

COURT OF APPEALS
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NO. 37970-8-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TAYLOR TOM CONLEY ,

Appellant.

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

1. TRIAL COURT DID NOT ERR BY LIMITING DEFENDANT'S ARGUMENT REGARDING THE TEXT MESSAGE.
2. THE DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION WAS NOT VIOLATED BY DETECTIVE ACKLER'S TESTIMONY.
3. TRIAL COURT'S REFUSAL OF DFENDANT'S PROPOSED INSTRUCTIONS ON IN-CUSTODY INFORMANTS AND EYE WITNESS TESTIMONY WAS A PROPER EXERCISE OF JUDICIAL DISCRETION.
4. WPIC 26.01.01 IS NOT AMBIGUOUS AND ACCURATELY STATES THE LAW.
5. THE DEFENDANT WAS NOT PREJUDICED BY THE JURY SEEING HIM IN HANDCUFFS IN THE BACK HALLWAY DURING COURT RECESS.
6. THE DEFENDANT WAS NOT PREJUDICED BY CUMULATIVE ERROR.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. DID THE TRIAL COURT COMMIT ERR BY LIMITING THE DEFENDANT'S ARGUMENT REGARDING THE TEXT MESSAGE?
2. DID DETECTIVE ACKLER COMMENT ON THE DEFENDANT'S RIGHT TO REMAIN SILENT IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT?
3. DID THE TRIAL COURT ERR BY NOT ALLOWING THE DEFENDANT'S PROPOSED INSTRUCTIONS REGARDING IN-CUSTODY INFORMANTS AND EYE WITNESS TESTIMONY?

4. IS WPIC 26.01.01 AMBIGUOUS?
5. WAS THE JURY PREJUDICED BY SEEING THE DEFENDANT IN HANDCUFFS?
6. WAS THE DEFENDANT PREJUDICED BY CUMULATIVE ERROR COMMITTED DURING THE COURSE OF HIS TRIAL?

III. STATEMENT OF THE CASE

On March 29, 2006, two days before Brian Swehla was murdered with a 12-gauge shotgun, two 12 gauge shotguns, two .22 caliber rifles, and ammunition for both guns were stolen from a boat moorage near Claskanie, OR. RP-71-81 The two reporting victims were Randy Anderson, and Tom Conley the defendant's father. RP- Id Numerous items of fishing gear, identified as belonging to Randy Anderson, including a float coat with his name on it, would later be found at the defendant's residence during the execution of a search warrant. RP-278, 320-21 The stolen firearms were never recovered. RP - 273

On the date of Brian Swehla's murder, during the early morning hours of March 31, 2006, around 3:00 a.m., James Zebley was leaving a friend's house, when he was approached by the defendant who asked him for a ride. RP-834 Zebley agreed, and drove him to Walmart. RP-835 It was rainy outside, so rather than dropping the defendant at Walmart, Zebley offered to drive the defendant to his house on 50th Avenue. RP-

836 When they arrived at the defendant's house, the defendant invited Zebley into the residence. RP-837 The defendant asked Zebley if he wanted to "pull some licks." RP -839 Zebley understood the term "pull some licks" to mean to burglarize some places. RP-840 Zebley declined, explaining that he didn't like to engage in that sort of activity. RP-Id Zebley allowed the defendant to use his rust colored Toyota truck to go to the defendant's grandparents' house around 4:30 a.m., but Zebley did not want to accompany the defendant, and instead stayed behind at the defendant's house. RP-840 Zebley would not see the defendant again for several hours. RP-840

On that same date, Jennifer Perry became aware that the defendant was at her house when she heard a gun discharge inside her house. 802-3 It was around 6:00 – 6:30 a.m. on March 31, 2006, when Ms. Perry heard the shot, and when she bolted from her room to investigate, she found the defendant holding a 12 gauge sitting with Ronnie Weller-Childers in Weller-Childers's bedroom. RP-Id. Ronnie Weller-Childers (referred to herein as "Childers") was staying with Ms. Perry and kept a room at her house. RP-Id. Ms. Perry confronted the defendant regarding his firing a 12 gauge inside her house, and the defendant and Childers left Ms. Perry's residence around 7:00 a.m. RP -804. Childers returned to Ms. Perry's house several hours later, around 11:00 a.m., and Ms. Perry noticed that

Childers appeared quiet and upset. RP-803-4. The defendant would also re-appear at Ms. Perry's residence later that evening, and when he did Ms. Perry would hear the defendant claim that he had shot someone. RP-805.

