NO. 44523-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DERRICK LAMONT THOMAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 12-1-02671-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the open-court exchange of the parties' peremptory challenge list accord with defendant's public trial right when the challenges were exercised in open court and reduced to a written document filed in the public record?

2. Were the statements defendant made about his residence without a *Miranda* warning properly admitted when they were obtained during a non-custodial *Terry* stop without interrogation?

3. Is remand for correction of the challenged findings and conclusions unwarranted when the identified ambiguity is resolved through reference to the oral ruling?

4. Does the challenged drug conviction comport with defendant's right to be free from double jeopardy when jeopardy only attached to that offense in the trial ending in conviction?

5. Did the court properly deny defendant's motion to dismiss the challenged drug offense pursuant to the mandatory joinder rule when he waived its operation by failing to move for consolidation and when the rule is inapplicable to his case?

6. Has defendant failed to prove the prosecutor's varied use of the pronoun "we" in summation was improper when the challenged argument distinguished the State's burden from the jury's duty?

7. Defendant's misdemeanor sentence should be remanded for correction because it exceeds the statutory maximum by one day.

B. STATEMENT OF THE CASE.

1. Procedure

Appellant, DERRICK THOMAS ("defendant") was charged by original information with unlawful possession of a firearm in the first degree (Count I), violation of a protection order (Count II), and driving while license suspended in the third degree (Count III) on July 16, 2012. CP 1-3. The State presented an amended information adding one count of unlawful possession of a controlled substance on October 16, 2012; however, the Clerk's office misplaced it, so it was not filed until January 25, 2013. CP 113-115; 2RP 151;[1] 14RP 1133-45. A protracted adjournment followed. *Id.* When the case resumed on December 10, 2012, the court and prosecutor proceeded to trial on the original information, which did not include the controlled substance offense. 3RP

[1] Citations to the record will follow the following format: Volume RP page, e.g., 1RP 1, all transcripts not designated by volume will be identified as follows: RP (date) page, *e.g.*, RP (1/1/11) 1.

165-66; 4RP 188; 6RP 581; 7RP 664; 14RP 1133-34; CP 59, 65, 67. Defendant did not move for consolidation. *See e.g., Id.*

The court ruled admissible evidence obtained in the search of defendant's residence and statements defendant made to law enforcement. 1RP 118; 4RP 237-38; CP 81-86. The jury convicted defendant for the protection order violation and licensing offense. 7RP 659-62, 666; CP 77-78. A mistrial was declared for the firearm offense. *Id.*[2]

Defendant was re-arraigned on January 17, 2013 after another amended information adding the challenged drug offense as Count II was presented. CP 79-80; 9RP 689, 691; 10RP 771, 803. Defendant's motion to dismiss Count II pursuant to CrR 4.3.1 was denied. 9RP 701, 712. Jury selection was conducted in open court and the parties' openly exchanged peremptory challenge list was subsequently filed as a public record. *See e.g.*, 10RP 773-79; RP (Jan.24, 2013) 1-79. CP 200.[3] Defendant rested without calling witnesses. 11RP 1033. The jury convicted on both counts but left the firearm enhancement verdict form blank. CP 133-35.

[2] A one year suspended sentence was imposed on January 18, 2013. CP 87-91.

[3] The same open court procedure was observed in defendant's first trial where the convictions for the protection order violation and licensing offense were obtained. CP 184; 4RP 186-87.

Defendant was sentenced on February 15, 2013.[4] CP 166; 13RP 1120-30. A notice of appeal was timely filed on that day. CP 162.[5]

2. Facts

Officer Guiterrez contacted defendant in the front yard of 4840 South I Street on June 24, 2012. 10RP 815-19. Defendant stated he lived there. 10RP 817. Department of Corrections Officer Grabski received information defendant was living there in violation of his community custody. 10RP 822. Grabski watched defendant enter the residence twice without knocking. 10RP 822-27; 11RP 945. Defendant was detained by police after leaving the second time. 10RP 828.

Defendant admitted to possessing keys to the residence and to keeping personal belongings inside. 10RP 829. Grabski conducted a compliance check of the residence with assisting officers. 10RP 830-32; 11RP 946-48. They encountered the mother of defendant's children (Tessa Akes) and two children sleeping in the master bedroom near a loaded shotgun.[6] 10RP 826, 832-35; 11RP 951-52, 955-57, 959-60.[7]

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[4] He had an offender score of 4, which included a point for committing crimes on community custody. CP169. The trial court imposed 40 months in the department of corrections. CP 172.

[5] On June 4, 2013, the trial court alerted the parties to the Clerk's misplacement of the October 16, 2012, amended information. 14RP 1131.

[6] A predicate offense for the firearm charge was proved by stipulation. 11RP 1032.

[7] Defendant stipulated to the shotgun's operability. 11RP 939, 942, 1033.

Officers searched a dresser inside the master bedroom. 10RP 836. They recovered two scales near men's clothing and a plastic bag near women's clothing; both items tested positive for cocaine. 10RP 836, 839, 854-55; 11RP 969, 974, 976-77, 995.[8] Documents bearing defendant's name were found in a drawer with shotgun shells. 10RP 838-39; 11RP 962, 967, 973. Men's underwear and shotgun shells were located in and on the dresser. 11RP 962. Ammunition found in one drawer matched ammunition in the shotgun. 11RP 961, 964.[9] Defendant's connection to the contraband was further established through admissions he made during telephone conversations recorded by the jail. 11RP 929-32, 949; Ex. 23.

C. ARGUMENT.

1. THE OPEN-COURT EXCHANGE OF A PEREMPTORY CHALLENGE LIST ACCORDED WITH DEFENDANT'S PUBLIC TRIAL RIGHT BECAUSE THE CHALLENGES WERE EXERCISED IN OPEN COURT AND MADE A PART OF THE PUBLIC RECORD.

"The public trial right is not absolute ...." ***State v. Sublett***, 176 Wn.2d 58, 71, 292 P.3d70, 292 P.3d 715 (2012) (*citing* ***Waller v. Georgia***, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). "[I]t is

[8] The report identifying the cocaine was admitted by stipulation as Exhibit No. 24. *Id.*
[9] A closet in the master bedroom also contained male clothing. 10RP 837; 11RP 955.

[nevertheless] strictly guarded to ensure that proceedings occur outside the public courtroom in only the most unusual circumstances." ***State v. Leyerle***, 158 Wn. App. 474, 478, 242 P.3d 921 (2010) (*citing* ***State v. Easterling***, 157 Wn.2d 167, 182, 137 P.3d 825 (2006)). The right "is found in article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution, both of which provide a criminal defendant with a public trial by an impartial jury." ***Sublett***, 176 Wn.2d 58 at 71.[10] "These provisions ensure a fair trial, foster public understanding and trust in the judicial system, and give [participants] the check of public scrutiny." ***Leyerle***, 158 Wn. App. at 479 (*citing* ***State v. Brightman***, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); ***Dreiling v. Jain***, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004)).

Alleged public trial right violations are reviewed de novo. *Id.* (*citing* ***State v. Momah***, 167 Wn.2d 140, 147-48, 217 P.3d 321 (2009); ***State v. Bone-Club***, 128 Wn.2d 254, 256, 906 P.2d 325 (1995)). Reversal

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[10] Article I, section 10 of Washington's Constitution also provides justice in all cases shall be administered openly, granting both the defendant and the public an interest in open, accessible proceedings. This right is mirrored federally by the First Amendment. Washington's Supreme Court historically analyzed court-closure allegations under either, article I, section 10 or article I, section 22, analogously, although each is subject to different relief depending upon who asserts the violation. ***Sublett***, 176 Wn.2d 70, n.6 (*citing* ***Press-Enter. Co. v. Superior Court***, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (transcript will remedy violation of public trial right asserted by member of the public); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***State v. Easterling***, 157 Wn.2d 167, 182, 137 P.3d 825 (2006) (remanding for new trial when right asserted by defendant excluded from proceeding).

and remand for new trial is the remedy when a defendant's public trial right is violated. ***State v. Leyerle***, 158 Wn. App. 474, 478, 242 P.3d 921 (2010) (***In re Personal Restraint of Orange***, 152 Wn.2d 795, 814, 100 P.3d 291 (2004)).[11] Whereas courtroom management decisions that do not amount to a public trial right infringing closure are reviewed for an abuse of discretion and will not be reversed unless they are manifestly unreasonable or based on untenable grounds for untenable reasons. ***Lormor***, 172 Wn.2d at 93, 95; ***In re Marriage of Littlefield***, 133 Wn.2d 39, 46-7, 940 P.2d 1362 (1997); *see also* RCW 2.28.010.

a. Defendant's public trial right was observed through the open court exchange of a list of alternately exercised peremptory challenges.

