IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23744-3-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
JESSE JAMES FELLMAN-SHIMMIN,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

KATO, J.—Jesse James Fellman-Shimmin appeals his convictions and sentence for 11 counts of theft of a firearm and one count of first degree unlawful possession of a firearm. He assigns error to various rulings by the court, contends evidence was insufficient to support his convictions, and claims the prosecutor improperly vouched for the credibility of a witness. We affirm.

On August 30, 2004, police officer Charles Walls was dispatched to investigate a break-in at a home in Colville, Washington. When the officer arrived at the home, he spoke with the victim, Donald Bailey, who told him he had found his back door unlocked and his guns missing. Officer Walls completed his investigation and left for the police station to prepare his report. He drove for

three blocks and then turned around to go back to Mr. Bailey's house. When he arrived, he asked Mr. Bailey if he could search the property. Officer Walls found a shed. The front door to the shed had been forced off its hinges. Inside, the officer found two of Mr. Bailey's missing guns. The next day, police recovered from an informant several guns belonging to Mr. Bailey.

On September 1, police arrested Mr. Fellman-Shimmin. He was charged by amended information with one count of first degree burglary, 13 counts of theft of a firearm, and one count of first degree unlawful possession of a firearm. Mr. Fellman-Shimmin moved to sever the charge of unlawful possession of a firearm from the remaining charges against him or, in the alternative, for a bifurcated trial. The court denied the motion.

On November 10, the court conducted a CrR 3.5 hearing to determine the admissibility of Mr. Fellman-Shimmin's statements at the time of his arrest. During the hearing, he sought to introduce past medical records to establish that his statements to the arresting officer were involuntary. The medical records identified Mr. Fellman-Shimmin's history of methamphetamine use and addiction and previous diagnosis of attention deficit hyperactivity disorder (ADHD). The court ruled the records were inadmissible because they were not relevant to

determining whether he was under the influence on the evening of his arrest.

The jury found Mr. Fellman-Shimmin not guilty on the first degree burglary charge and two counts of theft of a firearm, but found him guilty on 11 counts of theft of a firearm and one count of first degree unlawful possession of a firearm. His motion for new trial under CrR 7.5 was denied. Mr. Fellman-Shimmin received a drug offender sentencing alternative (DOSA) sentence with an offender score of nine. This appeal follows.

Mr. Fellman-Shimmin contends the State violated CrR 4.7 when it failed to give him proper notice a witness would testify against him. He also argues the court erred by declining to grant a continuance in order to allow him to prepare for the witness's testimony.

During trial, the State informed the court it would possibly call Jarod Hubbard, among others, to testify. Defense counsel objected, stating these witnesses had not been made available and he did not have advance notice of their testimony. When the court asked the State who specifically it would be calling to testify, the State indicated it would call Mr. Hubbard. The court told defense counsel to interview him at the jail during the lunch break.

The State called Mr. Hubbard as its last witness. Defense counsel again

objected because he had not had an opportunity, after various attempts, to speak with Mr. Hubbard until that morning. Counsel told the court he had a problem with the "unfair surprise" and he could not adequately defend his client. Report of Proceedings (RP) at 252. The court allowed Mr. Hubbard's testimony and declined to grant a continuance.

CrR 4.7(a)(1) requires only that the State turn over relevant material "within the prosecuting attorney's possession or control." Here, trial commenced on the afternoon of November 10, 2004. The State informed Mr. Fellman-Shimmin's defense counsel in chambers that morning of Mr. Hubbard being added to the State's witness list. Counsel admitted that when he saw Mr. Hubbard's name on the witness list, he visited Mr. Hubbard's attorney twice and spoke with her over the telephone in an attempt to set up a meeting with him. When defense counsel visited him at the jail, Mr. Hubbard said he did not want to speak to him without his attorney present. A plea bargain between the State and Mr. Hubbard was firmly struck on November 11, a holiday, and the State informed the court and defense counsel the next day that Mr. Hubbard would definitely testify for the State. The court then gave Mr. Fellman-Shimmin's attorney an opportunity to speak with Mr. Hubbard that same day.

The defense and the State became aware Mr. Hubbard would testify against Mr. Fellman-Shimmin at presumably the same time. There is no evidence the State deliberately withheld the substance of Mr. Hubbard's testimony from the defense. Given that the defense admitted it was aware Mr. Hubbard was a potential witness for the State and the court gave counsel the opportunity to interview him, the court did not err by allowing Mr. Hubbard to testify or declining to grant a continuance.