At trial, Childers testified that he and his friend went to 109 Sequoia Drive, in a truck, to commit a "robbery." RP-898 The two broke into the house through a back door, and entered the home. RP-900 Both were armed, Childers with a .22 caliber rifle, and his friend with a 12 gauge. RP-901 Once inside, they saw Brian Swehla coming down the hallway towards them. RP-901 Swehla and Childers's friend struggled over the 12 gauge in the kitchen, then Swehla ran down the hall to the back guest bedroom. RP-902-4 Childers's friend followed Swehla down the hall. RP-903 Childers fired a couple of shots from the .22 caliber rifle down the hall. RP-903 While the victim and Childers's friend were in the guest room, Childers went into the master bedroom across the hall. RP-905 When Childers was unable to open the safe, the victim crawled into the master bedroom, and was shot in the back of the head by Childers's friend while trying to open the safe. RP-905 Childers took the victim's lap top computer and cell phone. RP-904

On their way back to the truck, the two were seen by Rose Daly who by then had returned from taking her kids to school. RP -406-7 Rose noticed the two young males in their 20's coming out of the woods

dressed in dark clothing carrying rifles. RP-Id Rose Daly was familiar with the defendant from when he lived with her neighbor, Brian Swehla, and would later identify the defendant as one of the individuals she saw in the woods that day coming from the direction of Swehla's residence. RP-409, 426.

Another neighbor, Carmen Eastlick reported seeing two young males in dark clothes get into a rust colored Toyota pickup that was parked in the parking lot of the church off of Pacific Way. RP-433-445 She could see that one was wearing a red bandana, and the other was wearing plaid. RP-Id She reported that they placed several things in the back of the pickup then removed their clothing and put it in the back of the truck. RP-Id She reported seeing this around 9:00 a.m. RP-433 Carmen Eastlick would later identify the "Hispanic" looking male with the red bandana as Ronnie Wellers-Childers. RP-445 Childers testified that he wore a red bandana during the raid and murder at the Swehla residence. RP-900

The defendant returned to his house in Zebley's truck around 10:30 where Zebley was still waiting. RP-840 When Zebley came out to contact the defendant, Zebley saw that the defendant had another person with him. RP-842 This person was identified to him as "Ron" or "Ronnie." RP-Id The defendant told Zebley that he had just committed

some burglaries in his truck, and doubted if he wanted it back. RP-845 Zebley saw that they had some rifles, and watched as the two wrapped them up in blankets. RP-843 Blood would later be found on the ceiling of the cab of Zebley's truck, but DNA analysis was unable to identify the source of the blood. RP- 687

When it came time for them to leave the defendant's house, the defendant insisted on trading shoes with Zebley. RP-845 When Zebley refused, the defendant became very combative, but Zebley did not trade shoes with the defendant. RP-845 The defendant also insisted on driving Zebley's truck. RP-845 The defendant then dropped Zebley off near a friend's house. RP-846 When Zebley would later speak to the police he was able to pick the defendant out of a photo montage. RP-852 When shown a montage including Ronnie Childers-Weller's photo, Zebley was able to identify Ronnie Childers-Weller as the "Ronnie" who had been with the defendant on March 31. RP-853

