90514-2

No. 90514-2

Appellate No. 69812-5-I

SUPREME COURT FOR WASHINGTON STATE

STATE OF WASHINGTON

Respondent,

v.

KEVIN CLOUDY

Appellant.

BRIEF OF APPELLANT

PETITION FOR REVIEW

Kevin Cloudy
Appellant pro se
1313 N. 13th Ave.
Walla Walla, WA
99362

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A. IDENTITY OF PETITIONER

Kevin Claudy asks this court to accept review of the court of Appeals decision terminating review designated in part B. of this petition.

B. COURT OF APPEALS DECISION

Petitioner appeals the court of Appeals opinion dated April 21, 2014 and reply to his Motion for Reconsideration that the court ruled was without merit. A copy of the decision is in the Appendix A, pgs 1-18
Petitioner claims that the court of Appeals decision is in conflict with both the Supreme Court and other courts of Appeal. He argues that there is a significant question of law under the federal and State constitutions. Petitioner is unable to provide a copy of the court of Appeals denial to his motion For reconsideration due to its loss. The court ruled that the motion was without merit.

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II. STATEMENT OF THE CASE

Petitioner herein appends counsel's statement of the case, in his opening Brief.

E. ISSUES PRESENTED FOR REVIEW

1. THE PROSECUTOR'S MISSTATEMENT OF THE LAW, GIVEN THE AUTHORITY OF LAW BY THE TRIAL COURT WHEN IT OVERRULED THE DEFENSE'S OBJECTION, CAUSED CONFUSION AMONG THE JURY AND BARRED THE DEFENSE FROM REQUESTING A CURATIVE INSTRUCTION IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

i. Misstatement of the law at closing arguments.

During closing argument, the prosecutor discussed the "to convict" instructions and explained that they decide the elements of each charged crime. The prosecutor continued:

> to put it in less legal terms it gives you a set, a list, a checklist of things you need to convict and make a decision on. If you decide all of them one way, the defendant's guilty, if you decide all of them another way, he's not guilty, then you can't render a verdict.

Defense counsel objected claiming this was a misstatement of the law. The court replied, "Excuse me a moment. overruled." Opinion, pg. 5. The Court of Appeals reasoned that:

> clearly fails to prove prejudicial misconduct where the prosecutor correctly stated the law moments later and the jury instructions correctly advised the jury of the applicable law.

Opinion, pg. 6. The Court went on to say:

> The jurors were instructed to disregard any remark, statement, or argument that was not supported by the evidence or the law given to them by the court. (emphasis added)

Opinion, pg. 9. Appellant argues that when the trial court endorsed the prosecutor's misstatement of the law by overruling defense counsel's objection, it gave authority to that misstatement that could only be corrected with a curative instruction, but was barred from doing so by the trial court's overruling of the objection.

At least four factors considered together, compel the conclusion that the improper argument prejudiced Appellant's constitutional right to a fair trial. First, "'the prosecutor made a confusing statement in closing argument that could be read as a misstatement of the law.'" opinion, pg. 6. Second, and most important, the misstatement was given the authority of law when the trial court overruled defense counsel's objection. Third, that overruling barred defense counsel from requesting a curative instruction. Fourth, the jurors were then instructed to disregard "any remarks, statement, or argument that was not supported by the evidence or the law given to them by the court," (emphasis added). At that point, any attempt by the prosecutor to correct that misstatement, itself became a remark, statement, or argument to be disregarded by the jurors with the court's endorsement of that misstatement as "the law given to them by the court."

ii. The necessity of a curative instruction

The court of Appeals reasons that subsequent to the misstatement, and subsequent to the court overruling of defense counsel's objection that endorsed that misstatement to the jury, the prosecutor corrected him-

set, and that because of the jury instructions, the error was neutralized. The reasoning is unavailing. The Ninth Circuit held that curative instructions, themselves, fail to "neutralize the harm" of improper statements by a prosecutor when "'[t]hey [do] not mention the specific statements by a prosecutor and [are] not given immediately after the damage [is] done.'" United States v. Witherspoon, 410 F.3d 1142, 1152 (9th Cir.) (quoting United States v. Kerr, 981 F.2d 1050, 1054 (9th Cir. 1992)).

"To determine whether the prosecutor's misconduct affected the jury's verdict, we must look first to the substance of a curative instruction." Kerr, at 1053. In that respect even in the absence of objection by the defense counsel, a "trial judge should be alert to deprivation from proper argument and take curative action as appropriate. Id. at 1054. Petitioner claims it was an abused discretion to overrule defenses objection.

In this instance the trial was doubly flawed. objection was indeed made by defense counsel and the trial court overruled that objection to a clear error. this acted as a bar to a request for a curative instruction by the defense. Such failure to correct the improper statement at the time it was made cannot be salvaged by the later generalized jury instruction reminding jurors that a lawyer's statements during closing arguments do not constitute evidence. U.S. v. Sinitch, 96 F.3d 759,

806 (9th Cir. 1990).

Another important factor contributing to the prejudicial effect of improper statement is the strength of the case against a defendant. When the case is particularly strong, which is not the case here, the likelihood that prosecutorial misconduct will affect the defendant's substantial rights is lessened because the juror's deliberations are less apt to be influenced. But as the case becomes progressively weaker, the possibility of prejudicial affect stemming from improper statements grows greater. Wuthenspan, at 1151. Coupled with the court's refusal to correct the prosecutor when there was an objection, this left the jury with the uncorrected and inaccurate misstatement of the law.

In cases involving jury instructions alleged to be ambiguous and therefore subject to erroneous interpretation, proper legal standard for reviewing instructions was whether there was a reasonable likelihood that jury had applied challenged instructions in a way that prevented consideration of constitutionally relevant evidence. Boyde v. California, 494 U.S. 370, 380-81 (1990).

The Supreme Court has explained that the Boyde test "is not a substitute for the Brecht harmless-error test. The Boyde analysis does not inquire into the effect of the error on the jury's verdict; it merely asks whether

constitutional error has occurred." Calderon v. Coleman, 525 U.S. 141, 146-47 (1998) (per curiam). Here, not only was the prosecutor's misstatement of the law clear error, it violated Appellant's constitutional right to a fair trial. The evidence against Appellant was limited to contradictory and questionable in-court identification from an eyewitness who had not seen Appellant in 19 months since the crimes, only at an impermissibly suggestive in-court identification.

The court's instructions were at the most general in nature and were not addressed to counteract the misstatement. When the prosecutor presented his erroneous misstatement, defense counsel's objection was overruled barring a curative instruction. Even worse, when the court overruled defense counsel's objection, the court thereby implicitly placed its own imprimatur on the prosecutor's argument.

