

63992-7

63992-7

NO. 63992-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WILLIE WHITFIELD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. A criminal defendant does not have the right to cross-examine State's witnesses with prior acts that are not relevant to truthfulness. Here, the trial court excluded evidence that was not probative of the detective's truthfulness. Did the trial court properly exercise its discretion?

2. There is no authority for giving a limiting instruction in regard to a stipulation to a prior felony conviction that is admitted because it is an element of the crime. Has the defendant failed to establish that counsel was ineffective in failing to request a limiting instruction, which would not have affected the outcome of the trial?

3. A claim of prosecutorial misconduct in argument is waived if no objection was made below unless the misconduct was flagrant and ill-intentioned. It is not flagrant or ill-intentioned misconduct to tell the jury that defense counsel's job is to look for doubt because doing so is not disparaging and does not misstate the burden of proof. It is also not flagrant or ill-intentioned misconduct to tell the jury to seek the truth because doing so does not misstate the burden of proof or the jury's role. Should the defendant's claim of misconduct be deemed waived?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

The defendant, Willie Whitfield, was charged by amended information with two counts of delivery of cocaine, one count of possession of cocaine with intent to deliver, and two counts of unlawful possession of a firearm in the first degree. CP 12-14. A jury found him guilty of all five crimes. CP 158-62. The court sentenced him to 110 months of total confinement. CP 98.

2. FACTS OF THE CRIMES.

In September of 2008, Dorothy Aguilar informed Detective Keith Martin of the King County Sheriff's Office that a person named Willie Whitfield, who lived in apartment three at the Snider Apartments, was selling crack cocaine. 2RP 27-28; 3RP 104-07; 6RP 42, 60.¹ Aguilar was a former heroin and crack cocaine user that had been working as a confidential informant for the King County Sheriff's Office since 2003.² 2RP 25; 6RP 40-42.

¹ The verbatim report of proceedings will be referenced in the same manner as in Appellant's Opening Brief, which is as follows: 1RP - 4/20/09; 2RP - 4/21/09; 3RP - 4/22/09; 4RP - 4/23/09; 5RP - 4/24/09; 6RP - 4/30/09; 7RP - 5/4/09; 8RP - 7/23/09.

² The King County Sheriff's Office paid Dorothy Aguilar \$500 for her assistance in this case. 3RP 140, 144. Over the course of her six years working with the sheriff's office, she had been paid \$3664. 3RP 98.

On October 26, 2008, Aguilar called Whitfield from a pay phone, at Detective Martin's request, and asked for a "bill," which meant that she wanted to purchase \$100 worth of crack cocaine. 2RP 28; 6RP 43-45. Detective Martin searched Aguilar to ensure that she had no narcotics and drove her to a grocery store parking lot. 2RP 26-29. Soon thereafter, Whitfield arrived driving a red and white sport utility vehicle. 2RP 29-32; 6RP 45-46. There was no one else in Whitfield's vehicle. 2RP 32; 6RP 45. Aguilar entered Whitfield's vehicle and gave him \$100 that Detective Martin had provided her. 6RP 46. Whitfield took crack cocaine from his pants and gave it to Aguilar. 6RP 46. Aguilar walked back to Detective Martin's car and gave the cocaine to him. 2RP 34; 6RP 46. Shortly after the transaction, Sergeant Babauta, who was conducting surveillance at the Snider Apartments, saw Whitfield return to the apartment complex driving a red and white sport utility vehicle and enter apartment three. 4RP 52. Laboratory tests confirmed that the substance that Whitfield sold to Aguilar was cocaine. 3RP 25; 4RP 149.

On November 9, 2008, Aguilar again called Whitfield from a pay phone at Detective Martin's request, asked for \$100 worth of cocaine, and was searched. 2RP 37; 6RP 47-48. Whitfield

arrived driving a green car. 2RP 29; 6RP 48. He was alone in the car. 2RP 40. Aguilar entered Whitfield's car, gave him \$100 that Detective Martin had provided her and received cocaine from Whitfield. 6RP 49-50. Aguilar gave the cocaine to Detective Martin who was waiting in a car nearby. 2RP 41; 6RP 49. Sergeant Babauta, who was again conducting surveillance at the Snider Apartments, saw Whitfield return to the apartment complex driving the green car and enter apartment three. 4RP 53. Laboratory tests confirmed that the substance that Whitfield sold to Aguilar was cocaine. 3RP 25; 6RP 103.

