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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TODD RAYMOND BUSH, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The court violated Mr. Bush's confrontation right under the Sixth and Fourteenth Amendments and article I, section 22, of the Washington State Constitution.
2. The court erred by prohibiting cross-examination into matters affecting Hardin's bias and motivation to testify.
3. The court erred by refusing to allow cross-examination into Hardin's well-founded belief that he might receive some benefit from cooperating with the State.
4. Mr. Bush's conviction was based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process.
5. The prosecutor improperly introduced irrelevant evidence suggesting that Mr. Bush was involved in dealing methamphetamine.
6. The trial court erred by denying Mr. Bush's motion for a mistrial.
7. The timing of the trial court's curative instruction had the effect of emphasizing the improper propensity evidence.

II. ISSUES PRESENTED

1. Did the trial court err by prohibiting cross-examination about a non-existent cooperation agreement, when voir dire of the witness revealed that the State never offered Mr. Hardin a cooperation agreement on unrelated charges, Mr. Hardin agreed he had never been offered incentive to cooperate, subjectively did not believe there was a plea agreement, and there was no foundation to support defense counsel's speculation that a purported agreement existed?
2. Did the trial court abuse its discretion by refusing to grant Mr. Bush's request for a mistrial, when the trial irregularity was not serious, the State was eliciting testimony in accordance with the court's prior ruling denying Mr. Bush's motion in limine, and a curative instruction was the appropriate remedy?

III. STATEMENT OF THE CASE

Todd Bush appeals from his convictions for vehicular homicide and possession of a controlled substance. CP 280-81.

Substantive facts

Ty Hardin was driving in downtown Spokane on May 2, 2016. RP 156-58. He had a passenger in his vehicle named Ann Huston. RP 173-80. An hour prior to midnight he was driving northbound in the far left lane, approaching the Division Street bridge. RP 158-61. A black Blazer travelled next to Mr. Hardin in the middle lane, before it suddenly veered over the far right lane, catching his attention. RP 162. The Blazer ultimately slammed into a person riding a bicycle on the sidewalk next to the road. RP 163, 214-16. The Blazer shoved the bike into a concrete barrier, and the force of the collision threw the rider, Richard Johnson, over the side of the bridge onto the ground below. RP 163, 199, 228. Mr. Johnson died as a result of the collision. RP 473, 492.

The driver of the Blazer did not stop, so Mr. Hardin followed the vehicle while Ms. Huston called 911.¹ RP 163-64. At the other end of the bridge, the vehicle turned right into a dead-end; Mr. Hardin followed it and maintained visual contact with the vehicle the entire time. RP 166-67.

¹ The 911 call recording described the incident as it was happening, and the State published the recording to the jury. RP 186, 177; Ex. 7.

After the vehicle stopped; Mr. Hardin observed Mr. Bush exit from the driver's side door while a female exited from the passenger side door; the female passenger immediately fled. RP 168, 180. Ms. Huston also witnessed the same events. RP 173-80. Both Mr. Hardin and Ms. Huston identified Mr. Bush as the driver who had hit Mr. Johnson. RP 168, 181. Another witness on scene, Jeffrey Miesner, also saw Mr. Bush leave the driver's side door and then return to the car to do "something" underneath the dashboard. RP 194-95.

Lieutenant Dean Sprague of the Spokane Police Department arrived on scene and located Mr. Bush. RP 197-200, 205. Mr. Bush told Lieutenant Sprague that he had just been a passenger, and a woman named "Jessica"—who he had just met and did not know—had been driving his car and fled on foot. RP 206-07. Lieutenant Sprague doubted that Mr. Bush would permit someone he did not know to drive his vehicle; he also noted that, because of the impact, the passenger would have "sparkled" with shattered glass from the front window, but Mr. Bush did not. RP 207-08.

Officer Michael Huffman, a drug recognition expert, responded to the scene. RP 315-16, 334. He spoke to Mr. Bush. RP 335. Mr. Bush told him that a person named "Jenny"—not "Jessica"—was driving the car. RP 335. When Officer Huffman responded that other witnesses stated he was the driver of the vehicle he claimed that, for reasons he did not explain,

“Jenny went over him and got out the passenger side seat. He [Mr. Bush] then proceeded to jump in the driver’s side seat.” RP 337.

Officer Huffman detected signs of drug impairment. RP 337-38, 351-62. After an evaluation, he suspected Mr. Bush was under the influence of drugs. RP 364. The officer sought and executed a search warrant to take Mr. Bush’s blood. RP 365-66, 456. A blood test confirmed the presence of methamphetamine in Mr. Bush’s blood. RP 408, 514.

Law enforcement executed a search warrant on the vehicle. RP 261. Officers discovered a 500-gram scale in the center console of the Blazer, which had a liquid substance on it. RP 263-64, 269. They also found a lighter, glass pipe, and a bag containing methamphetamine. RP 268-69, 271.

Eight days later, Mr. Bush gave an interview to law enforcement. RP 561. He then admitted to police that he was, in fact, driving, contradicting his earlier statements. RP 561. He now claimed his fiancé, Summer Patrick,² had grabbed the wheel and caused the collision. RP 561. He claimed that Ms. Patrick frequently engaged in this type of behavior in the car. RP 565. He also claimed all drug paraphernalia in the car belonged to her, not to him. RP 568-69. He denied using methamphetamine.

