

64725-3

64725-3

NO. 64725-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FERNANDO CHIRINOS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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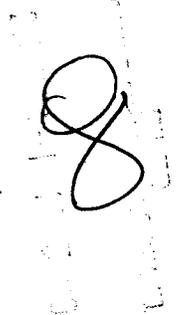
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A. ISSUES

1. CrR 6.5 and Washington case law requires the trial court to instruct the jury to begin deliberations anew when a juror is replaced by an alternate. The Court instructed the alternate not to discuss the case before temporarily excusing her, held a hearing on the record to instruct the jurors to begin deliberations anew, and the defense did not request the alternate be questioned. Did the trial court properly ensure an impartial and unanimous jury?

2. Attempted robbery in the second degree requires a substantial step toward taking property of another by force. The evidence showed Chirinos leaped through the open window of a car, commanded the driver to go, and grabbed the steering wheel and gas pedal. Was there sufficient evidence, viewed in a light most favorable to the State, to convict Chirinos of attempted robbery in the second degree?

3. The trial court had the discretion to admit evidence of Holt's stolen car. Chirinos conceded the stolen car was part of the res gestae and did not object under ER 404(b) or ER 403. Chirinos cannot show any prejudice from the evidence. Did the trial court err by admitting evidence of Holt's stolen car?

4. Alleged misconduct by the prosecutor is waived if there is no objection. Chirinos did not object to the prosecutor's cross examination, and Chirinos has failed to show a substantial likelihood the questions affected the verdict. Did the prosecution commit misconduct that prejudiced Chirinos requiring reversal?

5. Jurors are presumed to follow the court's instructions. Chirinos objected to the prosecutor's closing argument, which the trial court sustained and cured by instructing the jury to disregard. Did the prosecution commit misconduct that prejudiced Chirinos requiring reversal?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Fernando Chirinos, was charged by Information with Burglary in the First Degree, Robbery in the First Degree, and Forgery. CP 1-2. The State alleged that on October 31, 2008, Chirinos forced James Holt to drive to the bank and withdraw one thousand one hundred dollars, and further alleged that Chirinos stole and forged checks from Holt's account. 10/27/09 RP 88-90, 124-25. Chirinos was arrested on March 31, 2009. 10/22/09 RP 18. While detained on these charges Chirinos

attempted to escape from custody during a medical visit to Harborview, and attempted to carjack Alana Turner in the process. 10/26/09 RP 14-16. The State amended the Information to include additional counts of Escape in the Second Degree and Attempted Robbery in the Second Degree. CP 7-9. At trial, the State added an additional count of Kidnapping in the First Degree for the October 31st incident involving Holt, and added a deadly weapon enhancement to the burglary and kidnapping charges. CP 17-20.

The trial commenced on October 15, 2009. 10/15/09 RP 1.

The jury returned a verdict on the charges as follows:

- Count I - Burglary in the First Degree (Victim Holt)
Guilty of lesser crime of Residential Burglary
Deadly Weapon Special Verdict – Not used
- Count II - Robbery in the First Degree (Victim Holt)
Guilty of the lesser crime of Extortion in the
First Degree
- Count III - Forgery (Victim Holt)
Guilty
- Count IV - Kidnapping in the First Degree (Victim Holt)
Guilty
Deadly Weapon Special Verdict – Not used
- Count V - Escape in the Second Degree
Guilty
- Count VI - Attempted Robbery in the Second Degree
(Victim Turner)
Guilty

Chirinos received a standard range sentence. CP 124-34.

2. SUBSTANTIVE FACTS

James Holt was a vulnerable crime victim. He worked at a bank and maintained an apartment in Bellevue, but his life was teetering on the brink. 10/27/09 RP 10-11. He was a gay man who found sexual partners on the internet, and he had become addicted to methamphetamines. 10/27/09 RP 20, 23. He met Ryan "the red haired man" on the internet and invited him over. 10/27/09 RP 24-25. They had a relationship that included sex, and Ryan would supply Holt with methamphetamines. 10/27/09 RP 25. A few days before the robbery, Holt and Ryan spent the night together and used drugs. 10/27/09 RP 25. In the morning Holt had to go to work, and Ryan asked if he could stay to take a shower. 10/27/09 RP 27. Holt was reluctant to leave Ryan in his apartment unsupervised, but agreed against his better judgment. 10/27/09 RP 27. This mistake led to Holt crossing paths with Chirinos.

