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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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3. Whether Williams' counsel was deficient where he failed to object to an instruction which correctly stated the law?
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13. Whether Bradford's counsel was deficient in failing to request a jury instruction that would have required the court to comment on the evidence?

B. STATEMENT OF THE CASE.

1. Procedure

On April 10, 2009, the Pierce County Prosecuting Attorney (State) charged Seth Williams and James Bradford as co-defendants with three others: James Briggs, Larell Hartlett, and Marces Sanders. CP 1-2.

Williams was charged with one count of robbery in the first degree, with two firearm sentencing enhancements (FASE). *Id.* The State later amended the charge to allege two specific firearm enhancements. CP 7-8.

Bradford was charged with two counts of unlawful possession of a firearm in the second degree (UPF2). CP 219-220. At the time of trial, the

State discovered that one of Bradford's prior convictions was for Unlawful Delivery of a Controlled Substance. Therefore, the State amended the charges to two counts of UPF1. CP 236-237, 2 RP 63. Bradford did not object to the amendment. *Id.*

On February 8, 2010, the case was assigned to Hon. Stephanie Arend for trial. 1 RP 3. Co-defendants Briggs, Hartlett, and Sanders pleaded guilty. *Id.* Williams and Bradford proceeded to trial.

At the conclusion of the trial, the jury found Williams guilty of robbery in the first degree, as charged. CP 147. The jury also found that he or an accomplice had been armed with two firearms. CP 148. The jury found Bradford guilty of two counts of UPF1, as charged. CP 286, 287.

On March 12, 2010, the court sentenced Williams to 151 months in prison, including 120 months for the FASE. CP 195. The court sentenced Bradford to 40 months in prison. CP 297. Both defendants filed timely notices of appeal on the sentencing date, March 12, 2010. CP 187, 288.

2. Facts

On the evening of April 8, 2009, Efreem Peoples (victim) arranged to meet with James Briggs at a "76" gas station/convenience store at South 106th and Steele St. in Pierce County. 4 RP 235. The victim intended to sell Briggs some marijuana. 4 RP 237. Although Briggs was supposed to come alone, he arrived with another person, Hartwell. 4 RP 236, 237. They were waiting at the location when the victim arrived. 4 RP 236.

The victim wanted to conduct the transaction at the gas station. 4 RP 239. However, Briggs wanted to do it across the street, by the nearby Sandman Apartments. *Id.* The victim agreed and Briggs and Hartwell got into the victim's car for the short trip. 4 RP 240. Hartwell was in the front, Briggs was in the back. *Id.*

The victim parked in the back of the apartments at Briggs' direction. 4 RP 241. Briggs wanted the victim to park by a large dumpster, but the victim thought it too dark there. 4 RP 246. Briggs got out, claiming he needed to urinate. 4 RP 246-247. As soon as Briggs got out, Marces Sanders appeared and opened the victim's driver's door. 4 RP 248.

Sanders pointed a .40 semi-automatic pistol at the victim. 4 RP 249. Hartwell pulled a small chrome revolver and pointed it at the victim. *Id.* Sanders and Hartlett started going through the victim's pockets. 4 RP 250. They took his money, cell phone, and a gold chain. *Id.* They told the victim to get out of his vehicle. 4 RP 252.

The victim cautiously backed away from the scene to get help. 4 RP 253. He eventually went back to the 76 station/convenience store, where the clerk called 911. 4 RP 256-257. Pierce County Sheriff (PCSD) Dep. Johnson happened to be working security at a nearby apartment complex. 6 RP 623. He arrived within minutes. 4 RP 257, 6 RP 624.

The victim gave deputies the name of suspects Briggs, Hartlett, and Sanders. 3 RP 157,163. He also described the van that was involved (3 RP 161) and his Ford Bronco, which had been taken. 3 RP 168.

Tacoma Police officer Heilman and DOC officer Grabski were working in the area on a special assignment. 3 RP 194. When they heard Sanders' name on the radio broadcast, they recognized him from previous contacts. 4 RP 406. The officers knew that Sanders' mother lived nearby. 4 RP 407. The officers went directly there to see if Sanders showed up. 4 RP 407. The officers were not there long before a van matching the description given arrived. 4 RP 407.