Mr. Fellman-Shimmin next contends the court erred by failing to give a unanimity instruction. He argues this was a multiple acts case where he was entitled to have jury unanimity as to which distinct act constituted the crimes. There is no indication in the record that Mr. Fellman-Shimmin either requested a unanimity instruction at trial or objected to the court's failure to give one. But a defendant may nonetheless challenge for the first time on appeal the court's failure to require the State to rely on a single act or give a unanimity instruction. RAP 2.5(a)(3); *State v. Fiallo-Lopez*, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995).

When a defendant is charged with multiple acts and any one of them could constitute the crime charged, the jury must be unanimous as to which act

constituted the crime. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). To ensure jury unanimity when there is evidence of numerous criminal acts, the State must elect a single act on which it will rely for conviction or the court must instruct the jury that all must agree that the same specific criminal act has been proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984), *overruled in part by Kitchen*,110 Wn.2d at 405-06.

But a unanimity instruction is not necessary when the evidence of multiple acts indicates a "continuing course of conduct." *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Evidence tends to indicate a continuing course of conduct if each of the defendant's acts promoted one objective and occurred at the same time and place. *See State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395, *review denied*, 129 Wn.2d 1016 (1996). To determine whether criminal conduct constitutes one continuing act, we evaluate the facts in a commonsense manner. *Handran*, 113 Wn.2d at 17.

Mr. Fellman-Shimmin was charged with 13 counts of theft of a firearm and one count of unlawful possession of a firearm based on the guns stolen from the home. He argues there were different acts that could have been the basis for his

convictions. But Mr. Fellman-Shimmin's acts occurred in one continuous stream during the evening and early morning of August 31. Moreover, all of his actions were related to the same purpose—stealing Mr. Bailey's guns. Under the *Petrich* commonsense approach, Mr. Fellman-Shimmin's actions formed a continuing criminal act. A unanimity instruction was neither required nor was the State required to make an election.

Mr. Fellman-Shimmin contends the prosecutor improperly vouched for the credibility of the State's witnesses and against the defense's witnesses. It is improper to vouch for a witness's credibility, but attorneys may argue credibility and draw inferences about it from the evidence. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). A prosecutor's "remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). A prosecutor arguing credibility only commits misconduct when it is "clear and unmistakable" he is expressing a personal opinion rather than arguing an inference from the evidence. *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983). Absent an

objection, a defendant cannot claim misconduct on appeal unless the misconduct was so flagrant and ill intentioned that a curative instruction could not have neutralized any prejudice. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

Mr. Fellman-Shimmin argues the prosecutor vouched for the State's witness in the opening statement when he stated, "Officer Newport was advised that the officers thought they had probable cause based upon Mr. Mullins' testimony to implicate the defendant in the burglary and thefts." RP at 93. Defense counsel objected on the basis that it was a statement of the officer's opinion. The trial court sustained the objection.

Here, the prosecutor's remarks were a characterization of the evidence to be presented at trial. It did not contain a clear and unmistakable expression of the prosecutor's personal opinion. His statements were not improper vouching.

Mr. Fellman-Shimmin also argues the prosecutor's comments in closing argument constituted improper vouching. In closing, prosecutors may argue facts in evidence and draw reasonable inferences from it, but may not state a personal belief about the defendant's guilt or innocence or witness credibility. *See State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Nevertheless, "prosecutorial

remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel, are a pertinent reply to his or her arguments, and are not so prejudicial that a curative instruction would be ineffective." *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

During closing argument, defense counsel told the jury:

> The prosecutor has outlined the highlights of the evidence and his summary differs substantially from his opening statement. In his opening statement, he didn't bring forth just exactly what you would hear. He stood here and he said well, you might hear from Perry Green, Shane Deardorff, Colt Snow and a lot of different people, and some of them aren't even here. And these are question marks. And Mr. Green, who was summoned as a State's witness and hadn't met me prior to today, what he said, [the prosecutor] says well, it was slanted towards Jesse Fellman-Shimmin. It was his witness that he subpoenaed to come to court and since he didn't help him, it wasn't something that he would bring forward.

RP at 326.