The prosecutor's misstatement of the law created the overwhelming impression that the jury must find, that in order to be found innocent, Appellant must somehow disprove every element of the crime or a verdict could not be rendered. This impermissively shifted the burden of proof from the State to Appellant; consequently, there is at least "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the

consideration of constitutionally relevant evidence." Boyde, at 380.

It is the duty of the court to cure the effect of misstatements "by giving appropriate curative instructions to the jury." United States v. March, 874 F.2d 1035, 1040 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990). A clear curative instruction could have eliminated any prejudice stemming from the prosecutor's remarks. State v. Allen, 178 Wn. App. 893, 317 P.3d 494, 502 (2014). A prosecutor's misstatement of the law is a serious irregularity having the potential to mislead the jury. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)

iii. Prejudice

In State v. Warner, 165 Wn.2d 17, 19, 195 P.3d 940 (2008), the court held:

> In analyzing prejudice, we do not look at the comments in isolation, but in context to the whole argument, the issues in the case, the evidence and the instructions given to the jury. Yates, 161 Wn.2d at 774, 168 P.3d 359. Had the trial judge not intervened to give effective curative instruction, we would not

hesitate to conclude that such a demonstrable misstatement of the law by a prosecutor constitutes reversible error.

The court in Glassman acknowledged that misconduct can be so pervasive that prejudice cannot be avoided even with a curative instruction. In re Glassman, 175 Wn.2d 696, 705, 286 P.3d 673 (2012). Appellant argues that this clear misstatement of the law is presumed to be prejudicial, Keller v. City of Seattle, 146 Wn.2d 237, 249, 44 P.3d 845 (2002), Appellant claims that although the trial court's jury instructions regarding this misstatement of the law may have minimized the negative impact on the jury, and the jury is assumed to have followed these jury instructions, a misstatement of the law and the State's burden of proof constitutes great prejudice because it reduces the State's burden and undermines Appellant's due process rights. State v. Johnson, 158 Wn. App. 677, 685-86 (2010). Some improper prosecutorial remarks, as is the case here, may touch upon constitutional rights but are curable by a proper instruction. State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1253, 37 P.3d 354 (2001). Appellant was unable to cure the misstatement by the court above of discretion.

2. TRIAL COUNSEL'S PERFORMANCE CONSTITUTED INEF-

FECTIVE ASSISTANCE OF COUNSEL

i) Ineffective Assistance of Counsel

the sixth Amendment to the united states constitution and article I, section 22 of the washington state constitution secure to all, by appointment if necessary, the right to assistance of counsel at any critical stage in a criminal procedure. State v. Valentine, 132 wn.2d 1, 16, 935 P.2d 1294 (1997) (citing Coleman v. Alabama, 399 U.S. 1, 7 (1970). The purpose of the right is to provide all defendants with a fair trial. Wheat v. United States, 486 U.S. 153, 158-59 (1988).

To prove ineffective assistance of counsel, Appellant must show:

(1) Defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and

(2) defense counsel's representation prejudiced the defendant, i.e., there is a reasonable probability that except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 wn.2d 322, 334-35, 899 P.2d 1251 (1995).

ii) Deficient performance

a.) Failure to propose or object to Jury Instructions

Where defense counsel proposes an erroneous instruction, review will after be precluded because the error was invited. But, if the instructional error is the result of ineffective assistance of counsel, "the invited error doctrine does not preclude review." State v. Kyllo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009). Seeing the recklessness instruction through the lens of ineffective assistance does not transform it into a different claim, the claim remains one of instructional error.

Under the rules governing jury instructions counsel are directed to (1) file proposed jury instructions and (2) take exception to instruction or lack of instruction in order to call potential instructional deficiences to trial court's attention. See CrR 6.15(a), (c). Here, defense counsel's failure to abide by both CrR 6.15(a) and (c) clearly constitutes deficient performance, as well as "invited error."

Through a tortuous series of cases, however, an exception to the requirement that defense counsel must except to the trial court's instruction to preserve error for review has developed. As Justice Horowitz

recognized in State v. Ermert, 94 Wn.2d 839, 850 n.1, 621 P.2d 121 (1980), absent a claim of ineffective assistance of counsel, appellate courts lack authority to review jury instructions to which no exceptions were taken.

Through the intervening years, the ineffective assistance of counsel exception to the issue preservation requirement has become so pervasive that an ordinary, reasonably competent effective counsel routinely ignores rules requiring the presentation of defense proposed instructions as required under CrR 6.15(c) and, to a lesser extent, the taking of exception to the trial court's jury instructions as required under CrR 6.15(c). This decision appears to be based on the fact that the invited error doctrine has been quite consistently enforced. See, e.g., State v. Momah, 167 Wn.2d 140, 153-55, 217 P.3d 321 (2009) (discussing application of the invited error doctrine), cert. denied, 167 Wn.2d 140, 217 P.3d 321 (2010).

In State v Bradley, 141 Wn.2d 731, 10 P.3d 358, 360 (2000), the court held:

> Initially, we note the state contends Bradley's argument on self-defense is barred by the doctrine of invited error. Because Bradley himself proposed the jury instruction, he now

challenges, the Court of Appeals correctly held he is barred from claiming error on appeal by the invited error doctrine. State v. Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989). But in a criminal case, where the offering of an incorrect jury instruction may constitute ineffective assistance of counsel, we reach the merits of the challenge anyway in determining if counsel was ineffective

State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

"Jury instructions must inform the jury the State bears the burden of proving each element of a criminal offense beyond a reasonable doubt." State v. Peters, 163 Wn. App. 836, 837, 261 P.3d 199 (2011) (citing In re Winship, 397 U.S. 358, 364 (1970). "It is reversible error to instruct the jury in a manner that would relieve the State of the burden of proof." Id. (quoting, State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)). This applies, also, to the former section above.

Here, there are two related instructions. The "to convict" instruction for a drive-by shooting states:

A person commits the crime of drive-by shooting when he or she recklessly discharges a firearm

in a manner that creates a substantial risk of death, or serious physical injury to another person and the discharge in either from a moter vehicle that was used to transport the shooter or the firearms to the scene of the discharge.