Dep. Delgado arrived almost immediately behind the van. 3 RP 199. Dep. Delgado ordered the occupants of the van out at gunpoint. 3 RP 199. Officers Heilman and Grabski joined Delgado in controlling the suspects. 3 RP 199, 4 RP 410. Heilman and Grabski contacted the driver, Williams, who was still at the wheel. 3 RP 201, 4 RP 412. They ordered him out of the van. 4 RP 411.

Dep. Fox was still interviewing the victim when the other units stopped the suspects and the van. 3 RP 162. Dep. Fox drove the victim the short distance to that scene. 3 RP 162. At the scene, the victim identified Briggs, Hartlett and Sanders as the ones who robbed him. 3 RP 164, 4 RP 260.

The victim's missing Bronco was located the next day, about 5 minutes from the Sandman Apartments. 3 RP 169, 170. The stereo equipment and speakers had been stripped from the vehicle. 3 RP 173. The victim's property, including the stereo, speakers, amplifier, DVDs, and video games were all gone from the Bronco. 4 RP 271.

A search of Williams' van found much of the victim's property inside. 5 RP 518, 6 RP 675. The victim identified his stereo equipment (4 RP 272, 273, 282) and his CD's and DVD's (4 RP 304-305). The search also discovered 4 handguns in Williams' van: a 9mm Ruger semi-automatic; a .32 revolver; and two .40 Glock semi-automatics. 5 RP 544-548.

C. ARGUMENT.

1. THE COURT CORRECTLY INSTRUCTED THE JURY REGARDING ACCOMPLICE LIABILITY.

a. Instruction 14 is a correct statement of the law.

Under Washington law, accomplice liability is established by showing that the actor aided or abetted the crime with the knowledge that he was promoting or facilitating that crime. *State v. Haack*, 88 Wn. App. 423, 958 P.2d 1001 (1997). 'The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation.' *State v. Carothers*, 84 Wn.2d 256, 264, 525 P.2d 731 (1974). If the State can prove that at least one person intended to commit the crime, accomplice liability extends to all who knowingly participated. *Haack*, 88 Wn. App. at 429.

In the present case, the accomplice liability instruction was Instruction 14. The language of this Instruction was taken directly from WPIC 10.51:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.

However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

WPIC 10.51 is a correct statement of the law. *See, State v. Hoffman*, 116 Wn.2d 51, 102–103, 804 P.2d 577 (1991). The language reflects the accomplice liability statute and definition in RCW 9A.08.020(2)(c) and (3). After *State v. Cronin*, 142 Wn.2d 568, 587-579, 14 P. 3d 752 (2000), WPIC 10.51 was revised to clarify that an accomplice participates in the specific crime, not a general crime.

Cronin and co-defendant Roberts (*State v. Roberts*, 142 Wn.2d 471, 14 P. 3d 713 (2000)) were escaped convicts from British Columbia. During a crime spree in Washington, they contacted a friend of Roberts', Eli Cantu. They wanted Cantu's help and to take his car to continue their get away. In order to "help" Cantu deny that he was an accessory, Roberts suggested that they tie Cantu up. Then it would appear that he had given them help and the car unwillingly. After tying Cantu up, Cronin left the residence. Roberts soon joined him in Cantu's vehicle. Unbeknownst to Cronin, Roberts had murdered Cantu when Cronin left. 142 Wn. 2d 575-576.

Cantu argued at trial that, although he had participated in binding Cantu and taking his property, he did not know about or participate in the murder. *Cronin*, 142 Wn. 2d at 577.

Williams' defense was factual, not legal. Unlike Cronin, he maintained that was innocent of any crime because he did not know what the other persons in the van were doing. He said that he was not paying attention. He did not see or hear anything. He was not suspicious of any wrongdoing when he picked them up.

His defense did not permit an argument that he only agreed to participate in theft of the victim's property, and that he could not be held responsible if the other participants committed robbery.

The concept of a “wheelman” being guilty as an accomplice to robbery has been recognized by Washington courts for many years. *See, State v. Brummett*, 116 Wash. 407, 199 P. 726 (1921). This factual scenario was discussed in *State v. Grendahl*, 110 Wn. App. 905, 43 P. 3d 76 (2002). There, Grendahl drove his friend, Nauditt, to a fabric store because Nauditt wanted to look it over to see if he could steal a purse from a back room. *Id.*, at 907. While Grendahl waited in the car, Nauditt knocked a woman down and stole her wallet. *Id.*, at 906. Both were charged with robbery. *Id.*, at 907. The Court of Appeals reversed the conviction because the instruction permitted the jury to find Grendahl guilty of robbery where the evidence only supported the conclusion that he intended to assist in a theft. *Id.*, at 911.

