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

STATE OF WASHINGTON, Respondent, v. TEGAN M. RUSHWORTH, Appellant.	No. 36077-6-III OPINION PUBLISHED IN PART

PENNELL, J. — Tegan Rushworth's appeal involves two under-examined evidentiary issues: (1) whether a trial judge who sustains an objection to testimony should also grant an accompanying motion to strike, and (2) whether the "open door doctrine" permits bilateral violations of the rules of evidence. The answer to the first question is yes; the answer to the second is no.

During Ms. Rushworth's trial, the court reached the opposite conclusions. It denied defense motions to strike inadmissible evidence and allowed the State to introduce hearsay evidence under the guise of the open door doctrine. Though erroneous, those rulings did not deny Ms. Rushworth the right to a fair trial. We therefore affirm the judgment of conviction.

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BACKGROUND

Spokane police officer Mark Brownell was looking for an individual at Spokane's Knights Inn[1] motel when he spotted a black 1999 Ford Expedition. With the assistance of a flashlight, Officer Brownell could see inside the Expedition and spotted the target of his search riding as a passenger. Officer Brownell stopped the vehicle and identified the driver as Tegan Rushworth. He also learned the vehicle had been stolen a month earlier.

Officer Brownell questioned Ms. Rushworth about the vehicle. Ms. Rushworth denied knowing the Expedition was stolen. She stated she had bought the Expedition from a man named Raymond Pfluger, and that the vehicle's title was at her home. Ms. Rushworth was accompanied to her home. Once there, Ms. Rushworth and her boyfriend, Adam Wilkening, spent approximately 30 minutes unsuccessfully searching for the vehicle's title. Officer Brownell asked Ms. Rushworth about Mr. Pfluger. Ms. Rushworth stated she had known Mr. Pfluger for several years, and admitted he had previously been involved in criminal activity, but had been recently trying to live above board.

Officer Brownell contacted Mr. Pfluger to inquire about the Expedition's sale. Mr. Pfluger admitted to knowing the vehicle was stolen. According to the officer, Mr. Pfluger also "said he never had a title for the vehicle" and "wanted to off load" it.

[1] The motel had since been renamed the Roadway Inn.

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Clerk's Papers at 4. Following that conversation, Officer Brownell believed he had probable cause to arrest Ms. Rushworth.

The State charged Ms. Rushworth with possessing a stolen vehicle. At trial, the State presented much of its evidence through law enforcement officers, including Officer Brownell. Neither Mr. Pfluger nor Mr. Wilkening testified. The jury convicted Ms. Rushworth as charged.

On appeal, Ms. Rushworth makes numerous assignments of error. In the published portion of this opinion, we discuss Ms. Rushworth's evidentiary arguments. Her additional contentions are addressed in the opinion's unpublished section.

ANALYSIS

Tegan Rushworth objected to three portions of Officer Brownell's trial testimony. The first two objections were made during direct examination and the third was made during redirect. The trial court issued favorable rulings as to Ms. Rushworth's first two objections, but denied her subsequent motions to strike. The court overruled Ms. Rushworth's third objection, finding that Ms. Rushworth opened the door to Officer Brownell's testimony through a question posed during cross-examination.

We review de novo the trial court's interpretation of the evidentiary rules, *see State v. Hatch*, 165 Wn. App. 212, 217, 267 P.3d 473 (2011), and its application of the rules for

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abuse of discretion. *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 766, 389 P.3d 517 (2017). Our review necessitates examining the challenged testimony in detail. Thus, the contested areas of testimony are recounted below.

Contested areas of testimony

The first objection involved Officer Brownell's discussion of the Knights Inn motel, where he first observed the stolen Ford Expedition. When describing the Knights Inn, Officer Brownell stated:

> [OFFICER BROWNELL]: . . . [I]t's a fairly busy place but not busy in the sense of I want to go there and stay there with my family. It's busy in the sense of where can I buy drugs, let's go to the Knights Inn.
> [DEFENSE COUNSEL]: Objection, your Honor. That's not relevant to this case.
> THE COURT: Sustained.
> [DEFENSE COUNSEL]: Move to strike.
> THE COURT: I'll deny that.
> Go ahead, Counsel.

