NO. 45662-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW DELANO GIPSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00757-6

BRIEF OF RESPONDENT

TINA R. ROBINSON
Prosecuting Attorney

RANDALL A. SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE		
	Lise Ellner Po Box 2711 Vashon, WA 98070-2711 Email: liseellnerlaw@comcast.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 15, 2015, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly limited Gipson cross-examination of the State's witnesses to relevant topics?

2. Whether police officers are "public officials" for the purposes of the sentencing reform act?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Matthew Delano Gipson was charged by information filed in Kitsap County Superior Court with two counts of third-degree assault against police officers Erik Wofford and Josh Horsley, and one count of attempting to disarm Wofford. CP 8-10. The information further alleged that that the assault on Wofford was aggravated by the commission of the offense against a public official in retaliation for the official's performance of his duty in the criminal justice system. CP 9. The jury found Gipson guilty as charged, CP 102-03, and the trial court imposed and exceptional sentence of 16 months based on a standard range of 9 to 12 months. CP 141, 151-52.

B. FACTS

A fight erupted at closing time at Moon Dogs Too, a bar and restaurant in downtown Port Orchard. 2RP 159. The police were called and William Bentley, the bouncer, detained Alicia Maxwell and handed

her over to the police when they arrived. 2RP 160.

The police handcuffed Maxwell. 2RP 162. Her boyfriend, George Fortin, became agitated and the police detained him as well, and had him sit on the ground. 2RP 162. When Gipson[1] saw Fortin being taken away, "he went from zero to a hundred." 2RP 166. He went into a rage. 2RP 166. Her was yelling and screaming and began walking toward them. 2RP 166. Bentley tried to calm him down, but he "amped up." 2RP 166-67. When the police attempted to detain him, Gipson's girlfriend started trying to record the situation and yelled for them to get their hands off Gipson. 2RP 168. Bentley did not stop her from recording. 2RP 168.

Gipson began fighting with the officer. 2RP 170. The officer told him to "stop resisting." Bentley heard the officer say that Gipson was going for his gun. 2RP 171. Bentley saw his hand on the officer's holster. 2RP 171. A second officer then approached and tased Gipson. 2RP 171. He continued to resist and scream, but after a two or three times, they were able to handcuff him and took him away. 2RP 172.

Port Orchard Police Officer Erik Wofford, a 13-year veteran, was a crisis or hostage negotiator, a collision investigator, a driving instructor, and a certified field training officer for the department. 3RP 212, 213-14.

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[1] Earlier in the night Bentley talked to Gipson. 2RP 163. Gipson told Bentley that he had had an incident with the police in King County and he was fighting the case. 2RP 164. Bentley thought it was an odd thing to share. 2RP 164.

In the latter role, he observed other officers as they did their jobs. 3RP 215.

On the day of the incident, he was working as a field training officer with Horsley. 3RP 219. They were called to the fight at Moon Dogs Too. 3RP 231. Wofford first saw Gipson when he approached Horsley and Morrison, who were trying to arrest Fortin. 3RP 234. Gipson was extremely agitated and yelling profanity at the officers. 3RP 234, 238. His body movements were exaggerated, he was swearing and "just super, super angry." 3RP 238. Wofford was concerned because there was a large group of people around Gipson, and in his experience, these situations could quickly get out of control. 3RP 234. Several years earlier he witnessed a similar situation in the same area degenerated into a full street brawl. 3RP 235. The crowd seemed to be almost enjoying it, and he became concerned that Gipson would incite them against the officers. 3RP 242. Because there were only three officers, this caused serious concern. 3RP 242. He called for backup from the Sheriff's Office. 3RP 244.

Wofford told Gipson to stop several times. 3RP 241. Then he told Gipson to leave. 3RP 241. He told him to leave at least five times. 3RP 242. Gipson continued to flail his arms around and swear at them. 3RP 242. As Wofford stood up from Fortin, Gipson said something directly to

Wofford. 3RP 244. Wofford told Gipson again to leave. 3RP 244. Gipson did not, and came toward him. 3RP 244. Wofford said, "that's it" and told him he was under arrest. 3RP 244.

Wofford had not had any contact with Gipson, and did not know why he was angry. 3RP 245. Wofford told Gipson that he was placing him under arrest. 3RP 247. Gipson turned sideways and Wofford grabbed his left arm. 3RP 248. Horsley took his right arm to assist Wofford in cuffing him, Gipson "kind of blew up." 3RP 334. At first Gipson seemed to comply but then he yelled "fuck no!" and began to resist. 3RP 248-49. He yelled and then spun away from them. 3RP 334. He pulled away from Horsley's grasp and Wofford took Gipson to the ground. 3RP 334.

Gipson spun around to face Wofford. 3RP 249. Horsley helped him take Gipson to the ground. 3RP 249. Wofford ended up on top of him, face to face. 3RP 250, 336. Gipson had his fists clenched and was flailing at him. 3RP 251. He punched Wofford in the face several times. 3RP 252. Morrison heard him say "he hit me in the face." 3RP 361. Wofford grabbed Gipson's right arm and pushed it to the ground over Gipson's head. 3RP 253, 336.

Horsley tried to grab Gipson's left arm and Gipson punched out at Horsley's groin. 3RP 336. Horsley tried to grab Gipson's arm again, and Gipson shoved his arm underneath Wofford. 3RP 337. Wofford then felt

Gipson's left hand going for his gun. 3RP 253. Gipson was pulling on it so hard that Wofford could feel his gun belt moving. 3RP 253. Wofford told Horsley that Gipson was going for his gun. 3RP 254, 337. He looked over and saw Morrison and yelled to him that Gipson was trying to get his gun. 3RP 254. Horsley was eventually able to pull Gipson's arm away. 3RP 337.

Morrison drew his taser and Gipson let go of the gun. 3RP 256. Morrison then tased Gipson. 3RP 256, 337. Gipson did not stop fighting. 3RP 256, 338. They managed to get Gipson onto his stomach and Morrison tased him again on the butt. 3RP 256, 338. Horsley then got Gipson's right arm behind his back and Morrison sat on his legs and held the taser to the small of his back. 3RP 338. Gipson grabbed the taser and Morrison tased him again, tasing Horsley in the process as well. 3RP 338. They were then able to handcuff him. 3RP 256, 339.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY LIMITED GIPSON'S CROSS-EXAMINATION OF THE STATE'S WITNESSES TO RELEVANT TOPICS.

Gipson argues that the trial court improperly limited his cross-examination of the State's witnesses. This claim is without merit because the limitations only excluded evidence that had no relevance to any issue

at trial.

Gipson generally argues that the trial court prevented him from questioning "(1) whether the police were untruthful in declaring that Gipson assaulted Wofford; (2) tried to take his gun; and (3) whether the police instigated the aggression by taking Gipson into custody for simply voicing his opinion about the wrongful arrests." Brief of Appellant at 26. The State will address the first two contentions shortly. However, the State will first address the third contention quoted above, that any alleged "police instigation" of the incident would be relevant.

1. Any alleged "police instigation" of the altercation was not relevant to the crimes charged.

This issue first arose during the State's motion in limine regarding the charging decisions as to the other participants in the melee. *See* CP 24, #10. Defense counsel argued that the charging decision was relevant because Maxwell did not commit a crime. The court responded that that was a different matter, but cautioned counsel that it might not be relevant, and the State concurred. *See* 1RP 72-73. The issue was postponed at that time, but when the court addressed it, it had difficulty getting Gipson to identify his theory of defense. 1RP 80-81. Counsel nevertheless conceded that at the very least Gipson committed obstruction. 1RP 82. However, he continued to be evasive about what the defense was. 1RP 82-83. Despite this, the court emphasized, several times, that it wanted

Gipson to be able to argue his theory of the case, *provided* it was legally cognizable. 1RP 83.

