IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES HARTZELL, Appellant.	)	NO. 63816-5-I (consolidated) DIVISION ONE
STATE OF WASHINGTON, Respondent, v. JEREMY TIESKOTTER, Appellant.	)	PUBLISHED OPINION FILED: July 19, 2010

Becker, J. — Charles Hartzell and Jeremy Tieskotter were convicted of armed assault and unlawful possession of a firearm for shooting into an apartment occupied by a woman and her daughter. Investigators were able to link Hartzell and Tieskotter to the crime by establishing that the guns they

possessed in two separate incidents were the same guns used to shoot into the apartment. Upon review of their assignments of error, we conclude that the evidence of the two separate incidents was properly admitted under ER 404(b); the trial court's limiting instruction was not a comment on the evidence; and appellant Hartzell opened the door to hearsay when he himself elicited an incomplete and misleading hearsay version of events from one of the detectives. Because the special verdict returned by the jury found only that the appellants were armed with deadly weapons, the court's imposition of a firearm sentence enhancement was an error that, under a recent decision by the Supreme Court, cannot be harmless. We remand for resentencing and otherwise affirm.

According to testimony at trial, Michael Vernam was awakened by gunshots outside his home on Trailblazer Road in Thurston County early in the morning of April 7, 2007. He looked outside and saw someone shooting from what he thought was the sunroof of a red car. The car moved as shots were fired, so Vernam concluded that more than one person was in the car.

The gunshots also woke Kimberly Hoage, but she thought someone was banging on the wall outside her apartment. Later in the day, however, Hoage discovered bullet holes in the headboard of the bed where she and her daughter had been sleeping. Sheriff's deputies found a bullet and bullet fragments in the

apartment and shell casings from 9 mm and .357 caliber bullets outside.

Four days after the shooting at Hoage's apartment in Thurston County, police officers in Pierce County interviewed Jeremy Tieskotter in response to a report of him firing a 9 mm semiautomatic handgun in Lakewood. Tieskotter admitted firing the gun. Ballistics analysis showed that the bullets fired into Hoage's apartment had come from the same 9 mm weapon.

The next month at about 10 o'clock in the evening, Kitsap County Sheriff's Deputy Daniel Twomey was dispatched to a house in a rural area of Kitsap County in response to a call of a man with a gun. The suspect had been described as a "skinhead." While the officer was waiting outside the house for backup to arrive, a RAV4 compact SUV (sports utility vehicle) pulled into the driveway and a man later identified as Hartzell got out. Hartzell gave a false name and claimed to be looking for his girl friend, Sarah Dodge, who he said had been given a pill "by a guy named Randy," was acting "crazy," and had gotten out of the car somewhere in the area.[1] When backup arrived, Deputy Twomey went inside, where he found Sarah Dodge. After interviewing her, he took Hartzell into custody and then discovered there was a bullet hole through the passenger door of the RAV4. Inside the vehicle, Detective Twomey found a

[1] Report of Proceedings at 244-45.

.357 SIG cartridge on the front passenger-side floor, several boxes of .357 SIG ammunition in the rear, and a .357 SIG cartridge in the seam of Hartzell's jacket.[2]

A K-9 officer was called to look for the gun that shot the bullet through the passenger door of the RAV4. The dog jumped up on the door, sniffed, then went south on the shoulder of Sidney Road. Less than 100 yards from where the RAV4 was parked, the dog found a .357 semiautomatic handgun, several rounds short of being fully loaded. A ballistics expert later determined that this was the same gun that had fired .357 bullets into Hoage's apartment in Thurston County.

Officers learned that Tieskotter and Hartzell were good friends. They also found out that Hartzell and his girl friend, Sarah Dodge, had been staying with Hoage days before the shooting at Hoage's apartment. Hartzell and Dodge were forging checks, and Hoage had threatened to call the police if they did not leave. After he and Dodge left, Hartzell called Hoage to demand that she return his laptop. Hoage ignored the message because she had seen Hartzell leave with the laptop. But after the shooting, she became fearful because she received a threatening text message from Hartzell that led her to believe he was the one who shot at her apartment.

[2] Report of Proceedings at 261-73.

