

NO. 44561-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JACOB BENJAMIN MATTILA, Appellant
MYKELL ALEX BRU, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01888-0

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

STATE V. MATTILA

- I. MATTILA DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL
- II. PROSECUTORIAL MISCONDUCT DID NOT DEPRIVE THE DEFENDANTS OF A FAIR TRIAL.
- III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT COUNT 8 AGAINST MATTILA, UNLAWFUL POSSESSION OF A FIREARM.
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- II. THE "TRIAL PER DIEM" ON THE JUDGMENT AND SENTENCE IS PART OF THE FEES FOR COURT APPOINTED COUNSEL AND WAS PROPERLY ORDERED.

B. JOINT STATEMENT OF THE CASE

On October 16, 2012 Jacob Mattila was caught acting as a lookout for an in-progress burglary at the home of Jennifer Mock in Camas, Washington. Ten year-old Paityn Mock was sick that day and her mother

briefly left her at home to go to the store and get her some food. RP 269, 281-82. She heard the doorbell ring and she looked outside to see who was there, and she saw a face she didn't recognize. RP 270. She is not allowed to answer the door when she's home alone. RP 270. She saw a car parked in the driveway that she described to 911 as tan with a black stripe. RP 243, 270. She called her mother on the phone and her mother told her not to answer it. RP 270-71. She called her mother back when men entered her home through her mom's room. RP 271. She hid in the pantry. RP 271. She knew there were at least two people, one of whom was a man, because she saw him talking to another person that was out of her line of vision. RP 271. Paityn's terrified mother, Jennifer, told her to hang up and call 911. RP 283. She called 911 from the pantry. RP 272. She wanted to escape from the house but they were still inside. RP 272. She looked out to see if the car was still there and it was, so she remained where she was. RP 272. The person she saw inside the house was different than the person she saw at the door. RP 273. She thought they might have seen her. RP 273. Paityn was too scared to give 911 her address. RP 275. She checked again to see if escape was possible and ran outside, slamming the door to the garage as she ran out. RP 275. She hid behind a tree in the front yard, but knew she would be seen by anyone still there. RP 275.

Deputy Buckner was dispatched to Paityn's 911 call. RP 241.

Within seven or eight minutes he arrived at the address. RP 242. It was in a very isolated area of upper middle-class homes on acreage. RP 242. The Mock driveway is approximately 400 feet from the house. RP 242. There were no close neighbors. RP 242. The Mock residence is at the end of Northeast Tenth Street, which is a dead-end road. RP 243. Mr. Mattila was parked at the end of the Mock driveway. RP 49-51,, 243. Mattila was speaking on a cell phone, and Buckner noted that the car he was in was a tan-colored Honda with a dark stripe on the side. RP 243. Buckner asked Mattila what he was doing and Mattila said he was trying to find his girlfriend's house. RP 243-44. He asked Mattila if he had driven up to the residence and he denied that he had. RP 244. As he was speaking with Mattila, Jennifer Mock came home and asked if he had been up to the house and he said he hadn't. RP 245. Mrs. Mock then tore up the driveway. 52, 245. At some point Mrs. Mock came back to Buckner and told him not to let Mattila go, that her home had been burglarized. 52, 245. Because Mattila did not claim he was prematurely arrested below, it is not clear whether Buckner learned this information before he placed Mattila in his patrol car or after. At trial, Buckner testified that as he was taking Mattila into custody (meaning, presumably, placing him in the patrol car) Mrs. Mock came back and told him her home had been burglarized. RP

245. At a pre-trial CrR 3.5 hearing, Buckner thought that Mrs. Mock relayed this information to him after he drove up the driveway (meaning, after Mattila had been placed in his car). RP 60-61.

About twenty minutes after taking Mattila up to the top of the driveway, and after clearing the residence and hearing from Mrs. Mock, Buckner advised Mattila he was under arrest and gave him *Miranda* warnings. RP 53, 61-62. Buckner asked Mattila no questions in between the time he spoke with him at the bottom of the driveway and about twenty minutes after taking him to the top of the driveway and investigating inside the house. RP 51-52. When Jennifer Mock went inside her house she found it had been burglarized. RP 283-85.

Mattila was questioned at the scene of the Mock burglary after waiving his *Miranda* rights, and then questioned again at Central Precinct by Deputies Buckner and Yakhour. RP 53-54. He implicated himself in several other burglaries. RP 251-52, 501-11. The Honda Mattila was driving was stolen. RP 249.

