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DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

NO. 37307-6-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN R. BOLDT,

Petitioner.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
I. PROCEDURAL HISTORY	1
II. STATEMENT OF FACTS.....	1
III. ISSUES PRESENTED.....	1
IV. SHORT ANSWERS.....	2
V. ARGUMENT	2
I. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT.....	2
a. THERE WAS NO DISCOVERY VIOLATION RELATED TO OFFICER TAYLOR’S ANNOTATED REPORT, AS THIS REPORT WAS PROVIDED TO THE DEFENSE AT TRIAL.	2
b. THE PROSECUTOR’S QUESTIONS REGARDING THE APPELLANT’S ACTIONS WERE NOT MISCONDUCT.....	4
c. THE PROSECUTOR’S ARGUMENTS DID NOT SHIFT THE BURDEN TO THE APPELLANT.....	6
II. TRIAL COUNSEL WAS NOT INEFFECTIVE.....	7
a. TRIAL COUNSEL DID IN FACT DEMAND AND RECEIVE A COPY OF OFFICER TAYLOR’S “ANNOTATED” REPORT.	8
b. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PROPOSE A PETRICH INSTRUCTION, AS THE CRIMES ALLEGED	

CONSTITUTED ONE CONTINUING COURSE OF CONDUCT.	8
c. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO ALLEGEDLY IMPROPER ARGUMENT BY THE PROSECUTOR.	10
III. THE TRIAL COURT DID NOT ERR BY FAILING TO GIVE A FAULTY PETRICH INSTRUCTION.....	10
IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY LIMITING THE ADMISSION AND USE OF THE VIDEO.	11
V. THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF RESISTING ARREST AND FAILURE TO OBEY.	14
VI. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY.	15
VI. CONCLUSION	16

TABLE OF AUTHORITIES

	Page
Cases	
<u>Jenkins v. Anderson</u> , 447 U.S. 231, 100 S.Ct. 2141 (1980)	6
<u>State v. Baldwin</u> , 109 Wn.App. 516, 37 P.3d 1220 (2001)	11
<u>State v. Barrow</u> , 60 Wn.App. 869, 809 P.2d 209 (1991)	5
<u>State v. Burke</u> , 163 Wn.2d 204, 181 P.3d 1 (2008)	6
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978)	10
<u>State v. Frazier</u> , 99 Wn.2d 180, 661 P.2d 126 (1983)	13
<u>State v. Grieff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000)	15
<u>State v. Handran</u> , 113 Wn.2d 11, 775 P.2d 453 (1989)	9, 11
<u>State v. Miller</u> , 66 Wn.2d 535, 403 P.2d 884 (1965)	10
<u>State v. Neal</u> , 144 Wn.2d 600, 30 P.3d 1255 (2001)	11
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984)	8, 9, 10, 14
<u>State v. Russell</u> , 125, Wn.2d 24, 882 P.2d 747 (1994)	5
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	7, 11
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990)	10
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987)	7
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972)	8
<u>State v. Workman</u> , 66 Wn.2d 292, 119 P. 751 (1911)	9

Statutes

RCW 46.61.021 14

Other Authorities

CrR 4.7..... 3

ER 615 2

I. PROCEDURAL HISTORY

The appellant was charged by amended information with two counts of assault in the third degree, reckless driving, failure to obey, and resisting arrest. The appellant was represented by Duane Crandall, and proceeded to jury trial on these charges on December 10, 2007. After a three-day trial, the appellant was acquitted of reckless driving and one count of assault in the third degree but convicted of resisting arrest and failure to obey. The jury was unable to reach a verdict on the other count of assault in the third degree.¹ After sentencing, the instant appeal timely followed.

II. STATEMENT OF FACTS

The State agrees with the facts as set forth by the appellant. When appropriate, this brief cites to particular facts in the record.

III. ISSUES PRESENTED

1. Did the State Engage in Prosecutorial Misconduct?
2. Was the Appellant's Trial Counsel Ineffective?
3. Did the Trial Court Err by Not Giving a Petrich Instruction?
4. Did the Trial Court Abuse Its Discretion Regarding the Presentation of Evidence?

¹ This remaining count is currently still pending in Cowlitz County Superior Court, and is set for trial on July 8, 2009. Mr. Crandall has withdrawn as counsel of record.