On November 16, 2008, Detective Martin and several other detectives with the King County Sheriff's Office executed a search warrant they had obtained for Whitfield's apartment. 3RP 16-19. When the detectives arrived, they waited for Whitfield to return home. 3RP 19-20. After less than an hour, Whitfield arrived at the apartment complex driving the red and white sport utility vehicle that he was driving on October 26. 3RP 20. The detectives arrested Whitfield and he gave them the key to the apartment. 3RP 21. Inside the apartment, the detectives found a loaded, operational shotgun underneath the bed, and a loaded, operational pistol in a locked safe in the bedroom. 3RP 21-28, 30-33. Inside

the safe, the detectives found documents with Whitfield's name and address on them and Ziplock bags. 3RP 30, 75. In a dresser drawer, the detectives found a plate containing crack cocaine and a razor blade, along with four digital scales, shotgun shells, handgun ammunition, more Ziploc bags, Whitfield's drivers license and the rental agreement for the apartment. 3RP 163; 4RP 37-41. The apartment was equipped with a closed circuit television so that activities in the living room could be monitored from the bedroom. 4RP 110. Laboratory tests performed on the substance from the dresser drawer confirmed that the substance was cocaine. 3RP 71; 6RP 107.

The property manager for the Snider Apartments testified that Willie Whitfield was the sole legal tenant of apartment three in October and November of 2008. 4RP 76-77, 82. Aguilar testified that she was familiar with Whitfield's brother, Curtis, and that Curtis was not involved in the two cocaine transactions. 6RP 51. Curtis Whitfield was incarcerated from June to November 2008. 3RP 150.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING EVIDENCE OFFERED TO IMPEACH DETECTIVE MARTIN THAT WAS NOT PROBATIVE OF TRUTHFULNESS.

Whitfield contends that the trial court abused its discretion in not allowing the defense to impeach Detective Martin with information obtained from an internal investigation file. This claim should be rejected. The information was not probative of Detective Martin's truthfulness. Even if it had some minimal probative value, the court did not abuse its discretion in excluding it because Detective Martin was not the sole witness and his credibility was not central to the defense theory.

The defense presented the court with an internal investigation report from 2000 that stated that Detective Martin was disciplined for conduct unbecoming an officer for omitting facts when he reported that his car had been stolen and his residence burglarized. Pretrial Ex. 1. He failed to disclose in the initial report that he knew who took his car. Pretrial Ex. 1. The evidence obtained in the investigation indicated that the woman took the vehicle without Detective Martin's knowledge or permission, and that friends of hers had burglarized Detective Martin's home and

stolen police equipment. Pretrial Ex. 1. The defense sought to impeach Detective Martin with this incident. The trial court initially ruled that the evidence would be excluded because it was "not probative of much of anything in this case." 2RP 8. Upon further consideration and review of the report, the court explained that the incident did not involve a false statement by the officer and thus was not relevant to the detective's credibility. 3RP 8.

A trial court's ruling on the scope of cross-examination is reviewed for abuse of discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). The trial court abuses its discretion if its ruling is manifestly unreasonable or based on untenable grounds. Id. This standard of review applies even when limits are placed on a criminal defendant's right to cross-examine State's witnesses. Id. The right to cross-examine the State's witnesses is not absolute. Id. at 620. The right to cross-examine is limited by general considerations of relevance. Id. at 621. However, the more essential a witness is to the prosecution's case, the more latitude the defense should have to explore motive, bias, and credibility. Id. at 619.

Impeachment with specific instances of misconduct is governed by ER 608(b). That rule provides that specific instances

of conduct may, in the discretion of the court, be inquired into on cross-examination if probative of truthfulness or untruthfulness. ER 608(b). Whitfield argues that the trial court should have allowed him to impeach Detective Martin with evidence of the 2000 disciplinary action under this rule. The trial court properly exercised its discretion in concluding that the evidence was not probative of Detective Martin's truthfulness.

A careful review of the internal investigations report reveals that Detective Martin did not make any false statements. The situation at the time was very confused, and the focus of the initial report was concern over the theft of police equipment from Detective Martin's home. To the extent that Detective Martin omitted the fact that he knew who had taken his vehicle in the initial report, he supplied that detail to other deputies on his own initiative shortly after the initial report. They used the information to quickly locate that person, who was then able to provide the names of the people who had burglarized the home and taken the police equipment. The trial court's conclusion that this incident had no probative value as to Detective Martin's truthfulness was not manifestly unreasonable.