Hartzell and Tieskotter were each charged in Thurston County Superior Court with assault in the second degree while armed with a deadly weapon (a firearm) (count 1), drive-by shooting (count 2), and unlawful possession of a firearm in the first degree (count 3). The two cases were joined for trial. Both defendants were convicted on counts 1 and 3. The jury returned special verdict forms finding that each defendant was armed with a deadly weapon during the assaults. The court imposed 36-month firearm sentence enhancements. The appeals of Hartzell and Tieskotter have been consolidated.

SEARCH ISSUE

Hartzell argues that the trial court erred when it admitted evidence of the gun recovered in Kitsap County. He contends the dog sniffing through the open window of the RAV4 was a search requiring a warrant under article I, section 7 of the Washington Constitution.

Constitution article I, section 7 protects a person's home and his private affairs from warrantless searches: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, section 7 is not implicated if no search occurs. State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). To determine if there was a search, the court asks whether the

State unreasonably intruded into a person's "private affairs." Young, 123 Wn.2d at 181. If it did, a warrant was required unless the circumstances fell into one of the recognized exceptions to the warrant requirement. Young, 123 Wn.2d at 181. None of those exceptions is present in this case.

The inquiry whether the State unreasonably intruded into a person's private affairs focuses on the privacy interests that "citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). In general, a search does not occur if a law enforcement officer is able to detect something using one or more of his senses from a nonintrusive vantage point. State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). Such observation does not violate Washington's constitution because something voluntarily exposed to the general public and observable without an enhancement device from a lawful vantage point is not considered part of a person's private affairs. Young, 123 Wn.2d at 182. An observation may constitute a search, however, if the officer substantially and unreasonably departs from a lawful vantage point or uses a particularly intrusive method of viewing. Young, 123 Wn.2d at 182-83. What is reasonable is determined from the facts and circumstances of each case. Seagull, 95 Wn.2d at 903.

Whether or not a canine sniff is a search depends on the circumstances of the sniff itself. State v. Boyce, 44 Wn. App. 724, 729, 723 P.2d 28 (1986). In Boyce, this court held that as long as the canine "sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred." Boyce, 44 Wn. App. at 730.

The trial court correctly concluded that Hartzell did not have a reasonable expectation of privacy in the air coming from the open window of the vehicle. Hartzell was not in the SUV when the dog sniffed from a lawful vantage point outside the vehicle. The sniff was only minimally intrusive. The trial court did not err when it denied Hartzell's motion to suppress the evidence.

ER 404(b)

Hartzell and Tieskotter contend the evidence connecting Hartzell to the gun found in Kitsap County and Tieskotter to the gun fired in Pierce County was improperly admitted because it was used to show they had a propensity to commit gun crimes.

Washington's ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

> opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This court reviews decisions to admit evidence under ER 404(b) for abuse of discretion. State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). A court abuses its discretion if it is exercised on untenable grounds or for untenable reasons. State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The test for admitting evidence under ER 404(b) is well established. To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. Lough, 125 Wn.2d at 853.

As to the first prong, Hartzell argues that the evidence of the Kitsap County incident was insufficient to establish by a preponderance that he had possessed the loaded .357 handgun found by the dog. But the gun was found less than 100 yards from where Hartzell parked the RAV4 when he pulled up, purportedly looking for Sarah Dodge. The dog tracked the weapon after sniffing around the bullet hole in the vehicle Hartzell had been driving. A bullet found in

Hartzell's clothing after he was arrested was the same type as the cartridge found on the floor of the RAV4. More of the same ammunition and documents connected to Hartzell were in the vehicle. This proof sufficiently linked Hartzell to the gun and satisfied the first prong of the ER 404(b) test.

Tieskotter similarly argues that the Pierce County evidence was insufficient to meet the first prong because it did not establish that he was one of the people who shot at Hoage's apartment. But whether he was one of the people who shot at Hoage's apartment was the ultimate question for the jury. To meet the test for ER 404(b) evidence, the State merely needed to show by a preponderance that the Pierce County incident occurred. When Tieskotter was arrested in Pierce County, he admitted he shot the gun, and there were two eyewitnesses. This was sufficient proof of the Pierce County incident for the court to admit the Pierce County evidence.