Later that same day, March 31, 2006 between 2:30 – 3:00 p.m., the defendant showed up at Superior Tire Services and spoke with Joshua Derum, an old friend from school. RP-369-70 In fact, Mr. Derum had accompanied the defendant to Brian Swehla's residence at 109 Sequoia Drive in the past when the defendant used to live at the Swehla residence. RP- 371 The defendant asked Mr. Derum if he wanted to buy guns,

specifically, a 12 gauge shotgun. RP-372 Mr. Derum asked the defendant if the guns were stolen, and the defendant told him that they were. RP-Id The defendant told Mr. Derum that he was trying to sell the guns because he needed money to get out of town because he'd just put a bullet in some guy's head. RP-373 The defendant then called Mr. Derum a couple of days later and asked Mr. Derum if he was interested in buying a .22. RP-374.

On the night of April 3rd, and possibly into the morning of April 4th, the defendant was interviewed by police. RP-383 During that interview, the defendant admitted to knowing Brian Swehla, and stated that he had lived at 109 Sequoia with Swehla's son in the past. RP- 384 During this interview, Detective Sid Acker informed the defendant that law enforcement had the ability to retrieve even partial latent prints from ammunition and shotgun shells. RP-315 The boots and clothing the defendant was wearing were collected for DNA analysis. RP-386 Analysis by the Washington State Patrol Crime Lab would later confirm that blood found on the defendant's boots matched blood found in Zebley's truck, although the source of that blood was unknown. RP- 687

Crime scene analysis confirms the highlights of Childers's vague testimony regarding the version of events at 109 Sequoia on March 31, 2006. RP- 649-94 Forcible entry had been gained through the back door.

RP- 657 Shell casings for a 12 gauge were found in the kitchen, which is consistent with Childers's story that there had been a struggle over the 12 gauge there between Swehla and the "Childers's friend." RP- 658 Two .22 caliber bullets were recovered in the closet wall at the end of the hallway, and spent shell casings for the same were found in the hallway consistent with Childer's story that he had fired the .22 down the hallway during the events. RP- 660

A great deal of blood was found in the bedroom across the hall from the master bedroom. RP- 661 Bloody smudges leading from that room across the hall into the master bedroom were also consistent with Childers's testimony that the victim had crawled into the master bedroom to open the safe. RP- 693-95 As the victim's dead body was found up against the front of the safe, 12 caliber bullet wound to the back of the head, and blood spatter on the wall and safe from the victim's bloody are all consistent with Childers's statement that the victim had been trying to open the safe when he was shot in the back of the head. RP- 694-95

On April 8th, the defendant's house was searched. RP-316 Among the items recovered were Randy Anderson's green float coat that had been stolen from the moorage near Claskanie, and charred debris in an outdoor sauna oven. RP-317, 321 Among the burned remains were shell casings from a 12 gauge shotgun. RP- 32

Around April 28 2006, after being booked into jail, Justin Brewer ran into the defendant. RP-541 The defendant told Justin that he had gone to Brian Swehla's house with the intent of robbing him. RP-545-46 The defendant told Justin that a struggle took place, and that the defendant shot Swehla in the "upper body". RP-546 The defendant told Justin that he had burned all of his clothing that had blood residue, and that there was no way his clothes or the weapons would ever be found. RP-543-44

1. The trial court did not error by limiting defendant's argument regarding text message.

A trial court's ruling on the admissibility of evidence is will not be disturbed on appeal absent an abuse of discretion. *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." *Powell*, 126 Wash.2d at 258.

In the present case, the defendant argues that the trial court denied him his Sixth Amendment right to present evidence because it limited his investigator's ability to testify regarding a text message presumably sent from the victim's cell phone to that of "Hillbilly" Hamrick which likely occurred after the victim was murdered. At trial, defense counsel sought to admit such evidence to establish an argument that "Hillbilly" Hamrick, and possibly Amy Hardesty, was involved as a conspirator in the murder.

