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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HARRY WILLIAM NETTLETON IV, Appellant.	No. 80809-5-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — After being chased and shot at, Harry William Nettleton IV took the taxi he was in, along with drugs and a firearm, and led police on a high-speed chase down Interstate 5 (I-5) that ended in a crash. A jury convicted Nettleton of the crimes of attempting to elude a pursuing police vehicle with an endangerment enhancement, possession of a controlled substance (heroin) with the intent to manufacture or deliver, possession of a controlled substance (methamphetamine) with the intent to manufacture or deliver while armed with a firearm, and unlawful possession of a firearm in the first degree. The jury acquitted Nettleton of the crimes of robbery in the first degree with a firearm and theft of a motor vehicle. Nettleton appeals arguing the trial court erred in denying his motion for severance, failing to conduct a severance analysis on the record, improperly admitting opinion testimony, and not properly calculating his offender

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score and sentence. We affirm Nettleton's convictions but reverse in part and remand for resentencing.

FACTS

On June 16, 2019, Nettleton had a firearm, and baggies of heroin and methamphetamine. While at a Lynnwood trailer park, he shared his drugs with Jill McCurdy. After smoking heroin together, they hired Yellow Cab taxi driver Roger Dean to pick them up from the trailer park. When Dean arrived, McCurdy got into the taxi, and then about a half a block away, as Dean was slowly pulling out, Nettleton got in. According to Dean, Nettleton "kind of just sort of appeared out of the – out of the bushes."

Dean observed that Nettleton was "frantic" and "on edge." McCurdy also observed that Nettleton was "stressed out." After stopping at a Dairy Queen drive-thru for a "Blizzard," Nettleton became concerned that another vehicle was following them. At first, Dean and McCurdy did not believe Nettleton and thought he was joking. Then, Dean and McCurdy noticed a red Honda tailgating the taxi. Dean tried to maneuver the taxi away from the Honda and eventually made a U-turn into a Dollar Tree parking lot. While in the Dollar Tree parking lot, a man leaned out of the Honda, pointed a firearm, and fired between five and eight shots at the taxi. Numerous individuals witnessed a man lean out of the Honda to shoot at the taxi and reported the incident to 911.

After the shooting, Dean kept driving until he no longer saw the Honda. Looking for a safe place to pull over, Dean eventually stopped in an apartment complex's parking lot. There, Dean and McCurdy exited the taxi.

The jury heard conflicting testimony as to what happened next. Dean provided inconsistent testimony as to how Nettleton obtained control of the taxi. Dean described Nettleton as leaping from the back seat to the front as Dean was getting out of the taxi.[1] Dean could not remember how Nettleton got the keys to the taxi. Dean said, while Nettleton was in the back seat, "this was the point at which it was like, 'Hey, I got a gun. I'm taking your cab.' That happened while we were all still in the car." When asked how Dean responded, Dean said he did not say anything, and then explained he begged and pleaded to get his "stuff" and for Nettleton to not take his taxi. When the prosecutor asked Dean if Nettleton did anything else while in the backseat of the taxi, Dean said:

> I'm going to say I -- I can't give you a 100 percent on anything like that. It was -- it was a pretty quick, you know, less than a second. It just -- it happened so quick, you know?
>
> If you're referring to, you know, a hand gesture, you know, like, I'm not even really looking. I'm still facing forward, you know, kind of looking back to the side. He says, "I have a gun too. I'm taking your cab." Maybe a hand gesture. Maybe not. I can't give you a 100 percent.
>
> But I definitely had no reason to not, you know, believe the validity of what he was saying, and at that point, you know, I was in compliance mode.

Later, when Dean was asked what Nettleton did with his hands, Dean described him as making a "movement, like, hey, you know, I got a gun. And I'm not 100 percent on that." When asked how he perceived that hand gesture, Dean said, "obviously like a threatening kind of move, you know?" Dean never saw

[1] In court, Dean did not actually identify Nettleton as the male in his taxi. Because McCurdy and Nettleton testified that Nettleton was in the taxi, we refer to the male in the taxi as Nettleton when discussing Dean's testimony.