Apparently, Ryan stayed in Holt's apartment that day and invited Chirinos over, representing that he lived there. 10/27/09 RP 37-38. Holt was unaware that Ryan had invited Chirinos over or that Chirinos believed Ryan had stolen his iPhone. 10/27/09 RP 37-38.

That night, Chirinos knocked on Holt's door. 10/27/09 RP 35. Chirinos told Holt that Holt's roommate, "the red haired man," had stolen his iPhone and that it had valuable information stored on it. 10/27/09 RP 36. This came as a surprise to Holt, because he did not have a roommate and had never met Chirinos before. 10/27/09 RP 36. Chirinos appeared menacing to Holt and implied that he was associated with the mafia. 10/27/09 RP 36-37. He told Holt that he would return in the morning and that it was Holt's responsibility to get his phone back. 10/27/09 RP 39.

Holt was afraid of Chirinos and frantically tried to contact Ryan the "red haired man." 10/27/09 RP 42. He was not successful, and he was afraid that Chirinos would return. 10/27/09 RP 39.

On October 31, 2008, Holt came home from work to find that Chirinos had broken into his apartment and was sitting in his living room waiting for him. 10/27/09 RP 48. According to Holt, Chirinos had a chain in one hand and a knife in the other. 10/27/09 RP 48. He had dimmed the lights and spoke menacingly to Holt; he demanded four thousand dollars for the missing cell phone. 10/27/09 RP 62. He told Holt that people were watching the apartment. 10/27/09 RP 58. Holt explained that he did not have

that much money, but his paycheck would be direct-deposited in the morning and he could get one thousand one hundred dollars. 10/27/09 RP 64. Chirinos told Holt that he was "in for a long night." 10/27/09 RP 65.

Chirinos stayed the night at Holt's apartment, and they went to the bank the following morning. 10/27/09 RP 88. Holt withdrew one thousand and one hundred dollars. 10/27/09 RP 96. Chirinos followed Holt into the bank and could be seen on the security video lurking behind Holt as Holt went to the teller. 10/27/09 RP 92-93. Holt explained that he did not ask the teller for help or try to call the police because Chirinos had implied there were associates of his watching them. 10/27/09 RP 91.

Holt drove back to his apartment with Chirinos. 10/27/09 RP 96-97. After Chirinos left Holt remained in his apartment for two days because he was afraid to go outside. 10/27/09 RP 101. When Holt finally went outside he found that his car was missing. 10/27/09 RP 109. The last time Holt had seen his car was on the trip home from the bank with Chirinos. Holt called the police and reported his car stolen and told the police about the ordeal with Chirinos. 10/27/09 RP 112-13. Several days later, Holt noticed

that his spare keys to the car were missing, as were several checks. 10/27/09 RP 109.

Holt's car was recovered in Auburn on November 23, 2008. 10/26/09 RP 90. The contents of the glove compartment were scattered in the back seat and the ignition had been punched. 10/26/09 RP 92, 98.

In November, Holt learned that one of the missing checks from his apartment had been cashed at "Salon Services." 10/27/09 RP 126-27. He reported this to the police. 10/27/09 RP 202. Bellevue Police Detective Bob Thompson spoke to the store clerk who had accepted the check. 10/27/09 RP 78. The clerk knew Chirinos and identified him as the person that chased the check from Holt's account. 10/27/09 RP 73-74.

Chirinos was arrested in March, 2009 by the Seattle Police. 10/27/09 RP 17. The Seattle detectives were investigating an unrelated crime. See CP 157-219. They called Thompson who responded to interview Chirinos about the Holt incident. Id. Chirinos admitted that he had told Holt that Holt had to compensate him for his lost iPhone, and that he had implied that he was associated with the mafia. CP 196. Chirinos acknowledged

staying at Holt's apartment all night, and going to the bank the following morning for Holt to withdraw cash to give to him. CP 199.

Chirinos was booked into the King County Jail. He had a pre-existing injury that required treatment at Harborview Hospital. 10/21/09 RP 114. He was transported by King County Corrections staff to his appointment on May 18, 2009. Id. After the medical appointment, Chirinos was led back to the van to be transported back to the jail. 10/21/09 RP 120. When the officer was looking away, Chirinos dropped his crutches and ran. 10/21/09 RP 121. Chirinos ran toward James Street where he leaped into the open window of Alana Turner's car. 10/26/09 RP 14. Turner had never met Chirinos before. Chirinos immediately grabbed the steering wheel, tried to press the accelerator with his hands, and yelled "Go Now." 10/26/09 RP 14-16. Turner began screaming and pulled the keys out of the ignition to prevent Chirinos from gaining control of the car. 10/26/09 RP 22.