The State offered the evidence of the guns associated with the defendants in Kitsap and Pierce counties because it was circumstantial evidence that Hartzell and Tieskotter were the individuals who fired the same guns at Hoage's apartment. The appellants argue that their conduct in the other incidents was not similar enough to what happened in Thurston County to be admissible to prove identity. They rely upon cases in which evidence of other

bad acts is offered to establish identity by showing a unique "modus operandi." See Thang, 145 Wn.2d at 643 (modus operandi evidence is relevant only if the method used to commit both crimes is so unique that proof that the defendant committed one crime makes it highly probable that the defendant committed the other crime). But the State was not trying to prove that the shooting into Hoage's apartment was a "signature crime" committed by certain individuals with a unique style. Rather, the evidence was offered merely to show that the weapons used to fire bullets into Hoage's apartment were found shortly thereafter in the possession of Hartzell and Tieskotter, thus tending to make it more probable that they were the individuals who did the shooting at Hoage's apartment. The evidence was relevant for this purpose, and it did not have to meet the test for modus operandi evidence.

Contrary to Hartzell's contention, the court did weigh the probative value of the evidence against its prejudicial effect. The court stated on the record that the prejudice from the Kitsap County incident was minimized by the limited amount of information the State intended to introduce about that incident. This satisfies the fourth element of the test.

In summary, the record demonstrates that the other two gun incidents were not admitted to show that the appellants committed the shooting in

Thurston County in conformity with their general propensity to use guns. The evidence was admitted because it was circumstantial evidence connecting the appellants to the particular guns that were used in the Kitsap and Pierce County incidents. Connecting them to the guns was relevant because of the expert testimony that those same guns were used to fire at Hoage's apartment. The probative value of the evidence outweighed its prejudicial effect. The trial court did not err when it admitted evidence of the shootings in Pierce and Kitsap County under ER 404(b). Because the evidence was properly admitted, we reject Tieskotter's further claim that counsel was ineffective for failing to prevent the court from admitting it.

OPEN DOOR

When the court was considering whether to admit the evidence of the incident in Kitsap County, Hartzell objected because the prosecutor did not intend to elicit all the details that were included in the police report. Hartzell believed a more detailed account would show that someone else—"Randy"—was responsible for the shooting in Kitsap County. The court warned Hartzell, who was representing himself, that if he were to insist on eliciting the evidence that favored his version of the event, less favorable evidence might also be admitted: "I caution you, if you do that, then the State

may be—may have the right to present all the information of which they are aware regarding that incident, some of which could be prejudicial to you."[3]

During direct examination of Detective Twomey, the prosecutor complied with an order in limine and limited the officer's testimony to what he saw and heard outside the house after the RAV4 drove up. On cross-examination, Hartzell elicited testimony from Detective Twomey that Sarah Dodge was crying and upset when he spoke with her inside the house. She told the officer that she had been inside the vehicle with Hartzell and "Randy" when the handgun was fired. She said Hartzell was driving and Randy was in the passenger seat. She initially told the officer that Randy had the gun, but she was uncertain whether Hartzell or Randy fired. Hartzell continued in this vein, eliciting further testimony from the officer about what Sarah Dodge said:

> Q: (Hartzell): What did Sarah say that Randy told her?
> A: (Detective Twomey): Randy asked her if she had heard that [the shot], and she replied that she did, and he told her to, "Shut the fuck up." That was her quote. And she said that you were agreeing with Randy as he was saying those things.
> Q: When she said I was agreeing, did she say in what way, verbally, physically?
> A: The characterization that she was presenting was that the two of you were acting as equal parts of the threats that were being made.[4]

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[3] Report of Proceedings at 26.
[4] Report of Proceedings at 292.

Before beginning redirect examination, the prosecutor sought permission to elicit testimony that Detective Twomey was dispatched to the scene because of a threat to kill, and to elicit a more extensive account of what Sarah Dodge told him inside the house. The trial court agreed that in fairness to the State, the prosecutor should be allowed to elicit information within the scope of the cross-examination Hartzell conducted. Over Hartzell's hearsay objection, the court ruled that this would include everything that Dodge told the deputy.[5]

On redirect, Detective Twomey testified that when he talked to Dodge, she told him that Randy had threatened that Hartzell was going to kill her with his bare hands or shoot her, and Hartzell was agreeing with everything Randy said. Dodge also told Detective Twomey that before she jumped out of the car, Hartzell said to her, "I hope you die, so I don't have to kill you."[6]

Hartzell argues that allowing Detective Twomey's rebuttal testimony denied him his constitutional right to confront Dodge and prejudiced him by letting the jury hear about his threats to kill Sarah Dodge. He suggests that the "open door" doctrine must give way to constitutional concerns. We disagree. A defendant may open the door to evidence that would otherwise be inadmissible,