The rules governing the constitutionality of an alleged courtroom closure only "come into play when" "the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." ***Sublett***, 176 Wn.2d at 71; ***State v. Lormor***, 172 Wn.2d 85, 92, 257 P.3d 624 (2011) (*citing* ***Bone-Club***, 128 Wn.2d at 257 (no spectators allowed in courtroom during suppression hearing); ***Easterling***, 157 Wn.2d at 172 (all spectators excluded during plea-bargaining). A courtroom

[11] "A defendant does not waive his or her public trial right by failing to object at the time of an alleged closure. ***Leyerle***, 185 Wn. App. at 478 (*citing* ***State v. Brightman***, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)).

closure implicating the public trial right must meet the standards announced in ***Waller***,[12] or Washington's equivalent ***Bone-Club*** analysis.[13] Courtroom management decisions are reviewed for an abuse of discretion when the courtroom remains open because"[i]n addition to its inherent authority, the trial court, under RCW 2.28.010,[14] has the power to ... provide for the orderly conduct of its proceedings." ***Lormor***, 172 Wn.2d at 93, 95.

"Neither the number of peremptory challenges nor the manner of their exercise is constitutionally secured." ***United States v. Turner***, 558 F.2d 535, 538 (1977) (*citing* ***Stilson v. United States***, 250 U.S. 583, 40 S.

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[12] ***Waller*** provides: (1) the party seeking the closure must advance an overriding interest likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) the trial court must make findings adequate to support the closure. ***Lormor***, 172 Wn.2d at 92, n.2 (*citing* ***Waller***, 467 U.S. at 48).

[13] ***Bone-Club*** requires: (1) The proponent of closure must show a compelling interest, and if based on anything other than defendant's right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given an opportunity to object; (3) the least restrictive means must be used; (4) the court must weigh the competing interests of the proponent of the closure and the public; and (5) the order must be no broader in application or duration than necessary." ***Sublett***, 176 Wn.2d at 73, n. 8 (*citing* ***Bone-Club***, 128 Wn.2d at 285-59).

[14] RCW 2.28.010 provides: "Every court of justice has power—(1) To preserve and enforce order in its immediate presence. (2) To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority. (3) To provide for the orderly conduct of proceedings before it or its officers. (4) To compel obedience to its judgments, decrees, orders, and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein. (5) To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto. (6) To compel the attendance of persons to testify in an action, suit or proceeding therein, in the cases and manner provided by law. (7) To administer oaths in an action, suit or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers or the performance of its duties."

Ct. 28, 63 L. Ed. 1154(1919)). "[W]ide discretion is committed to the [trial] courts in setting the procedure for the exercise of peremptory challenges...[yet] [t]he method chosen ... must not unduly restrict the defendant's use of his challenges, ... and ... the defendant must be given adequate notice of the system to be used." *Id.* Washington's trial courts must also exercise their discretion in accordance with CrR 6.4(e). A defendant bears the burden of proving prejudice where the challenged procedure substantially complies with the rules governing jury selection. *See e.g.*, ***State v. Tingdale***, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

The public trial right was not implicated by the open court exchange of the peremptory challenge list in this case. [15] Spectators had an opportunity to learn how peremptory challenges would be exercised when the process was described to the venire in open court before the strike list was exchanged. 4RP 186-87; 10RP 773-79.[16] The list was then

[15] The peremptory challenge list in this case was exchanged in open court so the trial court can be affirmed as properly exercising its discretion without this Court needing to draw a finer analytical line as to when a preemptory challenge is actually exercised, *i.e.*, when a party enters a selection on the alternately exchanged strike list or when the trial court announces the strike and seats the remaining jurors after giving the opponent an opportunity to object. That latter interpretation would be consistent with the fact that a party's peremptory challenge is not given effect until the challenged juror is stricken by the court. *See e.g.*, CrR 6.4(e); ***State v. Vreen***, 143 Wn.2d 923, 926, 26 P.3d 236 (2001) (privilege to strike individual jurors through peremptory challenges may be properly denied by the trial court when the challenge is based on purposeful discrimination); *See e.g.*, ***Batson v. Kentucky***, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (unconstitutional challenges based on race); ***State v. Saintacalle***, ___ Wn.2d ___, ___ P.3d ___, 2013 WL 3946038 at 21 (Slip Op. filed Aug. 1, 2013)(Gonzalez, J., concurring)).

[16] *See also* RP (Jan. 24, 2013).

alternately passed between the parties in the presence of the venire followed by an open-court announcement of stricken and seated jurors. *Id.* The challenges could have been publicly scrutinized for any disconcerting patterns, either in court when announced, or when they were made part of the public record. *See* CP 184, 200.

There is no showing public attendance was prohibited when the list was exchanged. The doors were not closed to all spectators as they were in ***Brightman***, 155 Wn.2d at 511, 122 P.3d 150. Defendant was not excluded from attending like the defendant in ***Easterling***, 157 Wn.2d at 172, 137 P.3d 825. None of the proceeding was conducted in an inaccessible location such as the judge's chambers as happened in ***Momah***, 167 Wn.2d at 146, 217 P.3d 321 and ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009), or a hallway like the one at issue ***Leyerly***, 158 Wn. App. 482. The claimed public trial right violation could not have occurred as defendant's courtroom was not closed when peremptory challenges were exercised.

The argument defendant advances to urge reversal of his convictions in this case would require courts to find courtroom closures whenever spectators are incapable of perceiving every aspect of a trial court's publicly-conducted business with their full array of senses. *See e.g.* App. Br. at 22. That requirement was rejected by the Ninth Circuit in

D'Aquino v. United States, 192 F.2d 338, 365 (1951). In that case the government introduced five audio records inaudible without the earphones provided to select participants and attendees such as court, counsel, and the media. *Id.* D'Aquino argued the procedure denied her a public trial because public spectators could not hear the exhibits. *Id.* The Ninth Circuit found that claim "wholly without merit" analogizing the argument to a claim that the public trial right was violated "because certain exhibits such as photographs, samples of handwriting, etc., although examined by the parties and by the jury were not passed around to the spectators in the courtroom." *Id.* (*citing* ***Gilliars v. United States***, 87 U.S.App.D.C. 16, 182 F.2d 962, 972-73 (1950)).

Similar courtroom practices are common in Washington. Exhibits may be properly admitted, yet never published in a way that permits public inspection before the verdict is entered. *See e.g.*, ER 611(a); [17] ER 901(a).[18] They may even be properly withheld from the jury when used for limited purposes such impeachment under ER 608(b)[19] or refreshing

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[17] ER 611(a) "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

[18] ER 901(a) "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent says."

[19] ER 608(b) "Specific instances of the conduct of a witness, for the purpose of attacking or supporting a witness credibility, other than conviction of a crime as provided by ER 609, may not be proved by extrinsic evidence ...."

witness recollection under ER 612.[20] *See also* WPIC 1.02 ("[e]xhibits may have been marked ... but they do not go ... to the jury room...."). The public quality of the proceeding is nevertheless preserved through the inclusion of those exhibits in a public record capable of subsequent review. *See e.g.,* ***Ishikawa***, 97 Wn.2d at 37. The public's right to open criminal trials does not impose upon trial courts a duty to tailor publicly conducted proceedings to the viewing preferences of its audience.

b. Neither experience nor logic requires an open-court exchange of peremptory challenges.

