

80037-5

SUPREME COURT NO. _____
COURT OF APPEALS NO. 34063-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

THEODORE ROOSEVELT RHONE,
Appellant.

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STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda Lee, Judge

PETITION FOR REVIEW

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original

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A. IDENTITY OF PETITIONER

Theodore Rhone, appellant below, asks this Court to accept review of the decision designated in Part B of this motion.

B. DECISION OF COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals, Division II, filed in his case on March 20, 2007.

A copy of the decision is in the Appendix at A-1 through A-28.

C. ISSUES PRESENTED FOR REVIEW

1. Does the holding in State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2001), that article 1, § 7 requires an actual custodial arrest before there can be a lawful search incident to arrest, necessarily preclude a finding that a person is under arrest prior to the time that he has been formally advised he is under arrest?

2. Is the holding by the Court of Appeals that excusing effectively the only African-American on the jury panel by peremptory challenge does not require the state to give a race-neutral reason in conflict with the decision of the Court of Appeals in State v. Rhodes, 82 Wn. App. 192, 195, 917 P.2d 149 (1996).

3. Is a sentence of life without parole under the POAA unconstitutional under Blakely v. Washington?

OTHER FEDERAL CONSTITUTIONAL ISSUES:

1. Is the decision of the Court of Appeals finding sufficient evidence of constructive possession in conflict with decisions of this Court and other Court of Appeals decisions which hold that mere proximity to drugs is insufficient to establish dominion and control over them?

2. Is the decision of the Court of Appeals affirming the exclusion of a defense expert on subjects testified to by state's witnesses

in conflict with decisions upholding state and federal constitutional rights to compulsory process?

3. Is the decision of the Court of Appeals affirming the admission of testimony by a state's expert on street-level drug selling in conflict with decisions guaranteeing the right to a jury verdict on evidence presented at trial where the expert testified that the drugs recovered were for sale, but could not even say that the case involved street level drug activity?

4. Is the decision of the Court of Appeals affirming the trial court's refusal to poll the jury to determine whether jurors heard a comment by a witness after he left the stand in conflict with other decisions holding that such contact is presumptively prejudicial?

5. Is the decision of the Court of Appeals excusing the prosecutor's misconduct in arguing facts not in evidence and facts which, if true, would have meant that the state's witnesses testified falsely in conflict with decisions holding that such misconduct denies a defendant a fair trial?

D. STATEMENT OF THE CASE

Mr. Rhone's charges for robbery, possession of a controlled substance with intent to deliver and unlawful possession of a firearm arose from an incident at a Jack-in-the-Box drive-through window in which it was alleged that Mr. Rhone, a passenger in the car, had a gun in his lap and asked employee Isaac Miller for the money Miller owed him.¹ When the car was stopped a short time later, Mr. Rhone was in the front passenger seat; a gun and drugs were found under the driver's seat and

¹ Contrary to the assertion of the Court of Appeals, Slip op. 5, n. 3, Mr. Rhone is appealing all of his convictions.

more drugs found in the back seat. The car belonged to Phyllis Burg, who was in the back seat when the car was stopped, and the car was driven by Ms. Burg's boyfriend, Cortez Brown.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

- 1. THE DECISION OF THE COURT OF APPEALS ON THE SUPPRESSION ISSUE IS IN CONFLICT WITH THE DECISION OF THIS COURT IN STATE V. O'NEILL; REVIEW SHOULD BE GRANTED UNDER RAP 13.4(B) (1) AND (2).**

The physical evidence supporting Mr. Rhone's convictions was seized in a search of a car owned by his co-defendant Phyllis Burg and driven by his co-defendant Cortez Brown. Lakewood police officer Darin Miller and Pierce County deputy David Shaffer were the state's two witnesses at the CrR 3.6 hearing.

Officer Miller testified that he received a call from the police dispatcher to investigate a suspicious person call from Jack-in-the-Box employees. RP 106. Miller was diverted by a second report that a car matching the description of the car from the Jack-in-the-Box, a Camaro, had been stopped nearby. RP 99. On arrival at the scene of the stop, Miller provided cover as the occupants were removed from the Camaro. RP 100, 110, 161, 179.

Once the occupants were safely out of the Camaro, searched, handcuffed and secured in the back seats of patrol cars, Miller went to the Jack-in-the-Box and took written statements from two employees. RP 102-103, 110-111. The Camaro was being searched before Miller left the scene to go to the Jack-in-the-Box. RP 141. Miller spoke with Deputy Shaffer, who conducted the search of the car and ultimately arrested Mr. Rhone, by phone before leaving the Jack-in-the-Box. RP 103, 127-129.

Deputy Shaffer, the officer who searched the car, testified that when he pulled in behind the Camaro, he drew his weapon and activated his car's overhead lights. RP 156-157. Shaffer demanded that Mr. Rhone, who was stepping out of the passenger door of the Camaro, get out of the car with his hands up. RP 159. According to Shaffer, Mr. Rhone, Cortez Brown and Phyllis Burg were all searched, handcuffed and detained in a patrol car before the Camaro was searched.² RP 161-162, 165, 208, 223.

² The Court of Appeals sets out that Ms. Burg testified at trial that "she started yelling about the gun as soon as Rhone threw the gun into the back seat." Slip op. at 3, n. 2. The gun, however, was found under the driver's seat wrapped in a towel and in a plastic bag. RP 166. Ms. Burg testified that she had seen the plastic bag "come flying" into the back at her, looked in and started screaming to the police that there was a gun. RP 558-559. If the gun had been thrown to the back seat, then she must have tried to conceal it--an act inconsistent with her alerting the police. Burg's testimony was also inconsistent with Shaffer's testimony that Burg told him about the gun after she, Brown and Mr. Rhone were in patrol cars. RP 213.

Although Shaffer's report indicated that all of the suspects and the car were searched "incident to arrest," he insisted that he did not have probable cause until after the actual search when he had talked with Officer Miller and learned what the witnesses at the Jack-in-the-Box had to say. RP 167-168, 178, 209-212, 223, 248.

The court ruled that the police did not act unreasonably to accelerate discovery of evidence and that the evidence would have been inevitably discovered in spite of the absence of probable cause to arrest. RP 412. The court's written findings and conclusions reflected the oral findings that Deputy Shaffer's search of the car was lawful based on safety concerns, not a lawful arrest, and that the evidence in the car would have been inevitably discovered. CP 121-125.

In State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003), this Court unambiguously held that "[u]nder article I, section 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest." In so holding, this Court noted that while "the exact formulation of when an arrest occurs justifying a search incident to arrest under the Fourth Amendment has sometimes been unclear," for article I, section 7, clear guidance has been provided: "Under article I, section 7, a lawful arrest is constitutionally required prerequisite to any search

incident to arrest. . . . in the absence of a lawful custodial arrest a full blown search, regardless of the exigencies, may not validly be made." O'Neill, 148 Wn.2d at 585; see also State v. Radka, 120 Wn. App. 43, 83 P.3d 1038 (2004) (search incident to arrest must be preceded by a lawful custodial arrest).

In spite of the clear, bright-line holding of O'Neill that a full custodial arrest must precede a search incident to arrest, the Court of Appeals held that Mr. Rhone was under arrest even though Officer Shaffer had not placed him under arrest and did not believe he had probable cause to make an arrest. Review should be granted to clarify that a valid custodial arrest means exactly that -- an arrest where the officer places the suspect under arrest. Otherwise the clear constitutional holding of O'Neill will be replaced by second guessing about probable cause and whether a reasonable person would believe he had been detained indefinitely in the absence of being advised that he was under arrest. Slip op. at 10.