The next day, Gipson disavowed any claim of self-defense:

> MR. MORRISON: Regarding the self-defense, it was actually when we originally had gone through it, I went through all my notes and whatnot. The self-defense was relating to holdback charges of resisting arrest and obstruction. We won't be bringing that regarding the assault, which he's only charged with and the disarming.
>
> THE COURT: So you're not going to be arguing self-defense or resisting an unlawful arrest or anything like that?
>
> MR. MORRISON: We're not.

2RP 92.

Despite avowing that he was not claiming self-defense or unlawful arrest, in opening statement Gipson began by describing the detention of Alicia Maxwell. He went on to describe the reaction of Gipson and Fortin to that arrest:

> At this point in time, her boyfriend George Fortin is like, Whoa, whoa, you're arresting the wrong person. You're arresting – and he is, he's insistent on them knowing that they're arresting the wrong person. This person was not the aggressor.

2RP 130. The State objected that this claim was irrelevant. The court overruled the objection but asked counsel to keep in mind the limitation the court imposed. 1RP 130. Gipson immediately continued:

> At this point in time he's insistent. This is the wrong person, this is the wrong person. You are out of line here.

2RP 131. The State again objected. *Id.* Gipson responded that he never stated that the arrest was unlawful. 2RP 131. The State responded that the evidence would be irrelevant:

> I'm going to argue that whether or not George Fortin felt that the arrest of Alicia Maxwell was proper or not proper, or whether he believed that it was wrong or right, is irrelevant to this cause of action. It's not relevant.

2RP 133. The State expanded on the objection:

> MS. MONTGOMERY: This is nothing other than veiled police brutality which you kept out, that's my concern, and that he's setting up an ineffective assistance appeal here. The bottom line, if he's going with the defendant had a right to defend himself against an unlawful or lawful arrest, there's a protocol to be followed. There are rules. We haven't done that. Whether or not Alicia Maxwell or George Fortin felt they were dealt with poorly is of no consequence.
>
> Additionally, I think, based on the court's orders in limine, he can't argue that the police overreacted. The law allows the police to use force to arrest an individual. Whether or not the individual is allowed to use force to keep that from happening, that's a defense. But we have to jump through some procedural hoops first. He can't argue that.

2RP 137-38. Gipson continued to maintain that he was not claiming defense against an unlawful arrest:

> I'm not arguing that. I haven't argued that. I can say what force these officers used. I can go into whether their statements, how they're saying what occurred are credible. I do not find them credible, and I believe we can show it through these witnesses.

2RP 138. The court unsurprisingly accepted Gipson's position that he was entitled to impeach the State's witnesses factually:

> THE COURT: Okay. So what I think is appropriate testimony for defense witnesses is anything that suggests a different version of how the facts lined up from law enforcement. It's valid impeachment evidence, witnesses from a different perspective.

2RP 138. The court went on to question, however, whether the evidence Gipson was proposing met that description. 2RP 139. When Gipson responded that he intended to contradict the facts presented by the State, the court agreed he could:

> MR. MORRISON: Well, they're claiming my client was aggressive, that he was cussing at these officers. He's going to testify he wasn't. They're going to testify that he wasn't.
>
> THE COURT: That's okay.

2RP 139. But when Gipson sought to further get into the appropriateness of the arrest of Maxwell and Gipson, the court asked him to explain why that would be relevant. 2RP 139-40.

At this point, the State, concerned that the discussion was "getting far afield," offered the controlling case law: "although a person who is being unlawfully arrested has a right ... to use reasonable and proportional force to resist an attempt to inflict injury upon him or her during the course of an arrest, that person may not use force against the arresting officer if he or she is faced with only a loss of freedom." 2RP 141 (*quoting State v. Valentine*, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997). The State argued, somewhat hyperbolically, that under that standard, "[w]hat happened to Alicia Maxwell and George Fortin, even if the defendant

thinks they're the worst, most brutal cops in the planet, does not give him the lawful right to resist his own arrest." 2RP 141.

The court acknowledged the State's position, but concluded that Gipson was entitled to present contradictory evidence. 2RP 141-42. The State recognized that Gipson had a right to contradict the State's witness, but emphasized that he could not be permitted to go into irrelevant evidence concerning the propriety of the arrests:

> My issue is he's saying ... you can use the arrest of Alicia Maxwell and George Fortin to determine or not what the police did to this gentleman was appropriate. That's really his argument. That's why the State doesn't feel that their testimony is relevant. What would be relevant – it doesn't matter what happened to Alicia or George. It doesn't matter. It's not relevant. What we're talking about is the arrest of Mr. Gipson.

2RP 142. The court specifically ruled that Gipson would be permitted to explore the fact pattern and present contradicting evidence. 2RP 142. The court asked Gipson to explain how going beyond that was warranted. Gipson never really explained his position, however:

> MR. MORRISON: Goes to the credibility.
>
> THE COURT: Again, I'm not getting your credibility argument, to be honest. I'm not quite understanding it. I don't have an issue with you bringing in evidence that said this witness says fact A and this says fact B, and there's a difference in who you're going to believe.
>
> Beyond that, I'm not getting your credibility argument.
>
> MR. MORRISON: I'm not going to an unlawful arrest situation. I'm not arguing that.

> THE COURT: Well, you keep saying that, but I'm not sure that's not true.
>
> MR. MORRISON: Until I do argue that, once I do argue that, you can say, hey, you've crossed the line. But I haven't.
>
> THE COURT: Why don't you answer the question, explaining to me the credibility argument.
>
> MR. MORRISON: I think that Officer Wofford acted out of protocol. I believe that he –
>
> THE COURT: What evidence do you have of that? You have no witnesses on your witness list who are going to present any testimony about any police protocol, and whether there was somebody who operated outside of that. Your witnesses are lay witnesses, and I have not heard anything that gives them any qualifications to testify about whether what Officer Wofford did was appropriate police protocol. You may not like what he did, but I haven't personally, as I heard the testimony, I haven't heard anything that sounded outside normal police protocol.

2RP 143-144. The conversation then returned to the question of relevancy:

> The State's argument would be even if it was, unless his life is at stake, we don't get to go there.

2RP 145. Gipson assured the court he had no intention of going into the lawfulness of the arrest. 2RP 145-46.

Gipson continues on appeal to argue that the circumstances preceding his arrest were relevant. As at trial, Gipson offers no pertinent authority explaining why any of these issues were relevant to the charges. They were not.

The United States Constitution and the Washington State

Constitution guarantee the right to present a defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). However, this constitutional right is not absolute and does not extend to irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010) (although defendant has "a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence"); *State v. Mee Hui Kim*, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (defendant has right to present a defense '"consisting of relevant evidence that is not otherwise inadmissible"') (*quoting State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)). Accordingly, where evidence is inadmissible, excluding that evidence does not violate a defendant's constitutional right to present a defense. This Court reviews a trial court's rulings on evidentiary matters for an abuse of discretion. *State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997).

Evidence which is not relevant is not admissible. ER 402. Evidence is relevant if it has "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. Thus, a trial court properly excludes evidence relevant to an affirmative defense to which a defendant is not entitled. *State v. Ginn*, 128 Wn. App.