The defense appears to argue that the information should have been admitted as impeachment simply because Detective Martin was on a list compiled by the prosecutor's office of police officers who have been disciplined. It is clear from the materials provided below that officers are placed on the list for a variety of reasons, including disciplinary actions that are not the result of any finding of dishonesty. CP 33. The fact that an officer is on the list compiled by the prosecutor's office does not obviate the requirement of ER 608(b) that prior acts be probative of truthfulness, and does not deprive the trial court of its discretion to determine whether evidence meets the requirements of the rule.

This Court's decision in State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980), is distinguishable from the present case. In York, the defendant was convicted of delivery of marijuana based on the testimony of a paid undercover investigator. Id. at 34. The investigator was the only witness to the transactions. Id. at 35. The defense argued that the investigator had a motive to fabricate the sales because he was unemployed and was paid for each successful drug buy. Id. Although the State elicited testimony about the investigator's military background and work experience, the court precluded the defense from cross-examining him about

the fact that he was fired from a sheriff's department in Montana for irregularities in his paperwork and unsuitability for the job. Id. This Court held that the trial court abused its discretion because the investigator was the sole witness to the crime and the impeachment went to the essence of the defense, which was that the investigator was not credible. Id. at 35-36. In State v. Martinez, 38 Wn. App. 421, 424, 685 P.2d 650 (1984), this Court distinguished York, and held that the trial court did not abuse its discretion in excluding impeachment evidence of a State's witness where that witness was not the sole prosecution witness and other impeachment was available.

Although Detective Martin was an important witness, there were many other witnesses in this case and the case did not rest solely on Detective Martin's credibility. The defense theory focused on Aguilar's credibility and her ability to identify Whitfield. The court allowed the defense to impeach Aguilar with her prior convictions and her drug use, and to explore her financial relationship with the Sheriff's Office. 1RP 39; 6RP 39, 57, 63-64. This is not a case where the defense was precluded from impeaching the State's sole witness with the only impeachment evidence available. Thus, York is distinguishable. The trial court properly exercised its discretion in

excluding the facts of the disciplinary action against Detective Martin.

2. WHITFIELD HAS FAILED TO ESTABLISH THAT A LIMITING INSTRUCTION WAS WARRANTED OR THAT COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE.

Whitfield objects, for the first time on appeal, to the absence of a limiting instruction to the jury in regard to the stipulation that Whitfield had previously been convicted of a serious felony offense. This claim was waived because no limiting instruction was requested. Whitfield's attempt to revive this claim as a claim of ineffective assistance of counsel should be rejected. There is no authority that a limiting instruction would be proper in this case, and there is no showing that counsel was deficient or that there is a reasonable probability that the lack of an instruction affected the outcome of the trial.

In order to prove the crime of unlawful possession of a firearm in the first degree, the State must prove that the defendant was previously convicted of a serious offense. RCW 9.41.040(1)(a). "Serious offense" is statutorily defined in RCW 9.41.010 and includes any felony violation of 69.50 RCW with a

statutory maximum of at least ten years. RCW 9.41.010(16).

Whitfield had a prior conviction for conspiracy to deliver cocaine, a serious offense. CP 13-14; 1RP 30-31. The parties entered into a stipulation that Whitfield had "a prior conviction for a serious felony." CP 37-40. The stipulation was read to the jury. 4RP 38.

Whitfield first contends that the trial court erred in failing to give a limiting instruction to the jury regarding the prior serious felony conviction. ER 105 provides that when evidence is admissible for one purpose but not admissible for another purpose, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury to do so.³ A party that fails to request a limiting instruction waives any argument on appeal that the court should have given a limiting instruction. State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007). Whitfield's counsel did not request a limiting instruction, and thus he has waived this claim.

In the alternative, Whitfield argues that counsel was ineffective in not requesting a limiting instruction. This argument should be rejected for three reasons. First, there is no authority for

³ WPIC 4.64.01 provides a generalized version, which reads: "Before this evidence is allowed, the court advises you that you may consider [the evidence] [the answer(s)] only for the purpose of _____. You must not consider [the evidence] [the answer(s)] for any other purpose."

giving a limiting instruction as to evidence of a prior conviction that is admitted because it is an element of the crime. Second, the stipulation to a "prior serious felony" was sufficiently sanitized so as to not be prejudicial, and thus a limiting instruction was unnecessary. Third, Whitfield cannot establish that a limiting instruction would have affected the outcome of the trial.

Limiting instructions are appropriate when the court admits prior acts evidence for a limited purpose pursuant to ER 404(b) or for purposes of impeachment pursuant to ER 609. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995); State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988), rehearing 113 Wn.2d 520, 782 P.2d 1013 (1989). In this case, the prior conviction was not admitted for a limited purpose pursuant to ER 404(b) or pursuant to ER 609. It was admitted to establish an element of two of the crimes. Whitfield has cited to no case that holds that it would be appropriate for the court to limit the jury's consideration of that fact. Notably, Whitfield has not proposed any language for such a limiting instruction.