Factually and legally, *Grendahl* is distinguishable from the present case. There, Nauditt testified that he was the one that decided to steal the victim’s wallet by force. 110 Wn. App. at 907. He exonerated Grendahl, saying Grendahl did not know of this intent or action until afterward. *Id.* Grendahl’s testimony was consistent with Nauditt’s. *Id.*, at 908.

In the present case, as argued *infra*, the jury was instructed in accordance with *Cronin* and *Roberts*.¹ None of Williams' co-defendants testified on his behalf, let alone that he had no knowledge of what was going on. There was considerable evidence that Williams knew the plan for the robbery; and was a key participant. Unlike *Grendahl*, the prosecutor did not argue that intent to commit theft was enough to convict for robbery.

b. If error, it is invited error.

Williams proposed this instruction. CP 50. If it is error, it is invited error. “[A] party may not request an instruction and later complain on appeal that the requested instruction was given.” *Seattle v. Patu*, 147 Wn. 2d 717, 721, 58 P.3d 273 (2002), quoting *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999)(additional internal citations omitted). Even where the challenge to a jury instruction raises a constitutional issue, the courts will not consider it if the defendant himself proposed the instruction. *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 143 (2005).

¹ The instruction in *Grendahl* also complied with the language required in *Roberts*. Other than a conclusory statement in note 2 on page 911, the Court did not explain why the instruction itself was erroneous.

Even though it is invited error, instructional error may be raised as an issue of ineffective assistance of counsel. *See, State v. Kylo*, 166 Wn.2d 856, 861, 215 P. 3d 177 (2009). This issue is addressed in argument 2. *infra*.

2. WILLIAMS FAILS TO DEMONSTRATE DEFICIENCY OF COUNSEL AND PREJUDICE THEREBY.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance 1) was deficient, and 2) prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn. 2d 222, 225-226, 743 P. 2d 816 (1987). Great deference is given to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome “a strong presumption that counsel's performance was reasonable.” *Kylo*, 166 Wn.2d at 862.

To demonstrate the prejudice prong of the *Strickland* test, the defendant must establish that, but for counsel's deficient performance, the outcome of the proceedings probably would have been different. *Strickland*, 466 U.S. at 694; *Kylo*, 166 Wn.2d at 862. In assessing prejudice, “a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according

to the law” and must “exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification’ and the like.” *Strickland*, 466 U.S. at 694-95.

a. Jury instruction 14.

Ineffective assistance of counsel may be demonstrated where counsel proposes a jury instruction that misstates the law. *See, Kylo, supra* at 863. In *Kylo*, the defendant was charged assault in the second degree arising from a fight while he was in jail on other charges. He asserted self-defense. Defense counsel proposed an improper instruction which, in effect, lowered the State’s burden of disproving self-defense. 166 Wn. 2d at 863. The Court found counsel’s performance deficient. *Id.*, at 869.

In the present case, as pointed out in section 1, *supra*, Instruction 14 was a correct statement of the law. Unlike, the instruction at issue in *Kylo*, the language of this pattern instruction had been revised and updated. Defense counsel was not deficient in proposing or agreeing to it.

b. Preparation of defendant’s testimony.

When determining counsel’s competency, the appellate court reviews the entire record. *See, State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Bonisio*, 92 Wn. App. 783, 797-98, 964 P.2d 1222 (1998). Based on the entire record, counsel’s performance cannot be described as deficient.

When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record. *McFarland*, 127 Wn. 2d at, 335. While off-the-record conversations between Williams and his attorney could be relevant to an ineffective assistance claim, the defendant must file a personal restraint petition if he intends to rely on evidence outside of the trial record. *Id.* The very strong presumption of competence of counsel assumes that trial counsel prepared for trial appropriately, unless the defendant can prove otherwise. *See, Strickland*, 466 U.S. at 689.