² The couple later married, but for clarity the State will refer to her as Ms. Patrick.

RP 574. When given the opportunity, he did not claim that any person named “Jenny” or “Jessica” was in his vehicle the night of the homicide.

RP 581. Mr. Bush asserted that Ms. Patrick was kicking or damaging the wheel or infotainment screen inside the vehicle at the time of the homicide, but law enforcement’s search did not reveal any such damage. RP 583-84.

Procedural history

The State charged Mr. Bush with vehicular homicide and possession of a controlled substance—methamphetamine. CP 2-3. The State was unable to serve Mr. Hardin with a subpoena after multiple attempts over many months. CP 75, 81-82. At some point in April 2018, the State charged Mr. Hardin with an unrelated felony theft crime. CP 81-82. On May 30, 2018, the State offered a plea bargain on this unrelated case; different prosecutors were involved, and the plea did not reference Mr. Bush’s case. RP 145-46.

On June 7, 2018, law enforcement arrested witness Mr. Hardin pursuant to a material witness warrant. CP 75. The trial court then moved the trial date, set for June 18, 2018, to October 22, 2018, necessitating the release of Mr. Hardin from custody. CP 75. The State moved the court for an order to preserve Mr. Hardin’s testimony through a deposition, which included a full opportunity for cross-examination, in the event that it could

not locate Mr. Hardin for the October trial date. CP 75. The court granted the motion. RP 89-90.

During Mr. Hardin's June 21, 2018, deposition, Mr. Bush did not attempt to elicit any evidence of any purported plea bargain for Mr. Hardin's unrelated theft charge, or any link between Mr. Hardin's May 2018 plea offer and his testimony in Mr. Bush's case. RP 106-10. Having secured Mr. Bush's testimony, the court ordered Mr. Hardin released from custody. RP 113.

Mr. Bush's case went to trial on January 14, 2019; Mr. Hardin was in custody on new charges and transported to trial. RP 144. Immediately prior to opening statements, the State informed the trial court that defense counsel theorized Mr. Hardin received a plea bargain in exchange for his cooperation. RP 131-33. The State adamantly refuted making such an offer and asked the court to individually voir dire Mr. Hardin outside the presence of the jury. RP 133-34, 138 ("Ms. McNulty and myself at no point offered Mr. Hardin any kind of deal or consideration on his then pending cases"). Mr. Hardin pleaded guilty to his unrelated theft charge, and the State incorrectly calculated his offender score; this was discovered when Mr. Hardin accrued additional charges and was told his score would be calculated as a 9+. RP 133.

Outside the presence of the jury, the State questioned Mr. Hardin under oath about the purported deal:

[THE STATE:] Now, in relation to the charges that were adjudicated or that you pled to in June of 2018, do you feel that you received a deal in exchange for being a witness in this case?

[MR. HARDIN:] No.

[THE STATE:] Were you at any point offered consideration from the State for your testimony?

[MR. HARDIN:] No.

RP 140-41. Next, defense counsel questioned Mr. Hardin:

[DEFENSE COUNSEL:] And since then you've been in court for a theft third degree from 2017, two counts of theft for 2017; is that right?

[MR. HARDIN:] Correct.

[DEFENSE COUNSEL:] And then later on you were in court here this year for a trafficking in stolen property; is that right?

[MR. HARDIN:] Yes.

[DEFENSE COUNSEL:] And then that was dropped down to theft 2 with intent to resell?

[MR. HARDIN:] No. It was taken off and I accepted because there were two charges.

[DEFENSE COUNSEL:] I see. So the trafficking was dropped?

[MR. HARDIN:] Trafficking was dropped.

...

[DEFENSE COUNSEL:] Did it ever cross your mind that perhaps you would receive some sort of leniency or mercy by the prosecutor because you were being cooperative in coming to court on the Todd Bush case?

[MR. HARDIN:] *I wish, but it wasn't.*

[DEFENSE COUNSEL:] Okay. You wished that that would be the case?

[MR. HARDIN:] *Yeah, but that was not. They never offered me anything and I didn't ask for anything.*

[DEFENSE COUNSEL:] Okay.

[MR. HARDIN:] *As a criminal, we, of course, would wish something to be like that, but it didn't happen.*

[DEFENSE COUNSEL:] Okay. So that was your hope that that would occur, but you don't feel you got any leniency because of your assistance?

[MR. HARDIN:] *It wasn't my hope just on that charge. It's hope on every charge, you know. It wasn't part of the deal.* My deal was that my points have dropped and cleared away and I accepted what I did.

RP 141-42 (emphasis added).

The State asked permission to create a record of the procedural history of Mr. Hardin's criminal cases to avoid an appellate issue. RP 144-45. The State routed Mr. Hardin's unrelated theft charge to the early case resolution (ECR) docket, a docket that encourages swift resolution of criminal cases. RP 145. Mr. Hardin entered this docket and was given a plea offer in May of 2018, which was prior to his preserved testimony in June. RP 146. The State reiterated that the miscalculation of Mr. Hardin's offender score was simply that; the State never asked Mr. Hardin to testify in Mr. Bush's case in exchange for a deal. RP 146. Mr. Hardin testified under oath he never asked for and never received such an offer. RP 146. Mr. Bush argued that this "subjective hope" confirmed bias, and asked the court for permission to cross-examine Mr. Hardin on this point in front of the jury. RP 147. The State reminded the court that Mr. Hardin had made a police report in 2016, years before any of these charges, and had already provided preservation testimony entirely consistent with that report. RP 148-49.

