ Three volumes were transcribed in this case. The first volume ("RPmot" herein) was transcribed by Jody K. Dashiell and encompasses pretrial motion hearings heard on March 15 and March 22, 2018. The third volume ("RP" herein) was transcribed by Korina C. Kerbs, and encompasses other

In February 2017, the North Idaho Violent Crimes Task Force issued a bulletin listing the defendant, Michael Wayne Withey, as the “Fugitive of the week,” complete with pictures of Withey, and noting that as of February 7, 2017, his information had been updated to include information that he had been driving the purloined 2012 White Chevrolet Malibu belonging to Mr. Cochran. CP 45.

Spokane Police Officer Scott Lesser was on duty March 15, 2017, when he received information that caused him to drive to the Airway Heights’ Walmart to look for Mr. Withey. Officer Lesser had been searching for Withey for some time because Withey had a warrant for his arrest and was supposedly driving a stolen vehicle. RP 45. Officer Lesser was familiar with Withey; Lesser had reviewed photographs of him in his secure police database, on Facebook, and in several flyers containing other photographs of Withey. RP 46. One of these pictures was a jail photo, another was a picture from the Idaho flyer. RP 46; Ex. S1, S2.²

pretrial motions, trial, and sentencing for dates June 18, June 19, and August 23, 2018. The second volume is not referenced in this brief.

² The Idaho “wanted” flyer (CP 45) with the defendant’s picture and picture of the stolen vehicle was redacted for trial, becoming State’s Exhibit 1. Defendant’s attorney, Ms. Donahue, agreed to the use of these redactions. RP 13.

Spokane Police Officer Winston Brooks was also on duty in Spokane Valley on March 15, 2017, when he was advised by Officer Lesser that Lesser had received information that Withey was going to be at the Airway Heights Walmart. RP 71. Officer Brooks responded, and while responding the distance to Airway Heights, he confirmed the existence of warrants for Withey's arrest. RP 72. Although he was already familiar³ with Withey's appearance and facial features, he reviewed photos of Withey. RP 72; CP 45, 46; Ex. S1, S2.

Upon arriving at Walmart, Officer Brooks was directed to the stolen white Chevy Malibu, which was located close to the store's entrance. RP 74, 82. Because Officer Brooks was driving an unmarked sedan,⁴ he was able to drive so close to the stolen vehicle that he would have been unable to open his door to exit his unmarked vehicle if the need had arisen. RP 74. Officer Brooks slowed down right in front of the stolen vehicle and very clearly identified the sole occupant as Michal Withey. RP 74-75. He was

³ Officer Brooks had prior information about Mr. Withey and his arrest warrant and that he was in possession a stolen vehicle. RP 80-81. He had seen the pictures of Mr. Withey and the stolen vehicle prior to the day he responded to Airway Heights. *Id.* It was part of his job in the "PACT" (patrol anticrime team) to keep familiar with the people at warrant or involved in car thefts. RP 72.

⁴ "I was driving a black unmarked or plain sedan. I know because my car was injured in the shop at the time, or damaged, so I had a loaner car which pretty much fits in with a normal vehicle on the road." RP 72.

certain it was Withey. RP 75. He notified Officer Lesser and other officers that he had confirmed Withey was in the driver's seat. RP 75. Officer Brooks then drove out of the Walmart parking lot, with Withey serendipitously following behind. RP 76.

As Withey followed Officer Brooks, Officer Lesser was able to get a good, clear look at Withey when he drove the stolen white Chevy Malibu around the Walmart Garden Center. RP 49. Officer Lesser was also certain it was Withey. RP 50.

As Withey entered the street from the Walmart parking lot, Officer Lesser pulled behind him, activated his red and blue emergency lights and attempted a traffic stop. RP 52-53. Withey temporarily stopped. RP 53. However, after Officer Lesser exited his patrol vehicle and approached Withey, Withey looked back and then accelerated northbound on Hayford Road. *Id.* Officer Lesser was, again, able to clearly identify Withey as the driver before Withey darted. *Id.*

Officer Lesser immediately started in pursuit. RP 54. Withey ran a stop sign and then sped down Hayford Road towards the casino at an estimated 90 to 100 miles per hour, sometimes veering into oncoming traffic. RP 54, 78. Because there was a lot of traffic on the road, the pursuit was terminated. RP 54-55, 78.