The definitional jury instruction for "reckless" reads:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a [wrongful act] [ ] may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

As far back as State v. Allen, 101 Wn.2d 355, 678 P.2d 798, 799 (1984), the Supreme Court held "the trial court must instruct the jury on every element of the crime." In dictum, the Court suggested that whenever recklessness is an element of the crime charged, the defendant is entitled to an instruction defining recklessness. Id. 101 Wn.2d 355, 678 P.2d at 800. Here, counsel's proposal of an incorrect definition of recklessness in the jury instructions was deficient performance. He supports

this argument to cases that have concluded that a definitional instruction should have been consistent with the correct "to convict" instruction which are on point with the case at bar.

In State v. Peters, decided just prior Appellant's conviction in September, 2011, Peters was convicted of first degree manslaughter, which requires the state to prove that the defendant "recklessly causes the death of another person." Id. 103 Wn. App. 836, 849-50, 261 P.3d 199 (2011). The definitional instruction stated that the State only had to prove that Peters "knew of and disregarded 'a substantial risk that a wrongful act may appear, rather than a substantial risk that death may occur." Id. (emphasis added). The Court held "[T]he instruction impermissibly relieved the State of the burden of proving beyond a reasonable doubt that Peters knew of and disregarded a substantial risk that death may occur, and allowed the jury to convict Peters of only a wrongful act." Id. at 850, 261 P.3d 189. The Court's decision was based on the Supreme Court's holding in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005) which also involved manslaughter. Thus, at the time these cases were decided, "it was not clear whether a more specific definitional instruction was neces-

sary for offenses other than manslaughter.

In State V. Harris, 164 Wn. App. 357, 358, 263 P.3d 1276 (2011), Division II agreed with Division I's analysis in Peters and extended it to an assault charge. The court concluded that the definition for "reckless" at issue here, misstated the law because it stated "wrongful act" instead of "great bodily harm." Id. at 587-88, 263 P.3d 1276.

In peters and Harris, both courts pointed at the WPIC's definition for recklessness includes brackets around the term "wrongful act", with the direction to "[u]se bracketed material as applicable." Peters, at 849, 261 P.3d 199 (quoting 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 10.13 (3d ed. 2008) (WPIC); see also Harris, at 587, 263 P.3d 1276.

Appellant's case is on point with Peters and Harris. The same definition for "reckless" misstated the law because it stated "wrongful act" instead of "a substantial risk of death, or serious injury." The only difference is the crime itself, rather than assault or manslaughter, Appellant's charge was a drive-by shooting.

Harris appears to be the first case to extend a particularized standard to an assault offense. In

Harris, Division II explained that when a court is instructing a jury, "a trial court should use the statutes language 'where the law governing the case is expressed in the statute.'" Harris, at 837, 263 P.3d 1276 (quoting State v. Hardwick, 74 Wn.2d 288, 290, 447 P.2d 80 (1968)). Division II agreed with that principle.

Defense counsel should have known of these decisions. Here, the jury instructions stating the definition of "reckless" included the same "wrongful act" language in Peters and Harris, the definition should have used the more specific statutory language stated above.

b.) Identification, and expert witness testimony

When defense counsel's motion to suppress was denied by the trial court, and with full knowledge that neither eyewitness had identified Appellant, and that, in fact, neither witness identified him at a show-up 19 months earlier, allowed both eyewitnesses to identify him sitting alone, with counsel, in the court room. Appellant argues that such in-court identification is inherently prejudicial and that counsel should have requested an out-of-court identification, i.e., either

a photo-montage or line-up, to ensure an identification that was not as prejudicial. Appellant argues that, subsequent to the denial of the motion to suppress, not to do so lacked any strategic value, and that to present him as the only black defendant under the circumstances of this case was impermissibly suggestive in violation of due process and effective assistance.

Furthermore, counsel failed to object when, during the state's direct examination of Nae, said:

Q. Anthony, is there anyone that you remember from the robbery present in the courtroom today?

A. It's been a long time, so I really don't remember his face, but---

Q. Okay. Let me ask you a different way. Do you know whether the person sitting here at counsel table, in the white shirt--do you whether he was someone who came into your house on the night of the robbery. 2RP 285

The prosecutor had, at that point, contaminated Nae's identification by describing the person by what and where he was sitting as the very person the State wanted him to identify. This was not only ineffective assistance of counsel, but prosecutorial misconduct

that was impermissibly suggestive, invalidating any sense of Doe's identification as reliable. He may as well have simply placed his hands on Appellant's shoulders and said "Is this man?" and yet counsel failed to object.

During the suppression hearing, the court recognized:

> either party could tactically seek a photo montage, a lineup, or whatever outside the court. Neither party has chosen to do so, which I consider to be a tactical decision in this case.

Appellant argues that while that decision may have been tactical in regards to seeking to suppress in-court identification, once that motion was dismissed, no tactical reason remained and counsel should have sought "a photo montage, a lineup, or whatever outside the court," supra., as well as expert testimony on eye witness reliability.

iii. Prejudice

a) Jury instructions

Appellant asserts that counsel's deficient performance

in failing to provide the proper definitional jury instruction, and his failure to either object or submit proper jury instructions violated his constitutional rights to a fair trial and effective assistance of counsel.

Because prejudice is presumed when instructional, as well as other errors, misstate the law, a defendant is entitled to a new trial unless the error can be declared harmless beyond a reasonable doubt. State v. Caldwell, 94 Wn.2d 614, 618, 618 P.2d 508 (1980). An instructional error is harmless only if it is "trivial, or formal, or merely academic," and "in no way affected the outcome of the case." State v. Walden, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997) (internal quotation marks omitted) (quoting State v. Warfield, 103 Wn.2d 221, 227, 691 P.2d 948 (1984)). In general an instructional error will not be reversed absent a showing of prejudice, but "[a] clear misstatement of the law, however, is presumed to be prejudicial." Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). Appellant's case was clearly prejudiced.

b.) Failure to Object

Appellant argues that counsel's failure to object

when the prosecutor impermissibly identified him as someone present in the courtroom from the robbery to an eyewitness, who himself was identifying Appellant for the first time in open court, was clearly prejudicial. This is especially true when, after admitting he couldn't remember the robber's face because it had been a long time, the prosecutor interrupted and was allowed to indicate to the witness what and where Appellant was wearing and sitting. Counsel also failed to request a photo montage or lineup for two eyewitnesses who, 19 months after the robbery, had as yet identified him and allowed an impermissibly suggestive in-court identification of the only defendant in the courtroom and did so after counsel's motion to suppress identification had been denied.

c.) Failure to request expert testimony

Counsel also failed to admit expert testimony on the unreliableness of eyewitness testimony, which is especially egregious under the circumstances of this case. To protect a defendant against unreliable eyewitness testimony, our Supreme Court held in State v. Chesteen, 190 Wn.2d 626, 649, 81 P.3d 830 (2003) that

when eyewitness identification is a key element of the state's case, and here it was the only evidence in the state's case, the trial court has discretion to admit its reliability. Appellant's case was prejudiced when counsel failed to admit expert testimony during trial.

d.) Objective Standards of Reasonableness

Appellant claims counsel's representation fell below the objective norm set out in the Rule of Professional Conduct. Under Rule 1.1, Competence, it reads:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Under Maintaining Competence at [6], it reads:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Appellant contends that counsel's errors show a lack of "legal knowledge, skill, thoroughness and preparation" and a failure to "keep abreast of changes in the law in each instance mentioned above.