In rebuttal, the prosecutor explained to the jury why he did not call Mr. Green to testify:

> You're required to make a dispassionate review of the evidence that has been presented in this case and apply the facts you find to the law. That's your job. And it's interesting because counsel pretty much got most of the facts wrong. He tells you what I said in my opening statement. I've said the same opening statement I've given for 20 years and I said I'll tell you what we anticipate the evidence will show. And that's not always the case. And I did not say that these parties will testify. I said you will hear the names of. And in fact, you did. And he said it was my witness, Mr. Green. I didn't call

> Mr. Green. The defendant didn't call Mr. Green. It was in response to a subpoena issued by my office. But I have an ethical obligation not to put a witness in front of you that I think the evidence suggests is lying. And I didn't put him on the stand.

RP at 335.

The prosecutor's statement was a personal belief about the credibility of Mr. Green. But in light of defense counsel's closing argument, the prosecutor's statements were invited and provoked. They were merely a pertinent response to defense arguments. The prosecutor's comments in opening and rebuttal arguments did not constitute improper vouching.

Mr. Fellman-Shimmin also contends, without citation to legal authority, that the court erred by failing to grant a mistrial or providing a remedy when an observer in the gallery directed a State's witness's testimony with signals.

After the defense rested its case, defense counsel requested that the court strike Mr. Hubbard's testimony. He informed the court that while Mr. Hubbard was on the stand, his attorney, Melissa May, was seated in the gallery, nodding "yes" and "no" during his testimony. Defense counsel said he had spoken with the court's clerk, Mr. Fellman-Shimmin's parents, his sister, and a family friend, all of whom indicated they had seen Ms. May nodding during the testimony. The court denied the motion to strike and stated:

> I should say that after [defense counsel] talked to the Clerk, Deputy Clerk, Chief Deputy Clerk, she indicated to me the same thing that she had told you and that, in fact, she had observed Ms. May and Ms. May was basically nodding and – I don't know if gesturing is accurate – as her client testified. The Court, having practiced with Ms. May for years and then now for a short time as a judge with her in the courtroom, that is Ms. May's way. And I think that she, as counsel who have worked with her very long know, that she gets involved like that. Even if that is the case, I don't believe there was communication between Ms. May and Mr. Hubbard. And I base that primarily on Ms. May's reputation and her style of practice.

RP at 303. Defense counsel then requested that he be allowed to call the court's clerk to testify before the jury as to what she had observed. The court denied the request.

A court should grant a mistrial only when "'nothing the trial court could have done or said would have remedied the harm done to the defendant.'" *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) (quoting *State v. Swenson*, 62 Wn.2d 259, 280, 382 P.2d 614 (1963), *overruled on other grounds by State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993)). The trial court is in the best position to evaluate the prejudicial effect the error has on the jury. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). The grant or denial of a motion for a new trial is within the trial court's sound discretion. We will only reverse it for abuse of that discretion. *State v. Copeland*, 130 Wn.2d 244, 294,

922 P.2d 1304 (1996). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In *State v. Johnson*, 69 Wn. App. 528, 540, 849 P.2d 662 (1993), *aff'd*, 124 Wn.2d 57, 873 P.2d 514 (1994), the defendant's mother created a disturbance in the courtroom, interrupting the prosecutor's closing argument. The court denied the defendant's motion for a mistrial. *Id*. On appeal, the court determined the comments were startling, but not inherently prejudicial. *Id*. at 541. The trial court did not abuse its discretion because there was no basis to conclude the jury believed the defendant was more likely to be guilty simply because it observed an agitated woman. *Id*.

Unlike *Johnson*, there is no indication here that anyone in the jury actually saw Ms. May nodding her head or were affected by this observation. The trial judge spoke with his clerk and stated that, based on his experience with Ms. May, the nodding was "Ms. May's way." RP at 303. The court then concluded there was no communication between Ms. May and the witness. Based on the record, Ms. May's nodding did not appear critically prejudicial in the context of the trial. The court did not err by failing to grant the motion for a new trial.

Mr. Fellman-Shimmin next contends the court erred by denying his motion to sever the charges for trial and denying his request in the alternative for bifurcation. Mr. Fellman-Shimmin's motion sought to sever the unlawful possession of a firearm charge from the remaining charges.

CrR 4.4(b) provides that a court may sever charges for separate trials when it "determines that severance will promote a fair determination of the defendant's guilt or innocence" of each charge. A court's ruling on a motion to sever charges is reviewed for abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990).