"Before determining whether there was a [public trial right] violation, [reviewing courts] first consider whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all." ***Sublett***, 176 Wn.2d at 71. "Existing case law does not hold that a defendant's public trial right applies to every component of the broad jury selection process.... Rather, [it] addresses application of the public trial right related only to a specific component of jury selection—*i.e.*, the voir dire of prospective jurors who form the venire...." ***State v. Wilson***, 174

[20] ER 612 "Writing Used to Refresh Memory."

Wn. App. 328, 338, 298 P.3d 148 (2013);[21] ***Orange***, 152 Wn.2d at 807-08 (entire voir dire closed to all spectators); ***Brightman***, 155 Wn.2d at 511 (entire voir dire closed to all spectators). ***Paumier***, ***Wise***, and the cases these opinions cite for support all involved courtroom closures during ... the voir dire component of jury selection ... The[y] did not... address or purport to characterize as "courtroom closures" the entire jury selection spectrum (from initial summons to jury empanelment)...." ***Wilson***, 174 Wn. App. at 339-40; ***Lormor***, 172 Wn.2d at 93 (*citing* ***Momah***, 167 Wn.2d at 146; ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009).

The exercise of peremptory challenges[22] is a component of Washington's jury selection process that has yet to be specifically addressed in our Supreme Court's recent expansion of public trial right jurisprudence. ***Wilson***, 174 Wn. App. at 338. A determination of whether peremptory challenges must be exercised in public must come from

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[21] In ***State v. Paumier***, 176 Wn.2d 29, 34, 228 P.3d 1126 (2012) and ***State v. Wise***, 176 Wn.2d 1, 10, 228 P.3d 1113 (2012) "our Supreme court appears to have used the terms 'jury selection' and 'voir dire' interchangeably in the ***Bone-Club*** context. But [this Court] view[s] this interchangeable usage as inadvertent and *not* as evincing the Court's intent to treat these two terms as synonymous for precedential purposes...." ***Wilson***, 174 Wn. App. at 339-40.

[22] CrR 6.4(e)(1) *Peremptory Challenges Defined.* A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror...."

application of the "experience and logic test." ***Sublett***, 176 Wn.2d at 141.[23]

That test requires courts to assess a closure by consideration of both history (experience) and the purposes of the open trial provision (logic). *Id.* at 73. The experience prong asks whether the practice in question has been historically open to the public, while the logic prong asks whether public access is significant to the functioning of the right. *Id.* The ***Bone-Club*** analysis must be applied before the court can close the courtroom if both prongs are answered affirmatively. *Id.*

A historical review of peremptory challenges in this state "does not require that th[eir] exercise ... [be] conducted in public." ***State v. Love***, ___ Wn. App. ____, 7, 9, No. 30809-0-III (Pub. Sept., 2013). "[I]n over 140 years ... there is little evidence of public exercise of such challenges, and some evidence that they were conducted privately." *Id.* The ***Love*** court only discovered one case in which defense challenged the "use of secret—written—peremptory jury challenges" as defendant does in the instant case. *See Id.* (*quoting* ***State v. Thomas***, 16 Wn. App. 1, 13, 553 P.2d 1357 (Div. 2, 1976)). Thomas, like defendant, argued "Kitsap County's use of use of secret—written—peremptory jury challenges

[23] Although no opinion gathered more than four votes, eight of the nine justices sitting in ***Sublett*** approved the "experience and logic" test."

denie[d] both a fair and public trial." This Court held that claim "ha[d] no merit" due in part to the Court's" fail[ure] to see how th[at] practice, which is utilized in several counties in this state, could in any way prejudice the defendant." 16 Wn. App. at 13. This Court concluded the "manner of exercise ... rests exclusively with the legislature and the courts, subject only to the requirement of a fair and impartial jury." *Id.* (*citing* ***State v. Persinger***, 62 Wn.2d 362, 383 P.2d 497 (1963)). ***Love*** found ***Thomas*** to be "strong evidence that preemptory challenges can be conducted in private." ***Love***, ___ Wn. App. at 8.[24]

Love's consideration of the logic prong similarly revealed that public exercise of peremptory challenges was not necessary. ***Love***, __ Wn. App. at 9. The purposes of the public trial right are: to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. ***Brightman***, 155 Wn.2d at 514. "Those purposes are not furthered by a party's actions in exercising a peremptory challenge ... as [it] presents no question of public oversight." ***Love***, __ Wn. App. at 9.

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[24] "The current statutes governing ... preemptory challenges in civil cases are found in RCW 4.44.130-.250. All of these statutes trace back to at least 1869; some are earlier. *See* Laws of 1869 §§ 212-223. CrR 6.4(e) supersedes the former statutes that provided for peremptory challenges in criminal cases. Those statutes, former RCW 10.49.030-.060 were repealed by Laws of 1984, ch. 76, § 30, and had their genesis in the Laws of 1854 §§ 102-06. *Id.* at 8, n.6.

Any risk that privately exercised peremptory challenges might conceal a litigant's attempt to strike potential jurors for impermissible reasons, such as race,[25] is negated when objections to challenges and the identity of stricken jurors are either disclosed in open court at trial or committed to the public record as public scrutiny could follow either form of disclosure. *See e.g.*, ***Cohen v. Senkowski***, 290 F.3d 485, 490 (2nd Cir. 2002) (*citing* ***United States v. Fontenot***, 14 F.3d 1364, 1370 (9th Cir.1994)).[26] "The written record of [the peremptory challenge process consequently] satisfies the public's interest in the case and assures that all activities were conducted aboveboard, even if not within public earshot." ***Love***, __Wn. App. at 10.

Love found further support for its reasoning through analogy to *Sublett* since a written record of the peremptory challenge process had

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[25] *See e.g.*, ***Batson v. Kentucky***, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2nd 69 (1986); ***State v. Saintacalle***, ___ Wn.2d ___, ___ P.3d ___, 2013 WL 3946038 at 21 (Slip Op. filed Aug. 1, 2013) (Gonzalez, J., concurring)).

[26] "Many ... circuits have held that if a defendant is given an opportunity to register his opinions with counsel after juror questioning and is present when the exercise of strikes is given formal effect, then his constitutional right to be present is satisfied. ***United States v. Fontenot***, 14 F.3d 1364, 1370 (9th Cir.1994); ***United States v. Gayles***, 1 F.3d 735, 738 (8th Cir.1993); ***United States v. Bascaro***, 742 F.2d 1335, 1349–50 (11th Cir.1984); cf. ***United States v. Washington***, 705 F.2d 489, 497 (D.C.Cir.1983) (finding that defendant has right to be present for juror questioning). [Some] [D]istrict courts ... have consistently held that a defendant's absence during the exercise of challenges does not violate his constitutional rights provided he is present for juror questioning and the formal reading of challenges in open court. *See, e.g.*, ***Evans v. Artuz***, 68 F.Supp.2d 188, 195 (E.D.N.Y.1999); ***Benitez v. Senkowski***, 1998 WL 668079, at 8 (S.D.N.Y. Sept.17, (1998)."

been committed to public record in ***Love*** as the written jury question and response had been, pursuant CrR 6.15(f)(1),[27] in ***Sublett***. The Supreme Court found that rule's directive to "put the questions, answer and objections in the record" sufficiently advanced and protected the interests underlying the constitutional requirements of open courts to include the appearance of fairness.... "176 Wn.2d at 77. The public filing of the peremptory challenge list in defendant's case ensured a commensurate protection of the public trial right. *See* CP 200.