Williams asserts that his counsel failed to prepare him by failing to show him photographs before trial. App. Br., at 17. The photographs depicted his van, which he admitted that he was driving during the incident. Exh. 72, 79, 83, 85, 87. The photographs also depicted the stolen property in prominent, obvious places in the van. Exh. 78, 79, 83, 84, 91. The photographs and video were evidence of the unfortunate reality that Williams van was present at the scene of the crime, and, when stopped by police with Williams at the wheel, was full of loot.

The record does not indicate that Williams' counsel failed to consult with him regarding the evidence, trial preparation, or strategy. There is no record of the conversations or consultations that Williams had with counsel; what advice counsel gave or what strategy was discussed. Although Williams testified that he had never seen the photos or video (7 RP 863), it is unknown whether this would be confirmed by defense

counsel. The record does not reflect whether Williams' attorney showed him the photos or video in advance. The record does not reflect that his counsel failed to discuss any of the evidence, Williams' testimony, or cross-examination.

Williams fails to show that, even if it is true that his attorney did not show this evidence to him in advance, this change in preparation would have changed Williams' testimony. The record reflects that his defense was lack of knowledge and lack of participation in the robbery. On re-direct, Williams' counsel used photographs of the van to demonstrate that, consistent with Williams' testimony and his defense theme or strategy, the evidence in the van was, for the most part, in the rear of the van. The items and the "real" participants were behind Williams, where he would not have seen the property or what the other persons were doing. 7 RP 901-903.

A review of the record reveals that trial counsel exercised reasonable professional judgment. The record does not show errors of decision, action, or inaction on the part of his trial counsel that can be blamed on lack of preparation. Williams also fails to show how the outcome of the trial would have been different had trial counsel spent more time consulting with him and preparing for his defense. Williams' claim of ineffective assistance of counsel fails on this ground also.

- c. Failure to object to prosecutor “vouching” for witness.

Counsel was not deficient where there was no such violation. *See* argument 4 *infra*.

3. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR THE JURY TO FIND ALL OF THE ELEMENTS OF ROBBERY PROVEN BEYOND A REASONABLE DOUBT.

In a challenge to the sufficiency of the evidence, the appellate court determines whether any rational fact finder could have found the essential elements of the charged crime beyond a reasonable doubt, viewing the trial evidence in the light most favorable to the State. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). An insufficiency claim “admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Direct and circumstantial evidence are equally reliable. *State v. Thomas*, 150 Wn. 2d 821, 874, 83 P. 3d 970 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *Thomas*, at 874-875; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In the present case, Williams admitted driving the van that Bradford, Briggs, Hartlett, and Sanders were riding in when the police stopped them. 7 RP 835. He admitted that he was in telephone contact with, and agreed to pick up, Briggs at the Sandman Apartments. 6 RP 811, 818. This is where the robbery had occurred. 4 RP 239. The victim had driven Briggs and Hartlett from the 76 station to the place where the robbery occurred. 4 RP 240. Sanders appeared about the same time as the van. 4 RP 262. Williams was driving the same van that had pulled up behind the victim's vehicle at the time of the robbery. 4 RP 262, 264. When stopped by the police, the van contained numerous items that, minutes before, had been taken from the victim, or from his vehicle. 3 RP 271-275, 5 RP 518. The van also contained 4 guns. 5 RP 544-546. Three of the guns were in plain sight on the floor. 5 RP 469. Among the several items taken from the victim's vehicle and found in Williams' van was a large stereo amplifier and speakers. 7 RP 869, 873. The amplifier was so large that it had to be strapped into the front seat, next to Williams. 7 RP 892. Surveillance video showed his van stopping by the victim's vehicle as other men moved between the vehicles. 7 RP 884-885.

From this evidence, the jury could conclude that Williams had agreed to, and did, transport Briggs and the others from the area where they had robbed the victim and then stripped the victim's vehicle of its valuables. The jurors could also conclude that Williams transported Sanders to the scene to participate in the robbery. The jury could further

conclude that Williams agreed to transport the stolen property and the co-defendants away from the scene. They jury could conclude that Williams knew the plan in advance and that at least four of the co-defendants were armed.