3. THE IN-TRIAL IDENTIFICATION OF TWO EYEWITNESSES WAS IMPERMISSIBLY SUGGESTIVE

i. Eyewitness Identification

Appellant's conviction rests solely on eyewitness identification. Mistaken eyewitness identification is a leading cause of wrongful convictions, as recognized by Washington courts. See State v. Rioflu, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) (citing Brandon L. Garrett, Judging Innocence, 108 COLUM. L. REV. 55, 60 (2008) ("'The vast majority of [studies] exonerees (78%) were convicted on eyewitness testimony; we now know that all of the eyewitnesses were incorrect.'" (alteration in original)).

ii. In-trial identification that is impermissibly suggestive.

During the defense's closing remarks, defense counsel did not contest that Dao and Wright, the two eyewitnesses, were the victims of a violent robbery, but argued that the State failed to prove Appellant was involved, noting that no one identified him as one of the robbers prior to trial. Defense counsel emphasized, "This trial has not really

been about what happened, but about who did it, identification." RP (Nov. 20, 2012) at 1231, opinion, pg.s 5-6

Appellant assigns error to the trial court order denying his motion to suppress identification by two eyewitnesses on the basis that their ability to identify him was irreparably tainted. In 1977, the United States Supreme Court held:

> reliability is the lynchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification." Id. at 199.

Manson v. Brathwaite, 432 U.S. 98, 114 (1977). See also State v. Turner, 31 Wn. App. 843, 644 P.2d 1224, 1228 (1982); State v. Abercrombie, 31 Wn. App. 687, 644 P.2d 692-93 (1982); State v. Burrell, 28 Wn. App. 606, 625 P.2d 756 (1981). An

identification must be suppressed when the ability of the witness to make an accurate identification is outweighed by the corrupting effect of law enforcement. Brathwaite, 432 U.S. at 114. This goes to the heart of the prosecutor's examination of Dao. Evidence should be suppressed when it "is so extremely unfair that its admission violates fundamental conceptions of justice." Dowling v. United States, 493 U.S. 342, 352 (2001).

In this case, unreliable evidence supports the assertion that Ms. Wright or Mr. Dao identified Appellant in the show-up identification. While a show-up identification was held, the results were not documented. officer Hessig performed the line-up and stated that Wright did not identify Appellant, Motion to Suppress Identification, pg. 8 (Hereinafter Motion), proper procedures were not used and Mr. Dao was not present at any identification procedure. Motion, pg. 8, Case law emphasizes the importance of documenting the identification. State v. Henderson, 208 N.J. 208, 241 (2011).

The in-trial identification in the instant case was highly suggestive, and the application of the five factors developed in Biggers heavily favored excluding any trial identification by either witness because: 1) neither of these witnesses provide a specific description of the

person they saw; 2) the witnesses' opportunity to view the driver was extremely brief and took place in a moment of intense stress and confusion; 3) no pretrial identification procedure was ever attempted with either witness; 4) the witnesses advised officers at the time of the incident that they would be unable to identify the driver; 5) nineteen months passed since the incident; and 6) in-trial, one-on-one identification procedure were unnecessarily suggestive in violation Appellant's right to due process. Biggers, 409 U.S. at 198; Motion, pgs 9-10.

The first question is whether an identification in which the witnesses are asked, for the first time, to identify Appellant at trial was suggestive. A show-up identification is inherently suggestive. State v. Hanson, 46 Wn. App. 656, 665-666, 731 P.2d 1140 (1987), See also State v. Herrera, 187 N.J. 493, 504 (2006). Hanson asserted that single suspect identifications were disfavored and generally suggestive because the procedure: "indicates that the police have focused their attention on that person." Hanson, 46 Wn. App. at 666. A show-up identification unmistakably directs undue attention upon the suspect both because the suspect is the only possible subject of the identification and because of incriminating circumstances. The

Federal Way Police Department recognizes the suggestive nature of show-ups. motion, ex. 8.

Eyewitness identification of a suspect can be a key component to a successful investigation. Show-ups provide immediacy appropriate to very particular situations. Officers conducting a show-up must ensure this process is handled so that it further enhances the investigative process - a professional and consistent approach for the best results.

(Id.). they have created protocols when conducting a show-up.

Here, asking ms. wright and mr. Dao to identify appellant for the first time at trial was enormously suggestive. the basic problem is that there was substantial evidence to support that ms. wright and mr. Dao never identified Appellant prior to trial. See motion, pg.s. 2-6. The way the trial played out, the witnesses were lead to conclude that the entire criminal justice system validated their in-trial identification.

Turning to the ms. wright and mr. Dao identifications, the application of the Biggers and Brathwaite factors similarly weighed in favor of exclusion of any in-trial identification. ms. wright did not answer the

door, Mr. Dao answered it. He yelled for her to run. She ran upstairs to the children's bedroom. She saw one female and one male. The police questioned her ability to see what happened. Motion, ex. 3, pgs 12-15, 25). Detective Clary said to Ms. Wright: "I thought you said that you didn't see them because you were facing the other way." Id., pg. 25. She got a glimpse. Id. In the bedroom, she was kneeling on the floor. Id., pgs 13-15. She was hit with a gun. She could not see the person. Id. Her opportunity was limited.

When Mr. Dao opened the door, he saw two people, a male and female. His opportunity to view was limited. He tried to prevent them from entering. The male went around to either side. By that time Mr. Dao left. He initially saw two people. When he left, he saw more people. He later chased them in a car. He admitted to the police that during the car chase he had problems seeing some of the suspects. At trial he admitted that he could not remember the robber's face. His opportunity was limited.

