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DIVISION III
STATE OF WASHINGTON
B: _____

No. 292410

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH CHRISTOPHER MILLER, JR,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE MICHAEL SCHWAB, JUDGE

BRIEF OF RESPONDENT

JAMES P. HAGARTY
Prosecuting Attorney

Tyler Hotchkiss
Deputy Prosecuting Attorney
WSBA #40604
Attorney for Respondent
211, Courthouse
Yakima, WA 98901
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I. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

- a. Does defense counsel open the door to introduction of Appellant’s eleven prior arrests for Driving Under the Influence by explicitly eliciting testimony of these arrests on direct examination?
- b. Does a prosecutor commit flagrant and ill-intentioned misconduct, while cross examining an Appellant, when, after the Appellant alleges, in testimony during direct examination, that officers conspired to fabricate charges, he asks the Appellant if officers “made up” portions of their testimony?
- c. Does a prosecutor commit flagrant and ill-intentioned misconduct, while cross examining an Appellant, when, after the Appellant elicits testimony that he talked to an internal investigations officer two days after alleged officer misconduct and the prosecutor asks the Appellant about the alleged officer misconduct and whether he disclosed this conduct to the internal investigations officer?
- d. If prosecutorial misconduct is found, does the asking of these questions alone, uphold a finding of substantial prejudice so that convictions must be reversed?

II. SUMMARY OF ARGUMENT ANSWERING ASSIGNMENTS OF ERROR

The Appellant appeals his conviction for two counts of assault in the third degree, one count of driving under the influence of intoxicants (hereafter, referred to as “DUI”) and one count of driving without an ignition interlock device. Specifically, the

Appellant assigns error to two legal circumstances at trial. First, the Appellant alleges that the trial court abused its discretion by allowing inquiry into prior arrests of Mr. Miller for DUI after they had been explicitly elicited on direct. Additionally, the Appellant alleges prosecutorial misconduct, as the prosecutor asked Mr. Miller, on cross examination, if he was saying the officers “made up” the criminal assault and a reason to search the car. The trial court did not abuse its discretion in allowing the prosecutor to briefly go into the prior arrests elicited on direct. Neither was there flagrant and ill-intentioned prosecutorial misconduct.

The trial court did not abuse its discretion by allowing inquiry into Mr. Miller’s prior arrests for DUI. This is true for three reasons.

First, case law, specifically *State v. Mattox* and *State v. Wilson*, overwhelmingly supports responsive inquiry once the “door has been opened.” In *Mattox*, on direct examination, the Defendant talked about his incarceration. Division Three ruled that having done so, the Defendant opened the door for inquiry as to the circumstances surrounding that incarceration, including the nature of the crime for which the Defendant was incarcerated. In *Wilson*, under similar circumstances as in *Mattox*, the trial court allowed

the state to pursue the issue of parole on cross, after a prior drug conviction had been brought up on direct. Division One affirmed this ruling. Numerous examples of similar situations also support the notion that the trial court's decision in this case was not manifestly unreasonable, nor made on untenable grounds for untenable reasons.

Second, the court significantly limited the State's responsive inquiry into these arrests. After careful consideration, the court limited the inquiry to two questions, avoiding inquiry into the number of Mr. Miller's DUI convictions and avoiding the facts of the individual arrests and convictions.

Finally, it is important to note that Appellant explicitly elicited testimony regarding these arrests. He did so as a trial tactic, both at this trial and the previous mistrial, knowing the potential results.

Similarly, the Appellant's second assignment of error is unfounded. The state did not engage in flagrant and ill-intentioned prosecutorial misconduct by asking if the deputies "made up" the assault and a reason to search the car. The inquiry made by the state was in direct response to the Appellants assertions on direct that the deputies fabricated the assault and a reason to search the car. Moreover, the context of the inquiry was intended to

determine why the Appellant did not report officer misconduct to an internal investigations officer three days after the incident, not to seek comment on the credibility of a witness. For these reasons, the state's questions were within the proper scope of cross examination, or, at the least, questions that were asked in good faith.

If the court finds there was misconduct, the law does not support a new trial as there is not a substantial possibility that the verdict was affected. The evidence against the defendant was overwhelming.

Three witnesses testified that Mr. Miller was obviously to extremely intoxicated, the only real issue as to this count. The witnesses articulated the basis of these opinions with minutia.

As to the assault on Deputy Wolfe, both officers testified to witnessing Mr. Miller spit on the deputy. Additionally, Randy Garcia, an EMT, corroborated this testimony by testifying that when he arrived on scene a deputy had a "glob" of spit on his face and was looking for something to wipe his face off with. He testified the "glob" was inconsistent with a sneeze, Mr. Miller's version of the event.

Finally, as to the assault on Deputy Lowry, Deputy Lowry testified that the Appellant kicked him in the shin. Deputy Wolfe stated he did not see Mr. Miller make actual contact with the Defendant, but did see the Appellant kick his legs backward.

The testimony of each witness for the state corroborated the other's testimony. On the other hand, Mr. Miller's testimony, on all counts, went uncorroborated and was unbelievable. Moreover, Mr. Miller's credibility was in serious question. Mr. Miller first told the internal investigations officer that he spit on a deputy. Mr. Miller then denied the same on the stand. Additionally, there was testimony that the Appellant, throughout the legal process, told four different stories as to how he received an injury to his chest.

There is no substantial possibility that any misconduct found by the court affected the verdict. For the foregoing reasons, the State asks this court to affirm the defendant's convictions.

III. STATEMENT OF THE CASE

On June 27, 2009, at 5:07 a.m., Deputy Ernie Lowry of the Yakima County Sherriff's Office was on patrol (RP 215-216; 224). He was traveling to assist other law enforcement, when he witnessed the Appellant traveling at a high rate of speed, 80 miles

per hour as determined by his radar, from Naches towards Gled in an easterly direction (RP 215-216; 224). The Appellant was using both eastbound lanes to pass vehicles (RP 217).

Deputy Lowry initiated a traffic stop, (RP 217) then exited his vehicle and contacted the Appellant, who was playing with an electronic device and did not acknowledge the officer (RP 219). The officer tapped on the window and waited five seconds for the Appellant to acknowledge him (RP 219). He did not. The officer tapped on the window a second time (RP 219). The Deputy then asked for the Appellant's license, registration and proof of insurance (RP 219). Mr. Miller proceeded to pull out his wallet and "fumble" through it, looking for is identification (RP 219-220). He passed over his identification card a couple times, before Deputy Lowry pointed it out to him (RP 219). As a part of the initial contact, Deputy Lowry detected the odor of intoxicants emitting from the vehicle (RP 220). Additionally, the deputy noticed the Appellant's slow, deliberate movements, as well as red, watery eyes and a flush face (RP 220).

As Deputy Lowry was ending his shift, Deputy Wolfe was called to assist and arrived on the scene at 5:19 a.m. (RP 223). Both Deputies noticed alcoholic beverage cans in the back of the

vehicle (RP 221; RP 334). While communicating with the Appellant, Deputy Lowry also noticed his speech was slow and slurred (RP 222). As the Appellant stepped from the vehicle, he displayed poor coordination (RP 225; RP 334). He was unsteady on his feet and reached up to use the vehicle to steady himself (RP 225; 334). Additionally, Deputy Lowry noticed the odor of intoxicants coming from the Appellant's person (RP 261; 355). Deputy Wolfe also noticed the odor of intoxicants coming from his person, as well as bloodshot, watery eyes and an unresponsive demeanor (RP 335). At this point, because of warrants and the fact that the Appellant appeared under the influence of intoxicants, Deputy Wolfe asked the Mr. Miller to place his hands behind his back (RP 226; 336).