The trial court agreed with the State, reasoning that: (1) Mr. Hardin never received any consideration from the State; (2) he acknowledged he did not receive consideration nor ask for consideration; (3) no cooperation agreement existed; (4) no foundation in fact existed to support the claim; and (5) the prejudice outweighed the complete lack of probative value on the point. RP 149-50. The trial court concluded: “I don’t find any probative value in that and I don’t find anything that supports demonstration of bias. I mean, in other words, just because he hopes that he might get favorable treatment in sentencing doesn’t demonstrate bias where he didn’t ask for an agreement and one was never offered.” RP 150.

At a recess during the State’s case-in-chief, Mr. Bush moved the court to exclude any evidence of the 500-gram scale located in Mr. Bush’s vehicle. RP 188. Mr. Bush argued the scale had no probative value and could be prejudicial because a jury might infer Mr. Bush was a drug dealer but did not cite a specific evidence rule. RP 188. Mr. Bush acknowledged that the scale could be used to buy methamphetamine and perhaps the owner of a scale would use it to ensure he or she was not “ripped off.” RP 188.

The court asked the State if the scale was relevant to the case, and the State asserted the scale was relevant to both charges. RP 190-91. The State had charged Mr. Bush with vehicular homicide while under the influence of methamphetamine and possession of a controlled substance—

methamphetamine; the scale was located in the center console of Mr. Bush's vehicle along with methamphetamine. RP 190. The State argued specifically, "the fact that he has a scale used to measure drugs in his vehicle is probative, far more so than prejudicial in terms of his access to drugs, how recent he may have used those drugs. And it's in his vehicle, Your Honor. This is his registered vehicle, found in the center console." RP 191. The State intended to elicit evidence the scale is used to measure objects, including drugs. RP 190-91.

The court ruled the scale was relevant and probative:

I'm going to decline the motion in limine. It's my sense, having heard both sides that given that methamphetamine is alleged to have caused or contributed to this accident and this event, the proximity of that scale to Mr. Bush, the fact that it was physically in his car at the time of the accident are all probative of whether Mr. Bush would or wouldn't have access to methamphetamine. And I'm purposefully on my own initiative weighing what the probative value is as compared to the prejudicial value under 403. And I am finding this instance in this type of case that the probative value outweighs the prejudice. And so, again, as I indicated at the outset of my remarks, I am declining the motion.

RP 191-92.

The State elicited testimony and presented exhibits demonstrating law enforcement found a 500-gram scale in the vehicle; Mr. Bush did not object. RP 263-64. Detective Brian Shrier, a collision reconstructionist and former narcotics officer, testified that the glass pipe, lighter, and bag of methamphetamine located together suggested methamphetamine

possession and use. RP 258, 272. The State referred Detective Shrier to the exhibit depicting the scale and asked him the significance of the item. RP 280. Detective Shrier answered, “A small 500-gram under-a-pound scales that are generally located—that I’ve located in the past in other cases are a lot of times part of a drug distribution.” RP 280. Mr. Bush objected, moved to strike the testimony, and moved for a mistrial. RP 280. The State stated that it was intending to elicit testimony that the scale was used to measure, as it did in the previous motion in limine. RP 280-81. Mr. Bush responded by claiming this was “hogwash” and that the State intentionally tried to discuss drug dealing. RP 282. The court excused the jury and heard argument. RP 281.

In support of his request for a mistrial, Mr. Bush argued the evidence was prejudicial by painting him as a drug dealer:

And so—but we heard from the prosecutor this morning that there was a scale present. And we also heard from [the State] this morning that it was a 500-gram scale present. So I made a timely objection to that. It was overruled.

And I worried over my lunch break, Your Honor, about the fairness that Mr. Bush would have in this trial with this spectre somehow or this cloud hanging over his head, the idea that he could be involved in drug distribution. I didn’t dream that somehow what [the State] had the nerve to imply in his opening would somehow push that further to explicitly endorse that theory. I didn’t know it would get that far. But having gotten the free rein from the Court this morning to mention the 500-gram scale, which is a significant amount of drugs to weigh that amount, he saw fit to then go in and,

you know, elicit this testimony that it was particularly of the kind of drug for drug distribution.

So I look forward to any explanation from [the State] as to his innocuous intent, what he hoped would be elicited from that question that somehow wouldn't prejudice my client to the utmost extreme. I'm looking forward to hearing that.

He is not so naive as a prosecutor to expect a different more benign answer from a scale that can weigh that. You can weigh to consume it. When you buy at the front end, you can make sure you're not getting ripped off, but that's irrelevant to the factor here. So that would be our position.

You can't unring the bell. Meth users, as I stated earlier in front of the bench, are held in the lowest regard and then meth dealers really weigh beyond that and that's just not what Mr. Bush is charged for. So with that, I would renew my motion for a mistrial.

RP 284-85.