1 Report of Proceedings (RP) (Sept. 12, 2017) at 167-68.

The second objection pertained to Officer Brownell's testimony regarding a statement made by Ms. Rushworth's boyfriend, Adam Wilkening:

> [PROSECUTOR:] And what, if anything, did [Mr. Wilkening] do after you talked with him about the status of the vehicle?
> [OFFICER BROWNELL:] He didn't want to be involved.
> [PROSECUTOR:] Is that what he said?
> [OFFICER BROWNELL:] Yeah.

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> [DEFENSE COUNSEL]: Objection, your Honor. Hearsay. Move to strike.
> THE COURT: It is, Counsel, but it's been asked and answered so let's just go on to the next question.

Id. at 179.

Finally, Officer Brownell provided the following testimony during redirect examination regarding information Officer Brownell obtained from Mr. Pfluger (the individual from whom Ms. Rushworth claimed to have bought the vehicle):

> [PROSECUTOR:] Officer Brownell, when you talked to Mr. Pfluger, did he dispel your suspicions that the defendant knew the car was stolen?
> [DEFENSE COUNSEL]: Objection, your Honor.
> [PROSECUTOR]: I think the door has been opened, Judge.
> THE COURT: So do I. Overruled.
> [OFFICER BROWNELL:] Yeah. He knew the car was stolen.

2 RP (Sept. 13, 2017) at 217.

The trial court's open door ruling was based on the following colloquy during cross-examination:

> [DEFENSE COUNSEL:] And after talking to . . . Mr. Pfluger, were you able to corroborate through your investigation that Mr. Pfluger had, in fact, given or supplied the car to Ms. Rushworth?
> [OFFICER BROWNELL:] That Mr. Pfluger had given the car to Ms. Rushworth?
> [DEFENSE COUNSEL:] Yeah.
> [OFFICER BROWNELL:] Yes, sir.

Id. at 216.

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Denial of the motions to strike

With respect to the first two contested areas of testimony, the trial judge rejected Ms. Rushworth's motions to strike. That was error. A motion to strike should be granted when a litigant successfully objects to an answer already provided by a witness. *Cf*. *State v. Neukom*, 17 Wn. App. 1, 4, 560 P.2d 1169 (1977) (motion to strike is the remedy for objectionable testimony already put on the record); *Magana v. Hyundai Motor Am.*, 123 Wn. App. 306, 316, 94 P.3d 987 (2004) (explaining fact finders may not consider information not admitted). By granting a motion to strike, the court informs the jury that it cannot rely on the evidence in question. *State v. Stackhouse*, 90 Wn. App. 344, 361, 957 P.2d 218 (1998); *see also* WPIC 1.02 ("If evidence was not admitted or was [struck] from the record, then you are not to consider it in reaching your verdict.").[2] Striking evidence does not erase it from the record or hide it from the public; it properly eliminates the evidence from the jury's consideration or from an appellate court's subsequent assessment of evidentiary sufficiency. The trial court should have granted Ms. Rushworth's motions to strike.

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[2] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02, at 20 (4th ed. 2016) (WPIC). This standard instruction was provided in Ms. Rushworth's case.

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The open door ruling

The concept of evidence being admissible under an "open door" theory is a remnant of the common law. *See State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) (recognizing the open door doctrine prior to passage of the rules of evidence in 1979). While modern, written rules of evidence have not specifically adopted the open door concept,[3] our case law recognizes the doctrine's persistent validity. *See, e.g.*, *Taylor*, 187 Wn.2d at 766. Continued reliance on the doctrine despite its absence from the written rules has resulted in "'notoriously imprecise'" applications. *State v. Gomez*, 367 S.W.3d 237, 246 (Tenn. 2012) (quoting 21 CHARLES ALAN WRIGHT ET AL, FEDERAL PRACTICE & PROCEDURE EVIDENCE § 5039 (2d. ed. 1987)). Clarification is in order.