This case is factually similar to State v. Wheeler, 108 Wn.2d 230, 737 P.2d 1005 (1987), in which this Court held that stopping a suspect, frisking him, handcuffing him, placing him in a patrol car and transporting him for a show-up was within the scope of an *investigatory stop*. Here,

Mr. Rhone and his co-defendants were stopped and detained pending investigation at the Jack-in-th-Box.

Moreover, the case relied on by the Court of Appeals as establishing when an arrest had taken place, State v. Belieu, 112 Wn.2d 587, 599, 773 P.3d 46 (1989), certainly did not set forth a definitive standard and did so in an entirely different context. In Belieu, the issue was when an investigatory stop went beyond the scope of a stop and became equivalent to arrest. Belieu did not involve upholding a search incident to arrest .

Because this case is in conflict with O'Neill and Radka and because inevitable discovery cannot cure the problem of the search preceding the arrest, whether or not the officers had probable cause, under O'Neill, review should be granted and the decision of the Court of Appeals reversed.

2. THE DECISION OF THE COURT OF APPEALS AFFIRMING THE COURT'S FAILURE TO REQUIRE THE STATE TO PROVIDE A RACE-NEUTRAL REASON FOR EXCUSING EFFECTIVELY THE ONLY AFRICAN-AMERICAN IN THE JURY POOL IS IN CONFLICT WITH THE DECISION IN STATE V. RHODES; THE ISSUE IS ALSO CONSTITUTIONAL.

Mr. Rhone objected that he was denied a jury of his peers when the prosecutor used a peremptory challenge to remove the only African-American on the jury panel. RP 438-439. The court considered the challenge to be a Batson challenge. RP 451. The court noted that there

were only two African-American jurors in the entire venire; one had to be excused for cause and the prosecutor exercised a peremptory challenge to excuse the other. RP 452-453. The court ruled that excusing one African-American juror was insufficient to establish a prima facie case of discrimination and denied the challenge without asking the prosecutor to articulate a race-neutral reason for excusing the juror. RP 452.

The holding of the Court of Appeals excusing the trial court's refusal to require the state to provide a race-neutral reason is in conflict with the decision of the Court of Appeals in State v. Rhodes, 82 Wn. App. 192, 195, 917 P.2d 149 (1996). In State v. Rhodes, 82 Wn. App. at 195, the court held that "the trial court improperly denied a Batson challenge when [the state's peremptory challenge was] exercise[d] against the only African American in the venire." Under Rhodes, the trial court should have asked the prosecutor for a race-neutral reason for in effect excusing the only African-American juror on the panel.

The issue is also constitutional. Under the equal protection clauses of the federal and state constitutions, a peremptory challenge "may not be exercised to invidiously discriminate against a person because of gender, race, or ethnicity." State v. Evan, 100 Wn. App. 757, 763, 998 P.2d 373 (2000); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d

69 (1986). Review should be granted because the issue is constitutional and because of the conflict with Rhodes.

3. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION AFFIRMING A CONVICTION UNDER THE POAA IS IN CONFLICT WITH BLAKELY V. WASHINGTON.

Mr. Rhone's sentence of life without the possibility of parole is unconstitutional under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), notwithstanding the decision in State v. Ball, 127 Wn. App. 956, 113 P.3d 520 (2005), review denied, 156 Wn.2d 1018 (2006).

In Blakely, the United States Supreme Court held that any fact, other than a prior conviction, which must be established before a sentence greater than the sentence authorized by the jury verdict can be imposed must be proven to a jury by proof beyond a reasonable doubt. Blakely, 124 S. Ct. at 2536-2537. In Blakely, the court further held that the applicable sentence authorized by jury verdict is the top of the standard range. Blakely, 124 S. Ct. at 2537-2538.

The Supreme Court, in Blakely, and in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), did not limit its holdings to specific types of statutes; Blakely and Apprendi apply to any situation in which the jury verdict authorizes one sentence and the

trial court imposes a longer sentence based on additional findings, not submitted to a jury. It violates the Sixth Amendment to structure sentencing laws such that the sentence reflects factual findings not submitted to the jury.

The inquiry is: (1) What sentence does the jury verdict alone authorize? (2) Is the sentence imposed by the trial court longer than the sentence the jury verdict alone authorizes? (3) Does the statute authorizing the longer sentence require any fact-finding beyond the mere fact of a prior conviction? (4) Does the statute permit that the facts to support the longer sentence be established by proof less than beyond a reasonable doubt? (5) Does the statute permit the facts to be decided by a judge rather than a jury? If the answer to all of these questions is yes, the statute is unconstitutional under Blakely; it violates the defendant's rights under the Sixth Amendment.

Here, clearly the jury's verdict alone did not authorize sentences greater than the top of the standard range. Life without the possibility of parole is longer than the top of the standard ranges for Mr. Rhone's convictions. The statute requires fact finding beyond the mere fact of a prior conviction. Under POAA, before a sentence of life without parole can be imposed, the trial court has to find that the defendant has prior

convictions which qualify as strike offenses. Specifically, the trial court has to find that (a) on two separate occasions (b) the defendant has been convicted of felonies that meet the definition of most serious offenses, (c) the defendant's prior conviction counts as offender score, and (d) at least one conviction for a most serious offense occurred before any of the other most serious offenses was committed. RCW 9.94A.030(32)(a)(ii). The statute does not require that the facts be found beyond a reasonable doubt or by a jury. Therefore the POAA violates the Sixth Amendment.

Review should be granted to decide this important constitutional issue.

OTHER FEDERAL CONSTITUTIONAL ISSUES:

- 1. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS FINDING SUFFICIENT EVIDENCE OF CONSTRUCTIVE POSSESSION IS IN CONFLICT WITH OTHER DECISIONS AND IS A CONSTITUTIONAL ISSUE.**

Mr. Rhone was convicted of possessing a controlled substance with intent to deliver. CP 156-171. The *only* evidence of possession was that Mr. Rhone had been a passenger in a car owned by someone else and driven by someone else. Phyllis Burg testified that the car was hers. RP 552, 562-563. The drugs were not found on Mr. Rhone's person and were not found near him in the car; he was in the front passenger seat and the

drugs were in the back seat or under the driver's seat. RP 166, 212-213, 243. No one testified that Mr. Rhone had any relationship to these drugs; none of the packaging for the drugs was tested for fingerprints; the handwriting on the note with the drugs was not analyzed. RP 703-705.

Since Mr. Rhone was not in actual possession of the drugs found in the car, the state had to prove beyond a reasonable doubt that he had dominion and control over either the drugs or the premises where the drugs were found. State v. Spruell, 57 Wn. App. 383, 385, 788 P.2d 21 (1990). A car is "premises" for purposes of establishing constructive possession. State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942 (1971).

The decision of the Court of Appeals holding that there was sufficient evidence is in conflict with the decisions holding that mere proximity to drugs is insufficient to establish dominion and control. Spruell, 57 Wn. App. at 388-389 (mere proximity to drugs is not sufficient to establish dominion and control); State v. Amezola, 49 Wn. App. 78, 86, 741 P.2d 1024 (1987) (same); State v. Hystad, 36 Wn. App. 42, 49, 671 P.2d 793 (1983) (knowledge of the presence of the drugs and proximity to them, together, did not establish dominion and control or constructive possession); State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969) (even temporary possession of the drugs was insufficient to establish constructive

possession where the defendant was a guest on the houseboat where the drugs were found); State v. Roth, 131 Wn. App. 556, 128 P.3d 114 (2006) (being in a room with a refrigerator full of beer in another person's house alone would not support a finding of constructive possession); State v. Plank, 46 Wn. App. 728, 733, 731 P.2d 1170 (1987) (the fact that the defendant was a passenger in a stolen vehicle was insufficient to establish dominion and control over drugs found in it); State v. Cote, 123 Wn. App. 546, 96 P.3d 410 (2004)(the defendant's presence as a passenger in a car where drugs were found and his fingerprint on a jar which was found in a meth lab were insufficient evidence to convict of possession of ephedrine with intent to deliver).