Several bystanders rushed to Turner's aid and pulled Chirinos out of the car by his feet. 10/22/09 RP 56. Soon after, the corrections officers responded to the scene and took Chirinos back into custody. 10/22/09 RP 61.

C. ARGUMENT

1. THE TRIAL COURT ENSURED AN IMPARTIAL JURY BY PROPERLY INSTRUCTING THE ALTERNATE JUROR NOT TO DISCUSS THE CASE.

Chirinos argues that the court had an affirmative duty to voir dire the alternate juror about her impartiality, and that the failure to do so requires reversal. There is no authority requiring voir dire, and neither the State nor defense requested one, or objected to the court's instructions. Moreover, a presumption of juror misconduct requiring reversal has never been endorsed by any Washington court.

a. Relevant Facts.

The jury began deliberations on October 29, 2009. 10/29/09 RP 128. Prior to deliberations, the court excused the alternate juror (number six), and instructed her not to discuss the case because it was possible that she would need to return to deliberate. 10/29/09 RP 126, 128. The court's instruction in full was:

So what I am going to do is excuse you from deliberations at this time. But there are a couple of things I want you to do for me. In the unlikely event that for some reason we should lose one of the jurors in the panel before they are able to complete their job here, I want to have the possibility of bringing you

back in and recommencing deliberations. So I would appreciate you continuing to abide by that admonition not to discuss the case with anyone until you find out the jury has reached a verdict. I know you are going away and I am not even sure when you were coming back or where you are going, and maybe you do not know either, but I would like to keep you sort of in the batter's box in case I need you.

10/29/09 RP 126. The court reiterated its admonition before the juror left and told her "Juror number 6, . . . Just hang in there and don't talk about the case until we notify you that it has been concluded." 10/29/09 RP 128.

The jury deliberated for approximately one hour on Thursday, October 29th. 11/3/09 RP 67. On the following day there were no deliberations, because a juror was sick and the alternate was not available. Id. There were no deliberations on Monday, November 2nd because another juror was unavailable due to a sick child. Id. On November 3rd, the illnesses were resolved but the court needed to excuse another juror (number thirteen) due to work commitments. Id. The court substituted the dismissed juror with juror number six, the designated alternate. 11/3/09 RP 69-70. The court properly held a hearing on the record with the State and the defense present to instruct the jury to begin its deliberations anew.

11/3/09 RP 70-71. Neither the State nor the defense requested any additional voir dire or instruction. Id.

b. The Trial Court Properly Instructed The Alternate Juror.

CrR 6.5 sets forth the procedures for substituting an alternate juror during deliberations. The court rule requires only that the jury be instructed that deliberations start anew; it does not require additional voir dire of the alternate juror. Id.

The Courts have not required an alternate juror's impartiality be questioned before a substitution. In State v. Ashcraft, the Court of Appeals held that the complete failure to so instruct the jury to begin deliberations anew after substituting an alternate juror was reversible error. 71 Wn. App. 444, 859 P.2d 60 (1993). The Court also suggested that instructions under CrR 6.5 "*may include* brief voir dire to insure that an alternate juror who has been temporarily excused and recalled has remained ... impartial." Id. at 462 (emphasis added). The Court in Ashcraft specifically held that "the trial court's failure to reinstruct the reconstituted jury *on the record* that it must disregard the previous deliberations and begin deliberations anew was manifest constitutional error." Id. at 467

(emphasis added). The Court further held that “the trial court should have made a reasonable effort to contact the parties through their counsel to obtain their input before rendering its discretionary decision” of seating an alternate juror. Id. at 465. Both of these requirements were met by Judge Ramsdell in this case.

Chirinos' reliance on State v. Stanley, 120 Wn. App. 312, 85 P.3d 395 (2004), is similarly misplaced. In Stanley, the court explicitly said that, “[b]ecause we have reversed the conviction, we do not determine whether the trial court's seating of the alternate juror without determining on the record his continued impartiality was reversible error.” Id. at 318. The error alleged in Stanley was that an alternate was substituted without any record at all. There was no way for the Court of Appeals to determine if the jury was properly instructed to begin deliberations anew, or even if the defendant's counsel was present. The court did not hold that the trial court was required to voir dire an alternate juror before a substitution. Id.