[5] Report of Proceedings at 320.
[6] Report of Proceeding at 476.

even if constitutionally protected, if the rebuttal evidence is relevant. 5 Karl B. Tegland, Washington Practice: Evidence Law § 103.14, at 66-67 (5th ed. 2007); see State v. Kendrick, 47 Wn. App. 620, 629-31, 736 P.2d 1079, review denied, 108 Wn.2d 1024 (1987) (testimony regarding defendant's postarrest silence was admissible to rebut defendant's evidence that he was cooperative following arrest); see also Harris v. New York, 401 U.S. 222, 225, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (criminal defendant is privileged to testify in his defense, or refuse to do so, but privilege cannot be construed to include the right to commit perjury).

The decision whether to admit or exclude evidence or limit the scope of redirect examination is within the trial court's discretion. State v. Gallagher, 112 Wn. App. 601, 609, 51 P.3d 100 (2002), review denied 148 Wn.2d 1023 (2003). Hartzell's cross-examination of Detective Twomey was aimed at creating the impression that Dodge told him it was Randy, not Hartzell, who had fired the gun during the incident in Kitsap County. By conducting cross-examination in this way, Hartzell opened the door to letting the detective give a fuller account of what Dodge said, including her statements showing that it was Hartzell, not Randy, who was threatening to shoot her. The trial court did not abuse its discretion by admitting this testimony.

LIMITING INSTRUCTION

It was agreed that the court should instruct the jury that the gun evidence from the other counties was admitted for a limited purpose, but in a manner that would not be a comment on the evidence.

The two defendants had different concerns about how to word the instruction. Tieskotter wanted an instruction especially for his case, and he proposed the following:

> Evidence from other jurisdictions has been introduced against Mr. Tieskotter that you may or may not consider for the limited purpose of establishing an association of the defendant to the crimes charged. You must not consider this evidence for any other purpose.[7]

Tieskotter also proposed another instruction that was not specific to him:

> Evidence has been introduced from another county in this case on the subject of identity for the limited purpose of showing an association between a defendant and a shell casing or expended shell. You must not consider this evidence for any other purpose.[8]

Hartzell offered three variations of a limiting instruction, but ultimately proposed the following:

> Evidence of unrelated alleged prior bad acts or crimes has been introduced from another county for the limited purpose of showing an alleged association to particular defendants to particular evidence. It may not be considered for any other purpose.[9]

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[7] Report of Proceedings at 635.
[8] Clerk's Papers at 61.
[9] Clerk's Papers at 171.

The State proposed an instruction that referred to the evidence from other counties as circumstantial evidence of an association between the defendants and the charged crime.

The court preferred to give a single limiting instruction applicable to both defendants to avoid confusion: "If it's impossible to do that, I would consider separate instructions for both of them, but I see that as somewhat problematic."[10] The court proposed the following, which ultimately was given as instruction 27:

> Evidence from other jurisdictions has been admitted that you may consider as establishing an association of the defendants to the crimes charged. You must not consider this evidence for any other purpose.

The appellants contend that instruction 27 was a comment on the evidence.

Under article IV, section 16 of our constitution, a judge is prohibited from conveying to the jury his personal opinion about the merits of the case or from instructing the jury that a fact at issue has been established. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Any remark "that has the potential effect of suggesting that the jury need not consider an element of an offense" could qualify as a judicial comment. Levy, 156 Wn.2d at 721. Impermissible judicial comments on the evidence are presumed to be prejudicial. Reversal is required unless the State shows that the defendant was not prejudiced or the

[10] Report of Proceedings at 634.

record affirmatively shows that no prejudice could have resulted. Levy, 156 Wn.2d at 723.

At the same time, a trial court *must* give a limiting instruction where evidence is admitted for one purpose but not for another and the party against whom the evidence is admitted asks for a limiting instruction. ER 105; Gallagher, 112 Wn. App. at 611. The trial court is not obliged to give the instruction in the exact language proposed by the defendant. The court has broad discretion to fashion its own limitation on the use of the evidence. Gallagher, 112 Wn. App. at 611.

Tieskotter contends that instruction 27 told the jury that the two defendants were involved in each other's crimes in Kitsap County and Pierce County. This is a strained reading. The evidence admitted was clear that Tieskotter was involved only in the Pierce County incident and was not part of the incident in Kitsap County. The trial court properly denied Tieskotter's motion for a new trial raising this argument.