Mr. Rhone was a temporary passenger in a car owned by someone else and never exercised dominion and control over it. His mere presence in a car where the drugs were found could not establish dominion and control over them. There was no evidence that he knew about the drugs or ever touched or possessed them. Even if there had been such evidence, it would not be sufficient to establish constructive possession.

The issue is constitutional. Due process, under the state and federal constitution, requires that the state prove beyond a reasonable doubt every fact necessary to establish the essential elements of the crime charged. In

re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

Review should be granted because the issue is constitutional and because the decision of the Court of Appeals is in conflict with other decisions by this Court and the Court of Appeals.

2. REVIEW SHOULD BE GRANTED BECAUSE MR. RHONE WAS DENIED HIS RIGHT TO COMPULSORY PROCESS.

The trial court had to decide at the CrR 3.6 hearing if Deputy Shaffer's report was accurate, how to interpret the CAD report and when the search took place. RP 116-118, 126, 146, 175, 178-179, 192, 199-200, 215, 248-250.

Mr. Rhone, as well as the prosecution, had a state and federal constitutional right to present evidence on these points. He had a right to call investigator Bob Crow as an expert on police practices and as someone who had reviewed hundreds of reports written by Deputy Shaffer, and to present hearsay evidence that Officer Miller said at an interview that Shaffer was "tearing the car apart" while Miller was still at the scene. RP 141, 271-282. Such hearsay is admissible as substantive evidence at a preliminary hearing under ER 104 and ER 1101, and Mr. Rhone had a right to present it. United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974).

The decision of the Court of Appeals is in conflict with reported decisions holding that the denial of the right to present material and relevant evidence contesting the state's evidence denies a defendant his fundamental right to appear and defend at trial, as guaranteed by the Sixth Amendment to the United States Constitution and Article 1, § 22 of the Washington Constitution. See State v. Roberts, 80 Wn. App. 342, 351, 908 P.2d 892 (1996) ("Washington defines the right to present witnesses as a right to present material and relevant testimony"); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

The denial of the right to present this evidence on matters state's witnesses testified about was a violation of Mr. Rhone's state and federal constitutional rights and review should be granted on this issue.

3. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED IN AFFIRMING THE ADMISSION OF EXPERT TESTIMONY THAT DENIED MR. RHONE HIS RIGHT TO A JURY VERDICT BASED ON THE EVIDENCE PRESENTED AT TRIAL.

Over defense objection, the state was permitted to present the testimony of Detective Oliver Hickman as an expert on street level narcotics sales, even though Hickman admitted that he did not know if the charged drugs were part of a street level operation. RP 833-835, 869.

Hickman described activities unrelated to the charged conduct. RP 842-843. He testified that ordinarily crack cocaine is sold without packaging. RP 845-847, 849. He admitted that the notation "40's" found with the drugs in the car meant nothing to him. RP 845-847, 849. He nonetheless testified that the baggies were packaged for sale for \$40. RP 852. In his opinion, the way the drugs were packaged looked like someone had weighed and packaged them and this was not typical of drug users, but typical of drug dealers. RP 855. He testified that dealing drugs could be dangerous and sellers might arm themselves. RP 843-844.

This was not expert testimony aimed at explaining something to the jurors that was beyond their common understanding; it was merely a police detective giving his opinion that the drugs were possessed with intent to deliver. Detective Hickman's testimony did not meet the requirements of ER 702, that it would "assist the trier of fact to understand the evidence or to determine a fact at issue" and thus its admission was in conflict with State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984) and ER 702.

The testimony by Hickman was essentially the kind of profile testimony that is inadmissible except in limited circumstances, such as after the defense has opened the door to the testimony. See, e.g. United States v. Lim, 984 F.3d 331, 335 (9th Cir. 1993). Since there was not even any

evidence that Mr. Rhone or anyone else involved in the case fit the profile, the effect of Hickman's testimony was to tell the jurors that he was a very experienced narcotics officer and that he believed that the drugs were possessed with intent to deliver. This unconstitutionally invaded the province of the jury, was not helpful to the jurors and should require reversal of Mr. Rhone's convictions.

4. THE DECISION OF THE COURT OF APPEALS IN AFFIRMING THE TRIAL COURT'S FAILURE TO POLL JURORS AFTER A WITNESS MADE A PREJUDICIAL COMMENT AFTER LEAVING THE STAND IS IN CONFLICT WITH OTHER DECISIONS.

Isaac Miller testified that he knew Mr. Rhone, Mr. Brown and Ms. Burg. RP 480-482. He said that they came to the Jack-in-the-Box and asked for money owed to Mr. Rhone which Brown had already been given, and that he felt intimidated and threw money into the car. RP 482, 485.

Miller had moved to Oregon by the time of trial and was unhappy about having to return to Washington to testify. When he learned that he might have to remain to testify for the defense, he stormed away from the witness stand, saying, "I could make it real easy on everybody and just say I didn't recognize the gun." RP 519-529. Defense counsel noted that Mr. Rhone heard this and asked that the jury be polled to determine whether they had heard it as well. The court denied the request because the court

believed the jurors were at the door when the comment was made, and because the court had not heard the statement. RP 530.

By refusing to determine whether any of the jurors had heard Miller's outburst, the court denied Mr. Rhone his right to an impartial jury guaranteed by the Sixth Amendment and Const. art. 1, § 22, and the decision of the Court of Appeals is in conflict with decisions holding that unauthorized contact may compromise the right to an impartial jury trial and is presumptively prejudicial. Remmer v. United States, 347 U.S. 227, 229, 98 L. Ed. 2d 654, 74 S. Ct. 450 (1954); Mattox v. United States, 146 U.S. 140, 150, 36 L. Ed. 2d 917, 13 S. Ct. 50 (1892); State v. Murphy, 44 Wn. App. 290, 296, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986); State v. Rose, 43 Wn.2d 553, 557, 262 P.2d 194 (1953)). The presumption is overcome only if harmless beyond a reasonable doubt. Murphy, at 296; State v. Brenner, 53 Wn. App. 367, 372, 786 P.2d 509 (1989); State v. Saraceno, 23 Wn. App. 473, 596 P.2d 297 (1979).

Miller's unsworn statement would constitute improper contact if heard by the jurors. Given that such contact is presumptively prejudicial, the trial court erred in not determining whether the jurors heard it. Review should be granted because the issue is constitutional and the decision of the Court of Appeals is in conflict with other decisions.

5. THE DECISION OF THE COURT OF APPEALS IN HOLDING THAT THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN ALLOWING TESTIMONY IT BELIEVED TO BE FALSE AND MISLEADING TO GO UNCORRECTED IS IN CONFLICT WITH A SUBSTANTIAL BODY OF FEDERAL CONSTITUTIONAL LAW.

Isaac Miller testified that he was poor and borrowed money from Mr. Rhone and that he had borrowed money once before and had paid Mr. Rhone back. RP 493-494. Burg testified that she had loaned Isaac Miller money because he had no food in his house. RP 567. During closing argument the prosecutor was permitted to argue that, contrary to the testimony of the state's witnesses, Mr. Rhone was a drug dealer and Miller owed Mr. Rhone money from a drug debt. RP 989. If this argument was in good faith, then the prosecutor knowingly presented false and misleading evidence to the jury.

The decision of the Court of Appeals holding that the prosecutor did not commit misconduct in presenting testimony it believed to be false raised a constitutional issue and is in conflict with the decisions in Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 31 L. Ed. 2d 1217 (1959), and Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991); United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481

(1976); Mooney v. Holohan, 294 U.S.103, 55 S. Ct. 340, 79 L. Ed. 2d 791 (1935); Alcorta v. Texas, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957); United States v. Kelly, 35 F.3d 929 (4th Cir. 1994); United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993); DeMarco v. United States, 928 F.2d 1074 (11th Cir. 1991); and Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986).