This was important to the defense because “Hillbilly” Hamrick was with Amy Hardesty (the victim’s girlfriend), according to the State’s theory of the case, during the time of the murder. The defense was hoping to establish that the cell call implied that whoever murdered Brian Swehla called “Hillbilly” Hamrick and Amy Hardesty right after the murder because they were co-conspirators with whoever committed the killing, thus, presenting a questionable light in which to view the testimony of State’s witnesses, particularly Amy Hardesty.

The Sixth Amendment guarantees that a criminal defendant has a right to confront witnesses against him, but does not afford him the right to have irrelevant evidence admitted. *State v. Smith*, 101 Wn.2d 36, 677 P.2d 100 (Wash. 1984), and *State v. Hudlow*, 99 Wash.2d 1, 15, 659 P.2d 514 (1983). A defendant’s right to compel witnesses and introduce evidence is limited to those whose testimony and what evidence would be relevant and material to the defendant’s case. *Smith*, at 41. The defendant bears the burden of showing materiality. *Smith*, at 42, citing *Ashley v. Wainwright*, 639 F.2d 258 (5th Cir. 1981). Specifically, where the defense seeks to introduce evidence connecting another person with the crime, a proper foundation must be laid. *State v. Rehak*, 67 Wash.App. 157 (Div. 2 1992).

When the State's case is mostly circumstantial, the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime. *State v. Clark*, 78 Wn.App. 471, 478-79, 898 P.2d 854, review denied, 128 Wn.2d 1004 (1995)(citing *Leonard v. Territory*, 2 Wash. Terr. 381, 396, 7 P. 872 (1885)). Nonetheless, Defendant should still make a showing that this other person had the ability, opportunity, and motive to commit the crime alleged. *State v. Clark*, 78 Wn.App. at 479-80. Most poignant, such evidence must be able to show that someone *besides* the defendant committed the crime to be relevant or probative. *State v. Clark*, 78 Wash.App. 471, 478; *State v. Mak*, 105 Wash.2d 692, 716-18.

In the present case, Defendant has made no such showing. The State's theory against the defendant did not preclude the possibility that Mr. Hamrick and Ms. Hardesty were involved in the murder of Brian Swehla along with Ron Childers and the defendant. Defense's cell phone argument simply had no bearing on the guilt of the defendant. The defense's cell phone arguments did not have any bearing on Childers's admission that he participated with another male in murder Brian Swehla, and that he stole Swehla's cell phone after the murder; that two neighbors saw two white males leave the Swelha residence with guns; one neighbor

identified Ron Childers, the other identified the defendant; that they left the area in a truck owned by James Zebley who testified to loaning his car to the defendant during that time; that within several hours of the murder the defendant told Josh Derum that he was trying to sell guns (including a 12 gauge), and get out of town because he had killed someone. In sum, the call from decedent's phone to Mr. Hamrick had no bearing on the guilt of the defendant, as it does not render the State's theory of events more or less likely with respect to the allegations against the defendant. Accordingly, the trial court correctly found the evidence to be irrelevant, and therefore, inadmissible.

2. The State did not violate the defendant's Fifth Amendment right against self incrimination by improperly commenting on the defendant's right to remain silent during.

At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wash.2d 466, 473, 589 P.2d 789 (1979); Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence. *State v. Easter*, 130 Wash.2d 228, 236, 922 P.2d 1285 (1996). The issue here is whether the defendant's silence was raised, and if so, did the State manifestly intend the testimony to be a comment on the defendant's right to

remain silent. *State v. Scott*, 93 Wash.2d 7, 13, 604 P.2d 943 (1980),
State v. Crane, 116 Wash.2d 315, 804 P.2d 10 (1991).

A remark that does not amount to a comment is considered a “mere reference” to silence and is not reversible error absent a showing of prejudice. *State v. Lewis*, 130 Wash.2d 700, 706, 927 P.2d 235 (1996). Thus, a reviewing court will focus largely on the purpose of the remarks to distinguish between “comments” and “mere references” to an accused pre-arrest right to silence.