After the burglary at her home, Jennifer Mock found a cigarette on her bathroom floor. RP 286. No one in her home smokes, and the cigarette had not been there before the burglary as the house had just been professionally cleaned. RP 286. The DNA on the cigarette matched Mykell Bru. RP 413.

Mr. Mattila was convicted of burglary in the first degree, two counts of residential burglary, two counts of theft of a firearm, theft in the first degree, and unlawful possession of a firearm. CP 89-96.

Mr. Bru was convicted on one count of residential burglary (Count 3) for his involvement in the Mock burglary. CP 11. This appeal followed.

C. ARGUMENT

RESPONSE IN STATE V. MATTILA

I. MATTILA WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE ELECTED NOT TO CLAIM THAT HE WAS UNLAWFULLY ARRESTED.

Below, Mattila did not believe that he suffered an unlawful arrest. His appellate counsel disagrees, and wants this Court to declare that he and his trial counsel were wrong and, therefore his trial counsel was ineffective. Because of Mattila's decision not to challenge his arrest below he has deprived this Court of an adequate record on which to rule on this claim and he therefore cannot demonstrate prejudice. If it is argued that the record is adequate for review, then the record clearly shows that Mattila was not arrested at the point that Mattila now claims he was, and that, in any event, there was probable cause for his arrest prior to the time he was placed in Deputy Buckner's patrol car.

Mattila did not file a CrR 3.6 motion in the trial court. As a result, neither the testimony at the CrR 3.5 hearing nor the trial was developed with a view toward exploring: 1) the precise moment when Mattila was arrested, and 2) whether the arrest was supported by probable cause. Questions were not asked on this issue. “A...basis for not reviewing a suppression issue raised for the first time on appeal is that the record is inadequate to do so.” *State v. Millan*, 151 Wn.App. 492, 500, 212 P.3d 603 (2009), *reversed on other grounds by State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011). Even though Mattila raises this issue through the back door of ineffective assistance of counsel, there must still be an adequate record in order for him to demonstrate that Mattila suffered prejudice.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

But even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” *Strickland* at 693. “In doing so, ‘[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, **the result of the proceeding would have been different.** (Emphasis added). A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (*quoting Strickland* at 694). When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983).

And the court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

“Criminal defendants are not guaranteed ‘successful assistance of counsel.’” *State v. Dow*, 162 Wn.App. 324, 336, 253 P.3d 476 (2011), quoting *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) and *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Not every error made by defense counsel that results in adverse consequences is prejudicial under *Strickland*, supra. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). Whether a “strategy ultimately proved unsuccessful is immaterial.” *Grier* at 43, see also *Dow*, supra, at 336. Last, with respect to the deficient performance prong of *Strickland*, “hindsight has no place in an ineffective assistance analysis.” *Grier* at 43.

Here, Deputy Buckner testified that he approached the car the defendant was in, which matched the description of the car that ten year-old Paityn Mock had seen in her driveway and was at the end of her isolated, rural driveway. RP 50. He made a detention at that time by activating his lights and asked several investigatory questions of the defendant. RP 50-51. He was alone, as no other deputies had arrived, and he knew from dispatch that there were multiple perpetrators present (Paityn had described seeing men in her house). RP 61, 245, 271. While he was asking investigatory questions Mrs. Mock arrived home and tore

up to the house because she believed her daughter was up there alone with burglars. RP 52. Buckner then describes driving up to the house with Mattila “in custody,” but he was never asked to explain what he meant by that. RP 52. He described Mattila as being “in custody until we could determine what was going on, and he was in the backseat of my car at that point.” RP 59. When asked if he arrested Mattila down at the bottom of the driveway when he first questioned him about who he was talking to on the phone, Buckner said

No. Obviously, I felt that it was suspicious in nature that he was parked in that isolated area, that he--the vehicle he was driving matched the description of a vehicle that was involved in a burglary, and--and so I took him into custody, detained him, until we could determine what was going on.