The State responded:

The State's intent here is to go into the officer's training and experience on essentially what a scale is used for so that the line of questioning that I intended to go down is that a scale is used to measure something. One of the things that the State has to prove in this case is possession of a controlled substance. So I understand [Mr. Bush] thinks that meth users and meth dealers are particularly looked upon lowly in society. But, again, the issue is Mr. Bush is charged with possession of a controlled substance and one of the elements of that is the State has to prove possession.

[Mr. Bush], in his opening statement, offered another suspect who I anticipate he is going to say that meth belonged to; that evidence in this case there are statements from Mr. Bush where he's casting the blame on another suspect. So one of the elements that the State has to show is possession, and part and parcel of possession is dominion and control of a particular item.

So this line of questioning in regard to the scale, the pipe, the lighter, and the meth itself is showing that there are items of paraphernalia strewn about in this vehicle that is owned by Mr. Bush. So the State believes this evidence is extremely probative as to the issue of possession and whether or not he was, in fact, in possession of the items and whether or not he was in constructive possession of the items. There is a body of case law that talks about drugs found in different areas of a car that can be ascribed to the registered owner based on where they're particularly placed.

So this particular issue of what the scale is used for, if I recall correctly, the officer's response said, well, in his training and experience this is something that he finds used for distribution. My follow-up question to that would be: "I want to be clear, Mr. Bush isn't being charged for distribution. What is a scale used for, Detective?" "To measure something." And it's in the State's position that the scale itself is paraphernalia when taken in conjunction with the other items. So as paraphernalia it has probative value as to the issue of possession because if the State shows that there's paraphernalia present in various passenger compartments of this vehicle, a vehicle owned by Mr. Bush, then the State is meeting its burden of proving possession. So that's the State's intent in going down this line of questioning.

There is no allegation that Mr. Bush is charged with distribution of a controlled substance, but he is charged with possession. And whatever prejudice that has is just something that—that's just present in this case.

So a defendant isn't entitled to exclusion of prejudicial evidence. That's not the standard. The defendant is entitled to exclusion of evidence that is unduly prejudicial when weighed in light of its probative value. And I believe the Court has already ruled on this issue. I do believe that any allegation of distribution can be remedied with follow-up questioning and to clarify that the charge in this case is possession of a controlled substance, not distribution of a controlled substance and I don't believe that a mistrial is appropriate.

I think that—and, again, I submit to the Court that the State had no intent to develop this testimony about distribution of drugs.

As [defense counsel] indicated, Mr. Bush is also charged with vehicular homicide by DUI, driving under the influence of methamphetamine in this case. If the State's evidence shows that there was methamphetamine present in the vehicle, that there was the means to consume that methamphetamine, there is a means to weigh it out, to measure it, to ingest it, that it is meeting its burden of proving all the elements necessary in that crime.

RP 286-89.

The court declined to grant the mistrial, stating, "mistrials are requested not infrequently, so the law concerning mistrials is fairly well known to me. One cornerstone of it is that a court would only declare a mistrial when there is no other option, there's no other way of having the jury disregard the putative offending evidence. The jury is presumed to follow the instructions of the court, and it's a high presumption." RP 289. The court ruled on Mr. Bush's preserved objection to relevance, explaining that it is not relevant whether a scale may be "used for drug distribution" but that a mistrial was not appropriate because—consistent with its earlier ruling on this issue—the scale itself was probative because the State charged Mr. Bush with being under the influence of and possessing methamphetamine. RP 289.

The court asked Mr. Bush to craft a curative instruction. RP 289. The court further reasoned, "I'm confident that juries faithfully follow what courts instruct, particularly in a serious case like this. I don't think the question was asked in order to elicit that response, and I don't think that the

response that the officer gave was intentionally used ... he was speaking from experience.” RP 290. The court reiterated, “I think the appropriate remedy is a curative instruction.” RP 290.

Mr. Bush’s proposed instruction asked the court to not only give a curative instruction, but also to admonish the prosecutor and the officer in front of the jury, “the proposed curative instruction I would seek is ‘I have a further instruction to the jury on the subject of the defense attorney’s last objection. It was wrong for the detective to say and for the prosecutor to elicit that such a scale is used for the distribution of controlled substances. The jury is to disregard that statement by the detective entirely.’” RP 292. Mr. Bush also asked the court to individually poll the jurors to ensure they could remain fair. RP 294. The court determined Mr. Bush’s request was excessive and decided to craft its own. RP 297.

The court created an instruction, and the following exchange took place:

THE COURT: So my curative instruction will be as follows: “The defense objection to the last statement of Officer Brian Shrier is sustained. You shall strike it from the evidence in this case and not consider it in any manner.

Please recall my instructions about the necessity of following my instructions and the need to disregard or strike testimony from time to time. If there is any juror, including the alternate, who does not think that she or he can do this, please raise your hand.”

And I will leave it at that. And I won't have to poll them. I'm going to then—also as part of this remedy, I'm thinking I have concerns about going too far and effectively commenting on the evidence. So that's why I limited it to where I am. And I could, for example, I could say the defense objection to the last statement of Officer Brian Shrier about distribution is sustained. I just don't know that it does anybody any good for me to go into that.

Lastly, my remedy is that if the State seeks to elicit any further testimony from any witness or evidence about the scale, you must inform the defense before you do it and bring it to the attention of the Court and have approval before doing so.

So that's my disposition. The only adjustment that I would make is I would specifically refer to distribution if the defense wants me to. I just don't think that's in anybody's best interest, but I will leave that to you.