Nettleton with a firearm in the taxi and did not know if there was a gun in the taxi. Dean also testified that Nettleton said he would leave the taxi at 145th Street and Aurora Avenue in Seattle.

After driving off and looping back aground, Nettleton handed Dean his cell phone, minus the battery, and drove off. McCurdy walked off in one direction and Dean walked in another eventually finding a couple with a cell phone so he could call 911.

McCurdy's version of events differed significantly. She described a panicked Nettleton asking Dean to leave the parking lot saying, "[L]et's get outta here. Let's get outta here. If you're uncomfortable driving, I'll drive," and Dean responding that he thought they should stay where they were. McCurdy testified that when Nettleton told Dean that it was not safe to stay in the parking lot, Dean handed Nettleton the keys to the taxi and the two agreed on a meeting place where Nettleton could return the taxi. McCurdy testified that she did not hear Nettleton say he had a gun or threaten Dean. After Nettleton drove off and looped back around, he gave Dean his cell phone, and McCurdy got back into the taxi and they left.

Nettleton testified that on January 10 he arranged to buy some heroin from a Matt Voeltz in Everett. But, when Nettleton arrived in Everett, he saw Voeltz's car surrounded by police at an AM/PM gas station. Nettleton saw Voeltz's girlfriend, Kim, leave the scene. Nettleton followed Kim to Voeltz's apartment and entered uninvited. Kim was frantically going through her belongings and noticed Nettleton and mentioned he was at the apartment to

someone on the phone. While there, Nettleton stole a safe that he later broke into and found a bag of methamphetamine, a bag of heroin, and a handgun.

On January 16, after using drugs with McCurdy, Nettleton threw a bag with the gun and the drugs he stole into the bushes at the trailer park before getting into the taxi. Nettleton explained he hid the bag in the bushes because he was paranoid and was not sure who was pursuing him. Nettleton testified that as a 6'2", 240 pound man, there was no way that he could have jumped from the backseat to the front seat to take control of the taxi. Nettleton said that after Dean stopped the taxi, Nettleton repeatedly begged Dean to let him drive saying, "Please don't let these guys kill me. Please let me drive the cab. You don't know how to drive. You don't know how to get us to safety." Dean, after just standing and staring, handed Nettleton the keys and gave him an address in Everett where Nettleton could drop off the taxi. Nettleton then drove away but turned around to pick up McCurdy. This is when Dean asked for his belongings. Nettleton grabbed "a bunch of electronics and such mounted to the dashboard" and handed them to Dean before driving off. Nettleton said he told Dean he would drop the taxi off at a restaurant at 145th Street and Aurora Avenue.

Nettleton and McCurdy testified that they returned to the trailer park where Nettleton picked up the bag with the drugs and gun he previously hid in the bushes. Nettleton said he grabbed the gun to protect himself from the people who shot at him. McCurdy got out of the taxi. Nettleton then got back into the taxi and sped south toward Seattle on I-5. He admittedly wove the taxi between

the high occupancy vehicle lane and the shoulder to pass slower vehicles because he was in a "[l]ife-or-death hurry."

Meanwhile, 911 dispatchers contacted Yellow Cab's dispatch center to get the taxi's real-time location. The taxi's location was relayed to law enforcement, and numerous officers in patrol cars with their sirens and lights activated pursued the taxi. Nettleton denied seeing law enforcement officers follow him. At one point he noticed, "out of the corner of [his] eye," two patrol cars without their sirens or lights activated. Nettleton claimed he could not see the pursuing patrol cars because the taxi did not have a rearview mirror. After a patrol car rammed into the taxi, Nettleton kept driving. He testified that he did not pull over for the officers because he thought they were trying to kill him, and he was running for his life. Nettleton said he kept driving until Seattle police officers arrived because he knew Seattle police have body and dashboard cameras, and he wanted those cameras to record the events in case the officers tried to kill him. Nettleton drove the wrong-way on the I-5 on-ramp until he drove into the safety netting intended to prevent drivers from driving into oncoming traffic. As Nettleton attempted to reverse out of the netting, two more patrol cars pinned the taxi.