Allowing parties to privately exchange a peremptory challenge list also logically serves legitimate interests in facilitating confidential communications on how peremptory challenges should be exercised. Such communications often involve the expression of protected mental impressions about the perceived merit of particular jurors or insights into the opponent's strategy, which in turn influences the way peremptory challenges are exercised. The doctrines of work product and attorney client privilege as applied to an adversarial trial proceeding warrant giving parties the ability to freely discuss and exercise peremptory challenges

[27] CrR 6.15(f)(1) "The jury shall be instructed that any questions it wishes to ask the court about the instructions or evidence should be signed, dated, and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response, and any objections thereto shall be made a part of the record...." (Emphasis added).

beyond the observation of opponents and spectators. *See e.g.*, ER 201; ER 502 (disclosures made in a proceeding waive attorney-client privilege or work product protection); CR 26(b)(4) (absolute protection from disclosure of mental impressions). Similar concern for protecting confidential information parties beneficially use to facilitate publicly conducted voir dire contributed to the Supreme Court's decision that the sealing of juror questionnaires did not constitute a courtroom closure in ***State v. Beskurt***, 176 Wn.2d 441, 447, 293 P.3d 1159 (2013).

Neither experience nor logic suggests peremptory challenges must be publicly exercised, at least where auxiliary safeguards of the public trial right are present as they were in this case.

2. THE STATEMENTS DEFENDANT MADE ABOUT HIS RESIDENCE WITHOUT A *MIRANDA* WARNING WERE PROPERLY ADMITTED BECAUSE THEY WERE OBTAINED DURING A NON-CUSTODIAL *TERRY* STOP WITHOUT INTERROGATION.

"In *Miranda*, the [United States Supreme] Court determined th[e] ... prohibition against compelled self-incrimination required that custodial interrogation be preceded by the advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney." ***Edwards v. Arizona***, 451 U.S. 477, 481-82, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) (*citing* ***Miranda v. Arizona***, 384 U.S. 436, 479, 86 S.

Ct. 1602, 16 L. Ed. 2d 694(1966)). ***Miranda*** claims are issues of law reviewed *de novo*. *See* ***State v. Daniels***, 160 Wn.2d 256, 261, 156 P.3d 905 (2007); ***State v. Lorenz***, 153 Wn.2d 22, 36, 93 P.3d 133 (2004).

Department of Corrections Officer Grabski contacted defendant at "a traffic stop" initiated by other officers. 1RP 15; 10RP 820. Defendant was driving with a suspended license in violation of his community custody. 1RP 20. He was also believed to be violating community custody by living at an unauthorized address. 1RP 18, 25; 10RP 821.

Grabski met with defendant for approximately five minutes while defendant sat handcuffed in the back of a patrol car parked outside a 7-Eleven. 1RP 25-27, 61, 63; 10RP 828. Grabski did not *Mirandize* defendant because their contact was limited to defendant's community custody. 1RP 28-29. Grabski asked defendant if he lived at 4840 South I Street. 1RP 25-27, 29-30; 10RP 828-29. Defendant denied living there, but said he had a key to the residence and stored property there. 1RP 25-27, 29-30; 10RP 828-29. Grabski terminated the contact to conduct a compliance check at the residence. 1RP 29-30; 10RP 829. A shotgun, cocaine, and scales containing evidence of cocaine were recovered inside. 1RP 31-32; 10RP 836, 839, 854-55; 11RP 969, 976-77.

a. ***Miranda***'s procedural safeguards were not triggered by the non-custodial ***Terry*** stop.

"In custody" for the purposes of ***Miranda*** means freedom of action curtailed to a degree associated with formal arrest. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). It is an objective test based on how a reasonable person in the same circumstances would have perceived the situation, which ignores the subjective views harbored by the person being questioned; thus, the test involves no consideration of the actual mindset of the particular suspect subjected to police questioning. ***Yarborough v. Alvarado***, 541 U.S. 652, 667, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004); ***Stansbury v. California***, 511 U.S. 318, 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994); ***State v Heritage***, 152 Wn.2d 210, 217, 95 P.3d 345 (2004); ***State v. Cunningham***, 116 Wn. App. 219, 228, 65 P.3d 325 (2003).

Terry[28]stops are non-custodial for ***Miranda*** purposes. ***State v. Heritage***, 152 Wn.2d 210, 218, 95 P.3d 345 (2004) (*citing* ***Berkemer***, 468 U.S. at 439-40). This is because they are brief and occur in public, making them substantially less police dominated than the interrogations contemplated by ***Miranda***. ***Heritage***, 152 Wn.2d at 218 (*citing e.g.,* ***State***

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[28] ***Terry v. Ohio***, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (to qualify as a ***Terry*** stop the detention must be reasonably related in scope to the justification of its initiation).

v. Hilliard, 89 Wn.2d 430, 432, 435-36, 573 P.2d 22 (1977) (suspect not subject to custodial interrogation even though he would not have been released until police questions were answered); ***Cunningham***, 116 Wn. App. at 228-29 (45 minute handcuffed-detention not arrest for *Miranda* purposes)). "[A] detaining officer may ask a moderate number of questions during a ***Terry*** stop to determine ...identity ... and to confirm or dispel ... suspicious without rendering the suspect in custody." ***Heritage***, 152 Wn.2d at 218.

The record shows defendant made the challenged statements about his use of 4840 South I Street during a non-custodial ***Terry*** stop, so ***Miranda*** warnings were not a prerequisite for their admissibility.[29]

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[29] Defendant's community custody necessarily curtailed his freedom of movement in ways that did not transform the ***Terry*** stop into a custodial setting for ***Miranda*** purposes. *See generally* ***Cervantes v. Walker***, 589 F.2d 424 428 (9th Cir. 1979) ("restriction is a relative concept...."); ***State v. Warner***, 125 Wn.2d 876, 885, 889 P.2d 479 (1995) ("When dealing with a person already incarcerated, 'custodial' means more than just the normal restrictions on freedom incident to incarceration. There must be more than the usual restraint...."); ***United States v. Conley***, 779 F.2d 970, 971-72 (9th Cir. 1985) ("While persons in government-imposed confinement retain various rights ... they retain them in forms qualified by the exigencies of prison administration and the special governmental interests that result.") (inmate not in custody for ***Miranda*** purposes despite being handcuffed in a small conference room); ***United States v. Stoterau***, 524 F.3d 988, 1004 (9th Cir. 2008) (defendant not entitled to ***Miranda*** warnings despite temporary restrictions associated with probationer's obligation to submit to a polygraph). A contrary rule would give community custody inmates greater protections under ***Miranda*** than ordinary citizens. *See* ***State v. Post***, 118 Wn.2d 596, 605-07, 826 P.2d 172 (1992).

b. The routine questions about defendant's residence were not interrogation as they were not likely to elicit an incriminating response.

"Interrogation" for the purposes of ***Miranda*** involves express questioning, as well as all words or actions on the part of police, other than those attendant to arrest and custody, that are likely to elicit an incriminating response. ***Rhode Island v. Innis***, 446 U.S. 291, 301, 100 S. Ct. 1682 (1980), 64 L. Ed. 2d 297 (1980).

Routine questions into general biographical information for police administrative purposes are generally not deemed interrogation since they rarely elicit incriminating responses. ***State v. Denney***, 152 Wn. App. 665, 671-72, 218 P.3d 633 (2009); ***State v. Walton***, 64 Wn. App. 410, 414, 824 P.2d 533 (1992). In ***Walton***, a booking officer and a pretrial investigator asked defendant for his address. *Id.* at 414. Walton later argued his responses were inadmissible under ***Miranda*** when the State relied on the address he gave to establish constructive possession of drugs located there. *Id.* at 413. The reviewing court disagreed, noting statements made in response to routine background questions are admissible "even though they ultimately prove to be incriminating." ***Denney***, 152 Wn. App. at 673 (*quoting* ***Walton***, 64 Wn. App. at 414).

Routine biographical questions relevant to community custody compliance are similarly outside ***Miranda***'s definition of interrogation

since they have no greater potential to elicit an incriminating response and "a probationer generally has no Fifth Amendment privilege regarding questions relevant to the status of her probation." *See* ***United States v. Nieblas***, 115 F.3d 703, 705, (9th Cir. 1997) ("A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer ... call for answers that would incriminate him in a pending or later criminal prosecution.") (*Citing* ***Minnesota v. Murphy***, 465 U.S. 420, 429-31, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984) ("custody" under ***Miranda*** has been "narrowly circumscribed"); *see also* ***United States v. Andaverde***, 64 F.3d 1305, 1310 (9th Cir. 1995) (probation officers need not issue ***Miranda*** warnings in non-custodial meetings).