RP 59. He couldn't recall if Mattila was in handcuffs when he testified at the hearing, but later recalled that he was. RP 59, 245. It was also unclear whether Mrs. Mock told him that her home had been burglarized when he was still at the bottom of the driveway with Mr. Mattila or after he had taken Mattila with him up to the residence. This could have been explored in a timely CrR 3.6 hearing. He testified that about twenty minutes after driving Mattila up to the house, and after investigating what went on inside the house (RP 62-63) he “advised him he was under arrest for burglary” (RP 53 at lines 19-21) and read him his *Miranda* warnings. RP

52-53. Buckner was asked on cross examination whether he questioned Mattila while he was detained in the backseat of his car before being given his *Miranda* warnings and Buckner reiterated “No, he was in the backseat of my car at that point. I had the homeowner watch him. I was out there by myself, I wanted to clear the residence for any additional suspects.” RP 61. Buckner reiterated at trial that in his view, Mattila was “detained” at the time when he was in the patrol car at the top of the driveway while Buckner attempted to “determine what was going on.” RP 245. At the point when he reached the top of the driveway Buckner felt that there had been a burglary at the residence and that additional persons were at large. RP 245. He called for additional units to respond to the location. RP 245. “I had a lot of things going on. I was trying to deal with the homeowner, I was trying to deal with the ten-year-old victim, if you will, and I was requesting additional units to respond to my location.” RP 61-62.

Mattila states in his brief that Deputy Buckner “arrested Mattila without probable cause” and cites to RP 63. See Brief of Appellant at 7. “Arrested” is Mattila’s word. Page 63 of the Report of Proceedings does not support Mattila’s statement. Mattila also cites to pages 50 and 59 of the Report of Proceedings for his statement that Buckner “arrested Mr. Mattila because he was parked in an isolated area, and because his car

matched the vague description given to 911-a tan car with a dark stripe.”¹ See Brief of Appellant at 7-8. Again, “arrested” is Mattila’s word and the report of proceedings does not in any way support that statement. In order for there to be custody, a reasonable person in Mattila’s position would have to believe that he or she was in police custody with the loss of freedom associated with a formal arrest. *State v. Lorenz*, 152 Wn.2d 22, 37, 93 P.3d 133 (2004). The test is an objective one. *Lorenz* at 36-37. “Courts examine the totality of the circumstances to determine whether a suspect was in custody.” *State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013).

Those two sentences comprise the extent of Mattila’s analysis of the actual facts, and his analysis is totally unsupported. The best evidence that Mattila did not believe he was under formal arrest is the fact that he didn’t make this claim below. But beyond that, a reasonable person in Mattila’s situation would have believed himself detained pending further investigation. The fact that Deputy Buckner had to ask Mrs. Mock to watch Mattila while he searched the inside of the house shows that Buckner was still conducting an initial investigation into what was going on, and Mattila knew that. Mattila ignores the fact that a party asking this Court to review a particular issue bears the burden of ensuring that the

¹ That description is not vague in the slightest. It is very specific.

record is sufficient for this Court to do so. *State v. Bennett*, 168 Wn.App. 197, 206, 275 P.3d 1224 (2012). He failed in that burden. Without an adequate record on review, Mattila cannot show that he was prejudiced. He cannot show on this record, as he must, that the trial court would have granted his motion to suppress.

If this scant record shows anything, it shows that Deputy Buckner uses the word “custody” to describe a *Terry* detention, not an arrest. “[A]n officer may briefly stop an individual based upon reasonable suspicion of criminal activity if necessary to maintain the status quo while obtaining more information.” *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002); *State v. Miller*, 91 Wn. App 181, 184, 955 P.2d 810, 961 P.2d 973 (1998). That is what Deputy Buckner did here. He was alone in an isolated, rural area. He knew that there were multiple perpetrators, he knew that some of them were inside or had been inside the house with a terrified ten year-old girl, he knew that the defendant was inside the very car that had been described by Paityn Mock and that it was at the end of the Mock driveway. He knew the defendant was lying to him when he claimed he had not been up at the house because Paityn Mock had described seeing it, and she was up at the house. He could see from his location at the bottom of the driveway that you couldn’t see the house from there, and vice versa. He couldn’t simply leave the defendant in his

vehicle (actually, it was a stolen vehicle, Buckner would later learn) at the end of the driveway while he went up to the house to ensure the safety of Mrs. Mock and Paityn; he had to take Mattila with him. He also had to keep Mattila detained while he investigated. What if he left Mattila unsecured outside the Mock house and Mattila hurt or killed Mrs. Mock or Paityn? Buckner's use of the word "custody," in a hearing where the arrest was not being challenged, does not compel this Court's conclusion, as part of its de novo review, that Mattila was arrested at the bottom of the driveway when he was detained in Buckner's patrol car.