872, 885, 117 P.3d 1155 (2005), *review denied*, 157 Wn.2d 1010 (2006); *State v. Gallegos*, 73 Wn. App. 644, 651, 871 P.2d 621 (1994); *State v. Bell*, 60 Wn. App. 561, 565, 805 P.2d 815, *review denied*, 116 Wn.2d 1030 (1991).

Here, Gipson was charged with two counts of third degree assault (based on punching Wofford in the face and attempting to punch Horsley in the groin) and one count of attempting to disarm an officer. It is well-settled that an arrestee may defend against official force only when he is about to be seriously injured or killed. *Valentine*, 132 Wn.2d at 20-21; *see also State v. Mierz*, 127 Wn.2d 460, 475, 901 P.2d 286 (1995) ("[I]n many cases the law enforcement officer and the citizen may both have sincere or reasonable beliefs about the lawfulness of the entry or arrest. Encouraging citizens to test their beliefs through force simply returns us to a system of trial by combat. The proper location for dealing with such issues in a civilized society is in a court of law."). And indeed, Gipson repeatedly disavowed that he was interposing a defense of unlawful arrest.

In this context the only relevant issue was whether the State proved the elements of the charged offenses. The elements are set forth in the jury instructions. For Count I, the State had to prove:

> (1) That on or about May 19, 2012, the defendant assaulted Erik Wofford;
>
> (2) That at the time of the assault, Erik Wofford was

a law enforcement officer who was performing his or her official duties;

CP 90. Count II had essentially the same elements, except named Horsley. CP 91. Finally, to convict on Count III that State had to prove:

> (1) That on or about May 19, 2012, the Erik Wofford was a law enforcement officer acting within the scope of his duties;
>
> (2) That the defendant knew that Erik Wofford was a law enforcement officer;
>
> (3) That the defendant, with intent to interfere with Erik Wofford's duties as a law enforcement officer, knowingly attempted to remove a firearm from his person;
>
> (4) That Erik Wofford did not consent to removal of the firearm;

CP 95.

Gipson's entire (admitted)[2] theory of defense was that he did not

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[2] As noted, he repeatedly attempted to introduce into the trial the issue of the propriety of the arrests, despite his claim that he was not. The trial court, which throughout the trial showed remarkable patience, expressed some frustration with this toward the end of trial:

> The evidence that's been presented to the court repeatedly throughout the State's case-in-chief is simply an argument that the defendant did not react until he observed the conduct of the law enforcement officers with regard to his friend, Mr. Fortin, repeatedly introducing a suggestion that his intent in this case was simply to try to protect his friend, to intercede on his friend's behalf.
>
> And while the court had cautioned and ruled that the evidence of police misconduct, if you will, was not admissible absent a defense being asserted by the defendant along those lines, in which case would need to go through the analysis of whether or not there was a foundation for such evidence; despite the fact and despite the rulings in the motions in limine that direct counsel to advise witnesses on the limitations of their testimony, the defense witnesses repeatedly introduced statements suggesting that the defendant, again, was just simply trying to help, that he was trying to intercede on Mr. Fortin's behalf, that Mr. Fortin was being brutalized, and that was why he reacted the way he did. And all of which the court had essentially previously ruled was not admissible, yet it was repeatedly introduced by the defense case-in-chief.

actually assault Horsley or Wofford and did not try to take Wofford's gun. Indeed, he repeatedly admitted that he was guilty of obstruction. 1RP 81, 82; 4RP 487, 555, 606. Under these circumstances, inquiries about "the officers ignoring the crowd's admonishment that they were arresting the wrong person," about the "rough treatment of Fortin," or about "why the police refused to investigate the perpetrators of the fight even though they knew [they] arrested the wrong person," Brief of Appellant at 25, were simply irrelevant. They did not pertain to any element of the offense and did not pertain to any cognizable defense.

Gipson claims that such questions would have:

> [E]xplained the reasons for Gipson's agitation, and the police responsibility for creating a hostile situation, and arresting Gipson, because they did not want to hear what he had to say. Before Gipson was arrested, there was no evidence that Gipson did anything except voice his frustration to the police about their arresting the wrong people.

Brief of Appellant at 25-26. He nevertheless fails to explain how any of these contentions are relevant.

The *reason* for Gipson's agitation had no bearing on whether he assaulted the officers or tried to take Wofford's gun. The *reason* does nothing but attempt to justify Gipson's action and win sympathy from the jury. But the evidence did not rise to the level of legal justification, and in

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4RP 489.

any event Gipson eschewed the legal defense. As such the *reason* for Gipson's hostility was irrelevant.

Likewise, regardless of whether the police handled the situation poorly, regardless of whether they ignored Gipson, regardless of whether Gipson was only voicing frustration, Gipson had no right to resist arrest, and, again, specifically denied that he was raising an unlawful arrest as a defense. To the contrary, he conceded that the police had cause to arrest him. As such, Gipson fails to show any relevance in this evidence.

As he did at trial, Gipson asserts that this evidence somehow bore on Wofford's credibility. Brief of Appellant at 26. As he did at trial, however, he fails to explain how these factors show that Wofford was not credible. Gipson conceded that he was obstructing, which gave Wofford probable cause to arrest him. Once that point was conceded the only issue was whether Wofford was being truthful about the punch and the grabbing of the gun. Issues about where he parked his car, whether Maxwell or Fortin should have been arrested, whether the four women should have been detained, whether sufficient investigation was conducted, are all collateral matters.

Finally, even if some minimal relevance were shown, even relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Under *State v.*

Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983), minimally relevant evidence may be excluded if it is so prejudicial as to disrupt the fairness of the fact-finding process at trial and the State's interest to exclude prejudicial evidence outweighs the defendant's need. *State v. Darden*, 145 Wn.2d 612, 621-622, 41 P.3d 1189 (2002). Here, Gipson repeatedly attempted to turn a trial about an assault and an attempted disarming into a trial on whether the police properly handled the investigation and the arrest of Maxwell and Fortin. As that was not the question the jury was there to decide, the trial court would also have acted well within its discretion to exclude this evidence under ER 403, particularly, as discussed, *infra*, Gipson had ample material with which to impeach Wofford.

2. Gipson was given ample opportunity to cross-examine Wofford and the other witnesses about whether the police were untruthful in declaring that Gipson assaulted Wofford or tried to take his gun.

Gipson's central claim is that he was limited in his ability to cross-examine Wofford about whether Gipson assaulted him or tried to take his gun. The record fails to bear out this contention.

Gipson was able to cross-examine Wofford, along with the State's other witnesses on these relevant topics. All of the following was elicited on cross-examination: Wofford first became aware of Gipson when he was yelling at the officers. 3RP 287. He was standing near the officers dealing with Fortin at the time. 3RP 287. He was watching their back.

3RP 288. Was not concerned about anyone filming. 3RP 289.

Wofford was not sure where Horsley was at the moment he grabbed Gipson's arm and told him he was under arrest. 3RP 292. Horsley eventually assisted him with Gipson. 3RP 292. He did not know if Horsley ever grabbed Gipson's right arm; he was focused on Gipson. 3RP 292. Once they were on the ground Horsley was to his right. 3RP 294.

Wofford did not recall the bouncer being between him and Gipson. 3RP 295. His reference in his report to seeing the bouncer was when they first arrived. 3RP 295-96. He walked by several people when he approached Gipson, but did not have a specific memory of one of them being the bouncer. 3RP 296.