The questions posed to defendant about his address were not "interrogation" as they did not reasonably elicit an incriminating response. His answer was not likely to directly implicate him in any crime because living at an unauthorized address is not a criminal law violation; rather, it only exposed him to a potential administrative sanction. Like ***Walton***, defendant's statement about using the relevant address only became inculpatory when a subsequent event made it relevant to prove constructive possession of contraband that was not the topic of the

challenged interview. 64 Wn. App. at 410, 414, *compare with* ***State v. Sargent***, 111 Wn.2d 641, 642, 650, 762 P.2d 1127 (1988) (probation officer's question: "did you do it?" interrogation when discussing a conviction pending sentence); ***State v. Willis***, 64 Wn. App. 634, 637, 825 P.2d 357 (1992). Grabski did not interrogate defendant, so the challenged contact did not trigger ***Miranda***'s procedural safeguards.[30]

3. THE CHALLENGED AMBIGUITY IN THE FINDINGS AND CONCLUSIONS CAN BE RESOLVED THROUGH REVIEW OF THE TRIAL COURT'S ORAL RULING.

"No remand is necessary where ... ambiguous written findings of fact are supplemented by the trial court's oral opinion." ***State v. Motherwell***, 114 Wn.2d 353, 358, 788 P.2d 1066 (1990) (*citing* ***In re Personal Restraint of LaBelle***, 107 Wn.2d 196, 219, 728 P.2d 138 (1986);

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[30] The admission of the challenged statements was harmless if error. Evidence obtained as a result of a ***Miranda*** violation is harmless if the reviewing court is satisfied the untainted evidence is so overwhelming as to necessarily result in the challenged verdict. *See* ***State v. Spotted Elk***, 109 Wn. App. 253, 261, 34 P.3d 906 (2001). Any error in the admission of the challenged statements was harmless as cumulative in light of other evidence of defendant's use of the relevant address. 1RP 31-32; 10RP 815-19, 836, 839, 854-55; 11RP 929-32, 949, 969, 976-77, 1001-02; Ex. 23

State v. Holland, 98 Wn.2d 507, 518, 656 P.2d 1056 (1983).[31] "[S]o long as no inconsistency exists, [the Court of Appeals] ha[s] held... an appellate court may [also] use the trial court's oral ruling to interpret written findings and conclusions. ***State v. Bynum***, 76 Wn. App. 262, 266, 884 P.2d 10 (1994) (*citing* ***State v. Moon***, 48 Wn. App. 647, 653, 739 P.2d 1157, *review denied*, 108 Wn.2d 1029 (1987)). "These rules make sense because the basic reason for requiring written findings and conclusions is to enable the appellate court to review the issues raised on appeal. ***State v. McGary***, 37 Wn. App. 856, 861, 683 P.2d 1125, *review denied*, 102 Wn.2d 1024 (1984)).

At the hearing held pursuant to CrR 3.5 the trial court unequivocally ruled defendant's challenged statement to Officer Gutierrez regarding his residence was part of the "initial social contact that occurred at the beginning of the interaction between the parties. There was no need at that point to advise the defendant of his *Miranda* warnings....." 4RP

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[31] "If the trial court's findings are ambiguous, vague or incomplete, its oral decision may be used to aid in understanding the findings." ***Interlake Porsche & Audi, Inc., v. Bucholz***, 45 Wn. App. 502, 526, 728 P.2d 597 (1986) (*citing* ***Bennet Veneer Factors v. Brewer***, 73 Wn.2d 849, 853, 441 P.2d 128 (1968)); ***State v. Jones***, 100 Wn. App. 820, 826, 998 P.2d 921 (2000) (*citing* ***State v. Hescock***, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999)). Even failure to enter findings associated with a hearing held pursuant CrR 3.5 the Court of Appeals does not necessitate reversal of the trial court's rulings where its comprehensive oral ruling is sufficient to allow appellate review. ***State v. Bynum***, 76 Wn. App. 262, 266, 884 P.2d 10 (1994) (*citing* ***State v. Smith***, 67 Wn. App. 81, 87, 834 P.2d 26 (1992), *modified on other grounds*, 123 Wn.2d 51, 864 P.2d 1371 (1993); ***State v. Clark***, 46 Wn. App. 856, 859, 732 P.2d 1029, *review denied*, 108 Wn.2d 1014 (1987)).

278-79. The evidence adduced at the hearing established defendant was *Mirandized* after making the challenged statement. 4RP 213. Gutierrez questioned defendant thereafter. 4RP 223-24.

The challenged findings and conclusions are only ambiguous when chronological order is naturally, *but unnecessarily*, read into their numbering. *See* CP 81-83. For example, finding No. 4 accurately states defendant was *Mirandized.* CP 82; 4RP 213. Finding No. 5 accurately states defendant told the officer he resided at the 4840 South I residence. CP 82; 4RP 214. The chronology of those two events is confused in so much as the event in finding No. 5 occurred before the event in finding No. 4, but their proper sequence is readily established through reference to the record and the court's oral ruling. *See e.g.*, 4RP 203-15, 278-79. The same pattern is present in conclusions No. 1-3. CP 83. Nothing in the written findings and conclusions expressly requires chronological interpretation, so no inconsistency between the written and oral ruling exists. Remand is not necessary.

4. DEFENDANT'S DRUG CONVICTION COMPORTS WITH DOUBLE JEOPARDY AS JEOPARDY ONLY ATTACHED TO THAT OFFENSE IN THE SECOND TRIAL.

"The double jeopardy clauses of the United States and Washington State Constitutions protect a defendant from multiple convictions for the

same crime." ***State v. Green***, 156 Wn. App. 96, 99, 230 P.3d 654 (2010) (*citing* U.S. Const. Amend. V; Wash. Const. art. I, § 9; ***State v. Tvedt***, 153 Wn.2d 705, 710, 107 P.3d 728 (2005)). Double jeopardy protections are also implicated where the State seeks to subject the defendant to a second trial for the same offense." *Id.* (*citing* ***United States v. Scott***, 437 U.S. 82, 87-88, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978)). "Retrial is barred where jeopardy has attached and terminated." ***State v. Wright***, 165 Wn.2d 783, 813, 203 P.3d 1027 (2009).

"Jeopardy attaches to charges pending when the jury is empaneled and sworn." *Id.* (*citing* ***Crist v. Bertz***, 437 U.S. 28, 35, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978)); ***Green v. United States***, 355 U.S. 184, 191, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)). "[The United States Supreme Court] has constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." ***State v. Daniels***, 165 Wn.2d 627, 633, 200 P.3d 711 (2009) (*citing* ***Richardson v. United States***, 468 U.S. 317, 324, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984) (*citing* ***Logan v. United States***, 144 U.S. 263, 297-98, 12 S. Ct. 617, 36 L. Ed. 429 (1892)). Appellate courts review constitutional challenges *de novo*. ***Green***, 156

Wn. App. at 99 (*citing* ***State v. Jones***, 159 Wn.2d 231, 237, 149 P.3d 636 (2006)). [32]

Defendant's double jeopardy claim should be rejected as meritless because jeopardy did not attach to the challenged controlled substance offense at defendant's first trial. *See* CP 1-3, 51-75, 79-80, 113-115, 136-161; 1RP 123-152; 2RP 165-66, 185-88; 3RP 155; 6RP 525-530; 578-610; 8RP 685-86; 14RP 1133-45. The court proceeded in that trial with three offenses charged in the original information, which did not include the challenged drug offense. 14RP 1134, 1136; CP 1-3. Pursuant to the original information the trial court told the venire defendant was charged with unlawful possession of a firearm in the first degree (Count I), violation of a protective order (Count II), and driving while license suspended in the third degree (Count III). 3RP 164-66. The venire was further instructed:

> "To all three charges, the defendant has entered a plea of not guilty. The plea of not guilty means that you, the jury, must decide whether the State of Washington has proved every element of these crimes charged.