But even if Mattila was arrested at the bottom of the driveway, the arrest was supported by probable cause. Probable cause is not proof beyond a reasonable doubt.

A lawful custodial arrest requires the officer to have probable cause to believe that a person committed a crime. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004); *State v. McKenna*, 91 Wn.App. 554, 560, 958 P.2d 1017 (1998). Probable cause "boils down, in criminal situations, to a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed a crime." *State v. Klinker*, 85 Wn.2d 509, 521, 537 P.2d 268 (1975) (emphasis added). Probable cause is not knowledge of evidence sufficient to establish guilt beyond a reasonable doubt but, rather, is "reasonable grounds for suspicion coupled with evidence of circumstances to convince a cautious or disinterested person that the accused is guilty." *State v. Bellows*, 72 Wn.2d 264, 266, 432 P.2d 654 (1967). We determine whether an arresting officer's belief was reasonable after considering all the facts within the officer's knowledge at

the time of the arrest as well as the officer's special expertise and experience. *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979).

State v. Louthan, 158 Wn. App. 732, 741-42, 242 P.3d 954 (2010), *reversed on other grounds*, 175 Wn. 2d 751, 287 P.3d 8 (2012). Further, an officer's subjective but mistaken belief that he has probable cause to arrest for one crime will not negate the actual probable cause he has for another crime. *State v. Huff*, 64 Wn.App. 641, 645, 826 P.2d 698 (1992), *review denied* 119 Wn.2d 1007, 833 P.2d 387 (1992). “ ‘The law cannot expect a patrolman, unschooled in the technicalities of criminal and constitutional law ... to always be able to immediately state with particularity the exact grounds on which he is exercising his authority.’ ” *Huff* at 646 (quoting *McNeely v. United States*, 353 F.2d 913, 918 (8th Cir.1965)).

When Buckner arrived at the Mock driveway he knew that there was a reported home invasion *in progress* with a ten year-old girl alone inside with one or more men. The Mock house is at the end of a dead-end road, and the area of full of isolated homes on acreage. He found Mattila sitting in a car at the end of the driveway, and the car matched the specific description given by Paityn Mock. That meant that the car had been up at the house because Paityn would not have been able to see it otherwise. Thus, when Mattila told Buckner that he hadn't been up the house,

Buckner would have known that was a lie. Also, if Mattila was really looking for his girlfriend's home, as he claimed, why wouldn't he have gone up to the house? Mattila's claim that he was looking for his girlfriend's house was facially absurd given the location of the car and the geography of the area. Buckner could have reasonably believed that Mattila had committed a crime or was in the act of committing a crime. See *Louthan*, supra, at 741-42. Buckner had probable cause to believe that Mattila was involved in the home invasion.

Regarding the search of the stolen car, Mattila assumes, without providing any analysis, that it would not have been searched absent the supposed unlawful arrest of Mattila. But Mattila does not deny that he was lawfully detained, and this record does not show when it was discovered that the car was stolen. Again, because Mattila has deprived this Court of an adequate record by failing to complain about his arrest until now, the record contains only one statement by Deputy Buckner about when he ran the plates on the car. It is found at page 249 of the Report of Proceedings and occurred during Buckner's trial testimony. He was asked "[D]id you check the status of the car that Mr. Mattila was in?" He replied "Yes, I did." He was then asked what the status of the car was and he replied that it came back as stolen. RP 249. He was not asked when he ran the plates. Without showing the precise point at which he was arrested, and that the

running of the plates occurred after the arrest, Mattila cannot show the search of the car was unlawful. Thus, he cannot demonstrate prejudice.