Two days later, the stolen white Chevy Malibu was found abandoned.⁵ RP 115-17. Contemporaneously, a cell phone was found by Ms. Houglum in the same area where the car was discovered. RP 94-97, 123. The phone had only been there a day or so. RP 96, 99. Ms. Houglum gave the phone to her neighbor, Mr. Ahlborn, and he, in turn, gave it to his son, Glen Ahlborn. On March 16, or March 17, Glen⁶ disabled the security software on the phone to determine the owner's identity in an attempt to enable its return. RP 109. Glen determined the owner (or at least the recipient of the e-mails on the phone) was named Michael Withey or Michael Whitey. RP 110. A Google search of that name located an attorney in Seattle and a press release from somewhere in Kootenai County. RP 111. The Kootenai County press release indicated that a person named Michael Withey or Michael Whitey was wanted by law enforcement. RP 111-12. Thereafter, the phone was turned in to the police. RP 97-99, 108-10. Officer Lesser obtained a search warrant for the phone. RP 56. An examination of the cell phone made it very clear that the phone belonged to the defendant, Michael Withey. RP 56-57.

⁵ Corporal Oien described this location as nearby (where the eluding took place) at 4414 North Indian Bluff Road. RP 115. He used a map to point the location out to the jury, but the map has not been designated.

⁶ For ease of reference, Mr. Ahlborn is used to identify the father and Glen is used to identify Mr. Ahlborn's son. No disrespect is intended.

After trial, the jury returned guilty verdicts on both the attempt to elude and possession of a stolen vehicle counts. CP 134, 136. By special verdict the jury found Mr. Withey had threatened other persons with physical injury or harm by this actions during his commission of the crime of attempting to elude a police vehicle. CP 135.

Mr. Withey had an offender score of 9+, yet received a prison-based drug alternative sentence. CP 187.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO ALLOW THE DISCOVERY OF A NON-TESTIFYING CONFIDENTIAL INFORMANT'S IDENTITY.

1. Standard of review and the informant's privilege.

In general, the government is privileged to refuse to disclose the identity of informants who provide information of criminal violations. *State v. Petrina*, 73 Wn. App. 779, 783, 871 P.2d 637 (1994) (citing *Roviaro v. United States*, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957)).⁷ “Disclosure of an informant’s identity shall not be required where the informant’s identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant.” CrR 4.7(f)(2).

⁷ The purpose of the “informer’s privilege” is to encourage citizens to communicate their knowledge to police in order to further and protect the public interest in law enforcement. *Roviaro*, 353 U.S. at 59; *State v. Harris*, 91 Wn.2d 145, 148, 588 P.2d 720 (1978).

However, the informer's privilege is limited by a defendant's right to due process and a fair trial. "When 'disclosure of an informer's identity ... is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.'" *Petrina*, 73 Wn. App. at 783-84 (quoting *Roviaro*, 353 U.S. at 60-61).⁸

The burden of production is on the defendant to come forward with evidence establishing that the informant's testimony was either relevant and helpful to his defense, or essential to a fair determination of his case. *State v. Driscoll*, 61 Wn.2d 533, 536, 379 P.2d 206 (1963); *State v. White*, 10 Wn. App. 273, 279, 518 P.2d 245 (1973); *United States v. Blevins*, 960 F.2d 1252, 1258-59 (4th Cir. 1992) ("Indeed, this circuit has made clear that the onus is on the defendant to 'come forward with something more than speculation as to the usefulness of such disclosure'" (citations omitted)).

In determining whether to allow disclosure, the court must "balance 'the public interest in protecting the flow of information against the individual's right to prepare his defense.'" *Harris*, 91 Wn.2d at 150 (quoting *Roviaro*, 353 U.S. at 62). In applying this test, the court must consider the

⁸ The defendant also has a Sixth Amendment right to compel attendance of material witnesses, so long as the defendant can establish "a colorable need for the person to be summoned." *Petrina*, 73 Wn. App. at 784 (quoting *State v. Smith*, 101 Wn.2d 36, 41-42, 677 P.2d 100 (1984)).

facts of the particular case, including the crime or crimes charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. *Id.* (citing *Roviaro*, 353 U.S. at 62).