Chirinos also cites to State v. Cruziak, 85 Wn.2d 146, 530 P.2d 288 (1975), to argue that it is “presumptively prejudicial to allow an unauthorized person to intrude into the jury room.” Brief of

Appellant at 8. But in Cruziak, the court allowed a 13th (alternate) juror to sit in on deliberations. There was no legal authority to allow a 13th juror in the jury room. In Chirinos' case, the alternate juror was authorized to participate in deliberations under CrR 6.5. Moreover, Cruziak was decided in 1975, long before Ashcraft or Stanley, yet those courts did not interpret Cruziak to create a presumption of prejudice from the failure to voir dire before using an alternate juror.

Failure to voir dire the alternate juror is not manifest constitutional error. In Ashcraft, the court held that the failure to instruct the jury on the record to begin deliberations anew was error of constitutional magnitude. Ashcraft, 71 Wn. App. at 467. However, this was because “[a]n appellate court must be able to determine *from the record* that jury unanimity has been preserved.” Id. at 465 (emphasis added). In the present case, the record establishes that impartiality was preserved because the court properly instructed the alternate juror not to discuss the case before she could be subject to outside influence. Jurors are presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982); State v. Kroll, 87 Wn.2d 829, 558 P.2d 173 (1976). The failure to voir dire the alternate juror was harmless in

light of the precautions taken by the court before she left, and waived since Chirinos did not request any further voir dire at the hearing to substitute the juror.

The trial court took appropriate steps to ensure that the alternate juror remained free from outside influence by instructing her not to discuss the case. There is nothing in the record to suggest the alternate juror failed to abide by this instruction. The court also properly instructed the jury to begin deliberations anew when the alternate juror was recalled. 11/3/09 RP 71. Therefore, the trial court took the appropriate steps to ensure a fair, impartial and unanimous jury.

2. CHIRINOS ATTEMPTED A CARJACKING TO AID HIS ESCAPE FROM CUSTODY, AND THE EVIDENCE WAS SUFFICIENT TO CONVICT HIM OF ATTEMPTED ROBBERY.

Chirinos asserts that there was insufficient evidence that he committed attempted robbery, and he argues that he merely asked for a ride in an unusual manner. Brief of Appellant at 19. To the contrary, the evidence at trial showed that Chirinos tried to seize control of Turner's car by force while attempting to escape from custody.

Courts should review a claim of insufficient evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Circumstantial evidence is as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The court should defer to the factfinder on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

This standard applies to the elements of attempted robbery in the second degree. Robbery in the second degree is defined as follows:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases *the degree of force is immaterial*. Such taking

constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190 (emphasis added). Since Chirinos was charged with attempted robbery in the second degree, he need only have taken "a substantial step" toward the commission of the crime.

RCW 9A.25.020.

Chirinos jumped through the window of Turner's car.

10/26/08 RP 14. He attempted to press the accelerator, grabbed the steering wheel, grabbed Turner's leg, and yelled at her to "Get going. Now." Id. at 14-15. Turner kept her hand on the steering wheel to prevent Chirinos from turning it, and put her foot on the brake to prevent the car from moving. Id. at 14-15. Turner's skirt was ripped during the struggle. Id. at 20. The struggle lasted two to three minutes. Id. at 16. Chirinos' efforts to rob Turner were stopped when bystanders pulled him from Turner's car by force.

10/22/08 RP 56. All of this occurred in the midst of his attempt to escape from custody. There was ample evidence that Chirinos intended to seize control of Turner's car, an attempted carjacking to facilitate his escape.

Chirinos counters with the absurd claim that he thought Turner was a friend and he was simply requesting a ride. Brief of Appellant at 15-16. The jury was entitled to, and obviously did, reject this story.

Chirinos nevertheless asserts that intent to temporarily use another's car is not a theft of a car as required by robbery. Brief of Appellant at 17. That is not correct. The intent to take another's property is a required element of robbery, but intent to temporarily deprive satisfies this element. RCW 9A.56.190 and 9A.56.200(1); State v. Komok, 113 Wn.2d 810, 816-17, 783 P.2d 1061 (1989). Chirinos' attempt to seize Turner's car by force, even temporarily, supports his conviction for attempted robbery.