Hartzell argues that by referring to evidence "from other jurisdictions," instruction 27 encouraged the jury to take all of the unfavorable evidence about him from the Kitsap County incident—the description of him as a "skinhead," the evidence that he lied about his name and birth date, the threats he made against

his girl friend—and reason that a person who did all of those things likely committed the Thurston County shooting. But as the State points out, a limiting instruction "does not limit the evidence to be considered, but rather the purpose to which it can be put. The instruction here does just that; the jury could consider it only to determine whether it connected the defendants to the Thurston County crimes."[11]

Hartzell raises a closer issue when he argues that the instruction was equivalent to a directed verdict with its language that the jury "may consider" the evidence from the other counties "as establishing an association of the defendants to the crimes charged." Below, Hartzell asked the court to modify the instruction to say that the jury "may or may not" consider the evidence as establishing an association. The court rejected that request, explaining that "may" was permissive.[12]

A court may not instruct the jury that "matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). In Becker, the trial court imposed enhanced sentences on the defendants because they had delivered cocaine within 1,000 feet of the Youth

[11] Brief of Respondent at 30.
[12] Report of Proceedings at 638.

Education Program, a general equivalency degree program administered by the Seattle School District. The statute authorizing the enhancement required that the delivery occur within 1,000 feet of "school grounds." The State claimed that the Youth Education Program was a school, but whether it was or not was the major issue at trial. A special verdict form asked the jury whether the defendants were "'within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program School at the time of the commission of the crime?'" Becker, 132 Wn.2d at 64 (emphasis added). Our Supreme Court reversed the sentence enhancements, concluding that by identifying the program as a school in the special verdict form, the trial court "literally instructed the jury that YEP was a school." Becker, 132 Wn.2d at 65; see also State v. Jackman, 156 Wn.2d 736, 745, 132 P.3d 136 (2006) (court commented on the evidence by putting victims' dates of birth in the to-convict instructions, where their minority was an element the State had to prove).

Hartzell maintains that instruction 27 similarly instructed the jury that the defendants were associated with the crimes charged in Thurston County as a matter of law, instead of leaving it to the jury to decide that essential question as a factual matter. The State offers what it argues is a more reasonable reading of the instruction: "You may consider this evidence to decide whether it

establishes a connection between the defendants and the charged crimes."[13] In hindsight, the language the State now offers might have been preferable. Nevertheless, the language the trial court used was not comparable to the special verdict form in Becker or the birthdates provided by the court in Jackman. It did not explicitly direct a verdict or remove a factual issue from the jury's consideration.

As the trial court correctly stated, "may" is generally viewed as a term that sufficiently communicates to a jury that it is permitted but not required to find a particular fact. Our Supreme Court faced a similar question when asked to decide whether the inference of intent instruction used in burglary cases created a mandatory or permissive inference. State v. Brunson, 128 Wn.2d 98, 905 P.2d 346 (1995). The instruction in that case stated, "'A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.'" Brunson, 128 Wn.2d at 101. The court concluded the language of the instruction was "clearly discretionary" and nothing in it suggested that the jury "must" infer criminal intent if it found unlawful entry.

[13] Brief of Respondent at 31.

Brunson, 128 Wn.2d at 106. Similarly here, we conclude the use of the word "may" was permissive and nothing in the language of instruction 27 suggested that the jury "must" find that the evidence from other jurisdictions associated the defendants to the Thurston County shooting.

The State's argument did not mislead the jury on this point. The prosecutor argued that the connection of the guns fired in Pierce and Kitsap Counties to the guns fired at Hoage's apartment in Thurston County was circumstantial evidence that Hartzell and Tieskotter committed the Thurston County crimes:

> Now, ladies and gentlemen, [Hartzell] does argue that, well, there is nobody that puts me in Thurston County on April 7th, and Mr. Woodrow argues for Mr. Tieskotter that no one puts him in Thurston County on April 7th. I know that, and you know that. We have no direct evidence of that, but what are we to do?
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> We must rely on circumstantial evidence, that law that allows you to use your common sense and draw reasonable inferences . . . .
>
> . . . .
>
> And when you have a gun used by Mr. Tieskotter and independently a gun associated with Mr. Hartzell bound together at a residence on April 7th because they are the weapons used, that is compelling evidence of not only accomplice liability, but that these people were doing the shooting.[14]