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[32] CrR 4.3.1's "mandatory joinder rule is procedural; it does not implicate double jeopardy." ***State v. Dallas***, 126 Wn.2d 324, 330-31, 892 P.2d 1082 (1995) (*citing* ***State v. Anderson*** 96 Wn.2d 739, 740, 638 P.2d 1205, *cert. denied*, 459 U.S. 842, 103 S. Ct. 93, 74 L. Ed. 2d 85 (1982)). The mandatory joinder rule is a rule that prevents prosecutors from charging new offenses to which jeopardy has never attached when they fall under the rule's judicially created definition of a "related offense." ***State v. Gamble***, 168 Wn.2d 161, 168-69, 225 P.3d 973 (2010)).

3RP 166. The jury was empaneled and sworn to decide that case. 4RP 188. The State did not pursue the controlled substance offense at trial. 3RP 164-66; 14RP 1138; CP 1-3. At the conclusion of the evidence the jury was instructed on the three offenses contained in the original information and rendered verdicts on counts II and III. 6RP 581; 7RP 664; CP 59 (Count I, Instruction No. 6), 65 (Count II, Instruction No. 12), 67 (Count III, Instruction No. 14), 77-78. A mistrial was declared on Count I. 7RP 659-62, 666.[33]

Jeopardy only attached to the firearm,[34] protective order,[35] and licensing[36] at defendant's first trial as those were the only offenses the jury was empaneled and sworn to decide. 4RP 185-88; 14RP 1134; CP 1-3. Jeopardy did not attach to the challenged drug offense until defendant's second jury was empanelled and sworn to decide it. *See* 10RP 803. Defendant's meritless double jeopardy claim should be rejected as it is erroneously based on an inapposite analogy to cases where the government abandoned an offense after jeopardy already attached. *See e.g.* App. Br. at 47.

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[33] Defendant was re-arraigned on January 17, 2013, on an amended information. CP 79-80; 9RP 689, 691. When the second trial began on January 24, 2013, and that venire was informed defendant was accused of committing the firearm offense alleged in Count I and the challenged controlled substance offense alleged in Count II. 10RP 771. The empaneled jury was then sworn to decide that case. 10RP 803.
[34] RCW 9.41.040(1)(a).
[35] RCW 26.50.110(1).
[36] RCW 46.20.289.

5. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO DISMISS THE CHALLENGED DRUG OFFENSE PURSUANT TO CrR 4.3.1's MANDATORY JOINDER RULE BECAUSE HE FAILED TO TIMELY MOVE FOR CONSOLIDATION AND THE RULE IS INAPPLICABLE TO HIS CASE.

"[P]rosecutors [generally] enjoy broad discretion in making charging decisions, including the discretion to determine what charges to file, when to file them, and generally, whether to amend them." ***State v. Waldenberg***, 174 Wn. App. 163, 168, 301 P.3d 41 (2013) (*citing* ***State v. Korum***, 157 Wn.2d 614, 141 P.3d 13 (2006)). CrR 4.3.1 only provides for dismissal for the timing of charges in "a limited set of circumstances." *See* ***State v. Collins***, 30 Wn. App. 247, 249, 633 P.2d 135 (1981).

"CrR 4.3.1 requires mandatory joinder where the crimes are related offenses." ***State v. Downing***, 122 Wn. App. 185, 190, 93 P.3d 900 (2004) (*citing* CrR 4.3.1(b); ***State v. Lee***, 132 Wn.2d 498, 501, 939 P.2d 1223 (1997)). "Offenses are "related" under the rule "if they are within the same jurisdiction and venue of the same court and are based on the same conduct." *Id.* (*citing* CrR 4.3.1(b)(1); ***Lee***, 132 Wn.2d at 501)). Failure to timely move for consolidation of known charges constitutes a waiver under the rule. CrR 4.3.1(b)(3). Denial of a motion to dismiss is reviewed

for manifest abuse of discretion. *See* ***State v. Warner***, 125 Wn.2d 876, 882, 889 P.2d 479 (1995).

a. Defendant waived any claim to mandatory joinder by failing to move for consolidation at his first trial.[37]

A trial court should grant a defendant's timely motion to consolidate related offenses unless it determines the ends of justice would be defeated if the motion were granted. CrR 4.3.1(b)(2). "[F]ailure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged." CrR 4.3.1(b)(3).

Defendant was alerted to the challenged charge by at least October 16, 2012. 2RP 149-52; 14RP 1133-45; CP 113-115. He did not move to consolidate it with the three offenses charged in the original information when his first trial resumed on December 10, 2012. 3RP 164-66; 4RP 188; 14RP 1134, 1137-38. He sat on his purported right to consolidation and let that case proceed to verdict on the original counts. 6RP 581; 7RP 659-62,664, 666; CP 59 (Count I, Instruction No. 6), 65 (Count II, Instruction No. 12), 67 (Count III, Instruction No. 14), 77-78. His counsel

[37] The trial court did not predicate its denial of defendant's motion on CrR 4.3.1(b)(2)'s waiver provision; however, a trial court may be affirmed on any basis supported by the record and the law. *See* ***State v. Kelly***, 64 Wn. App. 775, 828 P.2d 1106 (1992) (*citing* ***LaMon v. Butler***, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989)).

later confirmed she was expecting the challenged offense to be put before the jury in the first case and was "shocked" when it was not. 14RP 1138. She relayed the prosecutor informed her "the State had decided not to proceed with the UPCS count." 14RP 1139. Counsel's response was "Fine. If that's what the State wants to do, I'll go along with that." *Id.* Defendant did not raise mandatory joinder until after his first trial resulted in a mistrial on Count I. 9RP 701, 712; 14RP 1138.

The record clearly demonstrates defendant's pre-trial awareness of the challenged charge and decided to take advantage of the State's election to proceed without it in the first trial instead of standing on the right to consolidation claimed on appeal. *See e.g.* 14RP 1139. Any right he had to consolidation was waived at that time.[38]

Defendant attempts to avoid the consequences of CrR 4.3.1(b)(2)'s automatic waiver provision by claiming application of the rule somehow

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[38] Defendant stood to gain several strategic advantages by allowing the case to go forward without consolidation. Choices made to pursue conceivable trial strategy or tactics demonstrate effective representation even when they do not ultimately prove successful. *See* ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). He was able to avoid having the cocaine's proximity to the firearm emphasized in the first trial. Had the firearm count ended in conviction or acquittal, he might have secured a motion in limine precluding reference to the firearm in a subsequent trial for the cocaine. The serious offense that served as a predicate for the firearm charge would have been excluded as irrelevant. Defendant might have bargained to waive an appellate right from the first trial for the State's promise not to pursue the drug offense in a second trial. And there was always a remote possibility the State would just abandon it. The ultimate failure of those potentially favorable outcomes to materialize does not undo the waiver that accompanied defendant's decision not to move for consolidation before the first trial.

unfairly shifts the burden to the defense to urge prosecution of their clients. App. Br. at 44. That argument misunderstands the purpose of CrR 4.3.1, which vests criminal defendants with a conditional right to consolidate related offenses if the defendant perceives consolidation to be in his or her interest. *See* CrR 4.3.1(b)(2); ***Gamble***, 168 Wn.2d at 168. It is not uncommon for defendants to perceive consolidation to be disadvantageous. *See e.g.*, ***State v. Bryant***, 89 Wn. App. 857, 950 P.2d 1004 (1989) (Bryant claimed he was prejudiced by joinder of robbery and bail jump). Defendant also points out the prosecutor informed his counsel he elected not to proceed with the challenged offense at the first trial without venturing to explain why that statement would operate as a bar to a subsequent prosecution when it cannot be fairly construed as an agreement to abandon the charge in perpetuity. *See* App. Br. at 45. His mandatory joinder claim is procedurally barred.[39]

[39] Dismissal of the challenged controlled substance offense would have been inappropriate in this case even if CrR 4.3.1's mandatory joinder rule applied since the Clerk's extraordinary error in failing to file the amended information was not within the prosecutor's control and led to an understandable confusion that even misled the trial court into believing the original information remained operative. 14RP 1133-34, 1137-38. In fact, the record suggests defendant's counsel was the only one who was aware of the error but refrained from raising it before the first trial. 14RP 1138; *see* ***State v. Ramos***, 124 Wn. App. 334, 340-41, 101 P.3d 872 (2004) ("[f]or the extraordinary circumstances exception to apply the circumstances must be extraordinary; and ...be extraneous to the action or go to the regularity of the proceedings. This suggests that whenever else the exception may operate, it may apply when truly unusual circumstances arise that are outside the State's control.").

b. CrR 4.3.1 does not apply to the unrelated offenses at issue in this case.