Likewise Ms. Wright's degree of attention was divided. She was in the room trying to call 911. Her phone was between her legs. Motion, ex. 3, pg. 14. The robbers entered the room. They hit her with a weapon. "When a visible weapon is used during a crime, it can distract

a witness." Henderson, 208 N.J. at 242. She even admits being distracted. She was kneeling face down in the room, ID., pg.s 13-15. Mr. Dao's attention was also impacted by witness focus. He wanted to prevent them from entering the house. He kneeled down and shut the door. Motion, ex. 1, pg. 6. Then he left. During the car chase, his attention was divided between driving, following them while being fired upon, and trying to get someone's attention.

The accuracy of Ms. Wright's description is questionable. She said the Black male wore a hoodie and dark sweats. She provided this description to 911. She did not state this description to law enforcement. Law enforcement did not document any meaningful description other than skin color and dark clothing. It is unknown what appellant was wearing when law enforcement approached him. Law enforcement took pictures of hoodies. The hoodies had logos on them. Ms. Wright told police that she saw no logos on the hoodie worn by the robber. Finally, there is no description of the suspects to compare. She never provided law enforcement a description of the suspects at the show up and law enforcement failed to document it. Motion, pg. 12.

Mr. Dao's description suffers from the same

problems. He described the same male as Ms. Wright. The male had a gray sweater, black tee shirt, and dark colored jeans. This description is different than Ms. Wright's description. Detectives gently confronted Mr. Dao about the discrepancy. motion. ex. 1, pg. 33-35. He also thought one of the females looked like a man. motion, ex. 2, pg. 16. Two Black males were found at the scene. Mr. Dao did not provide officer Tseng any distinction between them. He provided no details on who fired upon him. He did not provide officer Tseng a description of what they were wearing. And he did not identify Appellant at the show up.

Ms. Wright's opportunity, her attention, and description were impacted by alcohol use. Federal Way detectives spoke to her in a recorded interview several hours after the incident. They noticed the odor of alcohol. Unknown to law enforcement at that time, Ms. Wright had an alcohol related criminal history. The effects on alcohol can promote false identifications. Jennifer E. Dysart et al., The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups, 87 J. APPLIED PSYCHOL. 170, 174 (2002).

Cross-racial identification is relevant. The Washington State Supreme Court heard oral arguments

on cross-racial identification in State v. Allen, cross-racial issues impact the reliability of identification.

F. CONCLUSION

WHEREFORE, Petitioner requests that his sentence be reversed with instructions.

Dated: 9-25-2014 by: Kevin Clardy
Kevin Clardy

Appendix A.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN STEWART CLARDY, JR. Appellant.	)	NO. 69812-5-I DIVISION ONE UNPUBLISHED OPINION FILED: April 21, 2014

LAU, J. — Kevin Clardy challenges his convictions for first degree robbery, first degree burglary, first degree assault, first degree unlawful possession of a firearm, and drive-by shooting. He contends the prosecutor committed misconduct in closing remarks and also contends the jury instructions erroneously defined the term "reckless or acts recklessly." He raises additional issues in his pro se statement of additional grounds (SAG). Finding no error, we affirm.

FACTS

The State initially charged Kevin Clardy with first degree robbery, first degree burglary, and first degree assault, all of which the State alleged were committed while armed with a firearm. Codefendants Tia Lyn Eaton, Amani Catrice Sorrell, Josiah M.

Rashid, and Doresida C. Castro were charged in the same information.[1] The State later filed a third amended information charging Clardy with first degree robbery (count I), first degree burglary (count II), first degree assault (count III), first degree unlawful possession of a firearm (count IV), and drive-by shooting (count V). The State alleged Clardy committed the crimes in counts I, II, and III while armed with a firearm.

The parties agree on the background substantive facts. See Resp't's Br. at 3. The charges arose from the robbery of Anthony Dao and Danielle Wright in early March 2011. Both Dao and Wright were home at the time, as were Dao's 7-year old son, BD, and the couple's infant daughter, MD. According to Dao, a woman rang his doorbell late in the evening on March 8, 2011. The woman claimed she was BD's aunt and that she was there to pick up BD for his mother, who was Dao's former girl friend. She insisted that Dao open the door. Dao told the woman to come back the next day, but at her insistence, he eventually opened the front door but kept the storm door closed and locked. Upon opening the front door, he saw a black man with a shotgun outside. The man immediately attempted to break into Dao's home. Dao closed the door and yelled for Wright, who was upstairs, to call the police.

Dao then saw the man and woman run around to the back of his home and shove the barrel of the gun through a back window. Dao ran out his front door to his neighbors' house to ask them to call 911. As he was leaving, he heard more glass breaking, which turned out to be a sliding glass door at the back of the house.

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[1] Before trial, Clardy's four codefendants entered guilty pleas to various charges for their roles in the events surrounding the robbery. None of the codefendants testified at Clardy's trial.

After alerting his neighbors, Dao returned to his home and entered the front door. He found no one inside, but he could see three or four people running away from the back of the house. He grabbed a large knife and chased them on foot. The robbers ran through Dao's backyard and into an adjacent neighborhood. They taunted Dao as they ran away and fired the shotgun at him once.

Dao abandoned his foot chase and pursued the robbers in his minivan. He drove around the surrounding area and stopped next to a red sedan at a stoplight. He saw four people in the car—two men in the back seat and two women in the front seats. According to Dao, one of the women was the one he first encountered at his front door and one of the men was the one with the shotgun at his house. When the light turned green, the red car sped away and Dao followed. The man with the shotgun fired at Dao three or four times as they drove along, and Dao could hear shotgun pellets hitting his minivan. Dao also claimed that at one point the red car stopped and the man with the shotgun stepped out of the car and fired at him two or three times from a distance of 30 to 60 feet. The man then picked up the spent shotgun pellets and returned to the red car, which sped away again. Dao kept following in his minivan.

About 10 or 15 minutes into the chase, Dao saw a law enforcement officer engaged in an unrelated traffic stop. Dao pulled up to the officer and told him he had just been robbed and needed assistance. He then sped off again in pursuit of the red car. About 5 to 10 minutes later he saw items taken from his home strewn on the roadway. He then saw the unoccupied red car, which had crashed into a guardrail. An officer arrived at the scene and directed Dao to park his car and wait for assistance.

Wright recalled that when she heard Dao open the door late on March 8, she saw a woman outside. She heard a sudden bang on the front door and then heard Dao yell, "Run, babe. They got guns." RP (Nov. 8, 2012) at 471. Wright immediately ran to the master bedroom, retrieved MD and a cell phone, and went to DB's bedroom. As she passed the stairs on the way to BD's bedroom she saw at least two black men, one larger than the other, and possibly another person coming up the stairs toward her. One of the men had a gun. Wright ducked into BD's room, put MD on the floor, and lay on top of MD to protect her.