The open door doctrine is often conflated with related doctrines pertaining to curative admissibility and invited error. This inexactitude is problematic. When the open door doctrine is not precisely identified and distinguished from related doctrines, a trial can become an evidentiary free-for-all; important constitutional protections and the rules of evidence are undermined. We therefore endeavor to outline the contours of the open door, curative admissibility, and invited error doctrines prior to discussing their

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[3] The concept is nevertheless implicit in ER 106 (remainder of related writings or recorded statements), and ER 404(a) and ER 608 (regarding rebuttal character evidence).

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application to Ms. Rushworth's case.

The open door doctrine

Put simply, the open door doctrine is a theory of expanded relevance. It permits a court to admit evidence on a topic that would normally be excluded for reasons of policy or undue prejudice when raised by the party who would ordinarily benefit from exclusion. The open door doctrine recognizes that a party can waive protection from a forbidden topic by broaching the subject. Should this happen, the opposing party is entitled to respond. As explained in *Gefeller*, "when a party opens up a *subject* of inquiry on direct or cross-examination, [the party] contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the *subject* matter was first introduced." 76 Wn.2d at 455 (emphasis added).

The fact that an ordinarily forbidden topic has gained increased relevance does not result in automatic admission of evidence. Relevance is only one test for admissibility. Evidence is still subject to possible exclusion based on constitutional requirements, pertinent statutes, and the rules of evidence. ER 402.

The open door doctrine typically comes into play in the context of Title IV of the rules of evidence. Title IV protects against the introduction of certain types of relevant

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evidence for reasons of policy or prejudice. *See, e.g.*, ER 404 (generally excluding character evidence), ER 407 (generally excluding evidence of subsequent remedial measures), and ER 412 (generally excluding evidence of alleged victim's sexual history in sexual misconduct cases). For example, ER 410 provides that evidence of a guilty plea, later withdrawn, is generally inadmissible. Although a guilty plea statement is relevant to the issue of guilt, overarching legal and policy concerns weigh against allowing a jury to learn about a withdrawn plea. *State v. Nelson*, 108 Wn. App. 918, 925, 33 P.3d 419 (2001) (noting "purpose of ER 410 is to encourage criminal dispositions by protecting plea negotiations from disclosure"). However, if a defendant introduces testimony that can only be rebutted by reference to a withdrawn plea, then evidence of the withdrawn plea will be admissible under the open door theory, despite ER 410. *See State v. Korum*, 157 Wn.2d 614, 645-47, 141 P.3d 13 (2006).[4]

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[4] *See also, e.g.*, *State v. Swan*, 114 Wn.2d 613, 653, 790 P.2d 610 (1990) (noting defendant may open door to impeachment with ER 404(b) evidence "by testifying to [their] own past good behavior and denying prior acts of misconduct"); *State v. Smith*, 115 Wn.2d 434, 442-44, 798 P.2d 1146 (1990) (concluding "since defendant himself raised the issue of his limited income," he opened door to questions regarding sources of income, including public assistance otherwise excludable under ER 401 and ER 403). *Cf. State v. Avendano-Lopez*, 79 Wn. App. 706, 714-15, 720-22, 904 P.2d 324 (1995) (holding defendant did not open door to evidence precluded by ER 404(b) and ER 403 by testifying he was recently released from jail and was born in Mexico).

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Another example of the application of expanded relevance under the open door doctrine arises under the Constitution. Because an accused person has a constitutional right to silence, due process prohibits the State from introducing evidence on the topic of a defendant's post-arrest silence at trial. *State v. Fricks*, 91 Wn.2d 391, 395, 588 P.2d 1328 (1979). But the accused can waive this constitutional protection. If an accused elicits evidence pertaining to post-arrest silence, then the State can introduce rebuttal evidence on the same subject under the open door rationale. *See State v. Kendrick*, 47 Wn. App. 620, 630-31, 736 P.2d 1079 (1987) (concluding defendant opened door to evidence of post-arrest silence by eliciting testimony that he cooperated with police).