Incident to arrest, officers recovered a .40 caliber semiautomatic pistol from the taxi's passenger seat floorboard.[2] Officers also found a small zipper pouch holding two smaller bags—containing approximately 59.79 grams of heroin and 144.19 grams of methamphetamine. Officers also recovered a larger

[2] Officers recovered two different caliber shell casing from the Dollar Tree parking lot.

bag containing clothing, glass pipes "similar to bongs," screwdrivers, knives, wire clippers, and a digital scale.[3]

PROCEDURAL HISTORY

The State initially charged Nettleton with robbery in the first degree with a firearm, theft of a motor vehicle, attempting to elude a pursuing police vehicle with an endangerment allegation, and possession of a controlled substance. Later, the State, over Nettleton's objection, amended the possession charge to possession of a controlled substance with intent to manufacture or deliver, and added another count for possession of a controlled substance with intent to manufacture or deliver with a firearm allegation, and unlawful possession of a firearm in the first degree.

Pretrial, Nettleton unsuccessfully moved to dismiss, under Knapstad, the controlled substance counts.[4] He also moved to sever all the amended charges from the initial counts. The parties submitted briefing and presented oral argument on the Knapstad motion. The motions were heard in Snohomish County Superior Court. The judge denied the Knapstad motion without prejudice. The judge then asked, "So you've got a motion to sever?" As defense counsel started to respond, the judge said, "Let's make this quick. I'm going to deny that one also." The judge did not conduct any analysis on the record or make any findings. Although the judge did not state on the record that the denial

[3] The digital scale was not booked into evidence, but it was included in photographs admitted at trial.

[4] State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). The motion to dismiss is not at issue on this appeal.

of the motion to sever was with prejudice, the order stated it was "denied with prejudice."[5]

Before trial, Nettleton renewed his severance motion during motions in limine in front of a different Snohomish County Superior Court judge. While both parties informed the trial judge that the pretrial motions judge denied the motion with prejudice, neither party explained that the pretrial motions judge had not conducted any analysis on the record. Defense counsel stated, "I believe I have a duty to reraise it. I think I waive the issue on appeal if I don't reraise it." The trial judge stated, "I do understand that this has to be a continued objection to this issue for purposes of your appellate record. At this point, I am going to deny the motion to sever." The prosecutor responded, "Would the court just note that it's a standing objection, I guess, from the defense? I have no problem with that for appellate purposes." Both the trial judge and the prosecutor invited Nettleton to revisit the motion if something changed during trial. Nettleton did not reraise the motion during trial.[6]

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[5] Neither Nettleton nor the State dispute that the motion for severance was to sever the three possession charges from the first degree robbery, theft of a motor vehicle, and attempting to elude a pursuing police vehicle charges. However, the pretrial order on the motion incorrectly described defense's motion as "[d]ismiss Counts 4 and 5 under Knapstad and sever Count 6."