Wofford did not recall the exact technique he used to get Gipson to the ground. 3RP 297-98. It was definitely not a "tackle." 3RP 298. Wofford weighed 230 pounds. 3RP 298. Wofford was on his knees, trying not to get punched and to grab Gipson's arm and take control. 3RP 298. Gipson was semi-reclined, not flat on his back. 3RP 299. He did not recall if he ever let go of his hand, but he must have, because he was punching him. 3RP 300.

Wofford did not recall Gipson saying he was going to sue him during the altercation. 3RP 302. He did say that after he was in custody.

3RP 302. Wofford was aware that at some point someone said they were arresting the wrong person. 3RP 302. He did not recall if it was specifically Gipson who said that. 3RP 302.

Counsel specifically inquired into who made the first contact: [3]

Q. Based on your training and experience, was he trying to get away from you?

A. Based on my training and experience he was attacking me.

Q. So he grabbed you first, or you grabbed him first?

A. What are you speaking of?

Q. The initial contact.

A. He was under arrest. I grabbed him first.

3RP 305.

Counsel extensively questioned Wofford about the grabbing of the gun. When Gipson grabbed for the gun, Wofford could see his arm and hand. 3RP 305. He could not see his fingers on the gun, but he saw his hand coming down his side and then felt the tugging on his gun belt. 3RP 306. It was not just Gipson trying to get his hand away from Horsley. 3RP 307. Wofford could feel Gipson's hand "locked onto" his gun. 3RP 307. Gipson said "whoa" and pulled his hand away quickly when Morrison approached with the taser. 3RP 307.

Counsel again cross-examined Wofford from his report:

[3] Like the Appellant, the State apologizes for the lengthiness of the excerpts of the report of proceedings. However, it feels that they are necessary to understand the context in which the issues are raised.

Q. Let's go back to your report on that. You indicated in your report, "I yelled over my left shoulder at Officer Morrison and told him, he's trying to get my gun. As soon as I said that, Gipson said, whoa, and removed his hand from my gun."

A. That's right. That's exact – that's what I just answered. That's exactly when Officer Morrison draws his Taser. I'm watching Officer Morrison draw his Taser and come up on scene with us, and this is all occurring at the same time.

Q. As soon as he heard that, you're saying as soon as he heard you say that, he lets go in your report?

A. It's simultaneous. That's what I'm trying to tell you. When I'm asking for help and I'm telling Officer Morrison that he's trying to get my gun and Officer Morrison is coming over, he immediately draws his Taser. These are occurring at near the same time.

Q. By the time you both hear it, you know, he's letting go at the same time that Officer Morrison is grabbing his Taser. Are you saying his response was that he was letting go of your gun because of the Taser or because you said it?

A. I believe it's because the Taser. I think he though it was either a gun or maybe he knew it was a Taser and he was about to be Tased.

3RP 307-08.

Wofford did not recall any comments specifically directed to him when he was struggling with Gipson. 3RP 310. There was a lot of yelling. 3RP 310. He did not recall ever threatening to break Gipson's arm. 3RP 311.

On recross-examination, the court allowed counsel to ask about whether Gipson told him he was arresting the wrong person:

Q. He was telling you that your actions were wrong, correct?

MS. MONTGOMERY: Objection. Same objection.

THE COURT: As phrased, overruled.

A. No, not me personally, us. Like, this is wrong, "F" you guys, "F" the police or words to that effect. But not – I guess to be clear, it's not uncommon in my line of work as a police officer, people don't wake up in the morning and say, today I want to go to jail. I'm so excited, I want – that doesn't happen.

MR. MORRISON: Objection. Nonresponsive, Your Honor.

THE COURT: Overruled.

A. It's frequent that people will say, this is wrong. It's infrequent when I have people that say, I'm really sorry that you have to do this. But what is frequent is when I take people to jail, they apologize, I'm sorry you had to do this. That's the kind of respect – that's the goal. But it's not uncommon for people to say that this is wrong or this is messed up or you're wrong. That wouldn't be uncommon.

3RP 313. Gipson further grilled Wofford on the foregoing response:

Q. That's your theme. Those aren't specific words that you actually recalled based on your testimony the other day.

A. Well, I don't remember everything that was said is what I'm telling you.

Q. Okay. But you can't specifically say that Mr. Gipson said "F" the cops. You made that clear the other day, correct?

A. Well, he was saying "F" us. He used the "F" word several times during the contact.

3RP 314. On the second recross-examination, counsel again confronted Wofford with his report:

Q. So now you're saying that when you two are in this tussle, you have all this other stuff going on, that you're noticing, you got your peripheral going and everything, he specifically now has turned it to, I'm going to get you. As if he's going to try to beat you up or something instead of, I'm going to sue you?

A. He said both. But when you asked me to refer to my report, both of those statements are in the report, sir.

3RP 315. Counsel continued:

Q. And your response in your report now to make it out like he's trying to get you is your response to your actions, correct?

MS. MONTGOMERY: Objection. Argumentative. Same objection.

THE COURT: Overruled.

MR. MORRISON: He can answer.

THE COURT: Mr. Morrison, it's my decision. It's overruled.

A. I don't understand your question, sir, I'm sorry.

BY MR. MORRISON:

Q. Okay. You're in a situation, right, and this isn't as you testified earlier, a typical situation of these friendly folk in Port Orchard, correct?

A. I don't know that I said friendly folk, but yes, it's not a typical situation, no.

Q. So this is an atypical situation that you're not used to around here?

A. Correct. ...

Q. Based on what was going around and all these people around you are yelling things, now you've got to justify yourself?

MS. MONTGOMERY: Objection, your Honor. This is beyond the scope. It's improper. I would move to strike.

THE COURT: Overruled.

BY MR. MORRISON:

Q. When you do actions, are you required to justify them?

3RP 316-17. A State objection was sustained to the last question, but counsel then continued to address Wofford's report:

Q. You put this statement in your report that he's stating that he's going to get you. And you're claiming that occurred while the two of you were on the ground?

A. Yes, I have it in quotes. So if I don't remember exactly what someone says, I don't put quotation marks around it and oftentimes I'll put words to the effect. But when it's in quotes, when I remember exactly what's said, then I put that in quotes like I did this in case.

Q. So while you two are wrestling, you guys are having a conversation?

A. Absolutely. I'm telling him the whole time – it's mostly one-sided on my end as far as telling him to stop fighting, to turn over, to quit resisting, to stop fighting, words to that effect. And he's using profanity and saying things to us.

Q. But while you're trying to get him under control and you're on top of him and you've got his arms, he's trying to get arms and self away from you, correct?

A. No. That's not accurate.

3RP 325-26.

A defendant's ability to use other relevant evidence to serve the purpose of impeachment is also factor that may justify limiting cross-examination. *See State v. Barnes*, 54 Wn. App. 536, 541, 774 P.2d 547

(1989). In addition to Wofford, Gipson also cross-examined the bouncer, Bentley. He testified that he was protecting Maxwell from the friends of the other party to the fight, who were outside. 2RP 175. Bentley was unable, however, to say who started the fight. 2RP 176. He described two or three police cars arriving. 2RP 176. When he handed Maxwell over to the officer, he began to tell them about the other women who were involved, but was interrupted when the Fortin got involved. 2RP 176-78.