The defendant also bears the burden of persuasion; he must show that the above standards require disclosure. *Petrina*, 73 Wn. App. at 784 (citing *State v. Massey*, 68 Wn.2d 88, 92, 411 P.2d 422, *cert. denied*, 385 U.S. 904 (1966)).

A trial court's decision to order or to refuse to order disclosure of an informant's identity is reviewed for abuse of discretion. *Petrina*, 73 Wn. App. at 782 (citing *Harris*, 91 Wn.2d at 152). Appellate courts also review for abuse of discretion the trial court's decision on whether or not to hold an in camera hearing. *Petrina*, 73 Wn. App. at 783.

2. Application of the standard of review to the case.

The defendant claims the trial court abused its discretion by failing to grant his pretrial motion to disclose the identity of the non-testifying confidential citizen informant.⁹ He also claims the trial court erred by failing to *sua sponte* order an in camera hearing with the informant. These claims are without merit.

⁹ For reasons unknown, the defendant filed two identical motions to compel disclosure. CP 26-29, 31-34.

Prior to trial, the defendant filed a motion to compel the disclosure of the name of the person (confidential or citizen informant) who called the police to notify them that the defendant was at the Walmart in Airway Heights. CP 31-34. When the motion was heard, the defendant conceded the informant was neither present at the crime nor a percipient witness to its occurrence. RPmot 6-7. The only reason proffered by Withey to establish his need for the witness's testimony was speculative, that the informant's identification of Withey *may have influenced* the officers, resulting in their misidentification of the defendant. RP 6-7.

The trial court properly denied this motion based on the speculative nature of the motion. Here, the informant was not a percipient witness to the criminal conduct, and neither accused nor provided direct evidence of the defendant having committed any crime. *See* CP 56 (first three findings of fact). Indeed, the only information received by law enforcement from the informant was that the defendant was headed from Northern Quest Casino to the Walmart located at 1221 S. Hayford Road in Spokane, Washington. CP 102-05. It is apparent that the information supplied by the informant only dealt with the location of the defendant; the informant was merely a

tipster as to the potential location of a person wanted by law enforcement for preexisting charged criminal conduct.¹⁰

Here, the defendant's speculation that he may *somehow* impeach the on-the-spot identification of the defendant as the driver and eluder of law enforcement simply because the informant gave the officers a tip as to the defendant's possible whereabouts is, simply, without support.¹¹ The *Roviaro* standard demands more. In applying the *Roviaro* standard, courts have held that mere speculation about the usefulness of an informant's testimony is not sufficient. *Blevins*, 960 F.2d at 1258-59; *United States v. Sharp*, 778 F.2d 1182, 1187 (6th Cir. 1985) (mere conjecture or supposition about the possible relevancy of the informant's testimony is insufficient to

¹⁰ All of the trial court's findings of fact are supported by the record. Those findings are summarized here: The trial court found that the informant did not accuse Withey of any crime, and the informant only gave information of the possible location and vehicle he may be in. CP 56. Further, the informant gave no information of a crime being committed, that the [stolen] vehicle information was already known to law enforcement officers, and that the defendant's appearance was already known to law enforcement. *Id.* Law enforcement had already viewed Withey's pictures prior to the identification of him on the date of the eluding from the wanted posters from Washington and Idaho, as well as in-house database photos. *Id.* Finally, law enforcement located Withey at Walmart and positively identified Withey as the driver of the white Chevrolet Malibu. Therefore, the informant was not a direct witness to the charged crime of attempting to elude a police vehicle. CP 56.