Given the foregoing principles, we hold the open door doctrine permits trial courts to admit evidence on a subject normally barred on policy or prejudice grounds, so long as the party who otherwise stands to benefit from exclusion has increased the subject's relevance through actions at trial.

The curative admissibility doctrine

The curative admissibility doctrine is much broader than the open door doctrine. Also aptly known as "fighting fire with fire," the curative admissibility doctrine permits the introduction of evidence that is inadmissible for reasons other than relevance. 1 MCCORMICK ON EVIDENCE § 57 at 472 (Kenneth S. Broun ed. 8th ed. 2020). *But see*

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5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.14, at 76 (6th ed. 2016) (quoting McCormick's firefight simile as an explanation for opening the door). "Curative admissibility, in its broadest form, allows a party to introduce otherwise inadmissible evidence when necessary to counter the effect of improper evidence previously admitted by the other party without objection." *Wright v. Virginia*, 23 Va. App. 1, 7, 473 S.E.2d 707 (1996); *see also United States v. Nardi*, 633 F.2d 972, 977 (1st Cir. 1980); *State v. Middleton*, 998 S.W.2d 520, 528 (Mo. 1999); *Gomez*, 367 S.W.3d at 248.

Our Supreme Court has never recognized the validity of the curative admissibility doctrine. At least in criminal cases, allowing the State to introduce evidence under the doctrine is inappropriate. In the criminal system, a defendant has a due process right to a fair trial. *State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). Even if the defense improperly introduces inadmissible evidence, "the prosecutor is not absolved of [their] ethical duty to ensure a fair trial by presenting only competent evidence on the subject." *Id.* at 298. If the defense introduces inadmissible evidence, the prosecutor has a remedy. The "proper course of action [is] to object." *Id*. at 295. But the prosecutor may not "seize[] the opportunity to admit otherwise clearly inadmissible" evidence by failing to

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act. *Id*. "A criminal defendant can 'open the door' to testimony on a particular subject matter, but [they do] so under the rules of evidence." *Id*.

Because applying the curative admissibility doctrine in the State's favor in a criminal setting would be tantamount to condoning misconduct, we hold the curative admissibility doctrine inapplicable in the current context. When a defendant does not merely open the door to a newly relevant topic, but attempts to introduce incompetent evidence such as hearsay, the prosecutor's recourse is to object. If the objection is successful, nothing more need be done to correct the record (other than a possible motion to strike). If unsuccessful, the prosecutor may either seek an interlocutory appeal or (more realistically) accept the trial court's ruling as the law of the case and introduce responsive evidence within the terms of the court's ruling. In the latter scenario, the doctrine of invited error will likely protect against reversal on appeal, as explained below.

Invited error doctrine

The invited error doctrine, unlike curative admissibility, does not condone misconduct. Also unlike curative admissibility, invited error is a doctrine specifically recognized by our Supreme Court. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). Invited error is not a substantive rule of evidence. Rather, it is an appellate remedy that "prohibits a party from 'setting up error in the trial court and then

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complaining of it on appeal.'" *State v. Armstrong*, 69 Wn. App. 430, 434, 848 P.2d 1322 (1993) (quoting *State v. Young*, 63 Wn. App. 324, 330, 818 P.2d 1375 (1991)). The invited error doctrine usually applies in the context of jury instructions. *See Henderson*, 114 Wn.2d at 870-71 (citing several cases addressing invited error related to jury instructions). But it can also apply to evidentiary rulings. *See, e.g.*, *In re Estate of Muller*, 197 Wn. App. 477, 484-85, 389 P.3d 604 (2016).

In the context of a criminal trial, the invited error doctrine provides the State redress for a defendant's evidentiary errors without condoning misconduct. Consider the following scenario: A defendant seeks to introduce a portion of a hearsay statement at trial. The State properly objects, but the defendant persists, arguing the statement is not hearsay. The trial court agrees with the defense and overrules the State's objection. Under these circumstances, it would likely not be misconduct for the State to acquiesce in the trial court's ruling and request introduction of the remaining portion of the statement in question, if relevant. Should the trial court admit the balance of the statement, the invited error doctrine would prohibit the defendant from reversing course on appeal and claiming error in the admission of the evidence.