[DEFENSE COUNSEL]: I would request that the Court make it clear what you're asking them to disregard. I think that needs to be clear. So I would ask that Your Honor reference the distribution testimony.

THE COURT: So do you want me to say “distribution of methamphetamine, distribution of drugs?” How do you want it phrased?

[DEFENSE COUNSEL]: Either one.

RP 297-98. The court gave its instruction, choosing to use the phrase “distribution of drugs.” RP 301. The court asked any juror who felt they could not follow the instruction to raise their hand; none did so. RP 301-02. Mr. Bush did not object to the phrasing or timing of the instruction. RP 301-02.

Mr. Bush testified in his own defense. RP 649. He claimed Ms. Patrick had been using methamphetamine that night in the car, and claimed they fought while he drove, over a length of several city blocks. RP 649-56. He testified this fighting is what caused the vehicle to leave the road and kill Mr. Johnson. RP 652-56. He denied methamphetamine use. RP 650. He admitted to several inconsistent statements: he told law enforcement he was a passenger, he told them a woman named “Jessica,” who he did not know, was driving his car, he told them a woman named “Jenny,” who he did not know, was driving his car. RP 667-68. He claimed that Ms. Patrick did not usually keep her drug paraphernalia in the car, but that this night she did. RP 668. He claimed all paraphernalia in the car, including the scale, belonged to her and her alone. RP 667-69, 673-76.

In rebuttal, the State elicited testimony that Mr. Bush had told officers that Ms. Patrick had been screaming at him, kicking at him, and kicking the dashboard and wheel for several blocks prior to the collision; although he had opportunities to pull over and did not do so. RP 697-98.³ Mr. Bush had not told this story to law enforcement the day of the crash. RP 697-98.

³ The State charged all alternative means of vehicular homicide. RP 775.

The jury found Mr. Bush guilty of vehicular homicide and possession of a controlled substance. CP 217-18. On a special verdict form, the jury indicated the State proved all alternative means of vehicular homicide beyond a reasonable doubt. CP 219. The court sentenced Mr. Bush within the standard range to 112 months confinement. CP 281-82. Mr. Bush timely appeals. CP 291.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE MR. BUSH'S CONFRONTATION RIGHT BY REFUSING TO ALLOW HIM TO CROSS-EXAMINE MR. HARDIN ABOUT A NON-EXISTENT COOPERATION AGREEMENT

Mr. Bush contends the trial court erred when it refused to allow him to cross-examine Mr. Hardin about a non-existent cooperation agreement that had no basis in fact. The trial court wisely chose to individually voir dire Mr. Hardin outside the presence of the jury to determine whether Mr. Bush's assertion had any basis for his request. There is no error.

1. Applicable law and standard of review

The federal and state constitutions protect a defendant's right to confront an adverse witness. U.S. Const. amend. VI; Const. art. I, § 22. *State v. Lee*, 188 Wn.2d 473, 486, 396 P.3d 316 (2017). The right includes the ability to confront witnesses with bias evidence. *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009). Bias includes that which exists at the time of trial, for the very purpose of impeachment is to provide

information that the jury can use, during deliberations, to test the witness's accuracy while the witness was testifying. *Id.*

However, the right to confront a witness through cross-examination is not absolute. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

General considerations of relevance limit both confrontation and cross-examination. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); *see* ER 401, 403. Courts may deny cross-examination if the evidence sought is "vague, argumentative, or speculative." *Lee*, 188 Wn.2d at 487 (quoting *Darden*, 145 Wn.2d at 621). This court "uphold[s] a trial court's ruling on the scope of cross-examination absent a finding of manifest abuse of discretion." *Fisher*, 165 Wn.2d at 752.

2. *Analysis*

The record supports the trial court's use of discretion. On the morning of trial, the State brought to the trial court's attention Mr. Bush's speculation that Mr. Hardin had received some sort of cooperation agreement in order to testify. The State adamantly refuted ever offering Mr. Hardin any such cooperation agreement. The trial court, out of an abundance of caution, directed the parties to question Mr. Hardin under oath, outside the presence of the jury, in order to determine whether it should grant Mr. Bush's request to cross-examine Mr. Hardin on this point.

The questioning revealed no agreement existed or had ever been offered. *See* RP 140-43. Mr. Hardin repeatedly stated he had never been offered any consideration from the State. He did not even subjectively "feel" that he had received a deal in exchange for being a witness. RP 140. He did say he wished he had received leniency, but he did not. RP 142. Mr. Hardin stated point-blank: "They never offered me anything and I didn't ask for anything... As a criminal we, of course, would wish something to be like that, but it didn't happen... It wasn't my hope just on that charge. It's hope on every charge." RP 142-43.

The court disallowed cross-examination on this point after hearing Mr. Hardin's testimony. The court ruled that Mr. Hardin did not receive any consideration and did not ask for any consideration. RP 149. The court

stated Mr. Bush's assertion had no foundation, was too prejudicial, and that the assertion was devoid of "any probative value." RP 150. In other words, the trial court excluded evidence of Mr. Hardin's hope for leniency as a cosmic exercise of good karma under ER 401 and 403. This decision is entirely within the court's discretion, and Mr. Bush does not explain how the court manifestly abused its discretion. *See Darden*, 145 Wn.2d at 621; *Fisher*, 165 Wn.2d at 752. The trial court gave Mr. Bush the benefit of the doubt by taking Mr. Hardin's testimony outside the presence of the jury, and that testimony did not support Mr. Bush's claim. The trial court was in the best position to determine whether to permit this line of questioning, and its actions were reasonable.