¹¹ The trial court found, as a conclusion of law, that the "confidential informant would not have provided any coercion on law enforcement to arrest Withey." CP 58.

warrant disclosure); *United States v. Zamora*, 784 F.2d 1025, 1030 (10th Cir. 1986); *United States v. Halbert*, 668 F.2d 489, 496 (10th Cir.), *cert. denied*, 456 U.S. 934 (1982). Additionally, because the informant was neither a participant in the criminal conduct, nor a percipient witness, disclosure of the informant's identity is not required. *United States v. Reardon*, 787 F.2d 512, 517 (10th Cir. 1986); *United States v. Perez-Gomez*, 638 F.2d 215, 218 (10th Cir. 1981).

It is apparent that the informant here was merely a “tipster” as to the defendant's location. *See United States v. Gordon*, 173 F.3d 761 (10th Cir. 1999). In *Gordon*, the court stated:

The informant's role in Gordon's arrest was extremely limited. The informant did not detain Gordon, and did not participate in or witness Gordon's detention or the transaction in which Gordon purportedly agreed to transport cocaine in exchange for money. We have refused disclosure in similar cases where the informant has limited information, was not present during commission of the offense, and cannot provide any evidence that is not cumulative or exculpatory. *See United States v. Brantley*, 986 F.2d 379, 383 (10th Cir. 1993); *United States v. Mendoza-Salgado*, 964 F.2d 993, 1001 (10th Cir. 1992); *United States v. Scafe*, 822 F.2d 928, 933 (10th Cir. 1987); *United States v. Halbert*, 668 F.2d 489, 496 (10th Cir. 1982). The Amtrak employee here simply provided a lead and in that sense was a mere “tipster” whose identity and testimony are unrelated to any issue in Gordon's case. *See United States v. Wynne*, 993 F.2d 760, 766 (10th Cir. 1993); *United States v. Morales*, 917 F.2d 18, 19 (10th Cir. 1990); *United States v. Zamora*, 784 F.2d 1025, 1030 (10th Cir. 1986) (“if a confidential informant was only a ‘tipster,’ and not an active

participant in the criminal activity charged, disclosure of the informant's identity is not required").

173 F.3d at 767-68.

Other circuit courts agree that a "mere tipster" is not a material witness whose identity must be disclosed.¹²

Here, the informant was but a tipster as to the defendant's possible location. The identification of Withey by law enforcement was not influenced by the informant, but was established by the study of the Idaho "wanted" bulletin and booking photographs of the defendant, studies which preceded the direct observation of Withey at close range. Therefore, the trial court did not abuse its discretion by denying the defendant's motion to compel the disclosure of the identity of the informant.

¹² See *United States v. Lewis*, 40 F.3d 1325, 1335-36 (1st Cir. 1994) (no disclosure required because informant mere "tipster" in no position to amplify or contradict witnesses' testimony); *Blevins*, 960 F.2d at 1258 (must be more than a mere tipster to require disclosure); *United States v. Cooper*, 949 F.2d 737, 749-50 (5th Cir. 1991) (no disclosure required in robbery case because nothing indicated informant anything more than "mere tipster"); *Sharp*, 778 F.2d at 1186 n.2 (6th Cir. 1985) (disclosure has usually been denied when the informer was not a participant, but was a mere tipster or introducer). *United States v. Harris*, 531 F.3d 507, 515, (7th Cir. 2008) (disclosure not required where informant is a mere tipster); *United States v. Sykes*, 977 F.2d 1242, 1245-46 (8th Cir. 1992) (no disclosure required when informant only alerted police that defendant conspiring to distribute PCP because identity of informant not material when informant mere "tipster" who did not witness or participate in actual offense); *United States v. Gil*, 58 F.3d 1414, 1421 (9th Cir. 1995) (Informants who are mere tipsters need not be revealed).

The abuse of discretion standard of review accords great deference to the trial court. This standard demands the reviewing court only find error when the trial court’s decision adopts a view that no reasonable person would take and is, thus, manifestly unreasonable, or rests on facts unsupported in the record and is thus based on untenable grounds, or was reached by applying the wrong legal standard and is, thus, made for untenable reasons. *See L.M. by & through Dussault v. Hamilton*, 193 Wn.2d 113, 134-35, 436 P.3d 803 (2019); *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993); *and see State v. Sisouvanh*, 175 Wn.2d 607, 620-624, 290 P.3d 942 (2012) (discussing the rationale for the abuse of discretion standard, noting that an abuse of discretion standard often is appropriate when a determination is fact intensive and involves numerous factors to be weighed on a case-by-case basis, or the determination is one for which no rule of general applicability could be effectively constructed).