The foregoing scenario is based on Division One's decision in *State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928 (2010). *Hartzell* declined to find error in the State's

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introduction of hearsay evidence under the rubric of the open door doctrine.[5] 156 Wn. App. at 935. It would have been more precise (and less solicitous of misconduct) for *Hartzell* to have denied the defendant's request for relief on the basis of invited error.

In summary, the invited error doctrine provides the State adequate redress in circumstances where the defense induces the trial court to commit evidentiary error. To be clear, a prosecutor should not take advantage of a clearly erroneous evidentiary ruling that endangers the accused's right to a fair trial. But it is not misconduct for a prosecutor (who has limited appellate remedies) to advocate for a correct evidentiary ruling and then abide by the trial court's disposition should their advocacy prove unsuccessful. The doctrine of invited error will protect the prosecutor from the defendant reversing course on appeal and claiming evidentiary error.

Application of the open door doctrine to Ms. Rushworth

Here, Officer Brownell's testimony regarding his conversation with Mr. Pfluger was not admissible under the open door doctrine. The problem with Officer Brownell's testimony was not relevance, it was hearsay. As such, the open door doctrine was not responsive to Ms. Rushworth's objection. On appeal, the State raises a curative

[5] We are not bound by Division One's conclusion in *Hartzell*. *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 148-49, 410 P.3d 1133 (2018).

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admissibility argument (characterized as open door). It asserts that because Ms. Rushworth elicited hearsay statements from Officer Brownell, the State should have been entitled to do so in kind. But, as noted, we reject application of the curative admissibility doctrine in this context. If the prosecutor believed Ms. Rushworth's question to Officer Brownell called for hearsay, they should have objected. The rules of evidence do not envision a tacit quid pro quo when it comes to inadmissible evidence. The prosecution was not entitled to waive its hearsay objections in order to gain the ability to introduce otherwise inadmissible evidence. Had the prosecutor's objection been unsuccessful, then it is possible (depending on the nature of the trial court's ruling) that the prosecutor would have been able to introduce evidence in reliance on the court's ruling. But that is not what happened here. The trial court's admission of Officer Brownell's hearsay testimony under the open door doctrine was error.

Analysis of prejudice

While Ms. Rushworth has established three evidentiary errors in her case, reversal is not automatic. Instead, the question is whether the trial errors, alone or in some combination, deprived Ms. Rushworth of her right to a fair trial. *See State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). As the party asserting error, Ms. Rushworth has the burden of establishing prejudice. *Id.*

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As previously noted, three of Officer Brownell's statements are at issue: (1) his characterization of the Knights Inn as a hub of drug activity, (2) the out-of-court statement by Mr. Wilkening (Ms. Rushworth's boyfriend) that he did not want to get involved with the investigation, and (3) the out-of-court statement by Mr. Pfluger that he knew the Ford Expedition was stolen.[6] While inadmissible, these statements did not impair Ms. Rushworth's right to a fair trial.

First, any prejudice from the testimony associating the Knights Inn with drug activity was offset by the trial court's agreement that the evidence was not relevant. Second, the statement from Mr. Wilkening that he did not want to get involved with the police was nothing more than a neutral fact. Mr. Wilkening spent at least a half hour helping Officer Brownell search for the Expedition's title. The testimony therefore did not suggest that Mr. Wilkening did not believe in Ms. Rushworth's innocence. Finally, Mr. Pfluger's admission that he knew the Expedition was stolen did not undermine Ms. Rushworth's theory of the case. It was uncontested that the Expedition was in fact stolen.

[6] Officer Brownell also responded affirmatively to the State's question of whether, as a result of the conversation with Mr. Pfluger, Officer Brownell elected to file charges. Ms. Rushworth did not object to this statement. On appeal, the defense argues Officer Brownell's response relayed improper opinion testimony regarding Ms. Rushworth's guilt. This objection was not preserved and therefore will not be reviewed on appeal. RAP 2.5(a).