Instruction 27 did not prevent the appellants from arguing their theories of the case. Tieskotter's lawyer began his argument stating that "Mr. Tieskotter

[14] Report of Proceedings at 728, 732.

disputes . . . that he was associated with" the Thurston County crime.[15] Much of Tieskotter's closing argument was an attempt to refute the evidence that allegedly connected him to the shooting in Thurston County. He argued that he did not have a motive to shoot at Hoage's apartment and, although Hartzell may have had a motive, he did not assist Hartzell because the friendship they had dissolved before the shooting. Similarly, Hartzell argued that he was not connected to the gun in Kitsap County and, therefore, the gun evidence did not connect him to the Thurston County shooting.

Although the instruction perhaps could have been more artfully worded, we conclude the trial court successfully maintained the necessary balance between the obligation to give a satisfactory limiting instruction and the obligation to refrain from commenting on the evidence.

STATE'S CLOSING ARGUMENT

Hartzell contends that the prosecutor's closing argument denied him a fair trial because it shifted the burden of proof and implied facts not in evidence. Hartzell particularly complains about arguments regarding his failure to call certain witnesses.

A defendant who alleges prosecutorial misconduct must establish that the

[15] Report of Proceedings at 694.

prosecutor's conduct was both improper and prejudicial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. Dhaliwal, 150 Wn.2d at 578. A defendant who does not make a timely objection waives review unless the prosecutorial misconduct "is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Hartzell mentioned in his closing argument that some people who may have had relevant information about the case, including Dodge and Juan Copin, were not called to testify at trial. According to Hoage's testimony, Copin was someone she initially suspected of being one of the shooters. Hartzell suggested that the State did not call the missing witnesses to testify because their testimony would have contradicted the State's evidence:

> I will tell you where they are. [The prosecutor] struck them from the list. They were all on his list, and he struck them. He struck them, because he is afraid they were going to tell you the truth.
>
> But this is not going to be case about where somebody comes up there and tell you the truth. The truth is something you are going to have to infer, infer yourself, and it's not what has been said that speaks the loudest; it's what you haven't heard.[16]

In response, the prosecutor argued that Hartzell could have called Sarah

[16] Report of Proceedings at 723.

Dodge as a witness:

> Ms. Dodge is available to the defense, Mr. Hartzell. Sarah Dodge was his girlfriend. Sarah Dodge could have been called by Mr. Hartzell. I have been attacked for not calling Sarah Dodge, but I can assure you, ladies and gentlemen, that the defense could have called her.
>
> As a matter of fact, it's, as you know, ladies and gentlemen, a defendant naturally and, thank God, has many rights under our system. They don't have to testify. They are presumed innocent until proven guilty, and during a trial such as this, they don't have to do anything. They don't have to put on a case. They don't have to put on any witnesses, but they can.
>
> Mr. Hartzell could have called these people he has named like Sarah Dodge and this Juan Copin. He did not, and you may consider the evidence and the lack of evidence, and you might consider why Mr. Hartzell did not offer Ms. Dodge or for that matter Juan Copin.[17]

Hartzell did not object to these comments.

Even had there been a timely objection, we would not find misconduct. Although an attorney may not make prejudicial statements in closing argument that are not supported by the record, counsel is given latitude to argue the facts and reasonable inferences from the facts. Dhaliwal, 150 Wn.2d at 577. A prosecutor may encourage the jury to draw an unfavorable inference from a defendant's failure to produce evidence that is properly part of the case and is within the control of the defendant in whose interest it would be to produce it, unless the prosecutor's comments infringe on the defendant's constitutional rights. State v. Blair, 117 Wn.2d 479, 485-91, 816 P.2d 718 (1991).

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[17] Report of Proceedings at 733-34.

Hartzell argues that the prosecutor's comments implied that he was obligated to present evidence and infringed upon his right to be presumed innocent. The arguments, however, were a pertinent reply to Hartzell's own comments and did not shift the burden to present evidence to Hartzell. On the contrary, the prosecutor specifically emphasized that Hartzell had no duty to present evidence.

Hartzell did not object to these arguments, the arguments were a pertinent reply to Hartzell's closing statement, and they were not so flagrant and ill intentioned that a curative instruction would have been useless.