Finally, because Mattila waived this issue below, the trial court never had the opportunity to determine whether Mattila's statements to the police were fruit of the poisonous tree. "Evidence is not 'fruit of the poisonous tree' if the connection between the challenged evidence and the illegal actions of the police is 'so attenuated as to dissipate the taint.'" *State v. Eserjose*, 171 Wn.2d 907, 921, 259 P.3d 172 (2011). Here, Mattila twice spoke with the police: at the scene of the Mock burglary with Deputy Buckner, and then later at the police station with Buckner and Deputy Yakhour. Moreover, nothing was gained from the supposed prematurity of the arrest. Deputy Buckner did not ask Mattila any questions in between the time he placed Mattila in his patrol car and the time that he advised Mattila he was under arrest and gave him the *Miranda* warnings. It must be noted that Mattila does not challenge the lawfulness of the initial seizure (when Buckner came up behind the stolen car and activated his lights). He only challenges his placement in the patrol car, claiming it was an arrest (and without even mentioning the standard for determining when an arrest occurs for *Miranda* purposes). But Mattila was asked no questions after being placed in the patrol car until at least twenty minutes later when he was told he was under arrest

and *Mirandized*. On this undeveloped record Mattila cannot show that his statements to the police were the fruit of the poisonous tree and therefore cannot show that the trial court would have granted a motion to suppress. Thus, he cannot show prejudice. Mattila's claim fails.

II. PROSECUTORIAL MISCONDUCT DID NOT DEPRIVE THE DEFENDANTS OF A FAIR TRIAL.

For the first time on appeal, Mattila and Bru complain about the prosecutor's closing argument. The argument now complained of was not objected to below, requiring Mattila and Bru to prove that the remarks were flagrant and ill-intentioned and could not have been obviated by a curative instruction.

The remarks complained of are:

These two Defendants had zero regard for other people's property, their sense of security, or their right to be safe in their own homes. They didn't care that ten-year-old Paityn Mock was home all alone that day, terrified, hiding in the pantry. They didn't consider how her mother would feel about leaving her daughter home alone that day, even for a few minutes.

RP 658.

These two didn't care that the victims of their crimes worked hard to obtain the property that they had. They didn't care that those things meant something to them, and they didn't care how these people would feel after their homes had been invaded by complete strangers to them. It meant nothing to them, nothing.

RP 659-60.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers* at 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

The best evidence that these remarks were not so prejudicial that they could not have been obviated by a curative instruction is that they were not objected to. “The absence of an objection by defense counsel 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. Edvalds*, 157 Wn. App. 517, 525-26, 237 P.3d 368 (2010); *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). The lack of objection by the *three* defense attorneys in the courtroom suggests that they did not contribute to the verdict in this case and were of little moment in the overall case. Although both defendants claim that the prosecutor was

appealing to the passion and prejudice of the jury, the prosecutor was merely asking the jury to understand that these crimes, which are widely understood as mere property crimes, are nevertheless important to those who are victimized by them. “A prosecutor is not barred from referring to the heinous nature of a crime but nevertheless retains the duty to ensure a verdict ‘free of prejudice and based on reason.’” *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158, 1169 review denied, 175 Wn. 2d 1025, 291 P.3d 253 (2012).

The prosecutor here did not invent an entire murder scenario out of whole cloth as the prosecutor did in *Pierce*, supra. She did not appeal to racial bias, as the prosecutors in *State v. Perez-Mejia*, 134 Wn.App. 907, 143 P.3d 838 (2006) and *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011). She did not craft a closing argument on the notion of a war on a particular crime, as the prosecutor did in *State v. Echevarria*, 71 Wn.App. 595, 860 P.2d 420 (1993). She merely asked the jury to care. The remarks were arguably irrelevant, but not so flagrant and ill-intentioned that they could not have been obviated by a curative instruction. This claim fails.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT COUNT 8 AGAINST MATTILA, UNLAWFUL POSSESSION OF A FIREARM.

Mattila claims that the evidence is insufficient to support the jury's finding that on October 16, 2012, he knowingly possessed the .22 Ruger firearm. He is correct, and the State concedes this assignment of error.

In light of this concession, it is unnecessary for this Court to decide whether Mattila received ineffective assistance of counsel when his attorneys agreed to admission of his redacted statement. If the redaction was misleading, as Mattila asserts, the error pertained only to Count 8 (see Brief of Appellant at page 9).

IV. THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS DID NOT DEPRIVED THE DEFENDANTS OF THEIR RIGHT TO COUNSEL.

Both defendants assert that the imposition of legal financial obligations for repayment of his defense costs should be reversed by this Court because the trial court, they claim, did not inquire into their ability or willingness to pay them. They further claim that the trial court must inquire about their ability or willingness to pay defense costs before the court can order future repayment in order to pass constitutional muster.