Whitfield cites State v. Ortega, 134 Wn. App. 617, 142 P.3d 175 (2006), for the proposition that a limiting instruction is required for stipulated prior conviction evidence. However, that is not the

holding of Ortega. Ortega was convicted of three counts of felony violation of a protection order. Id. at 620. In cross-examination, Ortega was impeached with a prior assault conviction because he had claimed he was falsely arrested in that incident. Id. The trial court gave a limiting instruction. Id. The parties stipulated that Ortega had two prior convictions for violating protection orders, which was an element of the crime. Id. at 621. It is clear from the court's decision that the limiting instruction the court gave pertained to the assault conviction, which was admitted as impeachment. Id. Ortega argued on appeal that the evidence was insufficient to convict because the limiting instruction informed the jury it could only consider evidence of all the prior convictions for credibility and not as evidence of guilt. Id. at 620-22. This court rejected Ortega's argument, and advised that "[I]n a case such as this where a prior conviction is an element of the current charge and a *different* prior conviction is also admitted as bearing on credibility or for some other purpose, it would be preferable for the court to tailor the limiting instruction so that there can be no mistake which prior conviction it refers to." Id. at 622-23. (emphasis added). In other words, this Court was advising that the trial court should make it clear that the limiting instruction only applies to the impeachment

evidence, and not to convictions admitted to establish an element of the crime. Ortega does not hold that a limiting instruction is proper for evidence of a prior conviction that is admitted because it is an element of the crime.

Even if a limiting instruction would have been appropriate, Whitfield cannot establish that counsel was ineffective in failing to request one. A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id.

The defendant has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong).

Id.; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Courts must engage in a strong presumption of competence. Id. at 689. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Id.

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must affirmatively show prejudice. Id. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. If the standard were so low, virtually any act or omission would meet the test. Id. The defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Defense counsel's decision not to request a limiting instruction was neither deficient nor prejudicial. The stipulation that

was read to the jury was very general. The jury was only presented with the fact that Whitfield had a prior conviction for a "serious felony," a fact that was necessary to establish the firearm offenses. The jury was not informed that the prior felony was a drug offense. Because of the general nature of the stipulation, it was reasonable for counsel to conclude that a limiting instruction would have little effect and thus was not necessary for a fair determination of guilt.

Whitfield cannot show a reasonable probability that a limiting instruction would have affected the outcome of the trial. Detective Martin, Sergeant Babauta, Detective Morrell, Detective Tighe, Detective Mulligan and Dorothy Aguilar all identified Whitfield as the person they observed in the course of the narcotics investigations on October 26 and November 9.⁴ 2RP 31, 39; 4RP 52, 53, 90-91, 102, 103, 164; 6RP 45-49. The evidence was overwhelming that those transactions took place and that Whitfield was the seller. Similarly, the evidence was undisputed that Whitfield lived in the apartment where the other cocaine was found along with

⁴ Not all the detectives were involved in the operation on both days. Detective Martin and Sergeant Babauta saw Whitfield during both operations. 2RP 32, 39; 4RP 51, 53. Detective Mulligan and Detective Tighe only participated in the October 26th operation, but saw Whitfield on that date. 4RP 102, 162-64. Detective Morrell only saw Whitfield on November 9. 4RP 90-91.

compelling evidence of narcotics sales. No convincing evidence was presented that the drugs might have belonged to someone else. There is no reasonable probability that the lack of a limiting instruction affected the outcome of the trial. Even assuming that a limiting instruction should have been given, Whitfield has failed to establish that counsel was prejudicially deficient in failing to request one.

3. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

Whitfield argues that the prosecutor committed misconduct in closing argument. Although defense counsel objected to portions of the prosecutor's closing argument,⁵ counsel did not object to the statements that Whitfield alleges were improper. The prosecutor's argument did not misstate the burden of proof or the jury's role and was not misconduct.