5. Was There Insufficient Evidence to Support the Jury's Verdicts?
6. Does the Cumulative Error Doctrine Apply?

IV. SHORT ANSWERS

1. No.
2. No.
3. No.
4. No.
5. No.
6. No.

V. ARGUMENT

I. The State Did Not Commit Prosecutorial Misconduct.

a. There Was No Discovery Violation Related to Officer Taylor's Annotated Report, As this Report was Provided to the Defense at Trial.

At trial, Officer Dawn Taylor remained at counsel table with the deputy prosecutor as the State's representative, pursuant to ER 615. Officer Taylor made various notes on her police report during the course of the trial, including the defense's opening statement. Officer Taylor then brought her report with her to the witness stand while testifying.

The appellant implies that it was somehow improper for Officer Taylor to remain in the courtroom during opening statements. However, the appellant provides no authority for this suggestion. Officer Taylor was

clearly the primary investigator for the case, and her presence in the courtroom was neither remarkable nor objectionable.

The appellant is also aggrieved that Officer Taylor made various notes to herself on her police report as the trial progressed. The appellant claims this was somehow improper, but again provides no authority for this argument. The appellant also argues the prosecutor engaged in misconduct by failing to provide these “annotations” to defense counsel. However, it is far from clear that notes written between the prosecutor and the lead investigator during trial are subject to discovery under CrR 4.7. These notes may well be work product, or privileged material relating to trial tactics or strategic decisions.² See also CrR 4.7(f)(1).

Even assuming that these notes were subject to discovery, the appellant claims of misconduct fail because the notes were in fact discovered to defense counsel. At the beginning of Officer Taylor’s cross examination, defense counsel asked Officer Taylor to provide her report to him. Officer Taylor then handed the report to defense counsel, who then reviewed the annotations and remarked on them. RP Vol. II at 127. Defense counsel then went on to question Officer Taylor regarding several specific notes she had made on the report. *Id.* at 128-129. Given this, the

² Often, defendants will themselves take notes during the course of a trial. If a defendant then testifies, are his notes discoverable to the State for use in cross-examination? The appellant’s theory would seem to require this, which is a dubious conclusion.

appellant's claim that the notes were not provided is without any basis in fact. See Appellant's Brief at 28. If the note taking by Officer Taylor was misconduct, which the State disputes, there was no possible prejudice to the appellant as the notes were read by defense counsel who then cross-examined Officer Taylor regarding them. The Court should reject this claim as without any basis in law or the record.

b. The Prosecutor's Questions Regarding The Appellant's Actions Were Not Misconduct.

The appellant argues the prosecutor committed misconduct by asking two questions regarding his failure to perform field sobriety tests for Officer Taylor. The first question asked was:

Q. Would you agree that you, then, refused to cooperate with the investigation to the extent that it would allow Officer Taylor to confirm or dispel the suspicion that you were operating the vehicle under the influence of alcohol or drugs?

RP 12/12/07 at 34. This question was objected to, and the objection was sustained. *Id.* at 35. The appellant claims this was based on a prior ruling by the trial court excluding this sort of testimony, however the appellant provides no citation to the record to support this. Indeed, the petitioner's review of the record has failed to find any ruling by the trial court regarding the admissibility of the refusal to perform field sobriety tests.

The second question asked was:

Q. Would you agree, that based on the information that Officer Taylor was provided by you, she was unable to make a determination as to whether or not you were operating your vehicle under the influence of alcohol or drugs?

Id. at 35. This question was not objected to, and the appellant's answer was simply "no." Id.

The appellant's argument these two questions amount to misconduct requiring reversal is implausible at best. The appellant has not cited to any actual ruling of the trial court that was violated by these questions. Furthermore, it is difficult to determine what prejudice would flow from simply asking a question. The jury was instructed that the questions and remarks of the attorneys are not evidence. Id. at 77-78. The same rationale applies to the second question, as the appellant clearly denied the prosecutor's implication that he obstructed Officer Taylor. Considering this, the appellant has failed to meet his burden to show any misconduct by the State. See State v. Russell, 125, Wn.2d 24, 882 P.2d 747 (1994); State v. Barrow, 60 Wn.App. 869, 809 P.2d 209 (1991). The Court should reject this claim.

c. The Prosecutor's Arguments Did Not Shift the Burden to the Appellant.