Hartzell also argues that the prosecutor committed misconduct when arguing that Hartzell's calling his mother to testify and give him an alibi was an act of desperation. The prosecutor commented that of course a mother would try to help her son when told that a particular date and time was important. Hartzell's objection was overruled. He now contends the comment implied that Hartzell told his mother what to say. The comment, however, did not imply facts not in evidence as it would not have been understood as quoting from evidence not admitted. The prosecutor was simply dramatizing an argument based upon common experience, in response to Hartzell's argument in which he vouched for his mother's veracity. See State v. Barrow, 60 Wn. App. 869, 873-74, 809 P.2d

209, review denied 118 Wn.2d 1007 (1991).

We conclude prosecutorial misconduct did not deprive Hartzell of a fair trial.

FIREARM ENHANCEMENT

Hartzell and Tieskotter contend that the trial court erred by imposing a 36-month firearm sentence enhancement when the special verdict forms asked only whether the defendants were armed with a deadly weapon. Although our original opinion found the error to be harmless, the Supreme Court upon the defendants' petitions for review remanded to this court for reconsideration in light of State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010). The cited case holds that the sentencing judge is bound by the finding made by the jury in the special verdict form that each defendant was armed with a deadly weapon. In light of Williams-Walker, resentencing is required.

POSSESSION OF FIREARM—KNOWLEDGE ELEMENT

The trial court instructed the jury that to convict the defendants of first degree unlawful possession of a firearm, the State needed to prove the following elements beyond a reasonable doubt:

> (1) That on or about April 7, 2007, the defendant had a firearm in his possession or control;
> (2) That the defendant had previously been convicted of a serious

> offense; and
>
> (3) That the possession or control of the firearm occurred in the State of Washington.[18]

"Knowing possession" is an essential element of the crime of unlawful possession of a firearm. State v. Anderson, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000). The State, therefore, concedes that omitting the requirement of knowledge from instruction 23 was an error of constitutional magnitude. The State contends, however, that the error does not require reversal.

An instruction that omits an element of the offense does not necessarily render the trial fundamentally unfair. Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). To determine whether the omission of an element is harmless error, the court considers whether the omitted element was supported by uncontroverted evidence. Neder, 527 U.S. at 19; State v. Jennings, 111 Wn. App. 54, 64, 44 P.3d 1 (2002), review denied, 148 Wn.2d 1001 (2003).

In this case, the jury found each of the defendants guilty of second degree assault while armed with a deadly weapon for shooting into Hoage's apartment. The defendants did not defend against the charge of unlawful possession by claiming they did not know they possessed guns. Rather, they denied they were

[18] Clerk's Papers at 197.

the ones who shot into the apartment. It is uncontroverted that the shooters, whoever they were, knew they were in possession of guns. Under these circumstances, omitting the element of knowledge from the instruction was harmless error.

Tieskotter contends that his counsel provided ineffective assistance because he did not object to the instruction omitting the element of knowledge. Because Tieskotter was not prejudiced by the omission, this argument fails.

SUFFICIENCY

Tieskotter argues that the evidence was insufficient to support his convictions for second degree assault and first degree unlawful possession of a firearm. A person is guilty of the crime of second degree assault if he "assaults another with a deadly weapon." RCW 9A.36.021(1)(c). An intentional shooting is an assault. State v. Elmi, 166 Wn.2d 209, 216, 207 P.3d 439 (2009). Firearms are considered deadly weapons. RCW 9A.04.110(6). A firearm is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(1). A person is guilty of first degree unlawful possession of a firearm if he has a firearm in his possession or control and he previously had been convicted of a serious offense. RCW

9.41.040(1)(a).

Evidence is sufficient if, when viewed in the 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. Bencivenga, 137 Wn.2d 703, 706, 974 P.2d 832 (1999). Circumstantial evidence is considered as reliable as direct evidence. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). When deciding whether the evidence was sufficient to support a conviction, this court considers the State's evidence to be true and draws all reasonable inferences from the evidence in favor of the prosecution. Goodman, 150 Wn.2d at 781.

Tieskotter sets forth evidence that he argues is inconsistent with the jury's finding that he possessed a firearm and shot it at Hoage's apartment. But looking at the evidence in the light most favorable to the State, the evidence was sufficient for any rational trier of fact to find Tieskotter guilty of second degree assault and first degree unlawful possession of a firearm. Two eyewitnesses to the Pierce County crime testified that Tieskotter shot a 9 mm handgun. An expert witness testified in the State's case that the gun used in that shooting in Pierce County was the same weapon fired into Hoage's apartment. Other witnesses testified that Tieskotter and Hartzell were so close they were like brothers. Hartzell had been staying with Hoage a few days before the shooting,

but she had asked him to leave. He sent her a threatening text message after the shooting. Tieskotter was using his girl friend's car at that time, and a witness testified that the girl friend's car was the one he saw when shots were fired at Hoage's apartment. Tieskotter stipulated that he had a prior conviction for a serious offense. This evidence was sufficient proof that Tieskotter was guilty of the assault and unlawful possession of a firearm.