A reviewing court may not hold that a trial court abused its discretion “simply because it would have decided the case differently.” *Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 494, 415 P.3d 212 (2018) (quoting *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017)).

Here, the trial court properly determined that any testimony by the informant was not relevant and would not be helpful to the defense. There was no error in the denial of the defendant's motion to disclose the identity of the informant.

B. MR. WITHEY WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

1. Standard of review for ineffective assistance of counsel claim.

Mr. Withey asserts his two trial attorneys¹³ were ineffective for failing to enter an objection to Officer Lesser's statement that he knew the defendant had a felony warrant. Withey then claims that as a result of this failure to place an evidentiary objection, or request a limiting instruction, the outcome of the trial would have been different. He fails to meet either necessary element of an ineffective assistance of counsel claim.

To demonstrate ineffective assistance of counsel, Mr. Withey must show that counsel's representation was deficient in that it fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficiency was prejudicial in that there is a reasonable probability that, except for counsel's unprofessional error, the result of the proceeding would have been different. *State v. McFarland*,

¹³ Defendant was represented by two trial attorneys, Ms. Michelle Hess and Ms. Laura Donahue, both from the Spokane County Public Defender's Office. RP 1.

127 Wn.2d 322, 334, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Generally, a failure to request a limiting instruction is deemed a legitimate trial tactic to avoid reemphasizing the damaging evidence. *State v. Dow*, 162 Wn. App. 324, 335, 253 P.3d 476 (2011); *State v. Kloepper*, 179 Wn. App. 343, 317 P.3d 1088 (2014). Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). An attorney's strategic and tactical decisions are not subject to second guessing. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

If a petitioner fails to establish either element of an ineffective assistance claim, this Court need not address the other element. *Hendrickson*, 129 Wn.2d at 78.

2. Use of the term felony to describe the warrant.

Prior to trial, during motions in limine, counsel for defendant attempted to prevent the State from introducing the fact that the defendant had three warrants out for his arrest at the time he eluded the officers who attempted to stop him for the possession of a stolen vehicle. The State argued that the warrants were relevant to the reasons law enforcement was attempting to arrest Withey (*res gestae* ER 404) and also relevant for

regarding Withey's motive for his attempt to elude a police vehicle (exception to 404(b)). RP 16; CP 91-94. The trial court agreed and ruled the warrants were admissible for the res gestae of the case and were also admissible to prove motive and intent. On appeal, no exception is made to the trial court's ruling:

Here, the State could potentially have their case make sense based upon law enforcement finding out a potential stolen motor vehicle was at that location; however, it looks like they were looking for Mr. Withey based upon outstanding warrants. So to some extent this information is needed for the res gestae of the State's case.

Additionally, even though there may be a stolen motor vehicle involved, it could prove motive or intent, which are elements of the crime. So even though it is prejudicial, it appears the probative value outweighs the prejudicial affect.

And there could be a limiting instruction, if requested, to minimize any potential harm that a jury can only consider the alleged outstanding warrants for the purpose of understanding why law enforcement contacted Mr. Withey and potentially for his motive after being contacted.

RP 17-18.

After determining that the warrants were relevant and admissible, a view not contested on appeal, the trial court decided that it would limit any potential undue prejudice resulting from the mention of the warrants at trial. To this end, the trial court limited the mention of the warrants to one warrant, rather than three. RP 18. It also directed the State to not mentioning

“the *underlying* charges or *underlying* reasons for the warrants.” RP 18 (emphasis added).¹⁴