Chirinos further argues the prosecutor misrepresented the law as requiring only that Chirinos "needs to have done something." Brief of Appellant at 18. However, this quotation is taken out of the context of the prosecutor's discussion of the jury instructions and the evidence of Chirinos' guilt.

Mainly, when she testified, she indicated the defendant said "Go, Go, Go" that he was making motions, and she believed he wanted to take her car, she was fearful that she would be harmed, this was charged as attempted Robbery in the second degree. It is obvious from the testimony of the two gentlemen that work for AMR and from the testimony of the

police people that for SPD, from the other officers, that he did not complete a robbery. He did not have success in taking her car or taking her car from the scene where he was attempting to escape. That is why it is charged as attempted as opposed to a complete act.

Now for something to qualify as an attempted crime the person needs to have taken a substantial step towards completing the crime. In this case, for the defendant to have made a substantial step towards completing the crime of robbery in the second degree, taking her car, he needs to have done something.

What did he do? Evidence clearly shows the defendant Superman'd [dove] into the car. Evidence clearly shows he put his hands toward the gas pedal. He said to her "Go, go, go". And she indicated to you that she had fear that she would be harmed. You heard testimony that her skirt was ripped in the process.

10/29/09 RP 85-86. The prosecutor's remarks that Chirinos had to have "done something" were made while telling the jury that Chirinos had taken a substantial step toward the commission of robbery in the second degree, and while outlining the substantial evidence proving Chirinos' efforts to seize control of Turner's car by force. There was ample evidence that Chirinos attempted to seize Turner's car by force, and the prosecutor's closing remarks properly summarized the evidence and the law.

3. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF HOLT'S STOLEN CAR, WITHOUT PROPER OBJECTION FROM CHIRINOS.

Chirinos argues that the trial court erred by admitting evidence that Holt's car had been stolen because it was improper evidence under ER 404(b) and unduly prejudicial. However, Chirinos did not object to the evidence at trial on that basis, and conceded the evidence could be admitted for res gestae, and the trial court did not abuse its discretion by admitting the evidence. There was no error and Chirinos has waived any objection.

a. Chirinos Waived Any Claim Of Error.

An appellate court will not review issues raised for the first time on appeal. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). While there is an exception for manifest error affecting a constitutional right (see State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)), evidentiary rulings under ER 404 are not of constitutional magnitude. State v. Jackson, 120 Wn.2d 689, 695 P.2d 76 (1984).

At trial, Chirinos conceded that Holt's belief that his car was stolen was admissible as part of the res gestae. 10/26/09 RP 79.

Chirinos' only objection was that fact had already been established, and the manner which the car was recovered was not relevant. Id. At no time did Chirinos object to testimony about the recovery of Holt's car under ER 404(b) or argue that it was unduly prejudicial. Id.

A party cannot object on one basis at trial, then claim a different error on appeal. For example, in State v. Fredrick, 45 Wn. App. 916, 922, 729 P.2d 56 (1986), the defendant objected to the admission of money seized in a drug case. The defense stated that the State was trying to prejudice the jury, but at no time did he object to admission of the money under ER 404(b) or any other specific rule of evidence. The Court held the defendant did not preserve a ER 404(b) objection at trial because a party may only assign error on the specific evidentiary objection made at trial. Id. at 922 (citing State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986); State v. Boast, 87 Wn.2d 447, 451-52, 553 P.2d 1322 (1976)).

Chirinos also argues on appeal that the probative value of the testimony was outweighed by its prejudicial effects under ER 403. In Guloy, the defendant claimed the trial court erred by not weighing the probative value of the gambling conspiracy evidence

against its prejudicial impact as required by ER 403. 104 Wn.2d at 412. The defendant in Guloy never made an objection on that basis at trial. The court has “steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” Id. at 421 (citing Bellevue Sch. Dist. 405 v. Lee, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)). In the present case, Chirinos conceded at trial that the res gestae provided a basis for the evidence; he complained only that it was cumulative, not that it was inadmissible under ER 403 or ER 404(b). Brief of Appellant at 23. Objecting to the testimony as cumulative is insufficient to preserve an objection to the evidence under ER 404(b) or ER 403.

b. The Trial Court Properly Admitted Testimony About The Recovery Of Holt's Car.