Wright recalled that at least two of the robbers entered BD's room. One started hitting her hard in the back with what she thought was a large gun, and another held a gun to her head, demanded money, and threatened to kill her. Wright also heard someone rummaging through the rest of the house. After 30 or 40 seconds, the robbers left Wright and went to the master bedroom. Moments later, Wright saw the two men and a woman run downstairs with one of the men carrying Dao's briefcase. Wright heard the robbers leave the house through the back door.

Early in the morning on March 9, police arrested five suspects in an abandoned quarry near where the red car had crashed. The suspects were two black men, including Clardy, and three women. Police recovered two guns—a shotgun and a handgun—in the underbrush near the crash site. In the red car, they found both live and spent shotgun shells, a handgun case, and a rifle case. Strewn on the roadway near the crash site were a broken briefcase and various papers and documents, some of them bearing Dao's name. None of the male DNA (deoxyribonucleic acid) recovered

from the handgun, shotgun, and shotgun shells was conclusively linked to any of the suspects. No fingerprint evidence was presented at trial.

Dao identified Clardy for the first time at trial as the man he thought was wielding the shotgun during the robbery. Dao admitted he only got a glimpse of the man at his front door and further acknowledged that the man he saw with the shotgun in the back of the red car was "possibly" the same man he had seen at his front door. RP (Oct. 31, 2012) at 334. He eventually acknowledged he was "not sure" it was Clardy in the back seat of the red car when they were stopped at the stoplight. RP (Oct. 31, 2012) at 403. Like Dao, Wright claimed at trial that Clardy was the man with the shotgun.[2]

During closing argument, the prosecutor discussed the "to convict" instructions and explained that they described the elements of each charged crime. The prosecutor continued:

> To put it in less legal terms, it gives you a set, a list, a checklist of things you need to consider and make a decision on. If you decide all of them one way, the Defendant's guilty; if you decide all of them another way, he's not guilty; if you can't decide or you reach different conclusions on different elements, then you can't render a verdict.

RP (Nov. 20, 2012) at 1200. Defense counsel objected, claiming this was a misstatement of the law. The court replied, "Excuse me a moment. Overruled." RP (Nov. 20, 2012) at 1200.

During the defense's closing remarks, defense counsel did not contest that Dao and Wright were victims of a violent robbery, but argued that the State failed to prove Clardy was involved, noting that no one identified Clardy as one of the robbers prior to

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[2] There was conflicting testimony at trial regarding whether Wright positively identified Clardy as one of the robbers during a show-up identification of the suspects arrested near the crash site.

trial. Defense counsel emphasized, "This trial has not really been about what happened, but about who did it, identification." RP (Nov. 20, 2012) at 1231. Counsel also noted the lack of physical evidence linking Clardy to the crimes and further argued that even if the jurors concluded the State proved Clardy was involved, it failed to prove intent for the first degree assault charge.

The jury convicted Clardy as charged on all counts, including the firearm enhancements for counts I, II, and III. The court sentenced him within the standard range. Clardy appeals.

ANALYSIS

Prosecutorial Misconduct

Clardy argues that the prosecutor's statement, quoted above, constitutes prosecutorial misconduct. He contends,

> By arguing the jury had to conclude the State failed to prove beyond a reasonable doubt all of the element[s] listed in the to convict instructions in order to enter a 'not guilty' verdict, the prosecutor set up an impossible hurdle for the defense to overcome to obtain an acquittal on any charge.

Appellant's Br. at 13. The State responds that although "the prosecutor made a confusing statement in closing argument that could be read as a misstatement of the law," Clardy fails to prove prejudicial misconduct where the prosecutor correctly stated the law moments later and the jury instructions correctly advised the jury of the applicable law. Resp't's Br. at 1.

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). "Prejudice is

established only if there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). During closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of witnesses and arguing inferences about credibility based on evidence in the record. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995).

Misstating the law is improper and has the potential to mislead the jury. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). However, even if the prosecutor misstated the law or otherwise caused confusion, Clardy is not entitled to a new trial unless he can demonstrate a substantial likelihood that the prosecutor's statements affected the jury's verdict. Pirtle, 127 Wn.2d at 672.

The prosecutor's closing argument as a whole makes clear that he did not intend to argue to the jury that it had to find a failure of proof on every element in order to acquit Clardy. Despite the confusing statement quoted above, the prosecutor correctly stated the law immediately after the statement. The prosecutor turned to the first degree burglary charge and properly discussed the elements of that crime, noting that the only element truly in dispute was identity. He repeatedly emphasized that the State had the burden to prove every element of the crime beyond a reasonable doubt. See RP (Nov. 20, 2012) at 1202-04. The prosecutor argued that the case involved the perpetrator's identity, not what happened—an argument Clardy repeated in his closing

argument; RP (Nov. 20, 2012) at 1201-10 (prosecutor argued that identity was the disputed element in all of the crimes); RP (Nov. 20, 2012) at 1231 (defense counsel argued, "This trial has not really been about what happened, but about who did it, identification.").

Similarly, the prosecutor narrowed the areas of dispute regarding robbery, assault, drive-by shooting, and unlawful possession of a firearm. The prosecutor's statements properly clarified for the jury that if it found that the State's proof failed on any single element—most likely identity in this case—it should acquit. Defense counsel's closing remarks emphasized the State's burden of proof and argued the State failed to prove the identity and intent elements of the crimes.

Further, the jury instructions cured any potential confusion. See State v. McKenzie, 157 Wn.2d 44, 57 & n.3, 134 P.3d 221 (2006) (proper jury instructions can cure potential prejudice). Each to-convict instruction correctly states that if the jury has a reasonable doubt as to any single element, it must acquit on that charge. For example, the first degree robbery instruction described the six elements of the crime and informed the jury, "[I]f, after weighing all the evidence, you have a reasonable doubt as to any one of the elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty . . . ." (Emphasis added.) Regarding first degree burglary, the jury was instructed, "[I]f, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty . . . ." (Emphasis added.) The first degree assault, first degree unlawful possession of a firearm, and drive-by shooting to-convict instructions contained similar language. The court also instructed the jury that the lawyers' remarks are not evidence

and that the law is contained in the jury instructions. The jurors were instructed to disregard any remark, statement, or argument that was not supported by the evidence or the law as given to them by the court. We presume that the jury follows the court's instructions. State v. Swan, 114 Wn.2d 613, 662, 790 P.2d 610 (1990).