During trial, Officer Lesser testified that he was responding to Airway Heights because he had information that Withey was there in a stolen vehicle and knew Withey had “a felony warrant.” RP 45. The defendant asserts this violated the trial court’s oral ruling that prohibited the mention of the “underlying reasons for the warrants.” The State contends the “underlying reasons” for the warrant prohibits revelation of the underlying nature of the offense, such as theft, eluding, possession of stolen property. It does not address the level of the warrant. The purpose of ER 404(b) is to prevent the introduction of evidence of other wrong acts of a similar nature to show conformity, which, in this case, would include crimes such as eluding, theft, and possession of stolen property. Thus, the single mention of the word felony which only modifies the *rank* of the

¹⁴ The trial court stated:

With that said, there are a couple things that don’t need to be disclosed. One is the underlying charges or the underlying reasons for the warrants. And I think secondly there doesn’t need to be plural warrants. I think just “warrant” is fine. If we use more than one warrant, it shows there could be other bad acts out there, multiple bad acts. Whether there’s one warrant or many, it still gives law enforcement an opportunity to contact him. It also could potentially go towards his motive.

warrant did not violate the trial court’s oral ruling prohibiting the mention of the “underlying reasons” for the warrant. If the term “felony” is not covered by the court’s ruling, no ineffective assistance of counsel can be ascribed to the alleged failure to object.

Additionally, the defendant fails to overcome the presumption that the failure to object, “or to refrain from objecting even if testimony is not admissible,” is deemed a legitimate trial tactic to avoid reemphasizing the damaging evidence. *Klopper*, 179 Wn. App. at 355; *see also State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989) (“The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal”).

The record establishes that Withey’s attorneys knew how to object and did not just sit idly by during trial.¹⁵ Here, the one-time use of the word

¹⁵ *See* RP 67:

Q And when you identified Mr. Withey you were a hundred percent?

MS. HESS [defenses attorney]: Objection, Your Honor. Asked and answered.

THE COURT: Sustained.

“felony” to describe the rank of the warrant was not egregious or central to the State’s or defendant’s case, where the central issue was the closeup identity of the defendant *and the fortuity or phenomenon* of finding his personal cell phone in the vicinity of the abandoned stolen white Chevy Malibu.

The term “felony” was not mentioned in closing or elsewhere during trial. If an objection had been placed, it may not have been sustained, and would have only served to reemphasize the evidence, especially as here where the trial court had ruled that evidence that the defendant was at

See RP 76:

MS. DONAHUE [defense attorney]: Your Honor, objection.
If he could respond to a direct question.

THE COURT: Sustained. If you’ll –

See RP 100:

MS. HESS [defense attorney]: Your Honor, objection.
That’s beyond the scope of cross.

THE COURT: Overruled. Cross-examination, one of the questions was whether she found it on the ground. So this is in regards to where on the ground.

See RP 161:

MS. HESS [defense attorney]: Your Honor, I understand she’s allowed to ask about the facts of a case --

THE WITNESS: I don’t see how this is relevant to this case.

THE COURT: I’ll sustain the objection.

warrant was admissible. It is telling that the defendant highlighted the fact that the defendant was at warrant in his motion to dismiss:

I think as we kind of discussed earlier in the case, the State has also established that Mr. Withey had warrants out for his arrest at the time, and I think it's reasonable to think that he would have ran because of those warrants. I don't think running from law enforcement is enough to establish that he knew a vehicle was stolen. *And that's the element that we're going after.*

RP 145 (emphasis added).

Therefore, the lack of objection to the mention of the felony level of the warrant was tactical even though the motion to dismiss was denied. This principal was also utilized more subtly in the defendant's closing argument where Withey's counsel argued:

The State has not brought any evidence to you showing that Mr. Withey would know that vehicle was stolen or someone would know that vehicle is stolen. There was no damage indicated by any of the officers that saw the vehicle after it was recovered. There was no smashed windows. There was no screwdriver in the ignition. There was no hot wiring, nothing, to be really be a blatant tip-off that this was a stolen vehicle. I believe one of the officers even testified that it was fairly clean. *There's no way that the State can prove that Mr. Withey or the driver of the vehicle knew that that car was stolen.* And there's no implication that's been presented to you that Mr. Withey was the one that stole the vehicle. It had been missing for a few months. They had been looking for that car. And with that gap in the facts, there's no way to establish that he was the one that knew it was stolen.