For example, in *State v. Lewis*, the Washington State Supreme Court contemplated a situation similar to that before this court. In *Lewis*, the officer’s testimony on direct went as follows, regarding a pre-arrest telephone conversation the officer had with Lewis:

Q: What was the nature of your conversation?

A: I told him that we were investigating him for two incidents involving assaults on women.

Q: And did you go into detail about what the allegations were?

A: I told him-my recollection is that I told him or that he asked me if it was about women. He said those women were just at my apartment and nothing happened, and they were both just cokeheads. He was trying to help them is what he said.

Q: Did he appear to know what women you were talking about?

A: He did appear to? Yes.

Q: And did you have any further conversation with him?

A: I told him-my only other conversation was that if he was innocent he should just come in and talk to me about it.

Q: Was there any other part in the investigation that you had anything else-that you have done?

A: I prepared a bulletin to be distributed to the patrol officers with Mr. Lewis's picture on the bulletin stating there was probable cause to arrest him for that crime, distributed to all patrol precincts, and I drove to his house at one point but nobody was home. And later, once I was notified when he was arrested by patrol, and then just prepared the filing of the case.

Q: Do you know how much later it was that he was arrested?

A: He was arrested for this case on January 17 of 1993. So it was a little over a month after the initial case came in.

Lewis, at 703.

Prior to this testimony, the court had granted a defense motion in limine to prohibit testimony regarding the fact that the defendant failed to meet with the officer to discuss the case subsequent to the telephone conversation. After the officer's testimony, the defense moved for a mistrial arguing that the above exchange violated the court's pre-trial ruling. The court agreed, but denied the defense motion for a mistrial. In closing arguments, the State did not mention the defendant's refusal

to speak with the police about the charges, or about his failure to keep appointments with the officer.

On appeal, the defense argued the trial court erred in denying the motion for a mistrial after the officer's testimony because the testimony was a comment on the defendant's Fifth Amendment right to remain silent. The court concluded that while pre-arrest silence is not admissible as substantive evidence of a defendant's guilt, the issue was really whether Lewis's silence was used as evidence of his guilt.

The court opined:

A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions. However, we conclude that is not what occurred in this case. The detective did not say that Lewis refused to talk to him, nor did he reveal the fact that Lewis failed to keep appointments. The officer did not make any statement to the jury that Lewis's silence was any proof of guilt. The only thing the detective told the jury is that the defendant told him that "those women were just at my apartment and nothing happened, and they were both just cokeheads," and that "[Lewis] was trying to help them is what he said."

Unlike the officer's testimony in the *Easter* case, which included the officer's opinion that Mr. Easter was hiding his guilt with his silence, the officer in this case made no comment on Lewis's silence. The only statement he made was that Lewis had told him he was innocent.

There was no statement made during any other testimony or during argument by the prosecutor that Lewis refused to talk with the police, nor is there any statement that silence should imply guilt. Most jurors know that an accused has a right to remain silent and, absent any

statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence. *See Tortolito v. State*, 901 P.2d 387, 390 (Wyo.1995)(citing *Parkhurst v. State*, 628 P.2d 1369 (Wyo.) (a mere reference to silence which is not a “comment” on the silence is not reversible error absent a showing of prejudice)). A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. *Tortolito*, 901 P.2d at 391. That did not occur in this case.

The *Lewis* case is very similar to the case at bar. Unlike the circumstances surrounding the reversible error described in the cases cited by the defendant, there was no comment on the defendant's right to remain silent made by Detective Ackler, or any other State's witness, nor did the State attempt to use the defendant's silence as substantive evidence of guilt. During the testimony of Detective Ackler found at RP 315, the State was attempting to introduce evidence that Det. Ackler had informed the defendant of the types of evidence detectives would be looking for during the course of their investigation in this case. The reason that that comment by Det. Ackler to the defendant was relevant is because a few days after the interview shell casings and other items were found in an oven at the defendant's residence. The argument that the State was trying to render from this evidence is that the defendant attempted to destroy the exact kind of evidence Det. Ackler told the defendant that police

would be looking to find. The State was in no way attempting to elicit evidence of guilt based upon the defendant's silence, and the record does not support the defendant's accusation to the contrary.