Mr. Bush relies on *U.S. v. Martin*, 618 F.3d 705 (7th Cir. 2010). That case is distinguishable on many grounds. That case involved a "sprawling" narcotics distribution network. *Id.* at 708. Martin and Taylor were co-defendants who had each been named in the federal indictment. *Id.* at 708, 719. Taylor was a member of one of the various gangs involved in the large scale narcotic distribution network. *Id.* at 719. When federal law enforcement apprehended Taylor, they directly transported him to state authorities to investigate a *related and pending state murder investigation*. *Id.* at 719-20, 728. The federal authorities made Taylor available for questioning to the state authorities solely for the purpose of investigating

that murder. *Id.* at 719. The federal authorities “had talked with [state authorities] about working some type of concurrent deal. They were unwilling to do it, so we didn’t do anything with it. That’s it.” *Id.* Taylor ultimately was never charged with the murder, but the investigation was still open at the time of his co-defendant Martin’s trial. *Id.* at 728-30.

The trial court precluded Martin from cross-examining Taylor concerning any bias arising from a non-existent cooperation agreement. *Id.* at 728. The appellate court disagreed, not explaining the abuse of discretion but nonetheless reasoning that the bias theory in that case was not so speculative that it was inadmissible under ER 403. *Id.* at 729. It pointed to the factual factors listed above. *Id.* at 729-30. However, the court determined that the error was harmless. *Id.* at 730.

Mr. Bush’s case is distinguishable. Mr. Hardin was not a co-defendant. The State did not directly transport Mr. Hardin from custody to a different jurisdiction to be questioned about a related crime. The State never investigated Mr. Hardin for related charges. The State did not attempt to offer any type of deal, unlike the rejected deal that the federal authorities offered to state authorities in *Martin*. Mr. Hardin received an offer on his unrelated theft case in May, prior to his preservation testimony. In June, at his preservation deposition, Mr. Bush never attempted to cross-examine him on the issue of bias. The jury would have received that deposition in

its entirety, had Mr. Hardin not attended trial. Mr. Hardin never asked for any deal and never received one. The only application *Martin* has to this case, if any, is that any error would be similarly harmless.

3. *If the trial court erred, it was harmless*

Violations of the Confrontation Clause are subject to harmless error review. *Van Arsdall*, 475 U.S. at 684; *Darden*, 145 Wn.2d at 626. The State must show the error was harmless beyond a reasonable doubt. *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012) (citing *Van Arsdall*, 475 U.S. at 684).

Any confrontation error did not affect the trial. Most importantly, the State never offered a cooperation agreement, Mr. Hardin never received any related deal, and he did not subjectively believe he received a related deal. The jury would not have suddenly harbored a doubt about Mr. Hardin's bias where none existed. The purpose of putting the speculative cooperation agreement before the jury could only be to confuse it.

Even failing that, an attack on Mr. Hardin's credibility for bias would fail because all of his testimony was cumulative to testimony of other witnesses at trial. The entirety of Mr. Hardin's testimony was cumulative to Ms. Huston's testimony. It was largely cumulative with the 911 recording the State published to the jury. Mr. Meisner also testified

Mr. Bush was driving the vehicle. At trial, Mr. Bush himself admitted to driving the vehicle, although he blamed the collision on his reckless decision to continue driving while Ms. Patrick repeatedly kicked him and grabbed the wheel rather than the presence of methamphetamine in his blood. Every percipient witness corroborated Mr. Hardin's testimony. Mr. Hardin fully cooperated with the police investigation at the time of the incident, testified consistently with his earlier statements, and was not facing any related charges. Any alleged error would be harmless beyond a reasonable doubt.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. BUSH'S REQUEST FOR A MISTRIAL

Mr. Bush assigns error to the trial court's decision not to grant his requested mistrial after a witness testified that scales are sometimes used in drug distribution. Mistrials are an extraordinary remedy, and the trial court did not abuse its discretion in denying the mistrial request.⁴

1. Law and standard of review pertaining to mistrials

This Court reviews a trial court's decision to deny a motion for mistrial for abuse of discretion. *State v. Jackson*, 150 Wn.2d 251, 276,

⁴ Mr. Bush's argument is not clear from the briefing because he conflates three of his four issue statements into one issue. The State's position is that a mistrial was the only requested remedy below, so that is the only preserved argument. It will address each assignment of error to the extent possible.

76 P.3d 217 (2003). A trial court abuses its discretion in denying a motion for a mistrial only if its decision is manifestly unreasonable or based on untenable grounds. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006).

A trial court has broad discretion to rule on irregularities during the course of a trial. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The trial court is in the best position to determine if a trial irregularity caused prejudice. *State v. Perez-Valdez*, 172 Wn.2d 808, 819, 265 P.3d 853 (2011). The court should grant a mistrial “only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). An appellate court will reverse the trial court only if there is a substantial likelihood the trial irregularity prompting the mistrial motion affected the jury’s verdict. *State v. Rodriguez*, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). Courts strongly presume juries follow a curative instruction to disregard evidence. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983); *State v. Johnson*, 60 Wn.2d 21, 29, 371 P.2d 611 (1962).