4. THE PROSECUTING ATTORNEY DID NOT VOUCH FOR THE CREDIBILITY OF THE VICTIM, AND THEREFORE DID NOT COMMIT MISCONDUCT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

A prosecutor's allegedly improper questioning is reviewed in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The defendant alleging that the prosecutor expressed a personal opinion as to the credibility of a witness bears the burden of showing that the comment was improper and prejudicial. See, *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

In *State v. Ish*, -- Wn.2d --, 241 P. 3d 389 (2010), the Washington Supreme Court recently discussed an issue similar to that raised in the present case. Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness, or (2)

if the prosecutor indicates that evidence not presented at trial supports the witness's testimony. 241 P.3d at 392. However, once the witness's credibility has been attacked during cross-examination, the prosecutor may reference the witness's promise to testify truthfully on redirect. 241 P. 3d at 394, 395.

In the present case, there was a written agreement between the prosecuting attorney and the victim. Exh. 17. The victim had been charged with crimes unrelated to this case. He agreed to testify in the present case and in several others in exchange for a reduction in the charges against him. The agreement did contain a “testify truthfully” provision. However, the prosecuting attorney did not raise the “testify truthfully” provision in direct examination of the victim.

Here, in direct examination, the prosecutor sought to “pull the sting” (*see, Ish*, at 396, Stephens, J., concurring) by reviewing the agreement with the victim: that he had agreed to testify (4 RP 293); that he was charged with robbery in the first degree in a pending case of his own (4 RP 294); and that the State had agreed to reduce that charge to attempted robbery in the second degree for his cooperation in this case and several others (4 RP 295).

Williams’ counsel extensively cross-examined the victim regarding the written agreement. 4 RP 332-335. Williams’ counsel was the first to raise the provision of truthful testimony. 4 RP 333. After raising the issue, Williams’ counsel asked questions regarding who was to

determine whether the testimony was truthful and whether there was a polygraph provision. 4 RP 333-334. Counsel went on to highlight how many versions of the events the victim had given. 4 RP 337-338. Counsel then pointed out that the victim's written statement to police was supposed to be "true and correct", but that the victim had left out several details, such as his illegal possession of a gun and marijuana; and that he was going to sell that gun to someone. 4 RP 343-344.

Williams' counsel's strategy apparently was to discredit the victim by showing that the victim had promised, in writing, to tell the truth on more than one occasion, but omitted facts and changed his story to benefit from a bargain with the State.

The prosecutor did not ask about the "testify truthfully" provision until re-direct. 4 RP 380. This was in response to Williams' cross-examination. This sequence or procedure was specifically approved in *Ish*:

If the agreement contains provisions requiring the witness to give truthful testimony, the State is entitled to point out this fact on redirect if the defendant has previously attacked the witness's credibility.

241 P.3d at 394. And:

Once the witness's credibility has been attacked during cross-examination, the prosecutor may reference the witness's promise to testify truthfully on redirect.

241 P. 3d at 395.

Ish also cautions that in such circumstances that the state should not use this opportunity to comment on the evidence or to imply that the state could or did independently verify the witness' statement. *Id.*, at 394. The record reflects that prosecutor in the present case did not make such comments, nor did he refer to outside information, nor imply that the State had verified the statement independently.

5. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR THE JURY TO FIND ALL THE ELEMENTS OF POSSESSION OF A FIREARM PROVEN BEYOND A REASONABLE DOUBT REGARDING BRADFORD.

Defendant Bradford challenges the sufficiency of the evidence regarding his possession of the firearms alleged. App. Br., at 8-9. As stated *supra*, a defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably drawn from it. *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable, and the trier of fact decides on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-875.

Possession may be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). To establish constructive possession, the State had to show that Bradford had dominion and control over the firearms. *See, State v. Nyegaard*, 154 Wn. App. 641, 647, 226 P.3d 783 (2010). This control need not be exclusive, but the State must

show more than mere proximity. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). One can be in constructive possession jointly with another person. *State v. Morgan*, 78 Wn. App. 208, 212, 896 P.2d 731 (1995).

Although Nyegaard was charged with drug possession, with intent to deliver, with a firearm enhancement, the facts and proof issues in *Nyegaard* are similar to those in the present case. Nyegaard was a passenger in someone else's vehicle which had been stopped for traffic infractions. Police found a gun, and a paper bag containing cocaine and methamphetamine near where Nyegaard had been sitting. *Id.*, at 645. They found over \$3,000 on one of the other occupants. *Id.* On appeal, Nyegaard challenged the sufficiency of the evidence and the search. Like the present defendant, he argued that the state failed to prove constructive possession. Considering all the evidence and the inferences and conclusions that the jury could draw from them, the Court of Appeals rejected his argument. *Id.*, at 648.