[6] We consider the severance motion because the State does not argue that Nettleton failed to preserve the issue of severance. CrR 4.4(a), which provides:

> Timeliness of Motion--Waiver.
>
> (1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

During trial, over defense counsel's objection, the State called Everett Police Officer and Detective Jarrod Seth, a member of the Snohomish County Regional Drug Task Force. Seth's involvement in the case was limited to reviewing the reports and "photographs taken during the search . . . and the evidence," and to writing a report based on his observations. Seth testified to his training and experience with narcotics investigations, and interviewing drug users, dealers, and traffickers. Seth testified about the typical quantities of heroin and methamphetamine that users use and dealers sell. He explained that for the average person, one dose of heroin is between .10 and .20 grams. Seth also testified that individuals buying and selling drugs typically carry a knife or gun to protect their investment. Based on his training and experience, Seth testified to 59 grams of heroin and 150 grams of methamphetamine being

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> (2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground *before or at the close of all the evidence*. *Severance is waived by failure to renew the motion.*

(emphasis added.) Issue preservation rules "encourage 'the efficient use of judicial resources' by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011) (quoting State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). The reason parties are required to renew a severance motion during trial before or at the close of all the evidence, is because what happens at trial may have changed the circumstances as to why the motion was denied pretrial. Renewing the motion prior to trial during motions in limine does not satisfy the requirement under the rule to preserve the issue. See State v. McDaniel, 155 Wn. App. 829, 858-59, 230 P.3d 245 (2010) (determining that defendants, who argued for severance during motions in limine, did not preserve the severance issue when they failed to renew their severance motions during trial).

consistent with the quantity of drugs dealers sell rather than the quantity users use.

On June 28, 2019, the jury convicted Nettleton of attempting to elude a pursing police vehicle with an endangerment enhancement, possession of a controlled substance with intent to manufacture or deliver, possession of a controlled substance with intent to manufacture or deliver with a firearm enhancement, and unlawful possession of a firearm in the first degree. The jury acquitted Nettleton of robbery in the first degree and theft of a motor vehicle.

At the sentencing hearing, the State presented Nettleton's standard range as 100 to 120 months based on an offender score of 11 for each unlawful possession of a controlled substance conviction with 36-month firearm enhancements.[7] The State presented the standard range of 87 to 116 months for the unlawful possession of a firearm in the first degree conviction based on an offender score of 11. And, the State presented the standard range as 22 to 29 months with a 12 month and one day endangerment enhancement based on an offender score of 12 for the attempt to elude conviction. The State presented supporting documentation of Nettleton's criminal history, including the certified judgment and sentence for his last felony conviction dated February 6, 2009 for the crime of felon in possession of a firearm. According to the evidence

[7] It appears the trial court imposed a firearm enhancement on both the controlled substance convictions even though it was alleged only on one count, and the jury made that finding only as to one count. However, the court ran the 36 months for the firearm enhancements on these counts concurrent to each other. This issue has not been raised on appeal.

presented by the State, Nettleton's next conviction was not until 2015 for misdemeanors committed in 2011.

Defense counsel agreed with the standard range for the unlawful possession convictions. The trial judge agreed that Nettleton's offender score was 11 for the three unlawful possession convictions and 12 for the attempt to elude conviction. The trial judge sentenced Nettleton to 84 months for the unlawful possession of controlled substance offenses with two concurrent 36-month firearm enhancements, 116 months for the unlawful possession of a firearm, 41 months for attempting to allude a pursuing police vehicle with a 12-month endangerment enhancement.

Nettleton appeals.[8]

DISCUSSION

Motion for Severance

A court "shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). We review a trial court's decision to deny a motion for severance for abuse of discretion. State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992).

[8] The State cross-appeals. However, the State did not assign errors in its response brief and asks this court to affirm Nettleton's conviction. We "only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." See RAP 10.3(g).

Nettleton first argues reversal is required because neither the pretrial motion judge nor the trial judge conducted an analysis on the record to support its ruling denying severance. As our Supreme Court observed in State v. Bluford, "As in other contexts where trial courts are asked to exercise discretion, a court considering a pretrial joinder motion should conduct its analysis on the record to ensure that its 'exercise of discretion was based upon a careful and thoughtful consideration of the issue.' " 188 Wn.2d 298, 310, 393 P.3d 1219, 1226 (2017) (quoting State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)). A court's consideration of a pretrial severance motion also should be conducted on the record. It was error for the pretrial motions judge to not conduct his analysis on the record.[9]

Nettleton is correct that it was error for the pretrial motions judge to not put his analysis on the record. However, Nettleton cites to no authority that reversal is required without the defendant having to establish prejudice.