The appellant next argues the prosecutor committed misconduct by allegedly shifting the burden to the defense. Specifically, the appellant complains about the prosecutor's questions regarding the appellant's failure to ever mention the "tazer boy" note incident prior to trial and to arguments regarding the field sobriety tests.

The questions regarding the appellant's failure to ever mention the "tazer boy" note prior to trial did not shift any burden to the defense, but rather were clearly intended to impeach and impugn the appellant's claim of how he obtained the note.³ It is well established that the State may impeach a defendant who testifies and offers new information at trial with the fact that these claims have never been made before. State v. Burke, 163 Wn.2d 204, 215, 181 P.3d 1 (2008); citing Jenkins v. Anderson, 447 U.S. 231, 232-33, 100 S.Ct. 2141 (1980).

Moreover, the portion of argument the appellant claims to constitute burden shifting does no such thing. The prosecutor argued that:

But he acknowledges for us, that, yeah, I didn't – I didn't provide the information. And, sure, yeah, he had a right to refuse those

³ The appellant's theory at trial was that Officer Taylor had written the note and placed the bag on the appellant's door. This curious claim endured throughout the arguments, despite the appellant's testimony that he thought his friends had put the bag there.

field sobriety tests. Absolutely. I'm not going to stand up here and argue anything differently.

RP 12/12/07 at 97. The prosecutor goes on to argue that Officer Taylor was acting in good faith to investigate a possible DUI. It is unclear how this argument in anyway shifts the burden to the defense. Indeed, the prosecutor states the appellant had the right to refuse the tests. This Court should find that such an innocuous argument cannot be misconduct.⁴

II. Trial Counsel Was Not Ineffective.

The appellant argues his trial counsel's assistance was ineffective. To prove this claim, the appellant must show that (1) trial counsel's performance was deficient and (2) this deficiency prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Counsel's performance becomes deficient when it falls below an "objective standard of reasonableness." State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). In order to prevail on such a claim, the appellant must show that his attorney's performance was unacceptable, and that there is a reasonable probability the outcome of the trial would have been different. Stenson, 132 Wn.2d at 707-708. Importantly, while the law requires effective assistance of counsel, it does not, for obvious reasons, guarantee

⁴ This conclusion becomes even more inescapable when the argument in this case is compared to a true example of burden shifting. See State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) (flagrant, though ultimately harmless, misconduct for prosecutor to argue the defendant was not entitled to the benefit of the doubt.)

this assistance will be successful. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

a. Trial Counsel Did In Fact Demand and Receive a Copy of Officer Taylor’s “Annotated” Report.

The appellant supplements his misconduct allegations with an argument that trial counsel was ineffective due to a purported failure to demand a copy of Officer Taylor’s annotated police report and cross-examine her regarding these notes. However, as argued above, trial counsel did in fact obtain a copy of the report and questioned Officer Taylor about the notes she had made. This claim is simply without merit.

b. Trial Counsel Was Not Ineffective for Failing to Propose a Petrich Instruction, As the Crimes Alleged Constituted One Continuing Course of Conduct.

The appellant further argues that trial counsel was ineffective for failing to propose a jury instruction modeled after State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). A Petrich instruction is required where the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge. However, such an instruction is appropriate only where the State presents evidence of “several distinct acts”. Notably, this instruction is not appropriate where the evidence instead indicates a “continuing course of conduct”. Petrich, 101 Wn.2d at 571. To decide whether the acts were distinct and separate incidents as

opposed to one continuous event, the facts must be evaluated in a commonsense manner. Id. For example, where the evidence involves conduct at different times and places, then the evidence tends to show “several distinct acts”. Id., See also State v. Workman, 66 Wn.2d 292, 294-295, 119 P. 751 (1911).

In State v. Handran, 113 Wn.2d 11, 775 P.2d 453 (1989), the court examined whether a Petrich instruction was required in a burglary case. There, the defendant broke into his ex-wife’s apartment and then kissed her against her will, held her down, and struck her. The defendant argued a Petrich unanimity instruction was required because there were three acts that could constitute an assault. Handran, 113 Wn.2d at 454. The court disagreed, holding that because the acts occurred in one place over a short period of time, they were a continuing course of conduct and not separate and distinct acts requiring a Petrich instruction. Id. at 456-457.