The ability to reduce an object to actual possession is an aspect of dominion and control. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). No single factor is dispositive in determining dominion and control. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243 (1995). The totality of the circumstances must be considered. *Id.*, at 501.

Again, in *Echeverria*, as in the present case, the defendant was in someone else's car with a firearm and other weapons. Although he was driving, the gun was under the seat and Echeverria denied any knowledge that the gun was there. 85 Wn. App. at 781; 6 RP 733. From the totality of the evidence, the trial court found that Echeverria possessed the weapons. The Court of Appeals affirmed. 85 Wn. App. at 783.

Here, the evidence showed that the revolver and one of the semi-automatic pistols were between the chairs on the floor by Bradford. 5 RP 545, 546. Another semi-automatic pistol was protruding from the seat. 5 RP 544. All three guns were in plain sight. 5 RP 496. The jury could reasonably conclude that the defendant knew they were there and that he, individually or jointly, possessed or controlled these guns that were all within his reach.

6. THE COURT'S FAILURE TO GIVE A UNANIMITY INSTRUCTION REGARDING COUNT IV WAS HARMLESS ERROR.

a. Bradford had a constitutional right to a unanimous verdict.

Ordinarily, the defendant must preserve an issue regarding a jury instruction by proposing an instruction or stating his objections at trial as CrR 6.15 requires. *See*, RAP 2.5(a). But, the appellate court may review

for the first time on appeal a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988).

A criminal defendant has the right to a unanimous jury verdict. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). When the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, either the State must elect which of such acts the State is relying on for a conviction, or the court must instruct the jury to agree on a specific criminal act. 159 Wn. 2d at 511; *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). This assures that the unanimous verdict is based on the same act proved beyond a reasonable doubt. *Coleman*, 159 Wn.2d at 511-12.

b. The court’s failure to give a *Petrich* instruction was harmless error.

The failure to give a required unanimity instruction is subject to a harmless error analysis. *See, State v. Kitchen*, 110 Wn.2d 403, 756 P. 2d 105 (1988). It will be deemed harmless only if no rational juror could have a reasonable doubt as to any of the incidents alleged. *Coleman*, 159 Wn.2d at 512 (citing *Kitchen*, 110 Wn.2d at 411-12).

This harmless error test turns on whether a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Kitchen*, at 405-406. In *State v. Camarillo*, the Court described the inquiry this way:

Our task is to determine whether a rational trier of fact could have a reasonable doubt as to whether any of the incidents did not establish the crime. In other words, whether the evidence of each incident established the crime beyond a reasonable doubt.

115 Wn.2d 60, 71, 794 P. 2d 850 (1990).

Many of these unanimity instruction cases, such as *Petrich*, *Kitchen*, and *Camarillo*, involved multiple acts or incidents of sex crimes. Typically, these incidents occurred over a period of time on different dates, or the dates were uncertain. The rationale for giving such an instruction in cases involving multiple acts stems from possible confusion about which particular act a jury has used to determine a defendant's guilt, where the evidence shows multiple commissions of a single type of crime. In cases involving property crimes, the unanimity issue often involves multiple items, usually possessed or stolen, on the same date, often at the same place and time.

The crime here did not involve multiple incidents, but multiple items: two guns. The State presented evidence of a single offense involving several pieces of property at the same time and place against one individual. This is analogous to a case where acts are aggregated for one crime. See e.g., *State v. Carosa*, 83 Wn. App. 380, 382-83, 921 P.2d 593 (1996).

Another example is where one crime is charged in the same place and time where there are two victims. In *State v. Parra*, 96 Wn. App. 95, 977 P. 2d 1272 (1999), two defendants were charged with robbing a credit union. There were two victim tellers. One of the tellers testified that he gave the defendant money because of the threat. One of the tellers testified that she gave the defendant money because of a bank policy governing such situations, whether or not the person had a weapon or made a threat. *Id.*, at 98. The defendants appealed, arguing, in part, that the court did not give a *Petrich* unanimity instruction regarding which act, i.e. which teller, the jury could rely on for conviction. *Parra*, 96 Wn. App., at 102.