"CrR 4.3 requires joinder only when the offense is based on the same conduct as the alleged other counts." *Id.* at 253-54. "The CrR 4.3.1 test for 'related offenses' is not the same as that for same criminal conduct ... Our Supreme Court recently noted that offenses are related if based on the same physical act or actions, particularly where the charges are for the same crime. ***State v. Kenyon***, 150 Wn. App. 826, 834, 208 P.3d 1291 (2009) (multiple firearm offenses for possessing the same gun were "related") (*citing* ***State v. Kindsvogel***, 149 Wn.2d 477, 483, 69 P.3d 870 (2003); *see also* ***State v. Dallas***, 126 Wn.2d 324, 329, 892 P.2d 1082 (1995) (theft of property related to unlawful possession of that property); ***State v. Dixon***, 42 Wn. App. 315, 317, 711 P.2d 1046 (1985) (discharging a firearm related to felony possession of that firearm), *compare with* ***State v. Bradley***, 38 Wn. App. 597, 599, 687 P.2d 856 (1984) (possession of marijuana in vehicle used to elude police was not the same conduct as eluding)); ***Thompson***, 36 Wn. App. at 250-51.[40]

[40] "[C]rR 4.3 sets forth different provisions for permissive and mandatory joinder. CrR 4.3(a) deals with permissive joinder if the offenses are ... based on ... a series of acts connected together or constituting parts of a single scheme or plan. On the other hand, CrR 4.3(c) mandates joinder if the offenses are 'related offenses,' in other words, based on the *same conduct.*" (Emphasis in text). ***State v. Thompson***, 36 Wn. App. 249, 250-51, 673 P.2d 630 (1984) (four counts of delivery and possession were not based on "same conduct" as cocaine charges as they were committed at different times).

Defendant's act of possessing cocaine in violation of RCW 69.50.4013(1) is not the same conduct as his independent acts of possessing a firearm in violation of RCW 9.41.040(1)(a), violating a protective order under RCW 26.50.110(1), or driving with a suspended license pursuant to RCW 46.20.289, so CrR 4.3.1's mandatory joinder rule is irrelevant to his case. The fact defendant's different offenses were coincidently discovered during the same law enforcement contact simply makes them candidates for permissive joinder under CrR 4.3 due to the cross-admissibility of evidence. *See generally* ***State v. Russell***, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). The trial court properly denied defendant's motion to dismiss.

6. DEFENDANT FAILED TO PROVE THE PROSECUTOR'S VARIED USE OF THE PRONOUN "WE" DURING SUMMATION WAS IMPROPER AS THE CHALLENGED ARGUMENT CLEARLY DISTINGUISHED THE STATE'S BURDEN FROM THE JURY'S DUTY TO DECIDE THE CASE.

In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility. ***State v. Militate***, 80 Wn. App. 237, 250, 908 P.2d 374 (1995) (*citing* ***State v. Hoffman***, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)). "Prosecutors may argue ... inferences as to why the jury would want to believe one witness over another." *Id.* at 290 (*citing*

State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)).[41] A defendant bears the burden of establishing both the impropriety of the prosecutor's argument and its prejudicial effect. ***Brett***, 126 Wn.2d at 175 (*citing* ***State v. Furman***, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)); *see also* ***Hoffman***, 116 Wn.2d at 93. Challenged "arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (*citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990); ***State v. Green***, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986); *see also* ***State v. Warren***, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008)).

If the prosecutor's argument was improper and the defendant made a proper objection, appellate courts consider whether there was a substantial likelihood the comment affected the jury's verdict. ***State v. McChristian***, 158 Wn. App. 392, 400, 241 P.3d 468 (2010) (*citing* ***State v.***

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[41] Due process requires the State to bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); ***State v. Dolan***, 118 Wn. App. 323, 331, 73 P.3d 1011 (2003). To this end, "relevant evidence" is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401; ***State v. Beeb***, 44 Wn. App. 893, 723 P.2d 512 (1986), *aff'd* 108 Wn.2d 515, 740 P.2d 829 (1987). Since credibility determination are for the trier of fact, "it [i]s important for the jury to see the whole sequence of events...." ***State v. McBride***, 74 Wn. App. 460, 464, 873 P.2d 589 (1994); ***State v. O'Hara***, 141 Wn. App. 900, 910, 174 P.3d 114 (2007); *see also* ***State v. Brown***, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997); ***State v. Hughe***s, 118 Wn. App. 713, 725, 77 P.3d 681 (2003).

Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). If the defendant failed to make a proper objection, defendant must prove the prosecutor's argument was so flagrant and ill-intentioned the resulting prejudice could not have been cured by a proper instruction. *Id.*

Defendant assigns error to the prosecutor's inconsistent use of the pronoun "we" during summation when he recalled the jury to the evidence and instructions collectively experienced at trial. App. Br. at 35-37 (*citing* RP 1052, 1053, 1055, 1060-62, 1064, 1067-68, 1072, 1074, 1102-03). Defendant must prove the argument was so flagrant and ill-intentioned that any resulting prejudice could not have been cured by a proper instruction because he failed raise an objection to it below. *See Id.*; ***McChristian***, 158 Wn. App. at 400 (*citing* ***Reed***, 102 Wn.2d at 145).

a. The prosecutor's periodic use of the pronoun "we" was not improper since it was used to recall the jury to evidence and instructions experienced by those present at trial.

A prosecutor does not make improper argument by using the pronoun "we" or the phrase "we know" to marshal admitted evidence according to the court's instructions in a manner that does not to vouch for the State's case or suggest the State's case could be proved by evidence outside the record. *See* ***United States v. Younger***, 398 F.3d 1179, 1191 (9th Cir. 2005) (*citing* ***United States v. Leon-Reyes***, 177 F.3d 816, 822

(9th Cir. 1999); ***United States v. Bentley***, 561 F.3d 803, 812 (8th Cir. 2009) (*citing* ***United States v. Lahey***, 55 F.3d 1289, 1299 (7th Cir. 1995)); *see also* ***State v. McKenzie***, 157 Wn.2d 44, 52-54, 134 P.3d 221 (2006). Although courts have expressed concern that the phrase "we know," *when misused*, could blur the line between improper vouching and legitimate summary, those same courts concede the phrase is not improper when used to refer the jury to the government's evidence and to summarize the government's case against the defendant. *Id.*

The prosecutor's inconsistent use of the challenged phrase "we know" was either consciously or unconsciously employed to recall the jury to evidence and instructions presented during the collectively experienced trial. It was first used after the prosecutor alerted the jury to his intent to "take you [the jury] down a timeline" while acknowledging "you [the jury] heard the testimony." 12RP 1052. The prosecutor then said "we know" in relation to evidence of several facts and circumstances adduced at trial, making particular note of what a relevant witness told "you" (the jury) before arguing how "you" (the jury) could put that evidence "into context." 12RP 1052-53; 10RP 814-17. The prosecutor then reminded the jury it was:

> "important that you pay attention, because after we [the lawyers] finish these closing arguments, we're not going to be able to come back before you and answer any questions.

> You're going to have to rely on the facts presented during this trial, the exhibits submitted, and your own memories."

12RP 1053-54. This pattern repeated as the prosecutor moved to other evidence. *See e.g.*, 12RP 1054-58, 1058, 1060-62, 1065-67.[42] The prosecutor finished his chain of reasoning by reminding the jury of its unique responsibility to decide whether the "State" proved its case:

> "How do you [the jury] make a decision? I'm not making a decision. You're going to have to make a decision based on this evidence. What does the State have to prove ... Well, we know that ... each of the following elements of the crime must be proved beyond a reasonable doubt."