Fortin pushed his way through the crowd. 2RP 179. He was more than verbally aggressive; he put his hand on either the woman or the officer. 2RP 179. He did submit, however, when they handcuffed him. 2RP 179. Bentley did not see the police pepper spray Fortin. 2RP 180. Fortin told Gipson to calm down. 2RP 180. Bentley did not recall the officer putting Gipson's arm behind his back. 2RP 186. The officer never sat up when he was on top of Gipson. 2RP 188.

On cross-examination of Horsley, Gipson brought out that Gipson was angry because they were arresting someone. 3RP 342. He did not say they were arresting the wrong person. 3RP 342. Horsley did not recall if he asked why they were arresting Fortin. 3RP 342.

After they had Fortin under control, they dealt with Gipson. 3RP 342. Gipson was facing away from them and went to spin. 3RP 343. Wofford was on his left side and grabbed him up around the top of the

shoulder/neck area and they both went down to the ground. 3RP 343. Horsley did not see Gipson punch Wofford with his left arm. 3RP 345. He could not see Wofford's gun. 3RP 346. He did not hear Gipson tell Wofford he would get him. 3RP 349.

He revisited the gun issue with Horsley:

> Q. All right. So was – so when Officer Wofford was down, was he laying on his gun?
>
> A. I would say he was laying more onto where – he was laying on that side. I couldn't see to tell if he was –
>
> Q. He's sideways on his gun?
>
> A. If he's laying on it or if there was a gap between it because he was on the defendant.
>
> Q. During this time when Mr. Gipson's arm is between Officer Wofford and himself, you're jerking his arm, right?
>
> A. I'm trying to get ahold of the upper arm.
>
> Q. You're trying to pull his arm out of there, correct?
>
> A. Yes.
>
> Q. So while you're jerking his arm, that could have been banging into the gun, correct?
>
> A. I couldn't see the gun, so I couldn't say yes or no.
>
> Q. All right. But if Officer Wofford is laying on his gun, it's impossible to grab onto it if that were the case. I'm not saying it was or wasn't.
>
> MS. MONTGOMERY: Objection. Calls for speculation. Asked and answered.
>
> THE COURT: Overruled.

3RP 353-54.

Gipson also raised the issues with Officer Morrison. Morrison

arrived after Horsley and Wofford. 3RP 367. Gipson explored with him the location of police cars. 3RP 368. He addressed whether the police were beating Fortin, which Morrison denied: they pepper sprayed Fortin. 3RP 369.

In contradiction to Wofford's account, counsel elicited from Morrison that Wofford stated that Gipson was grabbing his gun between the second and third tasings, *i.e.*, after Morrison was involved. 3RP 393; *cf.* 3RP 254-56. Morrison, like Horsley, also admitted that he did not personally see Gipson strike Wofford or touch his gun. 3RP 396.

Gipson also presented several of his own witnesses to contradict the State's. Fortin testified that he was handcuffed. 3RP 406. Fortin asked if it was necessary for a witness. 3RP 407. Fortin then began yelling at the officers. 3RP 408. Fortin testified that he continued yelling and the police kneed to the back of the head and already had spray in his eyes. 3RP 408. The court overruled a State objection to the last testimony, but told counsel to move on. 3RP 308.

Despite this ruling, Fortin continued to testify that he continued to lay there and they dealt with Gipson. 3RP 409. He could not really see Gipson because of the pepper spray. 3RP 409-10. There had been four officers on him and then they were not. 3RP 409.

Over State objection, was permitted to testify that he told the

police who started the fight and in response they put him up against the wall. 3RP 418. He was already handcuffed when the officers "assaulted" him. 3RP 419.

Gipson's girlfriend Codi Robertson testified that guard came and also asked Gipson t help break up the fight. 3RP 422, 429. Robertson got pulled out into the hall and went and asked someone to call 911. 3RP 423. She and a friend (Jamie) waited near the front of the bar while they pulled the fight apart. 3RP 423.

Robertson and Jamie were outside in front of the bar. 3RP 425. Then the police arrested Maxwell. 3RP 426. According to Robertson, Gipson was not doing anything when Fortin was arrested. 3RP 428. Gipson did not say anything until Fortin was on the ground. 3RP 429. Gipson was yelling at him to calm down because he was getting arrested. 3RP 429.

Gipson was upset. 3RP 429. He and Fortin were very close. 3RP 429. Gipson was trying to assist Fortin. 3RP 429. Gipson was telling Fortin to calm down. They were waiting like the police told them to. 3RP 430. Then Gipson saw the officer drop his knee to the back of Fortin's head and Gipson "got a little upset." 3RP 430.

Robertson further testified that they told her if she did not move she would be arrested too. 3RP 432. She kept trying to record it. 3RP

432. There were three officers around Gipson and they had him pinned to the ground. 3RP 432. The guard was trying to distract her and get her to go away. 3RP 432. She told the guard she had to stay because she had to give a statement. 3RP 432.

Then she saw them start tasing Gipson. 3RP 432. His whole body was shaking. 3RP 432. She found Gipson's shoes in the middle of the road from when they slammed him face first into the cement. 3RP 433. He could not punch them because his whole body was shaking. 3RP 433. She did not see Gipson try to take the gun. 3RP 433. The only thing she saw was him shaking on the ground. 3RP 433.

On redirect, Robertson further testified:

A. After the officer slammed his knee off the back of George's head and his face bounced off the pavement.

Q. What else did he do to George?

[objection overruled]

Q. What did he do next?

A. After Matthew started yelling?

Q. No. What did he do to George next after he hit him in the head?

A. He pepper-sprayed him while he was in cuffs, face first on the ground.

Q. So he's in handcuffs, George gets knocked to the ground.

A. Yes.

Q. Officer Wofford comes up, knees him in the back of the head.

4RP 467-68.

Then in closing argument, counsel used all this testimony to support his theory of the case. When he was not trying to slip in the theory that the arrest was improper, 4RP 583, 583-87, 592, 602, 606, Gipson's primary argument was that Wofford was not credible. He supported this contention primarily with Wofford's testimony on cross-examination, and the testimony he elicited from the other State's witnesses that purportedly contradicted Wofford. *See* 4RP 583; 588-95; 597-602; 605-06; 608-09. In view of the foregoing it is quite clear that the trial court afforded Gipson ample opportunity to challenge the State's case.

3. The trial court did not otherwise improperly limit Gipson's cross-examination.

Gipson lists the following four contentions in support of his central thesis:

1. The "trial court did not understand that establishing that the police allowed the perpetrators of the bar fight to leave the scene without any investigation was relevant to place the witnesses in their proper setting." Brief of Appellant at 27.

2. The "trial court believed that the defense could not elicit that the police were responsible for the aggression unless the defense produced an expert." *Id.*

3. The "trial court did not allow any questions regarding Wofford's police report because the court believed the contents of the police report were collateral and cross-examination of Wofford about the content police report would be impeachment on collateral matters." *Id.*

4. "The trial court excluded all meaningful cross-examination of Wofford regarding his bias and credibility." Brief of Appellant at 32. "In addition, Wofford's credibility and bias concerned the heart of Gipson's defense, whether he committed the acts Wofford described on direct examination." *Id.* The State will address these specific contentions serially.

a. The trial court properly limited irrelevant testimony about the participants in the bar fight.

The trial court's decision to exclude impeachment evidence based on evidentiary rules will not infringe on a defendant's constitutional rights unless excluding the evidence "wholly prevented [the defendant] from cross-examining key witnesses on certain subjects central to [his] defense." *State v. French*, 157 Wn.2d 593, 604, 141 P.3d 54 (2006). "A trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative." *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). As noted, a criminal defendant has no

constitutional right to present irrelevant evidence. *Hudlow*, 99 Wn.2d at 15.