MAXIMUM TERM

The maximum term for each of Tieskotter's convictions (assault with a deadly weapon in the second degree and unlawful possession of a firearm in the first degree) is 10 years. The trial court ordered Tieskotter to serve a term of 84 months with a 36-month firearm enhancement for his assault conviction and 116 months for his unlawful possession conviction, for a total term of 120 months. In addition, the court ordered Tieskotter to serve 18 to 36 months in community custody. The addition of the community custody term resulted in an overall sentence of 138 to 156 months, which exceeds the maximum term.

The State concedes that Tieskotter's case must be remanded to have the sentence corrected and argues that, even though Hartzell did not raise the issue, his case should be remanded, too. In light of a recent Supreme Court

decision, the concession is well taken:

> We hold that when a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum.

In re Pers. Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).

As discussed above, the court erroneously enhanced each defendant's sentence for use of a firearm when the jury verdict authorized only the shorter enhancement for use of a deadly weapon. A remand is necessary to correct that error, and at that time, the court must ensure that the overall sentence does not exceed the maximum term in each case. Because there will be a remand and any maximum term issue can be addressed at that time, Tieskotter's claim of ineffective assistance based on the error fails.

STATEMENT OF ADDITIONAL GROUNDS—HARTZELL

In a statement of additional grounds for review pursuant to RAP 10.10, Hartzell argues that his conviction for assault in the second degree must be reversed and the charge dismissed because the court omitted the essential element of intent from the "to convict" instruction. Hartzell's argument fails because the instructions as a whole properly informed the jury that it must find

that he acted intentionally. Instruction 11 informed the jury that an assault is "an intentional touching or striking or cutting or shooting of another person," or "an act, with unlawful force, done with intent to inflict bodily injury upon another," or "an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury."

Hartzell argues that he was forced to waive his right to effective assistance of counsel because his court-appointed lawyer was not prepared for trial when his speedy trial deadline was nearing. Hartzell claims that he did not unequivocally waive his right to be represented.

A criminal defendant may waive his right to be represented by counsel and may choose instead to represent himself. State v. Woods, 143 Wn.2d 561, 585, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001). To waive the right of legal representation, the defendant must state his request unequivocally. State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002), review denied, 148 Wn.2d 1022 (2003).

Although Hartzell said he wanted to represent himself because his counsel indicated he could not be prepared for trial before the speedy trial deadline passed, Hartzell also wanted to represent himself because he was confident that the State's evidence was insufficient to convict him. He said that

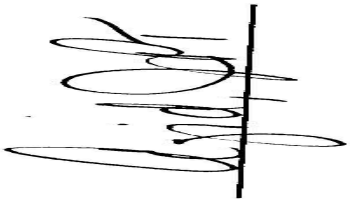
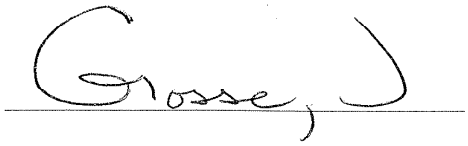
the charges against him in Kitsap County were dropped and, therefore, he did not think the Thurston County prosecutor could connect him to the gun. The court questioned Hartzell thoroughly about his desire to represent himself and warned him of the dangers. Hartzell acknowledged that he understood the risks. Thus, the record reflects that he voluntarily and unequivocally waived his right to counsel.

NO CUMULATIVE ERROR

Appellants argue that their convictions should be reversed based on cumulative error. That doctrine applies only if there were several trial errors, none of which standing alone is sufficient to warrant reversal, that when combined may have denied the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because the defendants have not shown there were several trial errors, reversal based on cumulative error is not warranted.

CONCLUSION

The convictions of Hartzell and Tieskotter are affirmed. The judgment and sentence in each case is remanded for resentencing consistent with Williams-Walker and, to the extent still applicable, Brooks.

Becker, J.

WE CONCUR: