

NO. 46592-2-II

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

STATE OF WASHINGTON, Respondent

v.

RYAN LEVI MATISON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00336-8

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. **THE TRIAL COURT PROPERLY REFUSED TO SEVER THE RECKLESS DRIVING CHARGE FROM THE VEHICULAR HOMICIDE CHARGE.**
- II. **DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PROPOSE A LIMITING INSTRUCTION.**
- III. **THE PROSECUTOR DID NOT COMMIT FLAGRANT AND ILL-INTENTIONED MISCONDUCT, AND ANY PROBLEMATIC REMARK COULD HAVE EASILY BEEN OBIATED BY A CURATIVE INSTRUCTION.**
- IV. **THE STATE AGREES TO CORRECTION OF THE JUDGMENT AND SENTENCE.**
- V. **THE TRIAL COURT'S FAILURE TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE CrR 3.5 HEARING DOES NOT WARRANT REMAND OF THIS CASE.**

B. STATEMENT OF THE CASE

In addition to the facts set forth by the appellant¹, the State offers the following facts:

On November 23, 2014, Ryan Matison drove along NE 29th Street in Battle Ground, in a southbound direction, approaching SR 502 (also

¹ The State largely agrees with the facts set forth by the appellant, with the exception of the facts that were derived from the defendant's testimony or statements, which are presented as fact. They are not facts, because the jury found Matison not credible. They are nothing more than claims.

known as Battle Ground Highway), with his girlfriend, seventeen year-old Samantha Effingham. RP 209, 758-60. Sarrah and Jeff Held had just left their home to do some Black Friday shopping along with their two young children, and turned onto NE 29th, also southbound, toward SR 502. RP 244-45. As they were driving, Sarrah heard her husband say “oh shit,” which was highly unusual given that they were with their children. RP 245. Sarrah saw that her husband had his eyes on the rearview mirror and had braced the steering wheel. RP 245. She wondered what was wrong, and the next thing she knew a car passed them on the left, into the oncoming lane of travel. RP 246, 248. NE 29th is a hilly road, and has one lane in each direction. RP 247. The car was a station wagon. RP 256. The car passed them at a high rate of speed, and Sarrah never saw the car return to the correct lane of travel. RP 250. It remained in the middle of the road, straddling the two directions of travel. RP 250. The car increased the distance between them and they lost sight of it. RP 251. It was raining that day and the roads were wet. RP 252. Because of the wet roadway they were able to see tire tracks, and saw that they continued to straddle the middle of the lanes. RP 253-54. They were concerned because the car was driving very fast and there was a stop sign ahead. RP 253-54. The stop sign is marked by flashing lights so as to warn drivers before they reach the state highway. RP 276. As Sarrah and Jeff reached the stop sign, they

saw the car that had passed them across the street in a field with another car (a silver truck). RP 255. There is no traffic signal for people traveling on SR 502, but there is for the traffic on NE 29th crossing SR 502. RP 304. The collision was on the passenger side of the station wagon. RP 309. The driver, Ryan Matison, was fine. RP 309.

Jeff Held testified that it is about a mile from his house to the stop sign at NE 29th and SR 502. RP 402-03. As he drove his family down NE 29th, he saw a car coming up on him so fast that he felt sure it would hit him. RP 404-05. He clenched the steering wheel and braced for impact, and let out an expletive. RP 405. His wife stared at him. RP 405. The speed limit on NE 29th is 40 miles per hour. RP 407. Instead of hitting him, the car went into the oncoming lane and flew past him, going at least 15 to 20 miles per hour faster than he was. RP 408. He estimated he was going 45 to 50 miles per hour. RP 441. The car continued driving in the center of the road. RP 408. Jeff lost sight of the car as it crested the next hill. RP 412. Jeff told a responding Trooper that the defendant's car passed him like he was "standing still." RP 429. Jeff continued to see tire tracks in the roadway that indicated that the car continued to travel in both lanes of travel, and he recalled telling Sarrah it appeared that the defendant remained in the center of the roadway. RP 412-13. Following the pass the defendant straddled double yellow lines in the roadway. RP 443.

Forrest Anglemeyer was traveling in front of the silver truck on SR 502, and they were traveling at a safe pace. RP 302. Mr. Anglemeyer noticed, as they traveled through the intersection at NE 29th and SR 502, that the silver truck's headlights disappeared from his view in his rearview mirror. RP 302. He saw the silver truck collide with the station wagon. RP 303.

The defendant testified that he picked up his girlfriend, Samantha Effingham, at about 4:00 a.m. on November 23rd. RP 757. Samantha worked at the Dairy Queen in Woodland. RP 758. They left his house that day at about two o'clock in the afternoon. RP 758. He was driving a Toyota Corolla. RP 758. The defendant claimed not to recall passing the Hells, due to his "head injury."² RP 760. Curiously, he remembered everything that happened before the pass and after it. RP 757-776. He was adamant in his testimony that he was going only 45 miles per hour, and was not speeding excessively. RP 763, 776. He claimed that the stop sign caught him off guard but that he saw it. RP 761. He claimed that his brakes failed when he tried to stop. RP 761-62.

Samantha Effingham suffered grievous injuries, including a crushed skull, a severed aorta, two broken femurs, four broken ribs, a

² Matison was not particularly injured. He stayed in the hospital "maybe an hour or so." RP 767.

fractured pelvis, and a lacerated liver. RP 215-20. She died of multiple blunt force injuries. RP 219.

Matison was convicted of one count of vehicular homicide and one count of reckless driving. CP 5-6.

With respect to the CrR 3.5 hearing, Matison advised the court that testimony about admissibility of his statements was unnecessary. RP 23-24. Rather, Matison was willing to stipulate the facts set forth by the State in its motion on the CrR 3.5 hearing (State's Supp. CP), with the exception of number 15. RP 24.

C. ARGUMENT

I. THE TRIAL COURT PROPERLY REFUSED TO SEVER THE RECKLESS DRIVING CHARGE FROM THE VEHICULAR HOMICIDE CHARGE.

Matison seeks reversal of his reckless driving conviction, arguing that it should have been severed from the vehicular homicide charge.³ The trial court did not err.

Court Rules provide that two or more offenses may be joined in one charging document if the charges are of same or similar character or are based on the same conduct or a series of acts connected together or constituting parts of a single scheme or plan. CrR 4.3(a). Washington is a

³ Matison does not seek reversal of the vehicular homicide charge on this basis.

liberal joinder state, and failure to properly join cases for trial wastes judicial resources. *State v. Thompson*, 88 Wn.2d 518, 525, 564 P.2d 315 (1977), overruled on other grounds by *State v. Thorton*, 119 Wn.2d 578, 835 P.2d 216 (1992); *State v. Wilson*, 71 Wn. App. 880, 886, 863 P.2d 116 (1993), *rev'd in part on other grounds*, 125 Wn.2d 212 (1994). Separate trials are not favored and courts should view consolidation for trial expansively to promote the public policy of conserving judicial and prosecutorial resources. *State v. Grisby*, 97 Wn.2d 493, 506-07, 647 P.2d 6, 25 (1982), *cert. denied*, 103 S. Ct. 1205, 459 U.S. 1211, 75 L.Ed.2d 446 (1983); *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998), *rev. denied*, 137 Wn.2d 1017 (1999).

A trial court should sever charges for trial if the trial court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense. CrR 4.4(b); *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Whether to sever offenses is within the sound discretion of the trial court, and will only be reversed upon a showing of manifest abuse of discretion. *Id.* The defendant has the burden of demonstrating that joinder of offenses would be so manifestly prejudicial so as to outweigh the concerns for judicial economy. *Id.* at 718.

On appellate review, this Court should review the trial court's consideration of the relevant factors in determining Matison's motion to sever. A court should consider the strength of the State's evidence on each count; the clarity of defenses as to each count; the court's instructions or ability to instruct the jury to consider each count separately; and the cross-admissibility of the evidence. *State v. Russell*, 125 Wn.2d 24, 62-68, 882 P.2d 747 (1994). The presence of these four factors tends to mitigate any prejudice from joinder. In *State v. Hentz*, 32 Wn. App. 186, 647 P.2d 39 (1982), *rev'd in part on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983), this Court found in a case where the defendant alleged error in the trial court's refusal to sever counts, that bare assertions that a joint trial of offenses will create a danger that the jury will accumulate evidence, or that the defendant may be embarrassed in presenting conflicting defenses, or that the jury may conclude the defendant has a propensity for crime do not satisfy the defendant's burden of demonstrating that there is substantial prejudice by the joinder of offenses when his jury was instructed to decide each count separately. *Hentz*, 32 Wn. App. at 190.

Here, the trial court properly denied severance. The first factor weighs in favor of joinder. The concern under this first factor is that the jury will use strong evidence on one count to bootstrap weak evidence on another. This factor overlaps with the second prejudice factor in the

joinder analysis. See *State v. Huynh*, 175 Wn.App. 896, 908, 307 P.3d 788 (2013).⁴ The strength of the State's evidence on the reckless driving count was very strong, contrary to Matison's claim of weak evidence.

Throughout his argument in this section, Matison repeatedly misconstrues what the State said in its response to the bill of particulars. Matison repeatedly claims that the State limited the evidence on the reckless driving charge to that driving which the Hells could see with their own eyes. Under this interpretation, the evidence of the tire tracks the Hells saw *after* Matison left their line of sight, which showed that Matison continued to straddle the middle of the road for quite some distance after he left the sight of the Hells, could not be considered by the jury on the reckless driving count. However, the State never said what Matison now claims. A review pages 37-40 of the VRP does not show the deputy prosecutor telling the court that the only evidence the jury would be able to consider as to the reckless driving was the driving which the Hells saw with their own eyes, prior to Matison blowing out of their view. Rather, the State advised the court that the reckless driving count was based on the events surrounding the passing of the Hells' car, and the vehicular homicide count was based on solely Matison blowing through

⁴ *State v. Huynh* is one of several cases that conflates the three joinder factors with the four severance factors. While there is substantial overlap in principle between the factors, they are different.

the stop sign at NE 29th and SR 502, thereby killing his passenger. RP 37-40. A fair reading of the State's response is that the vehicular homicide charge was based on the blowing of the stop sign at excessive speed, and the reckless driving charge was based on the behavior that came before it. The State did not limit the evidence in the reckless driving count to only the driving that the Hells directly saw. The State did not limit the Hells from being able to testify about the tire marks straddling the center line that they saw *after* Matison left the Hells' line of vision, and which continued for a significant distance. Indeed, when both Sarrah and Jeff Held testified about seeing tire tracks from the defendant's car which continued to straddle the center lane (see RP at 253-54, 412-13), defense counsel did not object—demonstrating that defense counsel did not believe this evidence fell outside the bill of particulars. The argument now advanced by Matison in his brief would have rendered the Hells' testimony about the tire marks in the roadway flatly inadmissible because it wasn't specifically mentioned by the deputy prosecutor in his oral response to the bill of particulars and thus did not neatly fit with one charge or the other. This is an overly broad view of the function of a bill of particulars, and an overly broad view of what the deputy prosecutor actually said.

“A bill of particulars is provided to the defendant in a criminal action to aid in the preparation of a proper defense.” *State v. Devine*, 84 Wn.2d 467, 471, 527 P.2d 72 (1974). Evidence which goes outside the bill of particulars (which, in this case, did not occur) does not necessarily constitute error, particularly where the evidence comes as no surprise to the defense. *Id.* If defense counsel in this case felt that the Helds should be precluded from testifying about the tire tracks they saw in the road after Matison’s car left their line of vision, he would have objected. The testimony about the tire marks in the roadway that showed that Matison continued to straddle the center line even after leaving the Helds’ line of sight was properly considered by the jury as part of the reckless driving charge, and the inclusion of that evidence made the reckless driving charge very strong.

With respect to the reckless driving charge the jury heard that Matison came up on the Helds so fast that Jeff Held felt certain Matison was going to ram into his car. Jeff even gripped the steering wheel and braced for impact. Just before he would have collided with the Helds, Matison darted into the oncoming lane of traffic and passed the Helds, who were traveling as fast as 50 miles per hour. Jeff Held testified that Matison passed them like they were “standing still.” Jeff Held estimated that Matison was driving 15 to 20 miles per hour faster than the Helds

were. The speed limit on the road is 40 miles per hour. But even more terrifying, after completing the pass Matison continued to straddle the middle of the road while continuing to drive extremely fast. The jury heard that this road is hilly. By driving in both lanes, Matison deliberately increased the chance that he would wind up in a head-on collision. Why would he do this? Only he can answer that question. Adrenaline, hubris, and stupidity are distinct possibilities. It is frankly amazing that only one life was lost that afternoon at the hands of Ryan Matison. The jury also heard that it was only a mile between the location at which the Helds entered Ne 29th and the stop sign for the intersection with SR 502. Because the Helds had already been on NE 29th when Matison came upon them, the jury knew that there was less than a mile between the pass of the Helds' car, which was done at breakneck speed, and the point at which Matison would have to stop at a stop sign or risk passing through a state highway in which the cars were not bound by a traffic signal.

Contrary to Matison's assertion, the evidence of reckless driving was not weak. It was, in fact, extremely strong—bordering on overwhelming. It was not based solely on speed, as Matison curiously claims. And because the evidence on both counts was very strong, the first factor supports the denial of the motion to sever.

As to the second factor, the defenses as to each count were clear and not irreconcilable. Each count was supported by clear and easily understandable evidence. There was not a “lack of clarity” in defenses. Matison claimed he didn’t recall passing the Helds (despite have a near crystal-clear memory of everything that occurred before and after the pass), and he was adamant that he was only driving 45 miles per hour on NE 29th. In other words, he denied every aspect of what Jeff and Sarrah Held testified to. See RP at 755-776. He flatly denied any conduct which would support a claim of reckless driving. Similarly, he denied any conduct which would support the claim that he recklessly caused the death of Samantha Effingham. Again, he claimed that he was only going 45 miles per hour, and that when he saw the stop sign he attempted to brake but was prevented from doing so based on a total mechanical failure of his brakes. This story, if believed by the jury, would have completely exonerated him on the charge of vehicular homicide. Thus, his defenses were identical and can be summed up as follows: “I didn’t do this. I didn’t drive too fast, I didn’t pass, and I didn’t carelessly or deliberately blow the stop sign. I blew the stop sign solely because of brake failure.” Because the defenses were entirely consistent and supported each other, the second factor weighs against severance.

As to the third factor, the court instructed the jury that its verdict on one count should not influence its verdict on any other count, and that it should decide each count separately. CP 104. Moreover, the jury was repeatedly told by both the prosecutor and the defense attorney that the reckless driving charge stood alone, and that they could not consider anything that occurred at the stop sign as evidence of the reckless driving. At page 1018 of the VRP, the prosecutor said: “The Defendant is charged with the two crimes that we talked about in the beginning. Vehicular homicide and reckless driving. And those – and those are two distinct acts, okay?” The prosecutor then went on to say “We already went over the vehicular homicide. The reckless driving charge has three elements.” Id. Thus, the prosecutor clearly admonished the jury that they were to decide the charges separately, and were to consider the elements separately. Defense counsel, for his part, told the jury that they must consider the reckless driving charge “in a vacuum,” as the court had instructed them. RP 1021. He went on to say:

Again, the Court has instructed you that you need to take the situation as it related to the passing -- or concerning the passing as it related to the charge of reckless driving and consider it separate from any other charges, or in this case separate from the charge of vehicular homicide.

RP 1025.

The jury was repeatedly told that the reckless driving and vehicular homicide charges were separate and distinct crimes and that they must consider them individually. The jury is presumed to follow the court's instructions. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). This factor weighs against severance.

As to the fourth and final factor, the evidence on each count was cross-admissible. These offenses were intricately related and were part of an ongoing pattern and course of conduct. But even if they were not cross-admissible, severance is not required in each instance in which evidence of one count would not be admissible in a separate trial on the other count. *Bythrow*, supra, at 720. In *Bythrow*, the Supreme Court found severance proper even where the evidence on each count was not cross-admissible, finding that so long as the evidence is not confusing as to the count to which it applies, and the jury can be reasonably expected to compartmentalize the evidence, prejudice is not shown by the lack of cross-admissibility. *Bythrow* at 721, citing *United States v. Johnson*, 820 F.2d 1065, 1071 (9th Cir. 1987). "When issues are relatively simple and the trial lasts only a couple of days, the jury can be reasonably expected to compartmentalize the evidence." *Bythrow* at 721, citing *United States v. Brady*, 579 F.2d 1121, 1128 (9th Cir. 1978), cert. denied, 439 U.S. 1074, 99 S.Ct. 849 (1990).

The trial court did not abuse its discretion in denying severance. A trial court abuses its discretion if its decision is manifestly unreasonable or is based upon untenable grounds or untenable reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The trial court did not deny Matison's motion to sever for an untenable reason, or based upon untenable grounds. Upon an application of the facts of the case to the law, it is clear the trial court's decision was not unreasonable, let alone manifestly unreasonable.

II. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PROPOSE A LIMITING INSTRUCTION.

Matison claims that he received ineffective assistance of counsel when his attorney elected not to propose a separate limiting instruction telling the jury that the sole evidence they could consider on the reckless driving charge was the driving the Hells saw before Matison "disappeared from their view." Brief of Appellant at 22. In other words, that they couldn't consider Matison's driving partially in the oncoming lane of travel for a sustained period of time after leaving the Hells' view, as evidenced by the tire markings in the road. The tire tracks in the wet road were evidence of extreme recklessness. Because, as noted above, the State was not limited in using only the *driving* seen by the Hells, to the exclusion of the tire tracks they saw in the roadway, this claim fails.

Again, the prosecutor did not limit the evidence on the reckless driving only to the *driving* they witnessed.

To the extent that Matison argues that the jury considered “the running of the stop sign, the collision, and the death of Samantha Effingham as evidence of the reckless driving charge,” and that, had they not, “it is likely Matison would have been acquitted of reckless driving,” (see Brief of Appellant at 23), there is no factual support for this argument. It is based entirely on assumption. As noted above, the jury was repeatedly told, both via explicit instruction from the court and argument of the attorneys, that the reckless driving charge was separate and distinct. The prosecutor also clearly delineated in his closing argument which acts he relied upon to support the reckless driving count, as opposed to the vehicular homicide count. RP 993-95. There is also no basis on which to assume that the jury would have acquitted Matison of reckless driving had a limiting instruction been provided.

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. 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, for the reasons set forth above, Matison cannot demonstrate prejudice. He has not shown that the error, assuming there was error, had an effect on the judgment. He cannot show that but for the decision not to seek a limiting instruction, he would have been acquitted of reckless driving. Matison did not suffer ineffective assistance of counsel on the charge of reckless driving.

III. THE PROSECUTOR DID NOT COMMIT FLAGRANT AND ILL-INTENTIONED MISCONDUCT, AND ANY PROBLEMATIC REMARK COULD HAVE EASILY BEEN OBIATED BY A CURATIVE INSTRUCTION.

The prosecutor's remarks complained of in this appeal, none of which were objected to by Matison, do not warrant a new trial. The standard of review in a claim of prosecutorial misconduct is as follows:

A defendant who alleges prosecutorial misconduct must establish that the prosecutor's conduct was both improper and prejudicial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. *Dhaliwal* at 578. A defendant who does not make a *timely objection* waives review unless the prosecutorial misconduct "is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

State v. Hartzell, 156 Wn. App. 918, 941, 237 P.3d 928 (2010) (emphasis added).

Thus, when a defendant makes a timely objection to a remark he believes constitutes misconduct, the remark must be improper and there must be a substantial likelihood the remark affected the jury's verdict. Where a defendant does not make a timely objection, a stricter standard of review is applied where the reviewing court must find the remark was flagrant and ill intentioned, that it caused prejudice, and that the prejudice could not have been obviated by a curative instruction. "Under this

heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn. 2d 741, 761, 278 P.3d 653 (2012), quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). Stated another way, where there is not a *substantial* likelihood the misconduct of the prosecutor affected the verdict then a defendant’s failure to object at trial will preclude relief. Conversely, a defendant is excused from the obligation to object where the remark is so damaging that an objection wouldn’t have mattered – because the damage unequivocally could not have been undone with a curative instruction. Stated another way, this second type of misconduct causes incurable prejudice and is the functional equivalent of a mistrial. *Emery* at 762. “Reviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” *Emery* at 762.

Here, Matison complains about three remarks the prosecutor made, which will be discussed in the order presented by Matison.

a. *“When all else fails.”*

During rebuttal closing argument, the prosecutor, in explaining to the jury that the elements instructions were the roadmaps they were to use in determining whether Matison was guilty or not guilty, said:

What he did was he drove in a reckless manner and because he did that, because there was a collision, and because the collision injured Samantha, and because she died because of those injuries, and because it happened in Washington, he’s guilty of vehicular homicide. He’s also guilty of reckless driving because he drove a motor vehicle on that date in willful and wanton disregard for the safety of others or property in the State of Washington. Those are the elements of the crimes. When all else fails, focus on those.

RP 1038. Matison’s complaint about the prosecutor’s use of the words “when all else fails” is, with due respect, extraordinarily nitpicky. The prosecutor was merely speaking in a conversational, colloquial manner. He was not, as Matison claims, asking the jury to ignore the elements instruction, or to look at it only as some sort of last resort. His full argument, when not taken out of context, shows that he did just the opposite. He repeatedly told the jurors that they must find the elements of the crime beyond a reasonable doubt, and that the elements instruction was their guide. Matison did not object to this remark, likely because doing so would have been silly. The prosecutor’s use of these words was not flagrant and ill-intentioned, and the words certainly did not cause prejudice to Matison. This claim fails.

b. "Should be held accountable."

Matson cites no case which says that a prosecutor may not ask a jury to hold a defendant accountable. Asking the jury to hold the defendant accountable is little different than asking the jury to find him guilty. Guilty verdicts are a precondition to holding an accused accountable. Saying that Samantha Effingham's killer should be held accountable was not an appeal to the jury's passion or prejudice, particularly when taken in the context of the entire argument here, where the prosecutor repeatedly reminded the jury about the elements it must find in order to reach a verdict of guilty. And it was certainly not a flagrant and ill-intentioned remark that could not have been obviated by a curative instruction, such that Matson should be excused from his obligation to lodge an objection to the remark. This claim also fails.

c. "Do your job."

Assuming without conceding that it is improper for a prosecutor to use the words "do your job" when speaking to the jury, the erroneous (and un-objected to) remark here was neither flagrant and ill-intentioned, nor was it incurable by a curative instruction. In *State v. Coleman*, 74 Wn.App. 835, 876 P.2d 458 (1994), the Court of Appeals recognized that it is improper for a prosecutor to imply to a jury that its "job" is to return a verdict of guilty. Specifically, in *Coleman*, the prosecutor implied to the

jury that if they rejected the State's theory of the case, they would be violating their oath as jurors and not doing their job. *Coleman* at 839. The argument in *Coleman*, which drew an objection from the defendant, was far more egregious than the singular plea made to the jury here. Nevertheless, the *Coleman* Court found that there was not a substantial likelihood that the misconduct affected the verdict and affirmed the defendant's conviction. *Coleman* at 841. First, the argument was the singular instance of misconduct in the trial. Second, the prosecutor told the jury that it would respect its finding and not "second guess" the jury. Third, the remark did not appear threatening to the trial judge, who directly observed the prosecutor's tone and demeanor. *Coleman* at 841.

The singular remark here is far less problematic than what occurred in *Coleman*. Defense counsel's lack of objection suggests that it did not appear that the prosecutor was unduly pressuring the jury to return a verdict of guilty. When viewed in the context of the entire argument, it cannot be said that this brief remark could not have been obviated by a curative instruction. Matison's claim of misconduct should be rejected.

IV. THE STATE AGREES TO CORRECTION OF THE JUDGMENT AND SENTENCE.

Matison believes that the sentencing documents in this case render it unclear whether the sentences are to be run concurrent or consecutive.

The felony judgment and sentence, at paragraph 4.1, orders that the “counts” be run concurrently. CP 19. However the gross misdemeanor judgment and sentence does not similarly make such an indication. CP 8. Thus, it could lead to confusion in the future on the part of DOC. The State agrees that the sentencing documents should be corrected to make the court’s concurrency order explicit. Full resentencing is not required.

V. THE TRIAL COURT’S FAILURE TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE CrR 3.5 HEARING DOES NOT WARRANT REMAND OF THIS CASE.

Matison generally complains that the trial court did not strictly comply with CrR 3.5 and enter written findings of fact and conclusions of law on the CrR 3.5 hearing. Matison does not assign error to the trial court’s admission of his statements, nor does he claim that his statements were not voluntary. The trial court erred in not entering written findings of fact and conclusions of law on the CrR 3.5 hearing, but the error does not necessitate remanding this case for entry of written findings and conclusions. Although failure to enter written findings of fact and conclusions of law pursuant to a CrR 3.5 hearing is error, such error is harmless so long as the trial court’s oral findings of fact are sufficient to permit appellate review. *State v. Hickman*, 157 Wn.App. 767, 776, n.2, 238 P.3d 1240 (2010); *State v. Riley*, 69 Wn.App. 349, 352-53, 848 P.2d

1288 (1993); *State v. Clark*, 46 Wn.App. 856, 859, 732 P.2d 1029, *review denied*, 108 Wn.2d 1014 (1987); *State v. Haynes*, 16 Wn.App. 778, 788, 559 P.2d 583, *review denied*, 88 Wn.2d 1017 (1977); *State v. Thompson*, 73 Wn.App. 122, 867 P.2d 691 (1994).

When CrR 3.5 has not been strictly followed by the entry of written findings of fact, “the appellate court must examine the record and make an independent determination of voluntariness.” *State v. Davis*, 34 Wn.App. 546, 550, 662 P.2d 78 (1983); *State v. Hoyt*, 29 Wn.App. 372, 628 P.2d 515 (1981); see also *State v. Daugherty*, 94 Wn.2d 263, 616 P.2d 649 (1980), *cert. denied*, 450 U.S. 958 (1981); *State v. Coles*, 28 Wn.App. 563, 625 P.2d 713 (1981) *State v. Mustain*, 21 Wn.App. 39, 42-43, 584 P.2d 405 (1979); *State v. Vickers*, 24 Wn.App. 843, 845-46, 604 P.2d 997 (1979).

In determining voluntariness the crucial inquiry is “whether the confession was “free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.”

Davis at 550, quoting *Vickers* at 846, *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489 (1946). “Whether the statements were voluntary, not whether findings as to voluntariness were made, determines the statements’ admissibility.” *Vickers* at 845, *State v. Shelby*, 69 Wn.2d 295, 301, 418 P.2d 246 (1966). The standard of proof for determining voluntariness is

preponderance of the evidence. *State v. Braun*, 82 Wn.2d 157, 509 P.2d 742 (1973); *Davis*, supra, at 550.

Here, Matison specifically declined to have the trial court hear testimony on the facts surrounding the taking of his statement. RP 20-26. Rather, he stipulated to the facts laid out in the State's motion on the admissibility of the statements, with the exception of fact number 15 (which was only a summary of anticipated facts). He stipulated to the remainder of numbers 1 through 21. RP 20-25. Mr. Matison was not concerned with the facts so much as he wanted to argue that the officer had an affirmative duty to advise him that he was free to leave the non-custodial setting. *Id.* He cited no authority for this claim, and the trial court rejected it. The court adopted those facts, based on Matison's agreement that she do so. RP 23-24.

In addition to the facts set forth in the State's motion, the trial court made clear and detailed oral findings of fact which are more than adequate to permit appellate review. The court begins its ruling at page 33 of the VRP and begins by noting that the defendant was not in custody at the time he made statements to law enforcement, but that the officer was "perhaps being more cautious" by advising Matison of his *Miranda* warnings. The court went on to find that Matison signed an acknowledgment that he had been informed of his rights, understood them,

and was willing to waive them. RP 33-34. The court both found and concluded as a matter of law that Matison knowingly, intelligently, and voluntarily waived his constitutional rights. RP 34.

The oral findings of the court, coupled with the agreed findings from the State's motion, were more than sufficient for Matison to make any assignments of error he deemed worthwhile. Written findings would likely not have varied much, if at all, from the oral recitation. Matison could not have been prejudiced by the trial court's failure to reduce these crystal-clear oral findings into written ones.

Matison's reliance on *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1988) for his claim that remand is required is misplaced because that case dealt with the trial court's failure to enter written findings of fact and conclusions of law after a *non-jury trial*, not a CrR 3.5 hearing. See *State v. Hesock*, 98 Wn.App. 600, 989 P.2d 1251 (1999); *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1988).

This Court, after independent review, should hold that the statements made by Matison were made after a knowing, intelligent, and voluntary waiver of his Fifth Amendment rights. Matison expressed no confusion about the warnings, and he at no time requested an attorney or invoked any of the Constitutional rights he enjoys. RP 60. This Court

should conclude that the trial court's failure to enter written findings of fact and conclusions of law was harmless.

D. CONCLUSION

The State respectfully asks this Court to affirm Matison's convictions.

DATED this 14th day of August, 2015.

Respectfully submitted:

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By: 
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CLARK COUNTY PROSECUTOR

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