The appellant appears to only address the Petrich argument to the resisting arrest charge. However, the evidence, when viewed in a common sense fashion, clearly indicates that the events were one continuous act instead of separate and distinct incidents. The events occurred in the same location over a very short period of time, mere minutes. There was no basis for the trial court to give a Petrich instruction, and trial counsel was by no means ineffective for failing to propose a faulty instruction.

c. Trial Counsel Was Not Ineffective for Failing to Object to Allegedly Improper Argument by the Prosecutor.

Finally, the appellant argues that trial counsel was ineffective for failing to object to prosecutorial misconduct. As indicated previously, there was no prosecutorial misconduct committed in this case, thus leaving nothing for trial counsel to object to. Even assuming, for the sake of argument, there was misconduct, trial counsel is not required to object to every potentially improper remark or argument.

Indeed, the fact that trial counsel did not object “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990); citing State v. Miller, 66 Wn.2d 535, 403 P.2d 884 (1965). Thus, even if the acts complained about were misconduct, they were not so “flagrant and ill-intentioned” to allow them to be raised for the first time on appeal. See State v. Burke, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). The Court should reject this belated claim in support of the appellant’s ineffective assistance argument.

III. The Trial Court Did Not Err by Failing to Give a Faulty Petrich Instruction.

The appellant also argues the trial court erred by not giving a Petrich instruction. As noted previously, neither party requested such an

instruction, nor was such an instruction appropriate. See Handran, 113 Wn.2d 11. This argument is without merit.

IV. The Trial Court Did Not Abuse Its Discretion By Limiting the Admission and Use of the Video.

The appellant argues the trial court abused its discretion by failing to admit the entirety of the Minit Mart video, and by limiting the number of times trial counsel was able to play the video for the jury. On appeal, this Court reviews the admission of evidence under an abuse of discretion standard. State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Here the appellant sought at trial to play the entire Minit Mart video for the jury, claiming that doing so would impeach the State's witnesses. The trial court only allowed a portion of the tape to be played. Notably, neither appellate nor trial counsel have ever explained or specifically identified why the other portions of the video would be relevant, other than a generic claim these portions would be "impeachment." In its ruling, the trial court noted that:

As to the section that – that I'm not playing, or not allowing to be played, I looked at the tape. The defendant had – had been arrested,

placed in the police vehicle, he's out of view. There's no indication that either of the two police officers involved in this case were in view, and it is basically police officers moving around the scene, after the fact, and that's just not relevant. So, I did not allow you to play that for the jury; I don't see it as relevant; and – and so, at this point, that's the basis for my ruling.

RP 12/12/07 at 71. It is beyond dispute that all evidence admitted at trial, either by the State or the defense, must be relevant. ER 401. The portion of the tape excluded by the trial court was clearly not relevant, as it did not tend to prove or disprove any issue in the case.⁵ The trial court's decision to exclude evidence with no probative value cannot be fairly described as “manifestly unreasonable” and cannot amount to an abuse of discretion.

The appellant also argues the trial court violated his right to cross-examine witnesses by prohibiting him from using the video to impeach the State's witnesses. In fact, the trial record directly refutes this claim, as trial counsel did in fact confront a number of the State's witnesses with the video and attempted to impeach their testimony with it. See RP 12/11/07 at 44-45 and 67-72.

Finally, the appellant claims the trial court abused its discretion by potentially placing limits on the number of times the jury could view the video. However, the trial court allowed the appellant to play the video during closing arguments. The trial court further ruled that, if the jury

⁵ The trial court's recitation of what the video showed was not refuted by trial counsel.

during closing arguments. The trial court further ruled that, if the jury requested to do so, they would be allowed to view the video again at least two times during deliberations. RP 12/12/07 at 70-71. The trial court also indicated that if the jury wished to see the video for a third time during deliberations, it would consider that request as well. Id. at 71.