"The law does not favor separate trials. We review a trial court's denial of a motion to sever for manifest abuse of discretion. To show that the trial court abused its discretion in denying severance, the defendant must be able to point to specific prejudice." State v. Huynh, 175 Wn. App. 896, 908, 307 P.3d 788,

[9] While the trial judge also did not conduct an analysis on the record, that is less surprising because under normal circumstances, the motion was renewed prematurely. Without a change of circumstances, there would be no basis to revisit pretrial a previous judge's pretrial ruling denying the motion. Neither party alerted the trial judge that the pretrial motion judge had not conducted his analysis on the record or raised any concern that the previous ruling was not based on careful and thoughtful consideration of the issue. The record reflects that Nettleton made the motion before the trial judge pro forma.

794 (2013) (citing State v. Medina, 112 Wn. App. 40, 52, 48 P.3d 1005 (2002), and State v. Bythrow, 114 Wn.2d 713, 720, 790 P.2d 154 (1990) (internal quotation marks omitted)).

To determine whether denying a motion for severance caused prejudice, we consider: "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.' " State v. Sutherby, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009) (quoting State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)).

First, we consider the strength of the State's evidence on each count. Russell, 125 Wn.2d at 63. "When the State's evidence is strong on each count, there is no necessity for the jury to base its finding of guilt on any one count on the strength of the evidence of another." Bythrow, 114 Wn.2d at 721-22.

In analyzing whether the pretrial motions judge should have granted the motion for severance, we consider the pretrial briefing on the motion to sever, which is in the record. Pretrial, Nettleton argued the strength of all the possession charges were weak compared to the charges of robbery in the first degree, theft of a motor vehicle, and attempting to elude a pursuing police vehicle. Nettleton was correct that there was no evidence common in cases of intent to deliver: ledgers, individual baggies, and large amounts of cash. However, the State correctly asserted that the large amount of drugs combined with the firearm and digital scale present sufficient evidence to support the intent

to deliver charges. Nettleton also argued that other than finding the firearm in the taxi, nothing connected the firearm to Nettleton. We disagree. According to Dean, Nettleton said he had a gun and reached like he was trying to grab a gun. When the high-speed chase with law enforcement ended, Nettleton was the sole occupant in the taxi that had a large amount of drugs and a firearm on the floorboard.

Second, we consider "whether the clarity of defenses to each count was prejudiced by joinder. The likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical on each charge." Russell, 125 Wn.2d at 64. Nettleton's defenses were general denial and necessity as to the unlawful possession of a firearm, which runs counter to Nettleton's argument that little evidence linked him to the firearm. Nettleton argued that the jury could conflate his necessity defense as an admission that he stole the taxi. Nettleton, claiming he had a firearm out of necessity to protect himself, does not prevent him from maintaining a defense that he did not use a firearm to take the taxi. The defenses were not contradictory.

Third, we consider the trial court's instructions to the jury to consider each count separately. Id. at 66. We presume the jury is capable of compartmentalizing the evidence. Bythrow, 114 Wn.2d at 721. And, "[w]e presume that juries follow all instructions given." State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). At that time, the State asserted it would "submit jury

instructions including a concluding instruction directing the jurors to determine Defendant's guilt on each count separately."