The trial court properly admitted testimony that Holt's car was stolen during the same time he encountered Chirinos. A trial court's decision to admit evidence is reviewed under the abuse of discretion standard. State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001). Holt reported his car stolen contemporaneously with the report of the incident with Chirinos. 10/26/08 RP 62. The

evidence supports Holt's contention that the car was stolen; the car was recovered over one month later, in disarray, and in an area where stolen cars are dumped. See 10/26/08 RP 87, 90, 92. Furthermore, at the time the car was recovered, police had not identified Chirinos as a suspect. The State was entitled to demonstrate the efforts the police made to investigate the case to identify a suspect by processing the car for prints. 10/26/08 RP 91-92. The defense conceded the stolen car was part of the res gestae. 10/26/08 RP 79. The evidence was not offered or used to argue propensity under ER 404(b). The trial court properly admitted evidence of Holt's stolen car.

c. Any Error Was Harmless.

Any error in the admission of evidence about Holt's stolen car was harmless. Erroneous admission of evidence under ER 404(b) is reviewed under the non-constitutional harmless error standard. State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). Reversal is not required unless there is a reasonable probability that the outcome of the trial was materially affected by the error. Id.

Chirinos argues that the evidence that Holt's car was stolen may have been misused by the jury to infer that Chirinos intended to take Turner's car during the escape. However, simply stealing a car has little resemblance to attempting a carjacking during an escape from custody. The evidence was admitted for the proper purposes and was not used to argue that Chirinos had a propensity to steal cars.

**d. The Prosecutor Did Not Commit
Misconduct By Introducing Evidence
About Holt's Stolen Car.**

Chirinos argues that the prosecutor "slipped in" evidence that Chirinos had stolen Holt's car after disavowing any intent to use 404(b) evidence. Brief of Appellant at 24. This assertion is not supported by the record. It is clear from the record that the State intended to address the stolen car for legitimate purposes. The prosecutor referenced the stolen car in the State's Trial Memo. CP 140. During the opening statements, the prosecutor referenced Holt's stolen car, and the defense did not object. 10/21/08 RP 55. The State offered Chirinos' taped statement to Detective Thompson at trial, and provided transcripts for the defense and the court that included references to Holt's stolen car. The defense, prosecutor,

and the court had a lengthy discussion about redacting reference to other crimes from the statement. See 10/21/08 RP 5-25. The defense did not object to references to Holt's stolen car or request that those statements be redacted. The taped statement included the detectives confronting Chirinos about the car: "[Holt] said that you stayed in his house all night long and that after you, in the morning, you went to the bank and, and forced him to withdraw funds. You took – *then, you took his car . . .*" CP 181 (emphasis added). Later, the detectives asked, "Did you steal his car?", which Chirinos denied. CP 112. The defendant's trial memo included objections to references to other specific charged and uncharged crimes¹, but did not ask the court to exclude reference to the allegation that Chirinos stole Holt's car. CP 23-24. When the defense did object it was not that the evidence was improper, it was that the evidence became cumulative. 10/26/08 RP 79.

The record does not support the contention that the prosecutor "slipped in" evidence of Holt's stolen car. There was no

¹ Chirinos was charged with possessing a different stolen car when he was arrested. The State agreed not to introduce evidence of Chirinos' possession of this stolen car. Chirinos was accused of passing forged checks at a supermarket, and he was accused of vandalizing the car of King 5 reporter Jim Foreman. The State agreed not to introduce evidence of these crimes. All references to these crimes were redacted from the defendant's statements. See CP 157-219 (redacted Statement of the Defendant).

misconduct by the prosecutor and there was no error in admitting the evidence. The evidence was properly admitted, with no objection other than to cumulative references to the stolen car.

4. CHIRINOS FAILED TO SHOW ANY PROSECUTORIAL MISCONDUCT THAT AFFECTED THE VERDICT.

Chirinos argues the prosecutor committed misconduct during cross examination of the defendant, and during closing argument. However, during cross examination Chirinos did not object to the prosecutor's questions. During closing arguments Chirinos did object to comments of the prosecutor, the trial court sustained the objection and gave a curative instruction to disregard the argument. Chirinos has failed to demonstrate a substantial likelihood the alleged misconduct affected the verdict.

a. Cross-Examination Of Chirinos.