A defendant seeking severance bears the burden of demonstrating a trial on both counts would be "manifestly prejudicial." *Id*. at 718. A defendant may be unfairly prejudiced by a single trial if he is embarrassed by presenting separate defenses or if a single trial invites the jury "to cumulate evidence to find guilt or infer a criminal disposition." *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Our Supreme Court has identified five considerations in reviewing a trial court's denial of a motion to sever: (1) the jury's ability to compartmentalize the evidence; (2) the strength of the State's evidence on each count; (3) the issue of cross admissibility of the various counts;

(4) whether the judge instructed the jury to decide each count separately; and (5) the concern for judicial economy. *State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

Mr. Fellman-Shimmin argues only that severance or bifurcation was necessary to protect him from the prejudicial effects inherent in being tried for unlawful possession of a firearm. Here, however, the danger of unfair prejudice is not apparent. He stipulated he had been convicted of a prior serious offense. Moreover, the court gave this limiting instruction to the jury: "Evidence has been introduced in this case on the subject of defendant's prior conviction for a serious offense for the limited purpose of proving an element of unlawful possession of a firearm in the first degree. You must not consider this evidence for any other purpose." RP at 316. Juries are presumed to follow the court's instructions. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Mr. Fellman-Shimmin has not established the requisite prejudice required for reversal. The trial court did not abuse its discretion by refusing to sever the charges or bifurcate the trial.

Mr. Fellman-Shimmin also contends the court erred by failing to suppress his statements to the arresting officer. He argues the court failed to consider evidence of intoxication when determining whether he voluntarily waived his

Miranda[1] rights.

An accused may waive his *Miranda* rights if the waiver is knowing, intelligent, and voluntary. *State v. Bradford*, 95 Wn. App. 935, 944, 978 P.2d 534 (1999), *review denied*, 139 Wn.2d 1022 (2000). When considering the validity of a waiver, two determinations must be made. *State v. Corn*, 95 Wn. App. 41, 57, 975 P.2d 520 (1999). "First, the relinquishment of the right must be voluntary in that 'it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.'" *Id*. at 57-58 (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)). "Second, the waiver must be made with 'full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Corn*, 95 Wn. App. at 58 (quoting *Burbine,* 475 U.S. at 421).

The voluntariness of a confession is determined by examining the totality of the circumstances under which it was made. *State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). "Factors considered include a defendant's physical condition, age, mental abilities, physical experience, and police conduct." *Id*. at 664. A "defendant's mental disability and use of drugs at the time of a confession

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

are also considered, but those factors do not necessarily render a confession involuntary." *Id*.

Here, Mr. Fellman-Shimmin testified at the CrR 3.5 hearing that, at the time of his arrest, he was delusional because he was "coming down off methamphetamine." RP at 38. He did not remember the circumstances surrounding his arrest and could not recall having his rights read to him or making any statements to the police. The arresting officer, however, testified that Mr. Fellman-Shimmin stated he had been sober for two days. The officer said he looked good, seemed sincere, was very cooperative, and did not appear to be under the influence of methamphetamine. The officer also said Mr. Fellman-Shimmin acknowledged his rights and indicated he was willing to waive those rights and speak with him. The only evidence presented by Mr. Fellman-Shimmin to prove he was intoxicated at the time of arrest involved past medical records identifying his drug use and diagnosis for ADHD. He presented no evidence of his use of drugs at the time of his statements to the police. In these circumstances, his waiver was knowing, voluntary, and intelligent. The court did not err by denying the motion to suppress.

Mr. Fellman-Shimmin also contends the evidence was insufficient to

support his convictions. In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime may be established by either direct or circumstantial evidence and one type is no more valuable than the other. *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202, *appeal dismissed*, 434 U.S. 898 (1977). "Credibility determinations are within the sole province of the jury and are not subject to review." *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. *State v. Longuskie*, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990).

Mr. Fellman-Shimmin argues there was insufficient evidence to prove the acts occurred in Washington. Proof of jurisdiction beyond a reasonable doubt is an integral component of the State's burden in every criminal prosecution. *State v. Svenson*, 104 Wn.2d 533, 542, 707 P.2d 120 (1985). In most circumstances,

proof that the crime was committed in Washington satisfies the jurisdictional element. *See State v. L.J.M.*, 129 Wn.2d 386, 392, 918 P.2d 898 (1996).