12RP 1068-69; *see also e.g.*, 12RP 1073-76.[43] The prosecutor concluded by again giving voice to the jury's duty to judge the State's case:

> "The State is going to ask you that you consider all the evidence and return a verdict finding the defendant guilty for possession of a firearm, possession of a controlled substance, and answer yes special verdict. Thank you."

12RP 1077.

The prosecutor's rebuttal actually reinforced a sense of separation between the lawyers and jury. He directed the jury to its instruction that: "It is important ... for you to remember that the lawyers' statements are not

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[42] The only objection interposed by defendant during this argument was an attempt to prevent the prosecutor from playing an audio recording admitted as Exhibit No. 23 during closing argument. 12RP 1054-55.

[43] During this argument defendant's only objection was grounded in a disagreement with the absence of a mens rea component for the controlled substance offense. The court sustained the objection during the argument, but ultimately reversed itself yet decided it would unduly emphasize the evidence to revisit the objection in front of the jury. 12RP 1075, 1079-85.

evidence." 12RP 1101. He challenged aspects of defendant's argument that were not supported by the evidence or inconsistent with the instructions. 12RP 1102, 1105, 1107. And explained that "when you [the jury] combine all th[e] evidence ... the State meets its burden." 12RP 1108-09. The argument concluded with: "[t]he State ... submit[ting] to you [the jury], ... you [the jury] make the final decision, but the State would submit to you that the defendant is guilty ...." Viewed in its entirety the prosecutor's argument was not an improper attempt to confuse the jury.

Ironically inappropriate use of "we know" phrasing can be found for comparison in defendant's closing remarks. Similar to the prosecutor, defense counsel periodically slipped into a "we don't know" refrain while discussing the evidence. *See e.g.*, 12RP 1087-88. Unlike the prosecutor, she inserted herself directly into the jury's decision making process:

> "Derrick Thomas is not guilty of possession of a controlled substance ... And when we stop there. Because when we come to that decision and realize the State hasn't proved otherwise beyond a reasonable doubt ... When we realize that the State hasn't proved either of those propositions, we're done. We don't have to go on and consider this nexus argument between the possession of the firearm and the possession of the controlled substance...."

12RP 1099-1100. Prior to improperly including herself as the thirteenth juror counsel improperly argued the State's theory of the case was un-American by first mischaracterizing it then rhetorically adding: "Excuse me? That's how far the State's argument goes ... That's not what we're

about in this county." 12RP 1091. It was the defense—not the State—that improperly attempted to engender a sense of aligned interest in the jury.

Defendant tallies the prosecutor's use of "we" in a manner that creates a false impression the prosecutor uniformly used that pronoun to describe the State and jury while arguing the case. App. Br. 35-37. In actuality the prosecutor differentiated the jury from the State approximately 108 times during summation by referring to the jury as "you"[44] and himself as "I"[45] or the "State."[46] Nevertheless, "[n]o such tallying is an indication of improper commentary nor can it measure the degree of impropriety if ... any." *See* ***Bentley***, 561 F.3d at 812 n.5 (*citing* ***United States v. Freisinger***, 937 F.383, 385 (8th Cir. 1991), *overruling on other grounds recognized by* ***United States v. Beaman***, 361 F.3d 1061, 1064 (8th Cir. 2004); *see also* ***McKenzie***, 157 Wn.2d at 53 n.2 ("The dissent opens with its own tabulation of the prosecutor's allegedly improper remarks, but what the dissent neglects to acknowledge is that, assuming these remarks were improper, an objection from defense counsel would have prevented any repetition of the ...remarks.... [A]bsence of an objection by defense counsel ... *strongly suggests* to a court that the argument ... in question did not appear critically prejudicial to an appellant

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[44] *See e.g.*, 12RP 1077.
[45] *See e.g.*, 12RP 1052.
[46] 12RP 1108-09.

in the context of the trial.") (*Citing* ***State v. Sawn***, 144 Wn.2d 613, 661, 790 P.2d 610 (1990)) (Internal quotation marks omitted). Defendant failed to prove improper argument.

b. Defendant failed to prove flagrant and ill-intentioned misconduct.

A prosecutor's improper argument is flagrant when it communicates a "remarkable misstatement of the law" in that it expresses an obvious, extremely, flauntingly, or purposely conspicuous error. *See* ***State v. Warren***, 165 Wn.2d 17, 28, 195 P.3d 940 (2008); ***State v. Emery***, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (*citing* Webster's Third New International Dictionary 862-63 (2002)). "Ill-intentioned" argument is argument evidencing a malicious disregard for a defendant's right to due process. *See generally* ***Warren***, 165 Wn.2d at 29 (prosecutor sought to undermine the State's burden of proof with argument previously determined to be "entirely inappropriate" by the Court of Appeals); Webster's Third New International Dictionary 1126 (2002).

Assuming the mere repetition of the pronoun "we" was improper, it was neither flagrant nor ill-intentioned. It was not flagrant, or obvious, misconduct as there does not appear to be Washington authority condemning the practice. *See e.g.*, App. Br. at 35-38. In the absence of such authority the challenged argument could not be ill-intentioned as the

prosecutor could not logically engage in malicious disregard of a non-existent prohibition. The federal authority cited by defendant does little more than put the prosecutor on notice that some federal courts dislike the "we know" phrase in argument, yet will not go so far as to call it improper when used as it was in this case. *See e.g.,* ***Younger***, 398 F.3d at 1190.[47]

c. Defendant failed to show prejudice that could not have been cured by a timely objection or proper instruction.

Defendant cannot identify prejudice that could not have been cured by objection or a proper instruction. ***McChristian***, 158 Wn. App. at 400 (*citing* ***Reed***, 102 Wn.2d at 145). He argues the prosecutor's mere repetition of the word "we" aligned the jury against him. App. Br. 38. The repetition might have been interrupted by a timely objection and the alleged rhetoric exposed through an instruction. The jury was nevertheless properly instructed, and reminded—by the prosecutor—that the lawyers' remarks are not evidence and the State bears the burden of proof. *See e.g.*, 12RP 1099-1101; CP 52-53 (Instruction No. 1), 55

[47] (Improper vouching consists of placing the prestige of the government behind the argument through personal assurances of a witness's veracity, or suggesting that information not presented to the jury support's the State's case); *see also* ***State v. Yates***, 161 Wn.2d 714, 777-778, 168 P.3d 359 (2007) (*citing* ***State v. Gonzales***, 111 Wn. App. 276, 45 P.3d 205 (2002) (improper vouching where prosecutor drew sharp contrast between the State as obliged to serve justice and the defense attorney as merely an advocate for the accused); ***State v. Monday***, 171 Wn.2d 667, 673-75, 257 P.3d 551 (2011) (State improperly referenced his personal credibility by invoking a popular King County Prosecutor).

(Instruction No. 3). It is presumed those instructions were followed. ***Gamble***, 168 Wn.2d at 178. And strong evidence of defendant's guilt belays any concern the verdict was the product of minds overwhelmed by rhetorical flourishes. *See e.g.*, 10RP 816-17, 821-23, 829-40; 11RP 880-939, 954-1006; Ex 23.

7. THE MISDEMEANOR SENTENCE SHOULD BE REMANDED FOR CORRECTION BECAUSE IT EXCEEDS THE STATUTORY MAXIMUM BY A DAY.

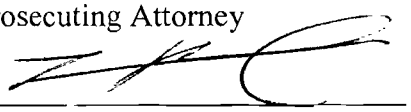
The State concedes defendant's misdemeanor sentence should be corrected to reflect the maximum 364 day sentence for gross misdemeanors. *See* RCW 9.20.020(c)(2).

D. CONCLUSION.

Defendant's convictions for offenses properly presented at separate trials under CrR 4.3 should be affirmed as they were based on admissible evidence properly presented by the prosecutor.

DATED: NOVEMBER 20, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/21/13 [signature]
Date Signature

PIERCE COUNTY PROSECUTOR

November 21, 2013 - 8:16 AM

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