Chirinos alleges that the prosecutor committed misconduct during cross-examination. He cites to five places in the transcripts where he contends that the prosecutor asked Chirinos to comment

on the credibility of the State's witnesses². In several instances Chirinos fails to demonstrate misconduct, and fails to demonstrate a substantial likelihood that the alleged misconduct affected the verdict.

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). If the defense fails to object, the error is waived unless the argument was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Several of the allegations by Chirinos fail to show that misconduct occurred. He asserts that "[f]rom the start of [the prosecutor's] cross examination of Chirinos, she asked him to explain why his testimony was different from Detective Thompson." Brief of Appellant at 27, citing to 10/28/09 RP 144. That is not correct, the prosecutor asked, "So if there were any differences

² The Appellant cites to 10/28/09 RP 144; 10/29/09 RP 23, 23-24, 52, 57.

between *what you said today* and *what you said to Detective Thompson*, how would you explain those differences?" 10/29/09 RP 144 (emphasis added). Chirinos went on to explain his inconsistent statements by saying that he used narcotics before his interview with the detective and he felt intimidated by the police. Id. The prosecutor asked Chirinos to explain discrepancies between what he said on the witness stand and what he said to Detective Thompson. There is no misconduct when the prosecutor gives a defendant a chance to explain his own inconsistent statements. Chirinos' accusation that the prosecutor asked him to comment on the detective's credibility is not supported by the record. At no time did the prosecutor ask Chirinos if Detective Thompson was lying.

Furthermore, the prosecutor did not ask Chirinos if Turner was telling the truth or lying. The prosecutor asked questions about whether some of Turner's assertions were "inaccurate." 10/29/09 RP 23-24. In State v. Wright, 76 Wn. App. 811, 825-26, 888 P.2d 1214 (1995)³, the Court of Appeals distinguished between merely

³ Wright also addressed the corpus delicti rule and that portion of the opinion has been superseded by statute.

objectionable, irrelevant cross examination and cross examination that rises to the level of prosecutorial misconduct. According to Wright, questions that compel a defendant to testify that a witness is lying are prejudicial because it puts the defendant in a bad light before the jury. Id. at 822. In contrast, questions about whether another witness is “mistaken” or “got it wrong” may be irrelevant, but do not have the same potential for prejudice. Id. at 822. In addition, questions concerning “mistakes” may be relevant and probative if there are discrepancies in the testimony and “cross examination may be relevant and helpful to the jury in its efforts to sort through conflicting testimony.” Id. Thus, in Wright, the court held that asking the defendant whether the police got their version of the events wrong was not misconduct, but the question was irrelevant because the testimony of the defendant and the police officers was in direct conflict and required no clarification. Id. Reversal was not required in Wright.

The prosecutor's question to Chirinos about Turner's testimony did not require Chirinos to call Turner a liar. The prosecutor asked:

Q: You didn't say "go, go, go"?

A: no, no, no.

Q: So if she remembered that, that would not be what happened?⁴

10/29/09 RP 23. The prosecutor asked two additional questions about whether Turner's testimony was "inaccurate." Id. at 23-24. These questions did not require Chirinos to say that Turner was lying, nor did he do so. Id. These questions are more akin to those addressed in Wright. While they may not be relevant, they are not misconduct.

During cross examination of Chirinos, the prosecutor did ask a series of questions about whether Holt was telling the truth.

10/29/09 RP 55-57. These questions were improper. The defense did not object to any of these questions. Furthermore, Chirinos cannot demonstrate a substantial likelihood that these questions affected the verdict. Unless a defendant objected to the improper comments at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the prosecutorial

⁴ This was the only question the defense objected to at trial, citing "speculation about another witnesses' testimony." The objection was overruled. 10/29/08 RP 23. Contrary to Chirinos' claim, having this single objection overruled did not make future objections to questions about whether Holt was "lying" futile. Brief of Appellant at 28.

misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Smith, 67 Wn. App. 838, 847, 841 P.2d 76, 81 (1992). In State v. Casteneda-Perez, 61 Wn. App. 354, 810 P.2d 74, *review denied*, 118 Wn.2d 1007 (1991), the court concluded that asking a witness to express an opinion as to whether or not another witness is lying invades the province of the jury. Id. at 362. Although the court found the practice improper and condemned it, it did not reverse the conviction because the improper cross examination had been repeated several times before being properly objected to. Without a proper objection, the trial court had not erred in admitting the testimony. The court found no prejudice to the defendant from the improper questions. Id.