Rather than being error, the trial court adhered to well-established precedent governing the use of video exhibits in jury deliberations. In State v. Frazier, 99 Wn.2d 180, 661 P.2d 126 (1983), the Supreme Court held that the viewing of video exhibits by a deliberating jury is a decision entrusted to the sound discretion of the trial court. The Supreme Court observed, “trial court judges should continue to be aware of the potential for overemphasizing the importance of such evidence.” Frazier, 99 Wn.2d at 190. In Frazier, the trial judge sent the video to the jury room, without any playback device, and required the jury to request to see the video. The Supreme Court approved this procedure, stating:

By admitting the tape recorded exhibit without a playback machine, the trial court judge assured himself that he would be apprised of and would retain some degree of control over the number of times the jury could review that particular piece of evidence. We find no abuse of discretion in this procedure and affirm the trial court's ruling.

Id. at 191. This is the exact process followed by the trial court in this case. Absent a showing that the jury requested to see the video a third time, and

was denied, the appellant cannot establish any abuse of discretion by the trial court. This Court should uphold the trial judge's prudent decision regarding the use and viewing of the video.

V. There Was Sufficient Evidence to Convict the Appellant of Resisting Arrest and Failure to Obey.

The appellant argues there was insufficient evidence to support his conviction for resisting arrest and failure to obey a law enforcement officer. The insufficiency argument for the resisting charge is based on the Petrich issue that has already been extensively discussed. As noted before, this claim is based on a misunderstanding of the applicable case law.

However, the appellant does raise a new argument regarding the failure to obey charge, claiming that there was no evidence Officer Taylor was investigating a traffic infraction. The appellant is correct to RCW 46.61.021 requires the officer to be requesting information pursuant to an "investigation of a traffic infraction." This element was satisfied as Officer Taylor testified that she observed the appellant commit a number of possible infractions.

Specifically, she stated that the appellant's driving constituted infractions for: (1) unsafe lane change; (2) failure to yield to oncoming traffic; and (3) failure to signal one hundred feet prior to a turn. RP

12/12/07 at 93. Officer Taylor testified that, based on her observations, she believed the appellant had committed a number of traffic infractions. Id. at 92. After stopping the appellant, Officer Taylor requested the normal documents asked for in a traffic stop, i.e. the appellant's drivers' license, registration, and proof of insurance. Id. at 96. Considering this testimony, there was clearly sufficient evidence for the jury to find that Officer Taylor was in fact "investigating a traffic infraction." The Court should uphold the jury's verdict on both counts.

VI. The Cumulative Error Doctrine Does Not Apply.

The appellant's penultimate argument is that the cumulative error doctrine applies, citing State v. Grieff, 141 Wn.2d 910, 10 P.3d 390 (2000). Interestingly, Grieff held that the errors alleged in that case did not amount to cumulative error, but rather had "little or no effect on the outcome at trial." 141 Wn.2d at 929. Here, the errors alleged on appeal were either nonexistent or trivial, as in Grieff. In fact, when viewed fully, the record reflects a hard fought trial where the appellant was ably represented by counsel. This is perhaps best demonstrated by the fact the appellant avoided convictions for any felony offense. As such, the cumulative error doctrine does not apply.

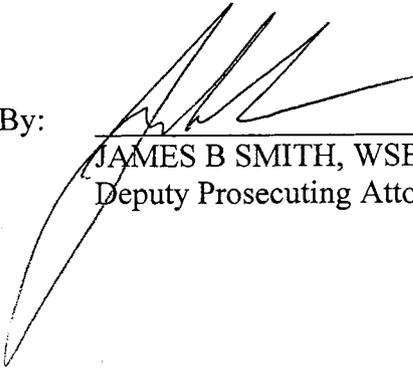
VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to affirm the appellant's conviction for resisting arrest and failure to obey. The record does not support the appellant's claims of misconduct, ineffective assistance, instructional error, and insufficiency of the evidence, and this Court should reject these arguments accordingly.

Respectfully submitted this 15th day of ~~March~~^{April}, 2009.

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By:



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each envelope containing a copy of the following documents:

1. Respondent's Brief.
2. Affidavit of Mailing.

Michelle Sasser
MICHELLE M. SASSER

SUBSCRIBED AND SWORN to before me this 1 day of April, 2009.

Fredrick Moore
Notary Public in and for the State
of Washington residing in Cowlitz
Co. My commission expires: 020910