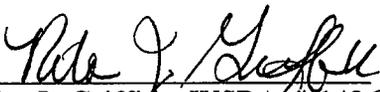
The false testimony likely had an effect on the jury and misled them. If the prosecutor was correct, the jurors likely found Miller more credible than they would have if they believed he was involved in criminal conduct and were not presented with his motive and bias in testifying favorably to the state. Review should be granted because the issue is constitutional and the decision of the Court of Appeals is in conflict with other decisions.

F. CONCLUSION

Petitioner respectfully submits that review should be granted, his judgment and sentences reversed and remanded for retrial.

DATED this 9th day of April, 2007.

Respectfully submitted,


Rita J. Griffith; WSBA # 14360
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on the 9th day of April, 2007, I caused a true and correct copy of ~~Opening Brief of Appellant~~ to be served on the following via prepaid first class mail:

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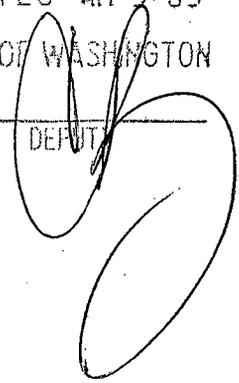
Rita J. Griffith 4/9/07
Rita J. Griffith DATE at Seattle, WA

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DIVISION II

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STATE OF WASHINGTON

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DEPUTY



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

THEODORE ROOSEVELT RHONE,

Appellant.

No. 34063-1-II

UNPUBLISHED OPINION

BRIDGEWATER, P.J. — Theodore Roosevelt Rhone appeals his convictions of first degree robbery with a firearm enhancement, unlawful possession of a controlled substance with intent to deliver also with a firearm enhancement, and first degree unlawful possession of a firearm. We hold that the police arrested Rhone when they seized him by force, handcuffed him, and placed him in a patrol car, the arresting officer had confirming information that there was a gun in the car, and the car had just come from the robbery site. We further hold that the officer had probable cause to arrest and that an arrest took place, even though he did not formally

enunciate an arrest until after the search. Thus, he properly seized the firearm and drugs in a search incident to arrest. We also hold that his trial was fair, evidence was properly admitted, substantial evidence supports the controlled substance conviction, there was no ineffective assistance of counsel, and his sentence as a persistent offender was appropriate. We affirm.

FACTS

On May 30, 2003, Pierce County Sheriff's Deputy David Shaffer received a dispatch indicating that there had been a suspicious vehicle in the Jack in the Box drive-thru window. The dispatch relayed that a red Camaro with three occupants, two black men and a white woman, had been through the drive-thru window. The car had a license plate number of 677 HCS. The dispatch also informed Deputy Shaffer that one of the occupants had displayed a gun and demanded money for a debt.

Fortuitously, Deputy Shaffer recognized the car description and license plate. He was a neighborhood patrol officer in Lakewood and had seen that car in his district at a known drug house.¹ Acting on that knowledge, Deputy Shaffer drove to the house and found the red Camaro.

Concerned that the occupants of the car might have a weapon because of the dispatch and the location in Lakewood, Deputy Shaffer executed a felony stop with his weapon drawn. At the time of the stop, Rhone was getting out of the car's passenger side. When Deputy Shaffer ordered him to show his hands, Rhone slowly and deliberately looked at Deputy Shaffer and then leaned back into the car. These movements made Deputy Shaffer believe that Rhone had a

¹ Deputy Shaffer apparently knew the house owner, Tim Hale, and believed that all the occupants of the house used drugs.

weapon or was reaching for one. Rhone finally complied with the deputy's commands and Deputy Shaffer detained him.

By this time, other officers arrived and they removed the other two occupants, Phyllis Burg and Cortez Brown, from the car. As the officers removed Burg, she told them that they had just come from the Jack in the Box. The officer patted down all three occupants. Rhone had a knife without a handle, someone else's checkbook, and a \$20 bill. All three were handcuffed and placed in separate police cars. As Deputy Shaffer started to return to the Camaro, Burg told him that there was a gun in the car.² At some point during this process, Officer Darin Miller left to investigate the Jack in the Box events.

At this point, Deputy Shaffer decided to search the Camaro to locate and secure the gun. As he approached the car, he did not see anything in plain sight. After he began searching, he found the gun in a plastic bag wrapped inside a towel. Deputy Shaffer did not stop searching at that point and found a purple Crown Royal bag and small plastic tube. Inside these containers, he found crack cocaine.

Deputy Shaffer did not, however, declare that he was arresting the occupants until Officer Miller called him from the Jack in the Box. Officer Miller relayed that the Camaro had gone through the drive-thru window, contacted an employee, and demanded money from him. When, the employee refused, the occupants displayed a gun and the employee threw \$30 into the vehicle. After receiving this information, Deputy Shaffer arrested all three for armed robbery.

² According to Burg's testimony at trial, she started yelling about the gun as soon as Rhone threw the gun into the back seat.

At trial, Isaac Miller testified that he worked at Jack in the Box. He admitted that he had owed Rhone money but claimed that Brown, the Camaro's other male occupant, had already collected it. Miller noticed, however, that Rhone was holding a gun in his lap and pointing it at him. Miller decided to give Rhone the money and threw what he had in his pocket into the car.

Burg testified that Rhone had asked Brown and her for a ride to Jack in the Box in her Camaro. Although she could not see Rhone's lap, she heard Rhone demanding \$40, and saw money thrown into the car. She also testified that she saw Rhone with a plastic bag and that she saw a gun in that bag when Rhone threw it into the back seat after the police surrounded the Camaro. Both she and Brown denied placing the Crown Royal bag in the car.

Deputy Shaffer testified at length about the Crown Royal bag's contents. Inside the bag, he found five small baggies of crack cocaine. In addition, Deputy Shaffer testified that there was a handwritten note with "40's" written on it. 8 RP (Apr. 29, 2005) at 624-25. There was also \$30 in cash in the bag.

Detective Oliver Hickman testified as an expert on street level crack cocaine transactions. He noted that a typical street sale involved selling amounts in \$20 or \$40 values. The crack cocaine rocks in this case were uniform in size, suggesting that they had been weighed and measured by a drug dealer. And the note with "40's" indicated that it was likely the drugs were packaged for sale in \$40 increments. 10 RP (May 3, 2005) at 852. Detective Hickman conceded that a user could use all five packages in a week and that a dealer normally had a cell phone, pager, scale, and crib notes.

Based on these events, the State charged Rhone with unlawful possession of a controlled substance with intent to deliver and first degree robbery. Both of these counts included a firearm enhancement.³

Before trial, Rhone moved to suppress the evidence Deputy Shaffer seized during his search of the Camaro. The trial court denied the motion to suppress. The trial court found that Deputy Shaffer had a reasonable suspicion from the dispatch to stop the Camaro. After that lawful stop, he had a reasonable concern for his safety as well as a reasonable suspicion that Rhone had a weapon in the vehicle. Thus, the trial court found that Deputy Shaffer's search was lawful.

At the State's urging, the trial court also found that Deputy Shaffer had probable cause and lawfully arrested the Camaro's occupants after Officer Miller reported from the Jack in the Box. The trial court also concluded that Shaffer would have searched the vehicle had he waited until making a formal arrest and would have inevitably discovered the evidence.

Before trial, Rhone disputed the fairness of the jury selection process. The jury venire included two African Americans. One was excused for cause by agreement of both parties. The State used a peremptory challenge on the other. Rhone, acting pro se, challenged the jury panel on the grounds that the prosecutor made this decision on the basis of the potential juror's race. The trial court determined that Rhone failed to make a prima facie showing of racial discrimination and denied Rhone's motion for a new jury panel.