RP 204 (emphasis added).

Fundamentally, this argument makes sense. If the jury were to believe (the obvious) that Mr. Withey eluded the officers, he still may not be culpable for *knowingly* possessing a stolen vehicle, which is the far more serious charge.¹⁶

Finally, Mr. Withey cannot show that but for the one-time mention of the word “felony,” the outcome of the trial would have been different. There was a superfluity of incriminating evidence. This included the direct testimony that the officers were positive that Withey was driving the stolen vehicle; that their identification was made only after carefully reviewing his mug shots and other photographs immediately prior to these observations. There was the unexplained and serendipitous discovery of Withey’s personal telephone. The evidence was overwhelming and any alleged error occurring from the lack of one objection was harmless beyond a doubt.

Therefore, the trial court ruling did not prohibit the use of the term felony as a modifier of the word warrant. Any failure to object to the one-time use of that term was tactical to avoid over emphasizing the fact that there was an arrest warrant. It was also tactical in that it could be used to account for the defendant’s flight (eluding) yet militate against a finding

¹⁶ The possession of a stolen vehicle has a 10-year maximum sentence, and has a base standard range sentence approximately twice that of the eluding count. *See* CP 168 (Judgment and Sentence, range of 22-29 months for eluding; compared to 43-57 for knowingly possessing stolen vehicle).

that the flight was reflective of the defendant's knowledge that the vehicle was stolen. In any event, the one-time mention of the word felony was harmless.

3. Lay witness Ahlborn's testimony that he "discovered a press release from somewhere in Kootenai County on a warrant for somebody with this name."

The trial court ruled that the witnesses could testify to the existence of an arrest warrant, but not the "*underlying* charges or *underlying* reasons for the warrants." RP 18. Lay witness Glen Ahlborn's statement that he discovered a warrant for somebody named Withey (or Whitey) in Kootenai County did not violate that ruling. Moreover, the damaging nature of this evidence was the ownership of Withey's phone. Officer Lesser wrote a search warrant for the phone and determined from the information on the phone, including Withey's Facebook photos of himself, that "it was very clear that it was, indeed his phone."

Mr. Ahlborn's statement that he discovered a "warrant" did not violate the trial court's ruling, and was, in fact, authorized by the trial court's ruling. There was no error in this regard. Furthermore, no harm came from this because Officer Lesser, by search warrant, was able to determine that the phone was, indeed, Withey's.

C. THE STATE DID NOT COMMIT INCURABLE PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT WHEN THE STATE MADE THE SAME ARGUMENT MADE BY THE DEFENDANT DURING HIS MOTION TO DISMISS.

Courts review allegations of prosecutorial misconduct during closing argument in light of the entire argument, the issues in the case, the evidence discussed during closing argument, and the court's instructions. *State v. Sakellis*, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011). Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered. *State v. O'Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007); *and see also State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

Mr. Withey alleges that the State committed incurable prosecutorial conduct during closing argument when the State inferred that Mr. Withey could be "running from" a warrant. He alleges this single statement, made without any objection, was so flagrant and ill-intentioned that reversal is required, and that this single statement creates a substantial likelihood that, without the statement, the jury would have rendered a not guilty verdict.

Withey fails to establish that any prosecutorial misconduct occurred in the State's closing argument. He concedes no objection was made to the

“running from” statement. That concession is not surprising because Mr. Withey previously argued, in his motion to dismiss, that it was reasonable to assume he was running from the warrant. *See* RP 145-46.¹⁷ Additionally, the trial court *ruled* that this was one logical inference of motive arising from Withey’s flight from police. RP 17-18. The State has wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Thompson*, 169 Wn. App. 436, 496, 290 P.3d 996 (2012). There was no error here.