The Court held that the lack of the unanimity instruction was harmless error. *Parra*, at 103. The criminal act was the same. Both tellers were approached by the same man. He took the credit union's money. The evidence supported the conclusion, beyond a reasonable doubt, that the same man had made the requisite threat. *Id.*, at 102.

Even if the present case is properly characterized as involving multiple acts, any error resulting from the trial court's failure to instruct the jury on unanimity was harmless. The evidence supports the jury finding, beyond a reasonable doubt, that Bradford possessed either or both of the semi-automatic pistols. The jury, in order to return the verdict it did, must have believed that Bradford possessed at least one of the semi-automatic pistols, both of which were found in the same place.

Bradford did not deny that the two semi-automatic pistols were present in the van. His defense was he did not see anything because he was not paying attention. 6 RP 731, 752, 757, 777. There was evidence linking Bradford to the others present. The possession of the two pistols occurred at the same time and place. Under these circumstances, the lack of a unanimity instruction was harmless beyond a reasonable doubt.

7. BRADFORD RECEIVED ADEQUATE NOTICE REGARDING THE CHARGE AGAINST HIM.

- a. The Second Amended Information correctly stated the law and facts required.

An Information or charging document must contain a “statement of the essential facts constituting the offense charged.” CrR 2.1(a)(1). An Information sufficiently charges a crime if it appraises accused persons of the accusations against them with reasonable certainty. *State v. Leach*, 113 Wn.2d 679, 694-95, 782 P.2d 552 (1989). The main question is whether all essential elements of an alleged crime have been included in the charging document. *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). The purpose of the Information or charging document is to apprise the defendant of the charges against him, so that he may prepare his defense. *State v. Borrero*, 147 Wn.2d 353, 58 P. 3d 245 (2002).

CrR 2.1(d) provides that a trial court may permit an information to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced. Bradford may challenge the charging

document as defective for the first time on appeal. *Kjorsvik*, 117 Wn.2d at 102. But because he failed to mount such challenge before or during trial, the appellate court construes the charging document liberally in favor of validity, using a two-pronged test: (1) Do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can Bradford show that he was nonetheless actually prejudiced by the improper or missing language? *See, Kjorsvik*, at 105-06.

Using the language of RCW 9.41.040(1)(a), the charging document lists all the elements of UPF1: that he 1) knowingly; 2) owned or possessed a firearm [each count specified a different firearm]; 3) he had been previously convicted of a serious offense [as defined in RCW 9.41.010]. CP 236-237. The Declaration for determination of probable cause states that “Bradford has prior convictions for Possession of Stolen Property in the First Degree and Unlawful Delivery of a Controlled Substance, both felony offenses.” CP 4. UDCS is a “serious offense” under RCW 9.41.010(16).

Even if the charging document did not specify Bradford’s prior conviction, it is not defective. The failure to allege specific facts in an information may render the charging document vague, but it is not constitutionally defective. *Leach*, 113 Wn.2d at, 686-687. The remedy in such circumstances is to demand a bill of particulars at trial; if this is not done, a challenge to vague, inartful or imprecise language will not be entertained on appeal. 113 Wn. 2d at 687. Bradford never alleged that the

charging document was vague and never requested a bill of particulars. The Second Amended Information provided adequate notice of the charge against defendant Bradford.

There is no basis for Bradford's claim of prejudice. His defense was denial. He did not see, let alone possess, the guns or anything else in Williams' van. 6 RP 733, 8 RP 1005-1006. He does not demonstrate how knowing that he was charged with UPF1 instead of UPF2 would have affected his defense or his testimony.

- b. If the amended Information was error, it was invited error.

Under the invited error doctrine, a defendant may not set up an error at trial and then complain about it on appeal. *Patu*, 147 Wn.2d at 720-21. Generally, invited error requires that the defendant engage in some affirmative action which sets up the error. *See, State v. Phelps*, 113 Wn. App. 347, 353, 57 P.3d 624 (2002). The defendant cannot set up error regarding the amendment of the Information at trial, and then argue on appeal that the Information was insufficient. *See, State v. Armstrong*, 69 Wn. App. 430, 848 P. 2d 1322 (1993).