They did not object to the imposition of these costs below and cannot complain about them for the first time on appeal. Although they

cite to *State v. Bertrand*, 165 Wn.App. 393, 404, 267 P.3d 511 (2011), that case is distinguishable. The defendant in that case was disabled and the sentencing court ordered her to begin payment on her LFOs 60 days after entry of the judgment and sentence, while she would still be in confinement for her 36 -month sentence. *Bertrand* at 398. Based on these facts, this Court reversed the trial court's finding that the defendant had the ability to pay the LFOs. *Bertrand* at 404. Here, in contrast, there is no evidence that the defendants would be similarly unable to pay LFOs when the State eventually seeks to collect them.

In addition to having waived this issue on appeal by not objecting below, the claim is not ripe for review. Neither defendant shows the State is currently seeking payment of his LFOs. The correct time to challenge an inability to pay LFOs is at the time the State seeks to enforce the judgment:

As a final matter, we note that generally challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them.

...

Here, nothing in the record reflects that the State has attempted to collect legal financial obligations from Lundy or even when Lundy is expected to begin repayment of these obligations. Accordingly, any challenge to the order

requiring payment of legal financial obligations on hardship grounds is not yet ripe for review.

State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013).

In an effort to have this issue reviewed for the first time on appeal the defendants attempt to convert this claim into a constitutional one, asserting that the Washington Supreme Court has misapplied *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116 (1974). They don't argue, however, that the cases interpreting *Fuller*, namely *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) and *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992), were incorrect and harmful. (See e.g. *State v. Stalker*, 152 Wn. App. 805, 808, 219 P.3d 722 (2009) ("The State now asserts that subsequent case law has undermined that holding. The standard for overruling precedent is strict: the earlier decision must be both incorrect and harmful.")). They simply ask this Court to ignore Supreme Court precedent.

But the defendants are not entitled to review because not every constitutional error is reviewable for the first time on appeal. "The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.' *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), quoting *State v. Kirwin*, 165 Wn.2d 818, 823,

203 P.3d 1044 (2009) and *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Robinson* at 305, *McFarland* at 333; *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). “[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources.” *Robinson* at 305.

As explained in *McFarland*, supra RAP 2.5 (a) (3) is “not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court.” *McFarland* at 333. In order to obtain review under RAP 2.5, the error must be “‘manifest,’—i.e. it must be ‘truly of constitutional magnitude.’” *Id.*; *State v. Scott* at 688. To be deemed manifest constitutional error, a defendant must identify the error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights. *McFarland* at 333. “It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record.” *Id.* at 334. Further, if the facts necessary to adjudicate the claimed error are not adequately presented in the record on appeal, a defendant cannot show prejudice and

the error is not manifest as a matter of law. *McFarland* at 333; *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

The defendants do not even discuss this standard nor make any attempt to meet it. This Court should deny review of this assignment of error.

STATE V. BRU

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING BRU'S UNTIMELY MOTION TO CONTINUE.

The decision of whether to grant or deny a motion to continue is within the sound discretion of the trial court. *State v. Miles*, 77 Wn.2d 593, 597, 464 P.2d 723 (1970). On review, this Court should not disturb the trial court's ruling on this matter unless Mayer can show that the trial court's discretion was manifestly unreasonable, exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In deciding whether to grant or deny a motion to continue, the trial courts may consider many factors, such as surprise, diligence, redundancy, due process, materiality and maintenance of orderly procedure. *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974).

In *State v. Downing*, 151 Wn.2d 265, 87 P.3d 1169 (2004), the defendant moved for a continuance in order to secure an expert witness.

The court found that the trial court did not abuse its discretion in denying the defendant's motion. *Downing* at 274. The trial court there had found the expert's testimony would not change material facts. *Id.* In finding the trial court did not abuse its discretion, the Supreme Court stated that "[w]hile reasonable minds may differ, we cannot say that the trial court's determination that the maintenance of orderly procedure outweighed the reasons favoring a continuance, such as surprise and due diligence, was manifestly unreasonable." *Id.*