³ The State also charged Rhone with first degree unlawful possession of a firearm and added a bail jumping charge after Rhone failed to appear for trial. The jury convicted him of these charges but Rhone is not appealing them.

At trial, the witnesses testified as indicated above, with one notable incident. After he was excused, Miller walked by the defense table and said, "I could make it real easy on everybody and just say that I didn't recognize the gun." 7 RP (Apr. 28, 2005) at 529. The trial court determined that the jurors could not have heard the comment. Therefore, the trial court denied Rhone's motion for a mistrial.

The jury convicted Rhone of all counts. In addition, by special verdict, the jury found that Rhone was armed with a firearm during the drug and robbery crimes.

At sentencing, Rhone stipulated that he had three prior felony convictions: a 1993 first degree robbery conviction in Washington, a 1988 second degree assault in Oregon, and a 1981 Oregon first degree robbery conviction. The trial court determined that all three convictions were most serious offenses for the purposes of the persistent offender accountability act (POAA). RCW 9.94A.030(29). Thus, the trial court sentenced Rhone to life without the possibility of parole for the unlawful possession of a controlled substance with intent to deliver while armed with a firearm charge and the first degree robbery charge.

ANALYSIS

I. Illegal Search

Rhone's primary issue on appeal is that the trial court should have suppressed the evidence Deputy Shaffer seized before he formally arrested Rhone. We hold that Deputy Shaffer had probable cause to arrest Rhone and the other occupants of the vehicle before he searched the car. We also hold that although Deputy Shaffer did not actually state that he was arresting Rhone

and the others, he did place them under custodial arrest. Therefore, the search he conducted was a search incident to arrest, and the trial court properly denied Rhone's motion to suppress.

Because a trial court's suppression decision under CrR 3.6 involves both factual and legal questions, our review is in two parts. We review challenged findings of fact for substantial evidence, which is enough evidence to persuade a fair-minded rational person of the truth of the finding. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). We treat unchallenged findings are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

If substantial evidence supports the challenged findings, we determine if the findings support the conclusions of law. *Vickers*, 148 Wn.2d at 116. We review de novo a trial court's conclusions of law after a suppression hearing. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Specifically, we review whether the evidence known to an officer constitutes probable cause de novo. *In re Det. of Peterson*, 145 Wn.2d 789, 799, 42 P.2d 952 (2002). Similarly, whether an officer arrested or seized a suspect is a mixed question of law and fact. *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996). We defer to the trial court's factual findings and then determine de novo whether those facts constitute a seizure. *Thorn*, 129 Wn.2d at 351. And we may affirm on a different ground than the trial court considered so long as the record is sufficiently developed. *State v. Villarreal*, 97 Wn. App. 636, 643, 984 P.2d 1064 (1999), *review denied*, 140 Wn.2d 1008 (2000).

We turn first to the findings of facts that Rhone challenges. We hold that these challenges are without merit. First, he argues that there was no evidence Deputy Shaffer was aware that robberies of fast food restaurants were common in Lakewood. But the deputy testified

that it was common for fast food restaurants in Lakewood to be robbed. That testimony is sufficient to support this finding.

Second, Rhone challenges the trial court's finding that Rhone reached into the rear interior when he initially disobeyed Deputy Shaffer's commands. While Rhone is correct that Deputy Shaffer did not specify the rear interior, it is hard to see the significance of this error. The trial court properly found that Rhone did lean back into the car.

Third, Rhone argues that there is no evidence that Burg told Deputy Shaffer about the gun or that the deputy entered the car to find it. But Deputy Shaffer testified that as he was walking back to search the car, Burg told him that there was gun in the car. The record therefore supports the finding that Shaffer's subjective intent at the time he entered the car was to secure the gun.

Fourth, Rhone argues that the findings are misleading because they do not describe the order in which Deputy Shaffer discovered the items in the car. We agree with the State that these findings imply the correct order of discovery—the gun, the cigarette tube, and the Crown Royal bag. As we explain below however, this is irrelevant for our analysis, and the error, if any, is harmless.

Rhone's last challenge to the findings of fact also fails. He argues there was no evidence that the trial court erred in finding that Officer Miller immediately contacted Deputy Shaffer after interviewing the Jack in the Box employees. Rhone argues that Officer Miller could not remember exactly when he called Shaffer. But the record belies Rhone's claim. Officer Miller testified that his interviews took about 20 minutes. He then testified that although he could not remember whether he called Deputy Shaffer or vice versa, he relayed the victim's information to

Deputy Shaffer. And Deputy Shaffer testified that he received Officer Miller's information before making the robbery arrest. Although Rhone may quibble with the trial court's use of the adjective "immediately," CP at 124, this record supports a finding that Officer Miller acted reasonably quickly.

Having determined that the trial court's factual findings were appropriate, we turn next to the trial court's legal conclusions. First, the trial court concluded that Deputy Shaffer did not have probable cause to arrest Rhone and the other occupants until Officer Miller reported to him. Second, the trial court determined that Rhone was not arrested until Deputy Shaffer said the words of arrest. We disagree with both conclusions and hold that Deputy Shaffer had probable cause once Burg confirmed there was a gun in the car and that the occupants had just come from the Jack in the Box. We also hold that Deputy Shaffer arrested Rhone and the other occupants before the search.

An officer has probable cause when he knows facts sufficient to warrant a prudent person's belief that the suspect has committed an offense. *Furfaro v. City of Seattle*, 144 Wn.2d 363, 379, 27 P.3d 1160 (2001), *cert. denied*, 536 U.S. 922 (2002). The officer's subjective intentions are not relevant so long as the circumstances, viewed objectively, support the arrest. *Furfaro*, 144 Wn.2d at 380.

Here, although Deputy Shaffer testified that he did not believe that he had probable cause to arrest the suspects, the objective facts dictate that he did. The police dispatch reported that there was a suspicious vehicle in the drive-thru window at the Jack in the Box with two black men in the front and a white woman in the back seat. One of the occupants displayed a gun and

asked about money. The dispatch also described the car and gave the license plate number of the car, and the Camaro matched the description and had the reported license plate number. At this point, Deputy Shaffer had a strong reasonable suspicion to stop the car on suspicion of armed robbery and second degree assault.

When Deputy Shaffer found the car a short time after the dispatch, that reasonable suspicion was elevated to probable cause. Because of the matching license plate number, a reasonable officer would have known this was the car from the Jack in the Box. And Rhone's furtive movement back into the car further confirmed that Shaffer had stopped the correct car. Moreover, when Shaffer removed the occupants of the car, Burg told him that the car had come from the Jack in the Box. At some point before the search took place, Burg also told the officer that there was a gun in the car. Thus, before the search took place, Deputy Shaffer had probable cause to believe that the Camaro's occupants had been involved in at least a second degree assault or an attempted robbery.

We next examine when Deputy Shaffer arrested Rhone. Rhone and the occupants of the Camaro were definitely seized because, under an objective test, the officer restrained their freedom of movement. *State v. Young*, 135 Wn.2d 498, 513-14, 957 P.2d 681 (1998). And, we may find that a person is arrested at the point at which an objective person would reasonably believe that they were being detained indefinitely. *State v. Belieu*, 112 Wn.2d 587, 599, 773 P.2d 46 (1989) (citing *United States v. Patterson*, 648 F.2d 625, 634 (9th Cir. 1981)).

Here, the three occupants of the car were removed at gunpoint, frisked, handcuffed, and placed in separate police cars. One of the occupants apparently threw a weapon into the car and

another admitted to police that there was a gun in the car. An objective person seeing this amount of force and knowing that the police knew of an illegal gun in the car would believe that he or she was being detained indefinitely in these circumstances. Therefore, on the facts of this case, we hold that Deputy Shaffer arrested the occupants even though he did not use the formal words. He then articulated the arrest of the three for robbery when Officer Miller contacted him from the Jack in the Box.