Whether a trial court abused its discretion in denying a motion for a mistrial depends on: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of other properly admitted evidence; and

(3) whether an instruction could cure the irregularity. *Perez-Valdez*, 172 Wn.2d at 818.

a. Seriousness of irregularity

Before trial, defense counsel moved to exclude any reference to the scale law enforcement retrieved from Mr. Bush's car. However, the trial court rejected his motion, explicitly ruling under ER 403 that the scale was probative of both charges and not unduly prejudicial. The court permitted the State to introduce evidence of the scale and its purpose. RP 189-91.

During trial and pursuant to the court's ruling, the State admitted exhibits and testimony demonstrating the scale was found in addition to other drug paraphernalia in Mr. Bush's car. Pursuant to the court's ruling, the State asked Detective Shrier the significance of that scale, intending to elicit testimony that the scale, along with the other items of drug paraphernalia "strewn about this vehicle that is owned by Mr. Bush" was indicative of methamphetamine usage and possession. RP 287. Detective Shrier stated scales were, in other cases, at times part of a drug distribution. Mr. Bush immediately objected, without giving a basis, and moved for a mistrial. The State expressed its intent to clarify that Mr. Bush had never been accused of drug dealing and was not now accused of drug dealing. The court excused the jury.

During discussion, Mr. Bush then conceded that the presence of the scale corroborated drug use (RP 284) and possession (RP 188, 284), that his earlier objection had been overruled (RP 284), that you can weigh drugs to consume them (RP 188, 285), and that the scale could be used when purchasing drugs to “make sure you’re not getting ripped off” (RP 188, 285). Each of those concessions demonstrates exactly why the irregularity was not serious in this case.

Detective Shrier did not state Mr. Bush sold drugs and the State did not ask the detective whether Mr. Bush sold drugs. As Mr. Bush’s concession demonstrates, scales are regularly used to *buy drugs* from a *drug distribution* operation. Under Mr. Bush’s own theory of the case, the scale could indicate *Ms. Patrick* used the scale for her personal use or to distribute her methamphetamine to Mr. Bush for him to ingest, which explains why he had methamphetamine present in his blood that night. The trial court agreed the irregularity was not so serious in this context, when it reaffirmed its ruling that it would not exclude the scale under ER 403.

b. Adequacy of the curative instruction

Mr. Bush relies on *State v. Escalona*, 49 Wn. App. 251, 742 P.2d 190 (1987), to argue the curative instruction was inadequate to cure the irregularity. That case is distinguishable. In *Escalona*, the victim violated a motion in limine by referring to the prior conviction of the

defendant for *the same crime*. 49 Wn. App. at 255. The victim testified the defendant “has a record and had stabbed someone.” *Id.* Although the trial court gave a limiting instruction and instructed the jury to disregard the testimony, the reviewing court concluded the irregularity was “extremely serious” and could not be cured by an instruction to disregard the testimony. *Id.* at 253-56. “[D]espite the court’s admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact” and conclude that the defendant “acted on this occasion in conformity with the assaultive character he demonstrated in the past.” *Id.* at 256.

By contrast, here, the testimony that scales sometimes related to drug distribution did not indicate that Mr. Bush had a propensity to commit vehicular homicide while under the influence of methamphetamine, possession of methamphetamine, or that he had even been previously convicted of a crime.⁵ Although Mr. Bush now claims an association with drugs prejudiced his case, he never sought to sever his drug charge from his homicide charge. Additionally, the jury’s special verdict showed the State

⁵ Mr. Bush had a prior conviction for first degree robbery. Although the State disagreed with Mr. Bush’s analysis, it stipulated not to reference that crime of dishonesty in its case in chief. Mr. Bush then argued in closing that he could not be subject to credibility attacks because the State did not demonstrate any crimes of dishonesty. The State objected and sought to reopen the case, but the court denied the request. RP 819-28.

met its burden on all alternative means of vehicular homicide, including those unrelated to drugs.

State v. Condon, 72 Wn. App. 638, 649-50, 865 P.2d 521 (1993), is more analogous. In that case, Condon successfully moved the court to exclude evidence he had been in jail. *Id.* at 648. The victim mistakenly testified Condon called her when he was getting out of jail. *Id.* Condon objected and moved to strike; the court granted his request. *Id.* Moments later, the witness made the same remark. *Id.* Condon moved for a mistrial, which the court denied, deciding instead to issue another curative instruction. *Id.* The witness then referenced jail a third time. *Id.*

The Court of Appeals affirmed the decision not to grant a mistrial. *Id.* at 649. The court determined a reference to jail was ambiguous. *Id.* The jury could easily have “concluded that Condon was in jail for a minor offense.” *Id.* Also, the fact that someone is in jail “does not necessarily mean that he or she has been convicted of a crime.” *Id.* The remarks had the potential for prejudice, but not so serious as to warrant a mistrial. *Id.*

The comments in Mr. Bush’s case were similarly ambiguous. Drug distribution requires buyers and sellers. The witness did not accuse Mr. Bush of selling drugs. The jury could infer Mr. Bush bought drugs or used the scale for any of the several purposes that Mr. Bush conceded the scale could be used for. Mr. Bush testified that the scale and all other drug

paraphernalia in the car belonged to Ms. Patrick, so the jury could just as easily infer that Ms. Patrick was the one who had the scale to buy or use drugs. The remark falls into the “potentially prejudicial remark” category identified by *Condon*.