Fourth, we consider the cross admissibility of evidence on all counts. Russell, 125 Wn.2d at 66. Severance is not automatically required when evidence of one count would not be admissible in a separate trial on another count or where the counts may not be cross-admissible. Bythrow, 114 Wn.2d at 720. Below, Nettleton argued the evidence of the drugs and evidence of a prior conviction that is required for the unlawful possession of the firearm charge would not be admissible in a trial for charges of robbery in the first degree, theft of a motor vehicle, and eluding. The State argued evidence of drugs and unlawful possession of a firearm would be admissible under ER 404(b) to show motive as to why Nettleton would take the taxi and elude police after getting shot at rather than calling the police. Regarding the predicate felony conviction, a trial court can instruct the jury that it could consider Nettleton's prior conviction only for purposes of the felon in possession count. State v. Thompson, 55 Wn. App. 888, 894, 781 P.2d 501, 504 (1989) (denying a motion to sever assault and unlawful possession of a firearm counts). Most importantly, we recognize that all of the charges relate to the same events or course of events, and, thus, increases likeliness of cross admissibility. See Huynh, 175 Wn. App. at 909.

Nettleton did not meet his burden to show that joinder of the offenses was so prejudicial that it outweighed the need for judicial economy. The denial of the motion to sever was not a manifest abuse of discretion. We are not convinced

that the evidence admitted at trial strengthened Nettleton's position regarding severance. The fact that the jury acquitted Nettleton on the robbery and theft of a motor vehicle charges demonstrates that the jury could and did compartmentalize the different counts and their defenses.

Opinion Testimony

Nettleton argues the trial court abused its discretion and denied him his right to a fair trial when it permitted Detective Seth to testify. Nettleton argues Seth did not have first-hand knowledge of the case, was not properly qualified as an expert witness, and did not offer helpful testimony. Nettleton also argues his testimony was unduly prejudicial. We disagree.

ER 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In other words, whether expert witness testimony is admissible depends on: (1) whether the testifying witness qualifies as an expert, and (2) whether the witness's testimony would be helpful to the trier of fact. We review a trial court's decision to admit evidence for abuse of discretion. State v. Quaale, 182 Wn.2d 191, 196, 340 P.3d 213 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Id. at 197.

Nettleton first objects to Seth's testimony because Seth did not have first-hand knowledge of the case. Courts may admit testimony of officers based on their observations of photographs of the evidence. State v. Kunze, 97 Wn. App.

832, 858, 988 P.2d 977 (1999) (trial court properly allowed officer to testify after having viewed photos of the scene). While Seth was not one of the responding officers to the scene, he did review photographs of the evidence prior to testifying.

Next, Nettleton contends Seth was not properly qualified as an expert. We disagree. Officers' training and experience can be sufficient to qualify them as experts regarding general practice of drug culture. State v. Francisco, 148 Wn. App. 168, 177, 199 P.3d 478, 482 (2009) (allowing opinion testimony about drug use because detective had close to six years' experience in the drug unit, made several hundred drug arrests, and had received extensive advanced level training).

In the instant case, Seth testified that as a detective with the Snohomish County Regional Drug Task Force, he was required to take an 80-hour drug investigation course and a 40-hour drug lab processing course led by the Drug Enforcement Agency, and an 80-hour undercover law enforcement course let by a local law enforcement agency in Burien. Seth also testified to his involvement with roughly 500 narcotics investigations during which he "interviewed hundreds of drug users and hundreds of drug traffickers during my course as an investigator." His interviews included talking with individuals who deal and who package narcotics. Seth's training and experience was sufficient to qualify Seth as an expert.

Nettleton also contends that Seth's testimony was not helpful. Nettleton's defense theory was that the drugs were for personal use and the only reason he

had a firearm was out of necessity because people were trying to kill him. The State argued that the amount of drugs Nettleton possessed and the firearm supported the controlled substance charges and the firearm allegation. The trier of fact unfamiliar with controlled substances would not necessarily know the amount of drugs commonly associated with personal consumption and the amount commonly associated with someone who delivers. Nor would the jury necessarily understand why someone who delivers drugs might carry a firearm. Seth's testimony was relevant to provide context regarding the quantity of drugs found and the reason a person with that quantity of drugs might carry a firearm. Seth's testimony could assist the jury in understanding an issue of fact during the trial.