Moreover, *if* the inference were not supported in law and fact, and *if* the defendant had objected, there is no showing that a curative instruction would not have sufficed to remedy the harm, nor is there a showing that the comments had a substantial likelihood of affecting the jury’s verdict. Withey’s uncertain nod in the direction of prejudice is insufficient. Indeed, he still fails to account for the solid identification made of him in the

¹⁷ Ms. Donahue [defense attorney]:

I think as we kind of discussed earlier in the case, the State has also established that Mr. Withey had warrants out for his arrest at the time, *and I think it’s reasonable to think that he would have ran because of those warrants*. I don’t think running from law enforcement is enough to establish that he knew a vehicle was stolen. And that’s the element that we’re going after.

RP 145 (emphasis added).

Walmart parking lot, and fails to explain away the fact that his personal cell phone was found near the situs of the abandoned stolen vehicle. “Actual and substantial prejudice is made of sterner stuff.” *In re Finstad*, 177 Wn.2d 501, 509, 301 P.3d 450 (2013). There was no error, never mind an insurmountably prejudicial error, resulting from the State’s (and the defendant’s) use of a valid inference in this case.

D. LEGAL FINANCIAL OBLIGATIONS SHOULD ONLY BE IMPOSED IN ACCORDANCE WITH STATUTE.

Mr. Withey was ordered to pay a \$200 criminal filing fee and a \$100 DNA collection fee. CP 172. Mr. Withey appealed, and the trial court entered an order of indigency, granting him the right to review at public expense. CP 201-202. Because the law has changed since Mr. Withey’s adjudications, the court should only impose legal financial obligations in accordance with the holding of *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).

House Bill 1783, which became effective June 7, 2018, prohibits trial courts from imposing discretionary legal financial obligations (LFOs) on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 6(3); *Ramirez*, 191 Wn.2d at 738. This change to the criminal filing fee statute is now codified in RCW 36.18.020(2)(h). These changes to the criminal filing fee statute apply prospectively to cases pending direct

appeal prior to June 7, 2018. *Ramirez*, 191 Wn.2d at 747. Accordingly, the change in law applies to Mr. Withey's case. Because Mr. Withey is indigent, the criminal filing fee must be stricken pursuant to *Ramirez*.

The change in law also prohibits imposition of the DNA collection fee when the State has previously collected the offender's DNA because of a prior conviction. Laws of 2018, ch. 269, § 18. The uncontested record establishes that Mr. Withey has ten Washington State felonies since 1990. CP 158. Since that time, Washington law has required defendants with a felony conviction to provide a DNA sample. Laws of 1989, ch. 350, § 4; RCW 43.43.754. It is a reasonable conclusion that Mr. Withey's criminal history means the State has previously collected a DNA sample from him.

The trial court intended to waive all discretionary obligations. *Ramirez* mandates the 2018 LFO amendments apply to cases pending on appeal; the State therefore concurs that the challenged obligations should be stricken.

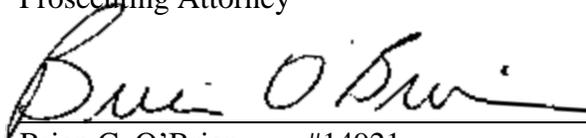
Therefore, this Court should remand this case for the trial court to strike the \$200 in court costs and the \$100 DNA collection fee from Mr. Withey's judgment and sentence. However, the defendant's presence is not required for the trial court to make this correction. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (defendant's presence not required for ministerial correction).

IV. CONCLUSION

The trial court did not abuse its discretion by denying the defendant's motion to compel the disclosure of the identity of the informant. The one-time mention of the word "felony" in conjunction with the word "warrant" was not prohibited by the trial court's ruling and was harmless in any event. Mr. Ahlborn's statement that he discovered a "warrant" did not violate the trial court's ruling, and was, in fact, authorized by the trial court's ruling. There was no prejudice, never mind an incurable prejudice, inuring from the State's closing argument. The judgment and sentence should be affirmed other than a remand for the striking of the \$200 filing fee and the \$100 DNA fee.

Dated this 23 day of May, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
Senior Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WITHEY,

Appellant.

NO. 36312-1-III

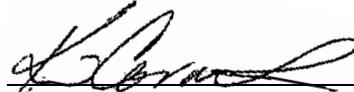
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 23, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Laura Chuang and Jill Reuter
admin@ewalaw.com

5/23/2019
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

May 23, 2019 - 12:01 PM

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