Having determined that the occupants had been arrested and that probable cause supported the arrest, we turn to the validity of the search. Absent an exception to the warrant requirement, a warrantless search violates the federal and state constitution. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). One such exception to the warrant requirement is a search incident to arrest. A valid arrest allows an officer to search incident to that arrest. *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

Here, there was a search incident to a valid arrest. Therefore, we hold that the trial court did not err when it denied the motion to suppress the fruits of that search. Because we resolve this issue on these grounds, we do not reach the remainder of Rhone's arguments (e.g., inevitable discovery).

II. *Batson* Challenge

Rhone's next argument is that the trial court erred when it denied his *Batson*⁴ challenge. He argues that where a prosecutor uses a peremptory challenge to dismiss one of two African Americans and both parties and the trial court agreed that the other African American juror

⁴ *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

should be dismissed for cause, the trial court should require the State to provide a nondiscriminatory reason for the challenge. The State responds that the trial court did not abuse its discretion in finding that the numbers alone were not enough to establish a prima facie case of discrimination. We agree with the State.

The Equal Protection Clause of the federal constitution prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified persons from a jury solely on the basis of race. *State v. Rhodes*, 82 Wn. App. 192, 195, 917 P.2d 149 (1996). A challenge on this basis, also known as a *Batson* challenge, requires a three-step process. *State v. Evans*, 100 Wn. App. 757, 763-64, 998 P.2d 373 (2000). First, a party must first establish a prima facie case of purposeful discrimination. *Evans*, 100 Wn. App. at 763-64. Once the party meets makes a prima facie showing, the other party must give a race-neutral explanation. *Evans*, 100 Wn. App. at 764. Finally, the trial court must considered the proffered explanation and determine if there was a discriminatory purpose. *Evans*, 100 Wn. App. at 764.

The court may not collapse the elements of this test and elicit a nondiscriminatory explanation before determining whether the challenging party has established a prima facia case for discriminatory intent. *State v. Wright*, 78 Wn. App. 93, 100-01, 896 P.2d 713, *review denied*, 127 Wn.2d 1024 (1995). If the trial court determines that no prima facie case exists, the prosecutor is not required to offer a race-neutral explanation. *Wright*, 78 Wn. App. at 101. We accord a trial court's decision about whether a party met its prima facie burden great deference on appeal. *Rhodes*, 82 Wn. App. at 196-97. We therefore will not overturn a trial court's decision unless it is clearly erroneous. *Rhodes*, 82 Wn. App. at 197.

We first address whether the trial court erroneously determined that Rhone failed to make a prima facie case of discriminatory purpose. To meet his prima facie burden, Rhone had to establish two criteria. First, he had to show that the State exercised its challenge against a member of a constitutionally cognizable group. *Evans*, 100 Wn. App. at 764. This criteria is unchallenged here. Second, he had to demonstrate that “that fact and ‘other relevant circumstances’ [raised] the inference that the challenge was based [on] membership in the group.” *Evans*, 100 Wn. App. at 764 (quoting *Rhodes*, 82 Wn. App. at 196). Other relevant circumstances include, among other things, a prosecutor’s disproportionate use of strikes against a group, the level of the group’s representation as compared to the jury, the defendant’s and victim’s race, past conduct by the prosecutor, the type and manner of the prosecutor’s venire questions, and whether the pattern of strikes had the disparate impact of removing minorities from the jury. *Wright*, 78 Wn. App. at 99-100.

We are generally hesitant to find discriminatory motivation in numbers analysis alone. *Wright*, 78 Wn. App. at 102. But it is possible that a prosecutor’s dismissal of the only eligible member of a constitutionally cognizable group can imply a discriminatory motive. *Rhodes*, 82 Wn. App. at 201 (1996).

Here, Rhone produced no evidence of any circumstances, beyond the race of one of the jurors the State challenged, to show the prosecutor acted with discriminatory purpose. The trial court is in the best position to evaluate the prosecutor’s questions and demeanor, and the trial court had no suspicion that the State acted with discriminatory purpose. Moreover, as the State points out, this is not a situation in which the State used a peremptory challenge on the only

African American on the venire. Nor did the State attempt to exclude all minorities. And we also note that Rhone's own attorney did not seem to believe that a discriminatory motive existed; Rhone actually raised this issue pro se.

We hold that, on this record, the trial court did not abuse its discretion in ruling that Rhone failed to meet his prima facie burden. In the absence of any other evidence indicating a discriminatory purpose, the trial court did not err.

III. Expert Testimony

Rhone next argues that the trial court made two evidentiary errors. First, he argues that the trial court erred by excluding testimony from his proposed expert on police procedures during the suppression hearing. Second, he asserts that the trial court abused its discretion by admitting evidence from the State's expert regarding the typical crack cocaine street sale.

Both arguments require us to determine whether the trial court correctly applied ER 702 to admit or exclude evidence that would have been helpful to the trier of fact. Under the ER 702, the trial court must determine whether (1) the witness qualifies as an expert and (2) whether the expert testimony would be helpful to the trier of fact. *State v. Cauthron*, 120 Wn.2d 879, 890, 846 P.2d 502 (1993). We review the trial court's admission of evidence under ER 702 for abuse of discretion. *State v. Greene*, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable reasons. *State v. Stenson*, 132 Wn.2d 688, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

We first address Rhone's assertion that the trial court erred during the suppression hearing when it excluded evidence from Bob Crow, whom the defense submitted as an expert on

police procedures. In the offer of proof, Rhone indicated that Crow would testify about his experience with how police officers write reports. Specifically, Rhone wanted Crow to testify that police reports were more accurate than memories. In addition, Crow would have testified about what Officer Miller told Crow about what he saw before he left to investigate the Jack in the Box events. The trial court actually issued two rulings in excluding this evidence. It excluded Crow's testimony about police procedures, and it ruled that the defense would have to ask Officer Miller about his statement before he could be impeached.

We hold that that it was within the trial court's discretion to determine that Crow's testimony about police procedure would not help the trier of fact. Crow did not have any personal knowledge regarding this investigation. And Deputy Shaffer and Officer Miller had already described the procedures they used in writing reports and acknowledged that there were discrepancies in the reports. Crow's testimony that these officers did not follow proper report procedures would not have provided any additional information as they had already admitted their mistakes. Moreover, in its oral findings, the trial court found that the reports were more accurate than the officer's actual testimony. The trial court did not abuse its discretion when it excluded cumulative evidence of a fact it already believed to be true.

As for the second ruling—that Officer Miller's statements were improper impeachment—that presents an issue under ER 613 rather than ER 702. Assuming that Rhone's argument on appeal includes the second ruling, we hold that the trial court did not abuse its discretion in sustaining the State's objection. Extrinsic evidence of a prior inconsistent statement is not admissible unless the witness has an opportunity to explain or deny the statement. ER 613(b).

Here, Rhone did not give Officer Miller an opportunity to explain his hearsay statements. Rhone could have recalled Officer Miller to the stand and given him that opportunity, but he did not. Therefore, the trial court properly excluded extrinsic evidence of Officer Miller's prior inconsistent statements. There was no error.

Rhone's next argument is that the trial court erred in admitting Detective Hickman's testimony about typical transactions involving crack cocaine. Rhone did not challenge Hickman's expert qualifications; he only objected on the ground that it would not be helpful to the jury and would invade the jury's province. Neither argument is persuasive.

Our courts have generally held that expert testimony is helpful to the trier of fact if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004), *review denied*, 154 Wn.2d 1026 (2005). Detective Hickman's testimony falls within this category. An average layperson would not understand the typical operation of a street level drug transaction. Nor does the average layperson know the common packaging practices of drug dealers, the consumption habits of drug addicts, or the average size of crack cocaine rocks sold to individuals. The trial court did not err in admitting Detective Hickman's testimony about such matters.