Gipson fails to explain how the issue of the four "perpetrators"[4] of the bar fight has any bearing on the issues presented at trial. The failure to detain them is at best a collateral issue. Moreover, the uncontradicted testimony showed that the affray involving Gipson and his friends began almost immediately upon the arrival of the police. As Wofford explained, ordinarily when responding to a reported bar fight, they would try to determine what had happened and whether there were any violations of the law. 3RP 240. Gipson's behavior changed the calculus. 3RP 240. Wofford was worried because he did not know if there were other people who would support Gipson, and because Gipson's behaviour was not normal. 3RP 240, 320.

b. The court's expert testimony comment pertained to the unclaimed unlawful arrest defense and is therefore moot.

Gipson fails to explain how this contention is germane to his appeal. While the trial court made passing reference to the need for expert testimony, it was in the context of an unlawful arrest defense, 2RP 139, 3RP 270, which Gipson subsequently disavowed. The trial court specifically advised Gipson that he could question the officer's behavior,

[4] There is actually no evidence about whether the four or Maxwell initiated the fight. *See* 2RP 176.

so long as he did not allege legal impropriety:

> Mr. Morrison, I've not limited your ability to ask the officer if he was stirring anything up or what his reaction was. I haven't limited you in that sense.
>
> But when you start getting into the area of whether something was improper or justifiable in a legal sense, then you're going beyond the scope of what is going to be admissible in this case.

3RP 322. Moreover, as discussed previously, the propriety of Wofford's *actions* as opposed to his recall or veracity was not properly in issue.

c. The trial court properly disallowed collateral impeachment.

Washington long has excluded evidence that attempts to impeach a witness on collateral matters. "'It is a well recognized and firmly established rule in this jurisdiction, and elsewhere, that a witness cannot be impeached upon matters collateral to the principal issues being tried.'" *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009) (*quoting State v. Oswalt*, 62 Wn.2d 118, 120-21, 381 P.2d 617 (1963)).

As is apparent in the discussion above of Gipson's cross-examination of Wofford, the trial court did not refuse to allow Gipson to use Wofford's report to impeach him. Instead, it only declined to allow him to be impeached on collateral matters, such as where he parked his car, what happened to the four women in the bar fight and similar extraneous matters. In support of this claim, Gipson cites to the record at 3RP 266-289. Brief of Appellant at 5. The State will attempt to sift

through this 20-page "citation."

At 3RP 267, Gipson asserted that Wofford "wrote a report and everything in that report is fair game." Gipson cited no support for this novel theory at trial, and notably offers none now. At the time the objection was raised below, Gipson was attempting to cross examine about the four women from the bar fight, which, as discussed, was irrelevant. At 3RP 270, Gipson again presented essentially the same argument:

> If you just let me put on my case. If you're going to limit what's in his police reports, for goodness sakes, this is what he wrote in response to this. And you're telling me I can't ask him what he put in the report. That's essentially what you're saying.

The court, despite counsel's disrespectful tone calmly responded that collateral matters were not going to be permitted:

> Impeachment on a collateral matter is not impeachment on a substantive issue, which is what you're supposed to be going for.

3RP 271. No abuse of discretion occurred.

d. The court allowed Gipson broad latitude in his cross-examination of Wofford.

Gipson's final claim is that the "court excluded all meaningful cross-examination of Wofford regarding his bias and credibility." Brief of Appellant at 32. In support of this last claim, Gipson provides numerous citations to the record. The State will address each of these contentions.

i. The trial court did not abuse its discretion in limiting cross-examination to the scope of direct.

With his first two citations to the record, Gipson claims that the "trial court expressly limited the defense to only asking questions that were asked on direct ... RP 27;[5] 266-276." Brief of Appellant at 28; Brief of Appellant at 23 (the court "ordered that Gipson not ask any questions that were not raised on direct examination. RP 271."). The third asserts that when "Gipson tried to ask Wofford about what was happening while Fortin was on the ground and Gipson was in the crowd, the trial court accused Gipson of trying to create evidence. RP 271." Brief of Appellant at 28. Gipson next claims that the "trial court refused to permit Gipson to ask about the fact that the police called the Sheriff for backup even though that was testified to on direct examination. RP 243, 276." Brief of Appellant at 28. He also asserts that he "was prevented from asking about the person Wofford arrested as soon as he arrived on scene or about any of the contacts made by Wofford. RP 276-77, 286-289." *Id.* Finally, he again asserts that the "trial court believed that Gipson was not entitled to cross-examine the witnesses if the prosecutor did not ask the specific question on direct." Brief of Appellant at 31 (citing 3RP 279-84).

This Court reviews claimed errors on an improper scope of examination for a manifest abuse of discretion. *State v. Hakimi*, 124 Wn.

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[5] The discussion at 1RP 27 pertains to the voir dire. Presumably this reference is a typo.

App. 15, 19, 98 P.3d 809 (2004). Washington trial courts have "broad discretion 'to conduct [a] trial with dignity, decorum and dispatch and [to enable it to] maintain impartiality.'" *Hakimi*, 124 Wn. App. at 19 (*quoting State v. Johnson*, 77 Wn.2d 423, 426, 462 P.2d 933 (1969)) (editing the Court's). It is the general rule in both civil and criminal cases that the cross-examination of a witness is limited to the scope of the direct examination. *State v. Hobbs*, 13 Wn. App. 866, 868, 538 P.2d 838, *review denied*, 85 Wn.2d 1019 (1975). In defining the scope of cross-examination, trial courts should limit it "to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." ER 611(b); *State v. Ayala*, 108 Wn. App. 480, 486, 31 P.3d 58 (2001), *review denied*, 145 Wn.2d 1031 (2002) (limiting cross to scope of direct did not violate Confrontation Clause). Moreover, the Confrontation Clause only guarantees an opportunity for cross-examination, not cross-examination that is effective to the manner and extent that the defense may wish. *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985). The scope of cross-examination thus lies in the discretion of the trial court and will not be disturbed unless there is a manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984).

During the cross-examination of Wofford, Gipson asked about the women who were in the fight with Maxwell:

> Can you tell the jury what came to your attention while you were arriving at the scene regarding four or five females?

3RP 266-67. The State objected both that the question was beyond the scope and irrelevant. 3RP 266. The court sustained the objection, but excused the jury so that Gipson could make a record. *Id.* Gipson argued that the evidence was within the scope and relevant. 3RP 267. The court was unpersuaded and again sustained the objection. Gipson then sought to further explain his position:

> The State is claiming that my client incited this situation and that he was the one that was getting the crowd all incited. We're arguing that's not the case. My client isn't the one. It was actually Officer Wofford. He had information when he first arrived upon the scene that there were four to five individual ladies who had gotten into an altercation in the bar.
>
> Upon his arriving at the scene, he sees these four to five individuals. But he doesn't just see them, he notices something quite peculiar about them. These individuals with the lights flashing and based on his training and experience, the fact that they did not look at him made him believe that somehow they were involved. But he didn't use that information. He came and arrested somebody without asking a single question at that point in time. That is our entire theory of the case.
>
> It is our position that this officer's testimony is based on the fact that he needs to substantiate what his actions were and we can show that his actions were wrong. If we can't argue this, then you're depriving Mr. Gipson of putting on his entire theory of the case and evidence that supports it. If the Court is going to say how it's not relevant, I would like to know. But it is relevant. I would

ask, Your Honor, to please allow us to put on our theory of the case and give him a fair shot here because it is relevant.