Because (1) the prosecutor immediately stated the correct law and clarified the State's burden of proof, (2) defense counsel rebutted or clarified the prosecutor's statement in his own closing remarks, and (3) proper jury instructions cured any confusion, we conclude no substantial likelihood any misstatement affected the jury's verdict. Clardy fails to establish prosecutorial misconduct.

Jury Instructions

Clardy contends that his drive-by shooting conviction must be reversed because the trial court erroneously defined "reckless" in its jury instructions. The State responds that Clardy invited any alleged error.

A person is guilty of drive-by shooting if "he or she recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is . . . from a motor vehicle . . . ." RCW 9A.36.045(1). Before trial, the State filed proposed jury instructions, including a definition of recklessness drawn from Washington's criminal pattern jury instructions. WPIC 10.03. The State also filed a pretrial motion to compel Clardy to file "a complete set of proposed instructions." The trial court granted the motion. Clardy then sought leave to agree with the State's instructions, thus avoiding the need to file his own proposed instructions. Clardy specifically requested, "The Defense asks leave not to propose the standard WPIC instructions and instead will rely on the State's proposed

standard instructions. The Defense will propose any supplemental instructions if the need arises." The trial court granted this motion. RP (Oct. 24, 2012) at 251 ("Motion to allow the Defense to agree with the standard WPIC instructions. That's granted.").

The first page of Clardy's proposed instructions states, "The Defense agrees and stipulates to the WPIC standard instructions proposed by the State of Washington except for the additional instructions that are being requested by the Defense." Clardy proposed no additional or different instructions on the definition of recklessness or the drive-by shooting charge. When Clardy revised his proposed instructions during trial, he again explicitly adopted the State's proposed instructions.

The trial court's to-convict instruction for drive-by shooting provided in relevant part:

> To convict the defendant of the crime of Drive-by shooting as charged in count V, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That during the period of time intervening between March 8, 2011, through March 9, 2011, the defendant recklessly discharged a firearm;
>
> (2) That the discharge created a substantial risk of death or serious physical injury to another person;
>
> (3) That the discharge was either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge; and
>
> (4) That the acts occurred in the State of Washington.

The court instructed the jury regarding recklessness in the same language proposed by the State and stipulated to by Clardy:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act or result may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

(Emphasis added.)

Clardy assigns no error to the court's to convict instruction but contends the above underlined portion of the court's definition of "reckless or acts recklessly" misstates the law. He argues, "A jury instruction defining the recklessness requirement must account for the specific risk contemplated under that statute," and, thus, the instruction should have replaced the term "a wrongful act or result" with "death or serious physical injury to another person." Appellant's Br. at 17, 18.

Jury instructions are sufficient when they allow trial counsel to argue their respective theories of the case, are not misleading, and when read as a whole, properly inform jurors of the applicable law. State v. Killingsworth, 166 Wn. App. 283, 288, 269 P.3d 1064 (2012). Each instruction is considered in the context of the "instructions as a whole" rather than in isolation. State v. Benn, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993).

We conclude that under the doctrine of invited error, Clardy may not challenge jury instructions he proposed. The invited error doctrine "prohibits a party from 'setting up error in the trial court and then complaining of it on appeal.'" State v. Armstrong, 69 Wn. App. 430, 434, 848 P.2d 1322 (1993) (quoting State v. Young, 63 Wn. App. 324, 330, 818 P .2d 1375 (1991)). Under the invited error doctrine, "even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) (emphasis added). Here, Clardy

expressed affirmative agreement to the instructions by joining in the State's proposed instructions. He cannot challenge the jury instruction quoted above.[3]

Statement of Additional Grounds (SAG)

Clardy raises several additional arguments in his pro se SAG. First, he contends, "The statements [and] testimony given by Anthony Dao [and] Danielle Wright were not fact, so they can only be false" and claims the prosecutor committed misconduct by knowingly presenting this allegedly perjured testimony. SAG at 10. He points to several inconsistent or inconclusive statements made by each witness. Our review of the record establishes that at best, Dao and Wright did not have a perfect recollection of the events surrounding the robbery. While their testimony was at times confusing and somewhat contradictory, the fact that some of a witness's statements were inconsistent or that one witness's testimony contradicts another witness's testimony does not reflect misconduct by the witnesses. The evidence does not show that Dao or Wright testified falsely or committed perjury. See RCW 9A.72.050 (perjury consists of person making inconsistent material statements under oath, knowing one to be false). We defer to the fact finder's credibility determinations on issues of conflicting

[3] We also note that in addition to inviting the error, Clardy waived this issue by failing to object to the instruction at trial. Under RAP 2.5(a), we may refuse to hear any claim of error not raised in the trial court unless that error constitutes manifest constitutional error. Here, Clardy argues in a footnote and without elaboration that he may raise the issue for the first time on appeal because it involves manifest constitutional error. This is insufficient to justify review. See Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (declining to consider an inadequately briefed argument); State v. Johnson, 69 Wn. App. 189, 194 n. 4, 847 P.2d 960 (1993) ("[P]lacing an argument . . . in a footnote is, at best, ambiguous or equivocal as to whether the issue is truly intended to be part of the appeal.").

testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Raleigh, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010). Because the jury had a full opportunity to consider each witness's testimony, we do not disturb its credibility determinations. Clardy fails to show misconduct by either the witnesses or the prosecutor in presenting the testimony.[4]

Clardy also contends the trial court erred in applying firearm enhancements in sentencing him for first degree assault, first degree burglary, and first degree robbery.[5] He claims, "Enhancements apply to all felonies except where the use of a firearm is an element of the offense." SAG at 11. We disagree. In State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010), our Supreme Court considered whether the trial court properly added firearm enhancements in sentencing the defendants for first degree assault, first degree robbery, and first degree murder. For each defendant, the jury returned a special verdict form indicating it found the defendant was armed with a "deadly weapon" at the time of the crime. Williams-Walker, 167 Wn.2d at 893-94. The verdict forms did not mention "firearm," and the trial court relied on the underlying guilty verdicts in imposing a firearm enhancement rather than a deadly weapon enhancement. Williams-Walker, 167 Wn.2d at 899-900. Our Supreme Court held that the jury in each case authorized only a deadly weapon enhancement, not the more severe firearm enhancement. Williams-Walker, 167 Wn.2d at 898. The court did not hold that firearm

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[4] Clardy also fails to demonstrate prejudice given defense counsel's extensive cross-examination and impeachment of both Dao and Wright.