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In addition, Ms. Rushworth admitted knowing Mr. Pfluger had a criminal past. Given these circumstances, Officer Brownell's testimony that Mr. Pfluger knew the Expedition was stolen was not particularly surprising. Ms. Rushworth's trial may not have been perfect, but it was not fundamentally unfair.

Ms. Rushworth's judgment of conviction is affirmed.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Ms. Rushworth makes three additional claims of error: (1) the trial court improperly conducted a portion of jury selection off the record, in violation of the right to a public trial, (2) the trial evidence was insufficient to support guilt, and (3) several legal financial obligations (LFOs) should be struck. We agree with Ms. Rushworth's third argument, but not the first two.

Jury selection

As the appellant, Ms. Rushworth has the burden of establishing the factual basis for a public trial violation. *State v. Koss*, 181 Wn.2d 493, 503-04, 334 P.3d 1042 (2014). She has not done so.

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The trial transcript shows that immediately prior to facilitating counsel's peremptory strikes, the trial judge went off the record twice. First, the judge asked to speak to his judicial assistant. Immediately after that, the judge invited counsel to join him and his assistant off the record in order to address "some instructions" that should have been discussed during the pretrial motions process. 1 RP (Sept. 12, 2017) at 118.

From context, it appears the trial judge went off record in order to explain the peremptory strike process. To the extent this inference is correct, this was a proper sidebar that did not implicate public trial rights. *State v. Whitlock*, 188 Wn.2d 511, 521-22, 396 P.3d 310 (2017).

Ms. Rushworth proffers that something more must have taken place during the off-record exchanges. She points to court records indicating two jurors were struck for cause and speculates that the jurors were struck during the off-record session. We are unpersuaded. One of the two jurors at issue (number 7) was removed by the court on the record, during questioning. The other juror (number 3) was an agreed strike, submitted by the parties in writing. The record suggests the agreed strike took place during the time that the parties completed paperwork for peremptory challenges. No public trial violation occurs in this context. *State v. Love*, 183 Wn.2d 598, 606-07, 354 P.3d 841 (2015).

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Because Ms. Rushworth has not established a public trial violation, her arguments on appeal cannot be sustained.[7]

Sufficiency of the evidence

Ms. Rushworth argues the trial evidence was insufficient to prove she knew the Ford Expedition was stolen. Viewing the evidence and all reasonable inferences available therefrom in the light most favorable to the State, *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), we disagree. Ms. Rushworth was discovered in possession of the Expedition approximately one month after it was reported stolen. She claimed she acquired the vehicle two weeks prior. The evidence at trial indicated the Expedition was partially repainted. Ms. Rushworth also admitted she obtained the Expedition from an individual with a criminal past. These facts, coupled with Ms. Rushworth's inability to find the Expedition's title at her house, were sufficient to allow a jury to discredit Ms. Rushworth's claim to have innocently come into possession of the Expedition. The facts at trial were sufficient for the jury to find the knowledge element satisfied.

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[7] Even if there had been a public trial violation, reversal would be unwarranted as the violation would be de minimis. *State v. Schierman*, 192 Wn.2d 577, 614-15, 438 P.3d 1063 (2018) (plurality opinion).

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LFOs

Ms. Rushworth argues that two LFOs should be struck from her judgment and sentence based on recent changes to Washington law: (1) the $200 criminal filing fee and (2) the $100 DNA[8] collection fee. We agree. The $200 filing fee should be struck based on Ms. Rushworth's indigence pursuant to RCW 10.101.010(3)(c). RCW 36.18.020(2)(h). The $100 DNA fee should be struck because Ms. Rushworth's history of felony convictions indicates her DNA has already been collected. RCW 43.43.7541.[9]

CONCLUSION

Ms. Rushworth's judgment of conviction is affirmed. We remand with instructions to strike the $200 criminal filing fee and $100 DNA collection fee.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Korsmo, J.

[8] Deoxyribonucleic acid.

[9] The State has superior access to the DNA database and does not suggest that the presumption of prior collection should not apply in Ms. Rushworth's case.