3. The trial court's refusal of defendant's proposed instructions regarding in-custody informants and eyewitness testimony was a proper exercise of the court's discretion.

A trial court's decision to reject a party's jury instruction is reviewed for an abuse of discretion. *State v. Picard*, 90 Wash.App. 890, 902, 954 P.2d 336 (1998). Jury instructions are sufficient if they permit each party to argue his or her theory of the case, are not misleading, and when read as a whole, properly inform the jury of the applicable law. *Picard*, 90 Wash.App. at 902.

A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *State v. Jensen*, 149 Wash.App. 393, 399, 203 P.3d 393 (2009).

In the present case, the defendant is claiming that the trial court erred in failing to give the jury an instruction regarding the credibility of in-custody informants, and eyewitness identification. The defendant provides no Washington case law to support his argument that the trial court's failure to give these instructions was an abuse of discretion.

The defendant was free to argue his theory that the in-custody witness's credibility should be questioned, and to urge the jury to question eyewitness identification. The court properly provided the jury with the standard introductory instruction found at WPIC 1.02 (CP 20), which fully informed the jury of its ability and duty to weigh the credibility of each witness, and evaluate the witnesses' opportunity to observe the events to which they testified, and instructed in part:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

This instruction amply informed the jury to be cautious in evaluating the testimony of witnesses, and what issues to consider in so doing.

a. Defendant's instruction regarding in-custody informants.

This instruction offered by the defense contemplates a situation where in-custody confessions are presented by fellow inmates

(codefendants excluded) in exchange for leniency. The defendant claims that State's witnesses obtained leniency for their cooperation and testimony in this case. That claim is completely false. Specifically, the defense state's in its brief at p. 29 that Hicks "did secure a good deal – he received a low end sentence, a drug offender sentencing alternative, and dismissal of seven of seventeen charges against him." However, as Mr. Hicks explained to the jury that he was not obtaining any consideration in exchange for testimony (RP 628 – 30), nor did anyone else. Consequently, because none of the State's witnesses (other than the codefendant) were given consideration for their testimony, this proposed instruction was not appropriate under the circumstances of the case, and was appropriately not presented to the jury.

b. Eyewitness identification.

In the present case, all who identified the defendant were people who had been familiar with the defendant in the past. In particular, Ms. Daly had been familiar with the defendant, and her ability to identify him was subject to cross-examination by the defense on all of the issues contemplated in the instruction offered. What is more, Ms. Daly's identification of the defendant is corroborated by the testimony of the second neighbor, Carmen

Eastlick, who although did not identify the defendant, was able to identify Childers as one of the two males at the scene. Eastlick was also able to identify the truck she saw them in as the same as or similar to James Zebley's truck. James Zebley was able to testify that the defendant was using his truck during that time, and arrived back to the defendant's house in that truck with Ron Childers. Such supporting evidence makes it clear that the jury would not have to give undue weight to Ms. Daly's identification of the defendant. As such, it cannot be said that the trial court abused its discretion by declining to include this instruction.

4. Pattern jury instruction WPIC 26.01.01 is not ambiguous and accurately states the law.

In this case, the court's instruction on premeditation instruction is identical to 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 26.01.01, at 360 (3d ed. 2008) (WPIC). Nonetheless, the defendant complains that this pattern instruction is ambiguous. The Washington Supreme Court has repeatedly held that WPIC 26 .01.01 adequately states the law on premeditation in cases involving virtually identical challenges. *See, State v. Clark*, 143 Wash.2d 731, 770, 24 P.3d 1006 (2001); *State v. Brown*, 132 Wash.2d 529, 604-07, 940 P.2d 546 (1997); *In re Pers. Restraint of Lord*, 123