In the present case, during pretrial motions, the prosecutor discovered that Bradford was erroneously charged with UPF2, instead of UPF1. 2 RP 63. The error apparently stemmed from a misunderstanding of Bradford's UDCS prior conviction. *Id.* The defense agreed that Bradford's prior conviction made the correct charge UPF1. In response to the court

specifically asking if there was an objection, the defense replied that they did not object:

[BRADFORD'S COUNSEL]: Your Honor, I've been trying to get through 9.41.010 and it would appear that [the prosecuting attorney] is correct under what constitutes a serious offense. 9.41.010(12)(b). Mr. Bradford was convicted of a felony, violation of the uniform controlled substance act that was classified as a Class B felony.
THE COURT: Okay. So you won't object to him being arraigned on the second amended information?
[BRADFORD'S COUNSEL]: No, your honor, we do not object.

2 RP 63. Amendment of the Information was correct. Any error was invited by the defendant.

8. BRADFORD FAILS TO DEMONSTRATE DEFICIENCY OF TRIAL COUNSEL AND PREJUDICE THEREBY.

a. Counsel's failure to move to sever.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance (1) was deficient, and (2) prejudiced the defense. *Strickland*, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. *See, State v. Stenson*, 132 Wn.2d 668, 705-706, 940 P.2d 1239 (1997). Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different. *McFarland*, 127 Wn.2d at 335. With respect to the specific contention that defense counsel's failure to move to sever constituted ineffective assistance, the defendant must demonstrate both that the motion would have been

granted, and that the outcome of the proceeding would have been different. *State v. Sutherby*, 165 Wn.2d 870, 884, 204 P.3d 916 (2009).

Separate trials have never been favored in Washington. *State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982). Severance is only proper when the defendant carries the difficult burden of demonstrating undue prejudice from a joint trial. *Grisby*, 97 Wn.2d at 507. Bradford fails to demonstrate that, had his counsel moved for severance, the motion would have been granted. Likewise, he fails to demonstrate that, had severance been ordered, the result would have been different, i.e., he would have been acquitted.

b. Failure to request limiting instruction regarding Williams' evidence.

In Instruction 4 (CP 123), the trial court instructed the jury to decide counts and defendants separately:

A separate crime is charged in each count. You must separately decide each count charged against each defendant. Your verdict as to one count as to one defendant should not control your verdict on any other count or as to any other defendant.

Judges are not permitted to comment on evidence. The Washington State Constitution, Article IV, § 6 provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

In deciding whether to give a limiting instruction, and if so, the wording of such an instruction, trial courts must be careful not to tell the jury what the

facts are or the weight or value of evidence they consider. In the present case, other than directing the jury to consider the evidence and counts against each defendant separately, and instructing on evidence that was admitted for a limited purpose, such as Instruction 8A, the court could not direct the jurors what to consider without commenting on the evidence.

Most of the evidence in this case was admissible regarding both defendants. The general circumstances could be considered in determining Bradford's knowledge of the firearms. The jury could also consider it in determining dominion and control and whether he possessed the guns himself or jointly with the others.

If the court had divided out the evidence for the jury as Bradford now suggests in his brief (Brf. at 21-22), the court would have violated Article IV, § 6. Trial counsel was not deficient for failing to request the court to so instruct the jury.

Even if deficient, Bradford must still show that the failure to request the instruction or the court's failure to give the instruction was prejudicial. *See, Kylo*, 166 Wn.2d at 862. The defendant has to demonstrate that, but for counsel's deficient performance, the result probably would have been different. *Id.* Other than a rather hopeful statement to this effect in his brief on page 23, Bradford does not show that the jury failed to follow Instruction 4, misapplied the evidence, or how the verdict or any individual juror's decision would have been different.

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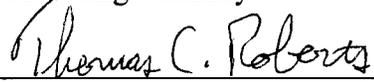
STATE OF WASHINGTON
BY _____

D. CONCLUSION.

Defendants Williams and Bradford received fair trials where the DEPUTY jury was appropriately instructed. The State adduced sufficient evidence for the jurors to all the elements proven beyond a reasonable doubt. They were adequately represented by counsel. The State respectfully requests that the judgments be affirmed.

DATED: February 28, 2011.

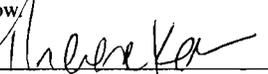
MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-28-11 
Date Signature