Moreover, as the State notes, Detective Hickman's testimony was helpful to Rhone as well. Hickman testified that drug dealers normally keep different wrapped containers, cell phones, pages, scales, and crib notes. Deputy Shaffer found none of these items. Detective Hickman also testified that a group of crack cocaine users would quickly use up the amount of drugs found in the car. This testimony tends to negate the State's theory that Rhone had the

intent to sell the drugs in the car. That the jury believed the State's interpretation of Hickman's testimony is unfortunate for Rhone, but it does not negate the usefulness of this testimony.

We also reject Rhone's argument that Hickman expressed an improper opinion as to Rhone's guilt. Generally, a witness may not offer an opinion regarding the defendant's veracity. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Opinion evidence is testimony based on one's belief rather than on direct knowledge. *Demery*, 144 Wn.2d at 760. Such opinion evidence is unfairly prejudicial because it invades the jury's exclusive province. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). Washington courts have declined to take an expansive view of claims that testimony constitutes an opinion on guilt. *Demery*, 144 Wn.2d at 760.

Here, Hickman did not give an opinion as to Rhone's guilt; he testified about typical drugs sales, not this one. For example, he opined that, based on his experiences, the note with "40's" indicated the sale value of the crack cocaine rocks found in the Crown Royal bag. 10 RP at 852. This is not an opinion regarding Rhone's guilt but an expert's opinion interpreting evidence based on how drug transactions normally occur. The testimony properly allowed the jury to make an informed decision whether Rhone was engaging in such a transaction.

IV. Motion for Mistrial

Rhone's next argument is that the trial court erred in not polling the jury to see if the jurors heard an off-the-record comment by one of the State's witnesses. Rhone moved for a mistrial on this basis, so we review this argument as an appeal of the trial court's denial of that

motion. Because the trial court determined that the jurors did not hear the comment, we hold that the trial court properly denied the motion for a mistrial.

We review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). We find abuse when "no reasonable judge would have reached the same conclusion." *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial would cure the error. *Johnson*, 124 Wn.2d at 76. We keep in mind that the trial court is best suited to judge the prejudice of a particular statement. *Lewis*, 130 Wn.2d at 707.

Here, Miller uttered a comment as he was leaving the stand. When the defense attorney called this to the trial court's attention, the trial court called Miller to the stand to explain himself. Miller testified, under oath, that he had been angry and muttered under his breath, "I could make it real easy on everybody and just say I didn't recognize the gun." 7 RP at 529. The trial court then determined that there were only two jurors in the room at the time and that the jurors were further away from Miller than the trial court judge was, and the court did not hear it. In denying the motion, the trial court found that, based on the relative locations of Miller and the jurors, there was no conceivable way that the jurors could have heard the comment. Moreover, had the trial court polled the jury, it would have invited unnecessary speculation about what Miller may or may not have said.

We hold that the trial court's decision to deny the motion for mistrial was within its discretion. The trial court did not ignore Rhone's complaint but, instead, investigated it. The

trial court then concluded, as a factual matter, that the jury did not hear the comment. The trial court properly ruled that there was no prejudice.

Rhone asserts that we should presume that the jury overheard the comment and that the trial court erred by not polling the jury. He relies on *State v. Murphy*, 44 Wn. App. 290, 296, 721 P.2d 30 (1986). In *Murphy*, Division Three held that communications with jurors, “[o]nce established . . . [give] rise to a presumption of prejudice.” *Murphy*, 44 Wn. App. at 296. Here, however, Rhone failed to establish that the jury overheard the comment and *Murphy* is inapplicable.

V. Prosecutorial Misconduct

Rhone’s next argument is that the prosecutor committed misconduct by suggesting to the jury that Miller was purchasing drugs. Rhone argues that the evidence did not support this inference or the prosecutor knowingly presented false testimony because Miller testified that he had borrowed the money. We reject both arguments.

The defendant bears the burden of establishing that the prosecutorial conduct complained of was both improper and prejudicial. *Stenson*, 132 Wn.2d at 718-19. If the defendant proves the conduct was improper, the prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); *Stenson*, 132 Wn.2d at 718-19. When the defense does not object to the statement, the misconduct must be so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. *State v. Jerrels*, 83 Wn. App. 503, 508, 925 P.2d 209 (1996).

Rhone first challenges the prosecutor's closing remarks. In closing argument, the prosecutor commits misconduct if it is clear and unmistakable that she is not arguing an inference from the evidence but is expressing a personal opinion. *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983) (citing *State v. LaPorte*, 58 Wn.2d 816, 365 P.2d 24 (1961)), *review denied*, 100 Wn.2d 1003 (1983). A prosecutor also may not refer to evidence not presented at trial. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). But the prosecutor has wide latitude in drawing reasonable inferences from the evidence. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 716, 101 P.3d 1 (2004). The court views closing statements in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions. *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017 (1999).

Here, the evidence supports a reasonable inference that Miller and Rhone were engaging in a transaction related to drugs.⁵ Moreover, the State only discussed Miller's likely drug involvement in its rebuttal after Rhone's attorney alleged that Miller lied because "once this happens [Miller] knows, wow, if [Rhone] gets in trouble, he is not going to have to pay him at all." 11 RP (May 4, 2005) at 967. The State's comments, taken in context, are an attempt to rehabilitate Miller's credibility by conceding that Miller might not be entirely innocent and then focusing on Rhone's conduct. We hold that this was not improper argument.

⁵ Specifically, Rhone possessed drugs packaged to be sold in \$40 increments and he was trying to collect a \$40 debt from Miller.

Turning to Rhone's second argument that the State knowingly presented false testimony, we hold that the State did not act improperly. Rhone cites to *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). In *Napue*, the Court held that a State may not present false testimony, or fail to correct testimony when the State later discovers it to be false. *Napue*, 360 U.S. at 269.

Initially, it is not evident that Miller's testimony was false. Miller testified that he owed Rhone money. Rhone elicited that this was a "loan" because he was poor. 7 RP at 493. That statement is not entirely inconsistent with the State's theory that the debt involved here was a drug debt.

Second, even if the State's theory was not exactly consistent with Miller's testimony, the State did not have an obligation to put him on the stand to recant. Although the State has an obligation to correct perjured testimony, it is not the State's responsibility to determine which version of the facts is true and then correct all other versions of the facts. Here, the State simply presented its own interpretation of Miller's testimony. That was permissible argument.

Even if we accepted that the State somehow committed misconduct by implying that Miller and Rhone were involved in a drug-related transaction, the trial court gave a proper instruction indicating that the attorney's comments were not evidence. Rhone did not ask for a curative instruction. The prejudice from this comment was not so ill-intentioned that a curative instruction could not have cured the prejudice. The error, if any, was harmless.

VI. Cumulative Error

Rhone's next argument on appeal is that he was denied a fair trial by the accumulation of all the errors alleged above. Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a trial that was fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 123 Wn.2d 737, *cert. denied*, 513 U.S. 849 (1994). The defendant bears the burden of proving an accumulation of errors of such magnitude that retrial is necessary. *Lord*, 123 Wn.2d at 332. But on this record, we cannot say that the trial court committed any errors that cumulatively denied Rhone his right to a fair trial. We therefore reject his argument.

VII. Sufficiency of the Evidence

Rhone next argues that the evidence is not sufficient to support his conviction for the drug possession charge. He asserts that the State proved only that he was in proximity to the drugs and not that he constructively possessed the drugs by exercising dominion and control over them. We hold that sufficient evidence supports the jury verdict on the possession charge.