Chirinos likewise cannot show any prejudice from the improper questions. As noted in Wright, questions that compel a defendant to testify that another witness is lying are prejudicial because it puts the defendant in a bad light before the jury. Wright, 76 Wn. App. at 822. However, here Chirinos placed himself in this poor light before cross examination began. Chirinos was eager on direct examination to assert that Holt was a liar and had not been truthful with him during the incident and in court:

Q: [defense on direct]: You've heard Mr. Holt on the stand say that he came home and found you to be sitting in his apartment. Is that true?

A: I heard him say that, but that's not true. 10/28/09 RP 121.

It didn't take too long because after he denied that - - that he knew this guy, I knew he was lying. 10/28/09 RP 116.

And so I said, look I know this guy. I could describe your apartment to a T. So you are lying to me. Id.

I was not there to threaten him in any ways, but because he lied to me so many times, by then, he only lied not only about not knowing Ryan, but also when I left the first time, he said Okay. If you're going to come back tomorrow, come back before nine o'clock because I have to go to work. Id. at 125.

I said, you know, Jamie, I said, look you lied to me about this guy Ryan. You lied to me about being here on time. Id. at 130.

By the end of direct examination, Chirinos had told the jury that Holt had lied on multiple occasions. When cross examination began, Chirinos was the first to suggest that Holt was not telling the truth. Chirinos alleges the prosecutor asked him whether Holt's testimony was "not true" or a "lie." Brief of Appellant at 28 (citing to 10/29/09 RP 52). However, the prosecutor's question does not reference Holt's credibility. It is Chirinos who offers the opinion that "[w]hen [Holt] told me about his paycheck and said it has to be in

the morning after, I said 'Well, due to the fact that you have lied to me how can I trust you that tomorrow you will be here?' Id. The defense argues that "[n]o prosecutor should demand that a defendant say that the State's witnesses are lying." Brief of Appellant at 28. While true, it is important to note that Chirinos commented on Holt's credibility before the prosecutor's line of questions.

Chirinos has failed to show a substantial likelihood that the prosecutor's questions affected the verdict. In fact, the verdicts confirm this. The prosecutor asked if Holt's testimony that Chirinos had a knife was a lie, and Chirinos agreed. 10/29/09 RP 57. The jury declined to find beyond a reasonable doubt that Chirinos had a deadly weapon. CP 118. Clearly, the jury did not hold this question against Chirinos.

Chirinos did not object to the cross examination and cannot show prejudice resulting from the prosecutor's questions.

b. Closing Argument.

During closing arguments, the prosecutor made a passing reference to the fact that the defense had requested lesser included offense instructions. This reference was made while addressing

the numerous counts, and there was no argument that the jury should draw any adverse inferences from the lesser included offenses. The defense made a timely objection, the objection was properly sustained, and a curative instruction was given. The jury was instructed to disregard the prosecutor's comments. The jury is presumed to follow the courts instructions. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). As in State v. Swan, 114 Wn.2d 613, 790 P.2d 610, 635 (1990), there was an objection that was sustained, and the jury was instructed to disregard the prosecutor's remark. While this statement was not proper, it was not prejudicial error that denied Chirinos a fair trial since the jury is presumed to follow the court's instructions to disregard it. Id. at 661-62. Furthermore, the trial court denied Chirinos' motion for a mistrial, noting that "it was clear to me in closing arguments that the defense was taking the position that, for better or worse, Mr. Chirinos has committed some crimes, but not the ones the state has charged him with." 10/29/09 RP 123. The trial court properly determined that the curative instruction was sufficient and a mistrial was not warranted. Id.

Chirinos objected to the remarks of the prosecutor and the trial court was able to cure any prejudice by instructing the jury to disregard them.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Chirinos' convictions for Residential Burglary, Extortion, Kidnapping in the First Degree, Forgery, Escape, and Attempted Robbery in the Second Degree.

DATED this 15th day of December, 2010.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the petitioner, Nancy Collins, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle WA 98101, containing a copy of the Brief of Respondent, in STATE V. FERNANDO CHIRINOS, Cause No. 64725-3-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.

W Brame
Wynne Brame
Done in Seattle, Washington

12/1/10
Date 12/1/10

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