This Court reviews a prosecutor's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In

⁵ See 7RP 60, 87, 88.

determining whether prosecutorial misconduct occurred, the court first evaluates whether the prosecutor's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the defense does not make a timely objection and request a curative instruction, the misconduct is waived unless the comment was so flagrant or ill-intentioned that no instruction could have cured the prejudice. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

Whitfield argues that the prosecutor committed misconduct by arguing that defense counsel's job was to search for doubt. In rebuttal argument, after defense counsel had made several arguments as to why the jurors should have a reasonable doubt, the prosecutor stated, "Ms. Stephens, I don't begrudge her what she's doing. She's an excellent attorney. Her job is to search for doubt. That's her job." This statement was not disparaging or incorrect. Defense counsel's job is to hold the State to its burden of proof, which is proof beyond a reasonable doubt. In doing her job, defense counsel focused her argument on areas where the jury might conclude there was a reasonable doubt. The prosecutor's statement that defense counsel's job was to search for doubt was not misleading or disparaging. Moreover, defense counsel did not

object. The prosecutor's statement was not flagrant and ill-intentioned misconduct causing prejudice that could not have been alleviated with a curative instruction. Thus, Whitfield's claim of misconduct was waived by the failure to object.

Whitfield also claims that the prosecutor committed misconduct by asking the jury to search for the truth. The prosecutor stated:

Your job, on the other hand, is to seek the truth. And the truth is that Mr. Whitfield dealt drugs to Dorothy Thomas on two occasions, he had cocaine with the intent to distribute it on November 16th, and he possessed two firearms and he's not allowed to do that under the law. It's as simple as that.

7RP 89. Whitfield's claim that it is misconduct to tell the jury that it should seek the truth is surprising. The truth plays a central role in the trial process. All criminal juries are instructed both at the beginning and the end of trial that, "It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during the trial." WPIC 1.01, 1.02. They are also instructed that, "You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference." WPIC 1.02. The jury's job is to decide the facts by deciding what evidence is true and what evidence is not. It

is not a misstatement of the law to say that the jury's duty in deciding the facts is to seek the truth.

Whitfield's claim of misconduct is based on a misinterpretation of two recent cases: State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), and State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009). In Warren, the prosecutor repeatedly misstated the burden of proof in closing argument over the defense objections by telling the jury that the defendant should not receive "the benefit of the doubt." Id. at 23-24. Nonetheless, the supreme court affirmed the defendant's convictions, finding misconduct, but also finding that the error was cured by the court's instruction. Id. at 28. Significantly, the court did not find that the prosecutor's statement that "this entire trial has been a search for the truth" was improper. Id. at 25, 27-28. In contrast to Warren, the prosecutor's argument in the present case did not misstate the burden of proof.

In Anderson, the prosecutor argued that "by your verdict you will declare the truth about what happened." 153 Wn. App. at 424. Division Two held that this statement is improper because the jury's job was not to solve the case or declare what happened, but to determine if the allegations were proved beyond a reasonable doubt. Id. at 429. It appears that the court was troubled by what it

viewed as the prosecutor's mischaracterization of the purpose of the verdict. In the present case, in contrast, the prosecutor did not mischaracterize the purpose of the verdict. The prosecutor simply stated that the jury should "seek the truth." And indeed, the jury could not make a proper determination of whether the allegations were proved beyond a reasonable doubt without making a determination as to whether the evidence presented to them was true. The argument made in the present case is not like the arguments that were disapproved in Warren or Anderson.

Whitfield's reliance on State v. Coleman, 74 Wn. App. 835, 876 P.2d 458 (1994), is similarly misplaced. In that case, this Court explained that it is misconduct to exhort the jury that it must "do its job" by convicting the defendant. Id. at 839. As this Court explained, "telling the jury it would violate its oath if it disagreed with the State's theory of the evidence" is improper. Id. No such argument was made in this case. The prosecutor at no time suggested that the jury would be violating its oath or shirking its duty by acquitting Whitfield.

The prosecutor's argument that the jury should seek the truth was not misconduct. Even if misconduct, it was not flagrant and ill-intentioned misconduct causing prejudice that no curative instruction could have alleviated. Whitfield's claim of misconduct was waived when he did not object to the argument at trial.

Whitfield alternatively argues that counsel was ineffective in failing to object to the argument. Because the argument was not misconduct, Whitfield cannot establish ineffective assistance of counsel.

4. WHITFIELD HAS FAILED TO ESTABLISH CUMULATIVE ERROR.

The cumulative error doctrine applies when several errors occurred, denying the defendant a fair trial, even though no single error warrants reversal. State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). As argued above, the trial court committed no errors and defense counsel did not render ineffective assistance. Thus, Whitfield has failed to show cumulative error.

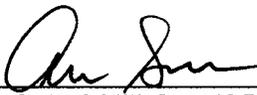
D. CONCLUSION.

Whitfield's convictions should be affirmed.

DATED this 18th day of May, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. WHITFIELD, Cause No. 63992-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

CBrame

Name

Done in Seattle, Washington

5/18/10

Date