3RP 268-69. The court still failed to see the connection that Gipson claimed:

> I'm not seeing how his not responding to four people walking away incited the actions that followed. I'm not seeing that. You're not making that connection for me.

3RP 269. Gipson tried another tack:

> MR. MORRISON: What I'm saying, right, is he had information. He had information that there's four to five females that were in a fight. He sees four females walking away. The lights are flashing and it drew his attention, why are these people not looking at me? And it turns out these people were actually involved in the fight.
>
> THE COURT: I understand that. You don't have to restate the facts again to me. Tell me how that incited anything that happened.
>
> MR. MORRISON: Well, the reason that everyone was – the reason Mr. Fortin and Mr. Gipson were directing their attention to the officers and yelling was they're saying, you're arresting the wrong people. It's those people leaving that are the ones who did this, not her. It's them. They're pointing, hey – he didn't want to hear it.

3RP 269-70. The court again tried to get Gipson to explain why this evidence would be relevant:

> You don't have an expert to testify that the officer did anything improper in terms of policy, procedure or the law. So I'm not sure that you have any basis to proceed with some argument that Officer Wofford did anything improper under the law.

3RP 270. The court explained that it was not limiting Gipson's ability to cross-examine, but that the cross had to be relevant to the issues in the case:

> Impeachment on a collateral matter is not impeachment on a substantive issue, which is what you're supposed to be going for.

3RP 271. Gipson continued to argue that he was entitled to impeach, but never explained how his line of inquiry was relevant to the offense:

> MR. MORRISON: Well, he's training this individual, which he testified to. And when you see something like that in the vehicle, he's passing this information on. He's sitting there telling him earlier –
>
> THE COURT: The objection is sustained.
>
> ...
>
> MR. MORRISON: I can't even ask if he saw four to five females leaving?
>
> THE COURT: We're not going to go into anything other than what he testified to on direct.
>
> MR. MORRISON: He testified to that.
>
> THE COURT: He did not testify to that on direct. The testimony picked up, I believe, at the point where he sees Fortin on the ground and draws his attention to the defendant.
>
> MR. MORRISON: So anything that anybody – anything that other people saw that he didn't testify to, I can't even ask him about?
>
> THE COURT: You're trying to create evidence to impeach him. That's inappropriate.
>
> MR. MORRISON: I'm not creating it. It's in his report.
>
> THE COURT: He didn't testify to it on direct, so you're impeaching him on what he testified to on direct.

3RP 271-72. Despite the court's ruling, Gipson continued to follow the same line of inquiry.

> Q. You received a call indicating that there were four or five females that were in an altercation at the bar,

correct?

A. Yes.

Q. So was it your goal to apprehend everyone who was involved in this incident while going to the bar?

MS. MONTGOMERY: Objection, relevance.

THE COURT: Sustained.

3RP 272. Nevertheless, the court did permit Gipson to ask Wofford about his intent at the scene:

Q. What was your goal while going to the bar?

A. My goal was to watch Officer Horsley and to see how conducted an investigation.

Q. And you testified earlier that it's your job to enforce the law, correct?

A. Yes.

Q. And you received a call indicating that there was fighting going on, correct?

A. Yes.

Q. And you indicated to the jury that fighting in public constitutes the breaking of the law, correct?

A. Yes.

Q. And so your purpose of going to the bar is to investigate this fighting, correct?

MS. MONTGOMERY: Objection. Asked and answered.

THE COURT: Overruled.

THE WITNESS: Yes.

3RP 272-73.

The fourth citation to the record shows no limitation on cross:

Q. So you called for backup, but you didn't assist? You called for backup, but you didn't assist?

MS. MONTGOMERY: I'm objecting for relevance at this point.

THE COURT: Sustained.

MR. MORRISON: It was on direct examination.

3RP 276. Despite this ruling, however, Gipson simply rephrased the question:

Q. So you testified earlier that your goal was just to observe?

A. That is the goal, yes.

3RP 276. After some discussion about the layout of the scene, Gipson again asked the question, before he again attempted to explore the irrelevant issues surrounding the arrest of Maxwell:

Q. On direct examination you stated your goal was that you wanted to observe and train Officer Horsley?

A. Yes.

Q. In addition, you also testified that your goal was to determine what happened, correct?

A. Yes.

Q. Okay. When you arrived, when you initially arrived, you immediately arrested a young lady, correct?

MS. MONTGOMERY: Objection. Based on my prior –

THE COURT: Sustained. Sustained.

Move on, Mr. Morrison.

3RP 278-79. Mr. Morrison did not move on:

Q. Did you come into contact with anybody when you first arrived?

MS. MONTGOMERY: Same objection.

THE COURT: Sustained, Mr. Morrison.

MR. MORRISON: Your Honor, I would ask to take this outside of the presence of the jury.

THE COURT: Denied. Move along.

BY MR. MORRISON:

Q. So when you first arrived at the scene, who did you talk to?

MS. MONTGOMERY: Same objection.

THE COURT: Sustained.

MR. MORRISON: He testified on direct that he –

MS. MONTGOMERY: Objection to speaking objections.

THE COURT: Sustained.

Move on, Mr. Morrison.

BY MR. MORRISON:

Q. Did you talk to anybody when you arrived?

MS. MONTGOMERY: Same objection.

THE COURT: Sustained.

BY MR. MORRISON:

Q. Did you do anything when you arrived?

MS. MONTGOMERY: Same objection.

THE COURT: If you can narrow the scope of the timeframe, Mr. Morrison.

MR. MORRISON: Your Honor, I need to make a record outside the presence of the jury –

THE COURT: Denied. Move along,

Mr. Morrison. You've made your record.

BY MR. MORRISON:

Q. So when you arrived, where did you go?

MS. MONTGOMERY: Your Honor, I'm going to lodge the same objection.

THE COURT: We could focus in –

MR. MORRISON: I need to ask some questions.

THE COURT: Mr. Morrison, you've been advised as to proper timeframe. You need to focus on the proper timeframe. You need to move to that point.

MR. MORRISON: I'm not sure what that timeframe is.

THE COURT: Okay. Going to have the jury step out, please.

3RP 279-81. The court excused the jury again, and Gipson again tried to convince the court that his inquiry was not irrelevant, and counsel bordered on contemptuous:

THE COURT: Mr. Morrison, you were advised that the scope of the direct commenced when the officer indicated that he observed Mr. Fortin on the ground and he drew his attention to the defendant from his behavior. That is the beginning of the fact pattern as to what happened on the 19th. That was the limit of the scope of direct.

MR. MORRISON: You can't limit me on that.

THE COURT: I can too.

MR. MORRISON: It's error. That is error. You are limiting our ability –

THE COURT: Mr. Morrison, I ruled.

MR. MORRISON: – to put on our case, Your Honor. That's not fair. You're picking sides.

THE COURT: No, Mr. Morrison. I've limited you in accordance with the rules of evidence. If you want to look them over –

MR. MORRISON: I have looked them over. And you know darn well –

THE COURT: Bring the jury back.

MR. MORRISON: Please allow me to make

my record for the Court of Appeals.

THE COURT: You've made your record, Mr. Morrison.

MR. MORRISON: I have not completely. You're picking sides here. You're limiting an officer's report.