In reviewing a challenge to the sufficiency of the evidence, we examine the evidence in the light most favorable to the State to determine if a rational trier of fact could find the elements of the offense beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v.*

Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Rhone challenges whether the evidence was sufficient to show that he possessed the drugs in the car. In Rhone's prosecution for a possession offense, the State had the burden of showing that Rhone actually or constructively possessed the drugs. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Actual possession requires physical custody. *Cote*, 123 Wn. App. at 549. Constructive possession is established when a person has dominion and control over the goods in question and need not be exclusive. *Cote*, 123 Wn. App. at 549. We look to the totality of the circumstances to determine if a reasonable trier of fact could have inferred that a person has dominion and control. *Cote*, 123 Wn. App. at 549. But mere proximity to the drugs, even with evidence that a person handled the drugs earlier, is not sufficient to establish dominion and control. *State v. Spruell*, 57 Wn. App. 383, 389, 788 P.2d 21 (1990).

Viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a trier of fact could have inferred that Rhone exercised dominion and control over these drugs. Rhone asked Burg and Brown to take him to the Jack in the Box. He held the gun in his lap and demanded \$40 from Miller. The Crown Royal bag contained \$30 in cash as well as drugs apparently being sold in \$40 increments. And the other two occupants of the car denied knowing of the crown royal bag.

From these facts, a reasonable trier of fact could have inferred that Rhone was collecting a drug debt. And as the threesome went to the Jack in the Box at Rhone's behest and as Rhone was the one armed with the gun, the jury could have inferred that he was the one in charge and

was exercising dominion and control of the drugs. The evidence is therefore sufficient to support his conviction.

VIII. Persistent Offender Sentence

Rhone also argues that his sentence was invalid because he was improperly sentenced under the persistent offender accountability act (POAA). He argues first that, under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the POAA is an invalid sentencing act. Second, he argues that Oregon convictions cannot be comparable because Oregon does not require a unanimous verdict. Third, he argues that one of his convictions, an Oregon robbery conviction, is not a most serious offense. We address his arguments in series and reject them.

Rhone first argues that under *Blakely*, the POAA is invalid. Under the POAA, a persistent offender must be sentenced to life imprisonment without the possibility of parole if he has two prior convictions for most serious offenses. *State v. Smith*, 150 Wn.2d 135, 139, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909 (2004). In *Blakely*, the Supreme Court affirmed its holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely*, 542 U.S. at 301 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

We have addressed this argument in *State v. Ball*, 127 Wn. App. 956, 113 P.3d 520, *review denied*, 156 Wn.2d 1018 (2005), where we held that *Blakely*, which requires all facts that enhance a sentence to be proved beyond a reasonable doubt to a jury, does not apply to the

POAA. *Ball*, 127 Wn. App. at 959-60. Rhone acknowledges that *Ball* controls this case and invites us to overturn our decision. We decline to do so on the facts of this case.

Rhone's second argument under the POAA is that because Oregon does not require unanimous criminal verdicts while Washington's constitution does, Oregon offenses can never constitute comparable offenses under the POAA. We addressed this argument in *State v. Gimarelli*, 105 Wn. App. 370, 20 P.3d 430, *review denied*, 144 Wn.2d 1014 (2001), specifically holding that Oregon convictions, even without the unanimous jury verdict, are valid under the Full Faith and Credit Clause of the federal constitution. *Gimarelli*, 105 Wn. App. at 379.

Rhone asks us to overturn our decision because this does not present a full faith and credit issue. He argues that Oregon is not seeking to enforce its judgment in Washington, but, rather, that we are interpreting Washington crimes. The State argues that *Gimarelli* forecloses this argument. The State is correct.

In *Gimarelli*, we noted that the State does not need to prove the constitutionality of prior convictions. *Gimarelli*, 105 Wn. App. at 374 (citing *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719, 718 P.2d 796, *cert denied*, 479 U.S. 930 (1986)). There is an exception if the conviction is unconstitutional on its face. *Gimarelli*, 105 Wn. App. at 374.

As *Gimarelli* noted, for a foreign conviction to be constitutionally invalid, we must find that it was invalid under the United States Constitution or the constitution of the state in which the conviction was entered. *Gimarelli*, 105 Wn. App. at 377. Here, the Oregon convictions are

facially valid and were constitutional in the state of Oregon and under the federal constitution. Thus, as the State does not otherwise bear the burden of showing constitutionality, Rhone's argument fails.

Third, Rhone argues that his Oregon robbery conviction is not a most serious offense. We decline to reach that issue because Rhone stipulated to two other convictions that would count as most serious offenses. Specifically, Rhone has a previous Washington robbery conviction, and he does not otherwise challenge the comparability of his Oregon second degree assault conviction with Washington's vehicular assault offense. As the State points out, these two convictions would be sufficient to fall within the POAA's mandatory sentence provisions. RCW 9.94A.030(29). Thus, even assuming that we agreed with Rhone that the Oregon robbery conviction should not be counted, Rhone's POAA sentence remains valid.

IX. STATEMENT OF ADDITIONAL GROUNDS ISSUES

Rhone raises two arguments in his statement of additional grounds (SAG).⁶ First, he argues that his attorney failed to give him effective assistance of counsel when his attorney accidentally ripped the plastic bag in which Deputy Shaffer found the gun. Second, he asks us to consider *United States v. Kithcart*, 134 F.3d 529 (3rd Cir. 1998). We reject both arguments.

In order to prevail on an ineffective assistance of counsel claim, Rhone must show that his defense counsel's conduct was deficient and that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Where the defendant

⁶ RAP 10.10.

cannot show any prejudice from the deficient performance, we may address the prejudice prong first and dispose of the claim. *State v. Rohrich*, 149 Wn.2d 647, 655, 71 P.3d 638 (2003).

Here, Rhone cannot show any prejudice. The jury in this case saw the exhibit intact with the gun inside the plastic bag. The trial court, before sending the exhibit to the jury, issued an instruction informing the jury that they were to consider the exhibit in the condition it was during trial. We presume that juries follow all instructions given. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Here, assuming that the state of the plastic bag might have affected the jury in some way, the instruction was more than enough to cure any possible prejudice.

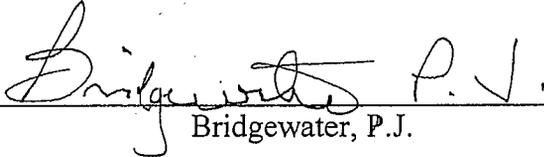
Rhone's last argument is that we should consider *United States v. Kithcart*. But this case is inapposite. In *Kithcart*, an officer received a dispatch regarding two robberies involving two black males in a black sports car, possible a Z-28 or a Camaro. *Kithcart*, 134 F.3d at 530. Ten minutes after the dispatch, the officer pulled over a black Nissan after it went through a red light. *Kithcart*, 134 F.3d at 529. While conducting a stop for the traffic infraction, the officer noticed there were two black male occupants. *Kithcart*, 134 F.3d at 530. The court held that the officer lacked probable cause to arrest the two men for armed robbery because they were driving a black car and remanded for reconsideration of the investigative stop for the traffic infraction or whether there was reasonable suspicion for an investigatory stop for the robberies. *Kithcart*, 134 F.2d at 532.

Presumably, Rhone wishes us to hold, following *Kithcart*, that the State did not have reasonable suspicion to stop his Camaro. But *Kithcart* explicitly avoided addressing the

reasonable suspicion analysis and is inapposite here. Besides, in this case, the dispatch included the make of the car and a matching license plate number. Thus, *Kithcart* is inapposite.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

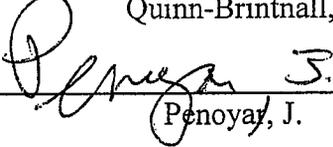


Bridgewater, P.J.

We concur:



Quinn-Brintnall, J.



Penoyar, J.