Nettleton next argues the danger of unfair prejudice substantially outweighed the probative value of Seth's testimony. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Nettleton asserts that Seth's testimony improperly suggested Nettleton was selling drugs.[10] We disagree.

"Opinions on guilt are improper whether made directly or by inference." Quaale, 182 Wn.2d at 199. "Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the

[10] Nettleton also argues that even though the trial court sustained Nettleton's objection and granted his motion to strike the testimony, it was prejudicial for Seth to testify, "Typically what you see is – especially people that are addicts, and most people in the drug world are using and selling." Because "[w]e presume that juries follow all instructions given," and the trial court struck this statement, we find no prejudice. Stein, 144 Wn.2d at 247.

defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). A law enforcement officer's improper opinion testimony may be particularly prejudicial because it carriers "a special aura of reliability." Id. at 765. "[O]pinion testimony is not objectionable merely because it embraces an ultimate issue that the jury must decide." Quaale, 182 Wn.2d at 197.

Opinion testimony is inadmissible if the opinion is of a personal belief as to the guilt or intent of the defendant or the veracity of a witness. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Because witnesses are generally not permitted to express their personal beliefs about the defendant's guilt or intent, phrases like " 'I believe' or 'it's possible' . . . are likely to draw objections at trial." Id. at 592. It is well established that

> [t]o avoid inviting witnesses to express their personal beliefs, one permissible and perhaps preferred way is for trial counsel to phrase the question "is it consistent with" instead of "do you believe." For example, experts are often asked if a history given is "consistent" with clinical findings or if certain assumptions are "consistent" with a conclusion.

Id. at 592-93.

In Montgomery, our Supreme Court determined the testimony of a detective constituted an improper opinion on the defendant's guilt when the detective testified, that based on his training an experience, "those items were purchased for manufacturing [methamphetamine]" because that went to the defendant's guilt and intent. Id. at 588, 594. Likewise, in Montgomery, it was

improper for a forensic chemist to testify about the necessary ingredients for making methamphetamine, survey the defendant's purchases, and testify that "these are all what lead me toward this pseudoephedrine is possessed with intent." Id. at 588, 594. By making that statement, the chemist improperly opined on the defendant's guilt. Id. at 594.

As the State correctly asserts, unlike the testimony in Montgomery, Seth's testimony did not contain any direct opinions on Nettleton's guilt, intent, or credibility. Over defense counsel's objections, the trial court permitted the following questions and answers:

> Prosecutor: Generally, as part of your investigations, have you come across individuals involved in either the buying or selling of narcotics that have a need for a weapon?
>
> Seth: Yes.
>
> Prosecutor: And could you describe that for us?
>
> Seth: Yes. Typically, when your drugs are worth a lot of money, they're a commodity, and you're dealing with typically folks that are desperate, people that are -- have addictions, and you want to protect your investment. So yes. We see either knives or handguns associated with people dealing in narcotics quite often.
>
> Prosecutor: So generally, based on your training and experience, is 59 grams of heroin consistent with an amount being sold?
>
> Seth: Yes.
>
> Prosecutor: Generally, based on your training and experience, is 150 grams of methamphetamine or more . . . consistent with an amount being sold?
>
> Seth: Yes.

> Prosecutor: And based on your training and experience, are -- either of those amounts of substances . . . consistent with personal use?
>
> Seth: No.

Seth did not express a personal belief as to Nettleton's guilt or intent. The trial court did not abuse its discretion by admitting Seth's testimony.

Offender Score

Nettleton argues the trial court improperly calculated his offender score because the State did not submit evidence that Nettleton's class C convictions did not "wash out" after his 2009 felony conviction. We agree.

"Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing." RCW 9.94A.500(1). A defendant's offender score affects the sentencing range and we generally calculate it by adding together the defendant's current offenses and the prior convictions. State v. Hunley, 175 Wn.2d 901, 908-09, 287 P.3d 584 (2012) (citing RCW 9.94A.589(1)(a)). At the sentencing hearing, it is the State's burden to prove the validity of the defendant's prior convictions by a preponderance of the evidence. Id. at 909-10; RCW 9.94A.500(1). And, the trial court "shall specify the convictions it has found to exist." RCW 9.94A.500(1).

The Sentencing Reform Act of 1981 expressly requires the State to not consider some felony convictions in an offender score under some circumstances. The "Offender score" statute provides:

> [C]lass C prior felony convictions other than sex offenses *shall not be included* in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the

> offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c) (emphasis added). See e.g., State v. Schwartz, 194 Wn.2d 432, 439, 450 P.3d 141 (2019) ("[O]ffenses which 'shall not be included in the offender score' . . . are said to have 'washed out.' ") (quoting State v. Keller, 143 Wn.2d 267, 284, 19 P.3d 1030 (2001)); State v. Gauthier, 189 Wn. App. 30, 40, 354 P.3d 900 (2015) (referring to RCW 9.9A.525(2)(c) as a "washout" provision). Misdemeanor convictions do not interrupt the wash-out period. In re Nichols, 120 Wn. App. 425, 433, 85 P.3d 955, 959 (2004). Neither does time spent in jail pursuant to violation of probation stemming from misdemeanors. State v. Ervin, 169 Wn. 2d 815, 826, 239 P.3d 354, 359 (2010).

At the sentencing hearing, the State argued, and the trial judge found, Nettleton's offender score to be 12 for the attempt to elude conviction and 11 for the other convictions. The trial judge based the offender score calculation on Nettleton's "significant criminal history." That history included numerous class C felony convictions that were not sex offenses. The evidence before the trial judge indicated Nettleton's last felony conviction occurred in February 2009, nearly 10 years before Nettleton committed these offenses on January 16, 2019. Based on the record before us, under RCW 9.94A.525(2)(c), Nettleton's previous felony convictions should have "washed out" from consideration of his offender score.

The State argues Nettleton's affirmative acknowledgement of his criminal history and standard range during sentencing is sufficient to show the State met

its burden of proof and is evidence that Nettleton agreed to the offender score. We disagree.

Defendants do not affirmatively acknowledge their criminal history just by agreeing with or failing to object to the State's proposed criminal history or proposed sentencing range. State v. Mendoza, 165 Wn.2d 913, 928, 205 P.3d 113 (2009) (remanding for resentencing where the State failed to establish the defendant's criminal history by a preponderance of evidence), disapproved of by State v. Jones, 182 Wn.2d 1, 338 P.3d 278 (2014)[11]; State v. Allen, 150 Wn. App. 300, 315-16, 207 P.3d 483 (2009) (determining that defense counsel's reference to defendant's criminal history and sentencing range did not affirmatively acknowledge his criminal history and the State did not provide sufficient evidence to establish the accuracy of that history). What suffices as affirmative acknowledgment is when the defendant affirmatively acknowledges the *facts and information* introduced for the purposes of sentencing. Mendoza, 165 Wn.2d at 928.

Defense counsel's acknowledgment of the standard range did not equate to Nettleton affirmatively acknowledging the facts and information supporting the offender score. Thus, the State failed to prove the criminal history by a preponderance of the evidence to support its proposed offender score that was adopted by the trial judge. Accordingly, the trial judge miscalculated Nettleton's

[11] Our Supreme Court disapproved of Mendoza only to the extent it could be read as affirming the "no second chance" rule. Jones, 182 Wn.2d at 7 (noting that Mendoza was argued just months after the 2008 amendments addressing remand for resentencing became effective and that provision was not addressed in Mendoza).

offender score. We affirm Nettleton's convictions but reverse in part and remand for resentencing.

Coburn, J.

WE CONCUR:

Chun, J.

Andrus, A.C.J.