THE COURT: Mr. Morrison, the entire scope of a police report is not relevant necessarily in a trial, and you well know that.

MR. MORRISON: Do you know the facts?

THE COURT: Mr. Morrison, do not argue with me. Let me make very clear to you, you should know the rules of evidence. The State limited the scope of their direct, they're entitled to do so. That doesn't open it up for you to go down any path you choose to, and that's the situation.

MR. MORRISON: They can't hide evidence for the sole purpose of not allowing me not to talk about it.

THE COURT: What evidence are they hiding?

MR. MORRISON: They're hiding the fact that he knew darn well that he comes straight up and arrests somebody. They came out –

3RP 281-83. The court interrupted counsel to ask why that would be relevant. Gipson again returned to the theory of unlawful arrest, but failed to cite any relevant authority showing relevance:

THE COURT: How is that relevant?

MR. MORRISON: He testified that – he said that you arrested the wrong person. Well, who is this person? He testified to it.

THE COURT: How is that relevant whatsoever?

MR. MORRISON: I can go into it. He

testified on the stand. You're telling me I can't go into what that meant, you arrested the wrong person. Is that what you're saying?

THE COURT: What I'm telling you is you need to stick to what is relevant.

MR. MORRISON: It is relevant.

THE COURT: Well, I disagree. You can bring back the jury.

(The following occurred in the presence of the jury.)

THE COURT: You can be seated.

The objection is sustained. Mr. Morrison.

BY MR. MORRISON:

Q. What's the first thing that you did in response to this situation?

MS. MONTGOMERY: Objection. Same objection.

THE COURT: Rephrase your question, Mr. Morrison.

BY MR. MORRISON:

Q. Let's start with, did you pepper-spray someone?

MS. MONTGOMERY: Objection. Beyond the scope.

THE COURT: Sustained.

MR. MORRISON: All right.

3RP 279-84.

Thereafter, Gipson was permitted to ask Wofford how long he was at the scene before he made contact with Fortin, 3RP 284-85; what directed his attention to Fortin, 3RP 285; What Horsley did under his guidance, 3RP 286; and whether he assisted Horsley, *id.* The trial court properly limited Gipson to the scope of direct.

ii. Gipson fails to show an abuse of discretion where the question was asked and answered.

Gipson next claims that he "was not allowed to inquire at all about the lack of investigation or the officers [sic] reasons for responding to the 911 call. RP 273." Brief of Appellant at 28. The actual objection that was sustained on that page was "asked and answered." A review of the previously quoted examination shows that the question had been, in fact, asked and answered:

> Q. And in doing so, you already have information that there's four to five people involved, correct?
>
> MS. MONTGOMERY: Objection. Asked and answered.
>
> THE COURT: Sustained.
>
> BY MR. MORRISON:
>
> Q. And were you looking for those four to five people in your investigation to do your job?
>
> MS. MONTGOMERY: Objection. Relevance. Asked and answered.
>
> THE COURT: Sustained.
>
> MR. MORRISON: His job is relevant.
>
> THE COURT: Mr. Morrison, move on.
>
> MR. MORRISON: Okay.

3RP 273-74.

Gipson had specifically already obtained an answer to these questions:

> Q. You received a call indicating that there were four or five females that were in an altercation at the bar, correct?

A. Yes.

3RP 272. As quoted above, Gipson already asked Wofford about his purpose at the scene. 3RP 272-73. Because these questions already were asked and answered by the witness, the trial court did not abuse its discretion in moving the questioning along. ER 611(a) ("The court shall exercise reasonable control over ... presenting evidence so as to ... avoid needless consumption of time.").

iii. The trial court provided Gipson with ample opportunities to be heard and make a record.

Gipson's final claim is that the "trial court also refused to permit counsel to take matters outside the presence of the jury. RP 281, 282, 322." Brief of Appellant at 28-29. This claim is without factual support.

As the foregoing excerpts from the report of proceedings show, Gipson was given ample opportunities to argue the objections outside the presence of the jury and to make a record. Ironically, on the very first page Gipson cites, 3RP 281, the court subsequently excused the jury. Indeed, 3RP 282, the second cited page, reports proceedings that then occurred outside the jury's presence. *See* 3RP 282-83. The final citation, 3RP 322, also occurred at the tail-end of a lengthy discussion, 3RP 318-24, that had occurred outside the presence of the jury.

4. Any error would be harmless.

To determine whether the exclusion of evidence is harmless,

Washington uses "the 'overwhelming untainted evidence' test." *State v. Lord*, 161 Wn.2d 276, 295, 165 P.3d 1251 (2007). Under this test, if the untainted, admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.* Even if the evidence Gipson was relevant, its exclusion amounted to harmless error when reviewed in context. As noted, none of it pertained to the actual element of the crime or Wofford's account of the crime. Moreover, Gipson brought in ample evidence, including from the other officers, to impeach Wofford and argue that Wofford was mistaken or lying. The jury nevertheless convicted. This claim should be rejected.

B. POLICE OFFICERS ARE "PUBLIC OFFICIALS" FOR THE PURPOSES OF THE SENTENCING REFORM ACT.

Gipson next claims that the trial court erred in finding that the aggravating circumstance set forth at RCW 9.94A.535(3)(x) could apply to a police officer. This claim is without merit because .

RCW 9.94A.535(3)(x) provides that it is an aggravating circumstance that:

> The defendant committed the offense against a public official ... in retaliation of the public official's performance of his or her duty to the criminal justice system.

Gipson argues that a police officer is not a public official because RCW 9A.04.110(13) & (15) includes separate definitions of "public officer" and

"peace officer." RCW 9A.04.110, however, applies by its own terms only to Title 9A. Moreover, the aggravating circumstance applies to a "public official" not a "public officer." Presumably if the Legislature intended the Title 9A definition to apply, it would have used the term defined in 9A.04.110, not a different term.

"Official" is defined as "a person appointed or elected to an office or charged with certain duties."[6] It is also defined as "one who holds or is invested with an office : officer <government officials>,[6] or a "person holding public office or having official duties, especially as a representative of an organization or government department: 'a union official'"[7] Black's defines an "official" as "An officer; a person invested with the authority of an office." Black's Law Dictionary, at 1236 (Rev. 4th ed.). Wofford was clearly a person appointed to office and charged with certain duties. He was clearly an officer. He clearly had official duties.[8]

Finally, even under the WPIC used by the trial court, CP 96, the officers clearly "held office under a city ... government," "performed a public function," and were "vested with the exercise of some sovereign power of government." Furthermore, even if the officers were deemed to not "hold office" they were clearly "persons lawfully exercising ... the powers or functions of a public officer." Gipson's sentence should be

[6] Dictionary.com, http://dictionary.reference.com/browse/official (viewed on April 8, 2015).

affirmed.

IV. CONCLUSION

For the foregoing reasons, Gipson's conviction and sentence should be affirmed.

DATED April 15, 2015.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney

RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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[6] Merriam-Webster, http://www.merriam-webster.com/dictionary/official (viewed on April 8, 2015).

[7] Oxford English Disctionary, http://www.oxforddictionaries.com/definition/english/official (viewed on April 8, 2015).

[8] When he became an officer, Wofford was sworn in by the chief of police and took an oath to serve and protect the people and to uphold the laws of Washington. 3RP 218. He was an employee of the City of Port Orchard. 3RP 218.

KITSAP COUNTY PROSECUTOR

April 15, 2015 - 3:32 PM

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