Here, defense counsel moved on the first day of trial to have the trial continued on the basis that he had just received a lab report showing that the cigarette at the Mock burglary was found to have Mr. Bru's DNA on it. RP 97-99. However, the record showed that defense counsel had been advised the test result was coming the previous Thursday at the readiness hearing. RP 97, 99. The record further showed that Mr. Bru initially told the State he would be seeking a continuance but then called it ready without any warning to the State. RP 99. At that point (at the readiness hearing) the State put on the record that there was a cigarette butt that was found at one of the burglaries that was being tested for DNA and that a report was expected back on that by the end of the week (meaning, the next day). RP 99-100. Mr. Bru affirmed at that time that he wanted to proceed with the trial anyway (knowing, as he must have, that

the DNA would be his). RP 100. The prosecutor actually received the results later that day (the Thursday before trial) and immediately forwarded them to Bru's counsel. RP 100. He then indicated to the State that he wanted a continuance and a hearing was supposed to take place at 2:30 the next day (which was the Friday before trial) but the defendant did not appear for the hearing and it wasn't heard. RP 100. When the court pointed out to defense counsel that he knew that a cigarette butt had been collected from the police reports, defense counsel responded "there's a number of burglaries, they seized all kinds of things, and again, it was four months ago." RP 101. The court also noted that the defendant had led the State to believe the case would be continued but nevertheless called it ready. RP 102. The court indicated it would give defense counsel time to interview the lab technician ahead of her testimony, but the trial would proceed. RP 102.

The trial court did not abuse its discretion. The motion to continue was an obvious tactic on Bru's part. By continuing the trial the court would have been forced to decide whether to sever the matter from Mattila's. The State, wanting to avoid the expense of a second trial, might be inclined to give a favorable plea offer in that event. There are any number of benefits that might accrue to a defendant who can successfully continue a trial on the day of its commencement. The trial court correctly

balanced the competing interests, as well as the actual facts of what occurred leading up to trial, and denied the motion.

II. THE “TRIAL PER DIEM” ON THE JUDGMENT AND SENTENCE IS PART OF THE FEES FOR COURT APPOINTED COUNSEL AND WAS PROPERLY ORDERED.

The “trial per diem” Bru complains of is part of the fees for court appointed counsel. RCW 9.94A.030 (30) authorizes the trial court to impose legal financial obligations which include “court appointed attorneys’ fees” and “costs of defense.” The trial per diem is the amount the court appointed attorney receives over and above the fixed fee for a case. It is customary in public defense contracts for attorneys to be paid a fixed amount per case which does not include the trial fee, and a separate fixed amount, on top of the fixed base fee, for taking the case to trial. On previous judgment and sentence forms used by Clark County these amounts were broken into two lines (one for the base fee and one for the trial per diem) rather than one line for total court appointed attorney costs. We briefly changed the judgment and sentence to place fees for court appointed attorney and trial per diem on one line to make it clear that both of these fees were for court appointed counsel as authorized by RCW 9.94A.030 (30). This is how it looks on George’s judgment and sentence. The judgment and sentence has since been changed again so that now, the

entire amount of the legal financial obligation is simply denoted as fee for court appointed attorney and the per diem is not mentioned (because it is totally irrelevant--it doesn't matter what forms the basis of the court appointed attorney fee so long as it is, in fact, a court appointed attorney fee).

Nevertheless, the State submits it is obvious that "trial per diem" is not some extra fine placed on a defendant for going to trial, untethered to the court appointed counsel fee. Indeed, the definition of "per diem" is "an amount of money *given to someone* for daily expenses." See *Merriam-Webster.com* On-line Edition (2013) (available at www.merriam-webster.com/dictionary/per+diem?show=0&t=1388520639) (emphasis added). To whom is the per diem going? If this fee were simply a fee for going to trial, it would not say "per diem." A per diem is necessarily given to a person as remuneration for expenses. Moreover, these fees appear on the same line on the judgment and sentence. Why would two unrelated fees appear on the same line when all other unrelated fees are given their own line? The State asks this Court to leave the legal financial obligations undisturbed because Bru has not shown that the "trial per diem" is not a part of the fee for court appointed counsel. Moreover, he did not object to this fee below and he should not be able to complain about this fee for the first time on appeal. The State adopts and incorporates the argument it

made on this point above in part IV of the Mattila response. The fee should not be stricken.

D. CONCLUSION

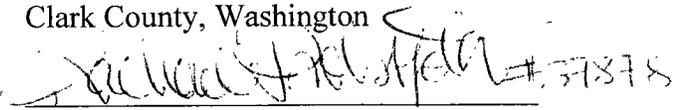
The judgments and sentences should be affirmed in all respects.

DATED this 10th day of February, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
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By:


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Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

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