Here, Officer Walls testified he was dispatched to investigate a break-in at Mr. Bailey's home located on 8th Street in Colville, Washington. Officer Walls and the two other investigating officers were all employed by Colville. David Mullins testified Mr. Fellman-Shimmin entered Mr. Bailey's home and the purpose of entering the home was to steal Mr. Bailey's guns. Mr. Mullins said Mr. Fellman-Shimmin and another individual entered the home and took the guns. Based on this evidence, the jury could reasonably infer the crimes occurred in Washington. The evidence was sufficient to support the convictions.

Mr. Fellman-Shimmin next contends for the first time on appeal the sentencing court miscalculated his offender score. He argues certain prior crimes constituted the same criminal conduct under RCW 9.94A.525(5)(a) and should have been so treated for purposes of his offender score.

Prior crimes encompassing the same criminal conduct must be treated as one offense by the sentencing court. RCW 9.94A.525(5)(a). Offenses encompass the same criminal conduct if they require the same intent, are committed at the same time and place, and involve the same victim. RCW

9.94A.589(1)(a). Although a defendant may not waive the right to challenge a sentence that is in excess of statutory authority, he or she may waive the right to challenge alleged errors involving matters of trial court discretion. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). Determining whether prior offenses encompass the same criminal conduct involves factual determinations and trial court discretion. *State v. Nitsch*, 100 Wn. App. 512, 520-21, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000).

There is no indication in the record that Mr. Fellman-Shimmin identified to the court the factual dispute here, that is, whether the prior crimes involved the same intent, were committed at the same time and place and involved the same victim. There is also no indication he asked the court to exercise its discretion in this manner. He therefore waived his right to challenge his offender score. *Id*.

Even if he had preserved the issue for appeal, the record is insufficient to support his argument. The criminal history included in the judgment and sentence establishes his prior crimes were sentenced on the same day and occurred on the same day, but nothing shows the circumstances surrounding these crimes. There is no indication whether these crimes involved the same intent, were committed at the same place, or involved the same victim. To the

extent Mr. Fellman-Shimmin relies on matters outside the record, the issue may not be considered on direct appeal but rather may be the subject of a properly supported personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

Citing *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), Mr. Fellman-Shimmin also contends the court erred by denying his CrR 7.5 motion for new trial. Mr. Fellman-Shimmin's motion argued, among other things, that the State failed to provide exculpatory evidence to the defense. He claims he had located witness Ashley Wagner after trial and she had information he was not involved in the crimes. He argued she had spoken to the police during the investigation, but this information was not disclosed by the State.

Due process under *Brady* requires the State to disclose evidence that is both favorable to the accused and material to either guilt or punishment. *Id*. at 87. The State must disclose any favorable evidence known to others acting on its behalf, including the police. *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). The essential components of a *Brady* violation are (1) the evidence at issue must be favorable to the accused because it is either exculpatory or impeaching; (2) the evidence must have been suppressed by the

State, either willfully or inadvertently; and (3) prejudice must have occurred. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). While the State cannot avoid *Brady* by keeping itself ignorant of matters known to other state agents, it has no duty to search for exculpatory evidence. *State v. Judge*, 100 Wn.2d 706, 717, 675 P.2d 219 (1984). There is no *Brady* violation if the defendant, using reasonable diligence, could have obtained the information at issue. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 972 P.2d 1250 (1999). Evidence is "material" with respect to a *Brady* violation only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. *Id*. at 396. In applying this reasonable probability standard, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

Here the record contains no evidence that either the State willfully or inadvertently suppressed evidence concerning Ms. Wagner from the defense or the State was even aware of her statements to the police. Even if the State had an obligation to provide such information to the defense, there was no *Brady*

violation because the defense could have discovered Ms. Wagner by using reasonable diligence. Indeed, defense counsel discovered Ms. Wagner after trial while continuing his interviews of potential witnesses after the jury issued its verdict. Counsel provided no reason why he could not find Ms. Wagner prior to trial.

Moreover, there was no reasonable probability that the verdict would have been different had Ms. Wagner been disclosed to the defense. There was substantial evidence from various witnesses at trial that Mr. Fellman-Shimmin participated in the theft of the guns. Mr. Fellman-Shimmin himself told the arresting officer that he "messed up by handling the guns." RP at 194. In these circumstances, any information from Ms. Wagner that Mr. Fellman-Shimmin was not involved in the crimes would not have changed the trial's outcome. The court did not err by denying the motion for new trial.

Affirmed.

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

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Kato, J.

WE CONCUR:

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Schultheis, A.C.J.

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Kulik, J.