Even if this court disagrees, Mr. Bush does not explain how the trial court’s decision was manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. The court articulated a reasoned, tenable and lengthy ruling. The court recognized that mistrial was a serious remedy, and that the jury is presumed to follow the court’s curative instructions. Those are both correct statements of the law. *Weber*, 99 Wn.2d at 166; *State v. Gilchrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). Weighing those factors versus the possible prejudice, the court concluded that a curative instruction was the appropriate remedy. Key in the trial court’s analysis was the fact that it had previously ruled the scale was admissible under ER 403, the only basis under which Mr. Bush had objected. Mr. Bush never assigned error to the court’s decision that the scale was relevant.⁶

The court granted Mr. Bush the opportunity to craft the curative instruction, but Mr. Bush’s creation was too intent on personally

⁶ Mr. Bush assigned error to the *prosecutor* introducing what he terms irrelevant evidence, but he has not addressed the *trial court’s previous ruling* on the subject under ER 401 and 403. *See* RP 190-92.

admonishing the witness and prosecutor. When the court crafted its own curative instruction, the court asked Mr. Bush for his input or objections. Mr. Bush did not object in any way to the timing or adequacy of the final instruction, instead stating, “Either way.” RP at 298.⁷ The court did not abuse its discretion in denying Mr. Bush’s motion for a mistrial.

2. *Any challenge under ER 404(b) is waived.*

As noted, the briefing conflates several separate issues in his analysis. For the same reasons the evidence was not unduly prejudicial under ER 403, it is not propensity evidence under ER 404(b). More importantly, Mr. Bush did not preserve any objection under ER 404(b) below, so he cannot assert it now for the first time on appeal.

“A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.” *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). On appeal, a party may not raise an objection not properly preserved at trial absent manifest constitutional error. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009); RAP 2.5. An evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of constitutional magnitude. *State v.*

⁷ Arguably inviting the instruction, which he now claims is inadequate and given in error. *State v. Mercado*, 181 Wn. App. 624, 629-30, 326 P.3d 154 (2014).

Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). “An objection to the admission or exclusion of evidence based on relevance is insufficient to preserve appellate review based on ER 404(b).” *State v. Jordan*, 39 Wn. App. 530, 539, 694 P.2d 47 (1985).

Mr. Bush waived this challenge because he never objected under ER 404(b). Mr. Bush did not object under any basis, but appeared to argue this evidence was not relevant, or substantially more prejudicial than probative. If this Court reaches this issue, Detective Shrier’s testimony does not constitute propensity evidence. Although he assigned error to whether the officer’s statement about scales used in drug distribution constituted propensity evidence, he appears to argue it was not relevant, which is a different analysis. Appellant’s Br. at 12-13. Mr. Bush *did* participate in drug distribution; he acquired methamphetamine. However, no testimony stated Mr. Bush was a drug dealer or engaged in the business of selling drugs. The State never sought to convict Mr. Bush based on any prior bad acts. The court’s ruling was that this one statement was substantially more prejudicial than probative. The State did not seek to elicit ER 404(b) evidence, Mr. Bush did not object under ER 404(b), and the court was never asked to analyze any evidence under ER 404(b). The State elicited evidence that scales are used to facilitate possession and consumption of methamphetamine. Evidence that scales are used to measure drugs for

purchase or consumption or prevent a drug buyer from being “ripped off” is not equivalent to accusing Mr. Bush of selling drugs.

3. Any challenge to the timing of the curative instruction is waived

Akin to how Mr. Bush did not object to the wording of the instruction, Mr. Bush did not object to the timing of the curative instruction. This claimed error is waived. RAP 2.5.

If not waived, it is not clear how this is error. Mr. Bush objected to witness testimony without giving a basis for the objection and moved for a mistrial. He did not ask for an immediate curative instruction. The court excused the jury. When the jury returned, the first action the court took was to instruct the jurors to disregard the statement. Mr. Bush does not explain when a more appropriate time to give a curative instruction would have been when he asked only for a mistrial and the court excused the jury to address that argument. Logically, the court chose the most effective time to give the instruction.

V. CONCLUSION

Mr. Bush cannot prevail on his claims. The court heard testimony and ruled that the alleged cooperation agreement was without foundation and no probative value. The limitation on cross-examination, if in error, was harmless because the testimony was cumulative. Mistrial is too extreme a remedy for the off-hand remark about drug distribution. Because

the scale had already been ruled admissible under ER 401 and ER 403, a curative instruction was the appropriate remedy. This Court should affirm.

Dated this 21 day of November, 2019.

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

STATE OF WASHINGTON,

Respondent,

v.

TODD R. BUSH,

Appellant.

NO. 36708-8-III

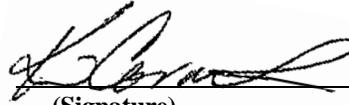
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I certify under penalty of perjury under the laws of the State of Washington, that on November 21, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jodi Backlund and Manek Mistry
backlundmistry@gmail.com

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(Date)

Spokane, WA
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SPOKANE COUNTY PROSECUTOR

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