[5] To the extent Clardy also argues the court improperly imposed a firearm enhancement in sentencing him for his drive-by shooting conviction, the record indicates the trial court imposed no enhancement on that conviction.

enhancements were inappropriate for crimes in which use of a firearm is an element of the offense. It merely held that a firearm enhancement must be alleged and authorized by the jury in the form of a special verdict:

> For purposes of sentence enhancement, the sentencing court is bound by special verdict findings, regardless of the findings implicit in the underlying guilty verdict. Where a firearm is used in the commission of a crime, the only way to determine which enhancement is authorized is to look at the jury's special findings. A sentence enhancement must not only be alleged, it also must be authorized by the jury in the form of a special verdict.

Williams-Walker, 167 Wn.2d at 900. Here, the jury found by special verdict that Clardy was "armed with a firearm" at the time he committed first degree assault, first degree burglary, and first degree robbery. CP 263-65, 297. The trial court properly imposed the firearm enhancements.

Clardy also contends that his first degree assault and drive-by shooting convictions constitute double jeopardy. Both the United States and Washington State Constitutions protect persons from being twice put in jeopardy for the same offense. State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); U.S. CONST. AMEND. V; CONST. ART. I, § 9. This includes "being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense." State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006) (citing State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005)). However, the State may bring multiple charges arising from the same criminal conduct in a single proceeding without offending double jeopardy. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Our Supreme Court has consistently rejected the notion that "offenses committed during a 'single transaction'

are necessarily the 'same offense'" for purposes of double jeopardy. State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). Because double jeopardy is a question of law, our review is de novo. Freeman, 153 Wn.2d at 770.

Our courts employ a three-part framework for double jeopardy analysis. Freeman, 153 Wn.2d at 771-73. First, if there is clear express or implicit legislative intent to punish the crimes separately, then we look no further. Freeman, 153 Wn.2d at 771-72. If the legislative intent is unclear, we turn to the "same evidence" test which asks if the crimes are the same in law and in fact.[6] State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). Third, if applicable, the merger doctrine may help determine legislative intent. Vladovic, 99 Wn.2d at 419. Even if the two offenses appear to be the same, when each one has an independent purpose or effect, then the two offenses may be punished separately. Freeman, 153 Wn.2d at 773.

Clardy asserts that the offenses of first degree assault and drive-by shooting are "covered under the same statu[t]e." SAG at 16. We presume he argues the offenses are legally identical. We evaluate the two crimes under the same evidence test, which considers "whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). "If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes." Freeman, 153 Wn.2d at 772. Offenses are not the same in fact and law if there is an element in each offense that is

[6] Washington's "same evidence" test is sometimes referred to as the "same elements" test or "the Blockburger test." Freeman, 153 Wn.2d at 772 (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)).

not included in the other and proof of one offense would not necessarily also prove the other. Calle, 125 Wn.2d at 777; Vladovic, 99 Wn.2d at 423. We view the elements "as charged and proved," not in the abstract. Freeman, 153 Wn.2d at 777.

As charged in this case, drive-by shooting and first degree assault each contain a statutory element that is absent from the others. See RCW 9A.36.011 ("A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm . . . [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death."); RCW 9A.36.045(1) ("A person is guilty of drive-by shooting when he or she recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle . . . .").

However, comparison of the statutory elements at an abstract level does not end the analysis. In re Pers. Restraint of Orange, 152 Wn.2d 795, 818, 100 P.3d 291 (2004); State v. Nysta, 168 Wn. App. 30, 46-47, 275 P.3d 1162 (2012), review denied, 177 Wn.2d 1008 (2013). We must look at the statutory elements and the facts used to prove those elements to determine whether each offense required "proof of a fact which the other d[id] not." Blockburger, 284 U.S. at 304. As the offenses were charged and proved in this case, evidence that Clardy fired a gun was required to prove both his convictions for drive-by shooting and first degree assault. But each offense also required proof of a fact that the other did not. With respect to first degree assault, the State was required to prove that Clardy's shooting was directed at Dao with the intent to inflict great bodily harm. To prove drive-by shooting, the State was required to prove

that Clardy discharged a weapon from a vehicle or in proximity to a vehicle in a manner that created a substantial risk of death or serious injury to another person.

This is not a case where evidence of a single act was required to prove multiple offenses and was the sole available evidence to prove those charges. The evidence that Clardy fired one bullet at Dao was all that was required to prove first degree assault. This evidence was available, but not required, to support the drive-by shooting conviction. That conviction was also established by evidence that Clardy fired several more times at Dao from the car in which Clardy was a passenger. In sum, first degree assault and drive-by shooting were not the same offenses. It follows that the two convictions did not violate the prohibition against double jeopardy.

Clardy also challenges specific items of evidence admitted at trial. He contests "the presentation of a sweat shirt that was not covered under CrR 4.7 and no one had any record (or) knowledge of how it showed up in the evidence locker." SAG at 19. He argues the sweat shirt evidence was "contaminated" because "[t]here was no control of the contents of the locker." SAG at 24, 25. He also claims "DNA . . . was presented to jurors for no other reason but confusion." SAG at 19. We find no support for these assertions in the record.

Clardy also argues that insufficient evidence supports his convictions. Evidence is sufficient if, when viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficient evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial evidence is as probative as direct evidence. State v. Vermillion, 66 Wn. App. 332, 342, 832 P.2d 95 (1992). Clardy bases his sufficiency challenge on conflicting witness testimony and also claims that identification evidence was unreliable. He essentially contests witness credibility and evidence persuasiveness at trial. We defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000). Given the fact finder's opportunity to assess witness demeanor and credibility, we will not disturb those findings. See State v. Pierce, 134 Wn. App. 763, 774, 142 P.3d 610 (2006). Viewing the evidence in the light most favorable to the State, we conclude a rational jury could have found Clardy guilty of the charged crimes beyond a reasonable doubt.

Finally, Clardy contends the record of proceedings from November 21, 2012 (the in-court presentation of the verdicts) is missing from the appellate record. We received the transcript from these proceedings and reviewed the complete record in deciding this appeal.

CONCLUSION

We affirm Clardy's convictions.

WE CONCUR:

Certificate of Mailing

I, Kevin Clardy, declare that on 9/25/14, I deposited the foregoing Motion for Discretionary Review or a copy thereof, in the internal mail system of the Washington State penitentiary and made arrangements for postage addressed to:

Clerk, Washington State	Eric Heiropoulos Becker / SPA
Supreme Court,	King Co. Pros.'s office
POB 40929	516 3rd Ave., Suite W554
Olympia, WA 98504-0929	Seattle, WA 98104-2390

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: 9-25-2014 by: Kevin Clardy

Kevin Clardy