Wash.2d 296, 317, 868 P.2d 835 (1994); *State v. Benn*, 120 Wash.2d 631, 657-58, 845 P.2d 289 (1993);

The defendant in *Clark* raised an argument regarding this premeditation instruction very similar to that raised by the defendant in this case. In *Clark*, the defendant at trial had proposed an instruction that added to WPIC 26.01.01 that premeditation “ ‘involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.’ ” *Clark*, 143 Wash.2d at 770, 24 P.3d 1006. The court rejected the necessity of the additional language, explaining that it “has had numerous occasions to invalidate [this pattern] instruction and has not done so-going so far as to state that further challenge to the instruction is frivolous.” *Clark*, 143 Wash.2d at 770, 24 P.3d 1006. See also *Lord II*, 123 Wash.2d at 317, 868 P.2d 835 (“Lord's challenge to the court's premeditation instruction is patently frivolous.”).

The defendant in the case at bar makes an argument that is indistinguishable from those unsuccessfully raised in *Clark*, *Brown*, *Lord II*, *Benn*, and *Rice*. *Clark*, 143 Wash.2d at 770; *Brown*, 132 Wash.2d at 605, 940 P.2d 546; *Benn*, 120 Wash.2d at 657 n.3, 845 P.2d 289. Thus, defendant's argument lacks merit.

5. Even if some members of the jury inadvertently saw the defendant in handcuffs, such a sight would not have been prejudicial.

In the event the defendant was seen by any of the jurors while in handcuffs, such circumstances would be evaluated on review as to whether such an event would have prejudiced the jury's verdict. In the present case, such a conclusion is not reasonable.

In the first place, the jury was aware that the defendant was in custody because witnesses testified as to conversations they had had with him while in custody on these charges. As such, affirmation that the defendant was in custody could have come as no surprise to jurors. Second, the evidence in this case was substantial enough that it cannot be said that the jury would have considered something as insignificant as seeing the defendant in handcuffs as evidence tipping the scales in favor of guilt. In sum, because the defendant cannot show that his allegation affected the outcome of his trial, the court should not grant a reversal of the verdict on that basis.

6. The Defendant was not prejudiced by cumulative error.

Finally, the defendant asserts that he was prejudiced by cumulative error. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wash.2d 910, 929, 10 P.3d 390 (2000). However, the

doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. Id. As discussed above, the defendant has failed to show how each alleged instance of misconduct affected the outcome of his trial. Similarly, the defendant has failed to establish how the combination of these alleged errors would cumulatively create prejudice.

IV. CONCLUSION

For the above stated reasons, defendant's conviction should be affirmed, and his request for a reversal and new trial denied.

Respectfully submitted this 21st day of August, 2009.

SUSAN I. BAUR, WSB# 15221
Prosecuting Attorney

By: 
MEGAN WHITMIRE, WSB#29933
Representing Respondent

**COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,)	NO. 37970-8-II
)	Cowlitz County No.
Appellant,)	06-1-00457-1
)	
vs.)	CERTIFICATE OF
)	MAILING
TAYLOR TOM CONLEY,)	
)	
Respondent.)	
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DIVISION II
TACOMA, WA
AUG 21 2009

I, Michelle Sasser, certify and declare:

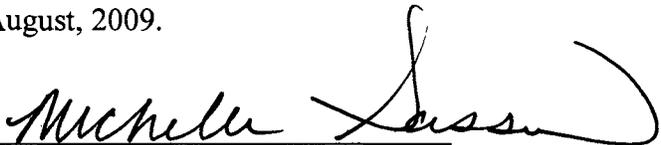
That on the 21st day of August, 2009, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Respondent's Brief to the following parties:

Ms. Susan F. Wilk
Attorney at Law
1511 3rd Avenue, Suite 701
Seattle, WA 98101-3635

Court of Appeals, Clerk
950 Broadway, Suite 300
Tacoma, WA 98402-4454

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

Dated this 21st day of August, 2009.



Michelle Sasser