Mr. Miller refused to comply with this command (RP 226; 336). Deputy Wolfe then reached up to handcuff him, at which point he became actively resistant (RP 227; 336). Deputy Lowry and Deputy Wolfe then attempted to get the Appellant to the ground (RP 229; 336-338). As the struggle ensued, Mr. Miller looked over his back shoulder, brought his leg to the side and kicked down at Deputy Lowry, making contact with his shin (RP 232-233). Deputy Wolfe stated he saw the Appellant, generally,

kicking, but did not see him strike Deputy Lowry (RP 338). Deputy Lowry sustained a quarter to half-dollar size injury to his lower right leg (RP 232). Subsequently, the Appellant was escorted to the ground (RP 236; 336). At this point, he continued to struggle and ignore the commands of the deputies (RP 240-241). While all three individuals were on the ground, the Appellant spit in the face of Deputy Wolfe, placing a glob of spit on his cheek and in his eye (RP 239; 339; 345). A baton and a taser were eventually deployed to gain compliance (RP 241-243; 343-344; 346).

After the Appellant was subdued and on the ground, Deputy Wolfe asked him if there was anything he needed to be concerned about, considering what had just taken place (RP 252; 347). The Appellant responded by saying, "Yes, I have AIDS (RP 252; 348)." Deputy Wolfe then looked for material to wipe the spit off his face (RP 252).

Randy Garcia, an EMT with Glead Fire Department, arrived on the scene to check the Appellant for injuries (RP 450-452; 253; 348). Upon arrival, Mr. Garcia witnessed the Appellant lying on the pavement and contacted deputies on the scene (RP 452). He noticed that one of the officers had saliva on his face and

was looking for something to wipe his face off with (RP 452-453). Mr. Garcia noticed the Appellant was non-compliant (RP 452-453). After being qualified as an expert, Mr. Garcia also testified that the Appellant was highly intoxicated (RP 457). Specifically, Mr. Garcia testified the Appellant had slurred speech, a flushed face, could not walk on his own and smelled of intoxicants (RP 457). He was then taken to the hospital for medical clearance (RP 254). At the hospital, the Appellant stated that he didn't have aids and "he was just trying to scare the officer. (RP 348; 549)."

After being qualified as experts (RP 258-260; 353-355), Deputy Lowry and Wolfe each stated they were of the opinion that the Appellant was obviously impaired by the alcohol he had consumed (RP 260; 355).

The Appellant testified that he was driving from Auburn to Toppenish in the early morning hours of June 27, 2009 (RP 517; 525; 530). He testified that he had had nothing to drink from 6:00 p.m. on June 2, 2009, to the time he was pulled over (RP 518-521). On June 2, he had had 3 Sparks drinks (RP 519). He stated he had put his cruise control on earlier in the evening and was traveling at 60 miles per hour when contacted by Deputy Lowry (RP 521). Additionally, the Appellant explicitly elicited testimony regarding

previously being arrested for Driving Under the Influence (RP 524). The Appellant testified he had trouble with his legs from being in the car for 13 hours (RP 529).

The Appellant also testified that he asked Deputy Lowry to get his medicine. Deputy Lowry then proceeded to the car “and he saw a lighter and a ashtray and he jumped at it and he kind of skinned his knee, I mean his shin, and then he came out with the lighter and he said, ‘now we have probable cause to search the car (RP 531).’” The officer then said ‘well it looks like, looks like Mr. Miller kicked you,’ and the other deputy said “Yeah, I think we could make it work (RP 531).” Mr. Miller testified he never tried to hit or kick either police officer (RP 535). Additionally, Mr. Miller testified he did not spit on Deputy Wolfe (RP 542-544). The Appellant also testified that he sneezed on Deputy Lowry (RP 541). According to Mr. Miller, this is “when the beating started (RP 541).”

On cross examination, the state followed up on the Appellant’s statements regarding his arrests (RP 529). Additionally, the state asked questions regarding Mr. Miller’s talk with Theresa Shuknecht (RP 574-576). The Appellant admitted he told Ms. Shcuknekt that he spit on the deputy (RP 573). On the

stand the Appellant denied spitting on the deputy (PR 573). The Appellant admitted to giving four conflicting stories as to how he received an injury on his chest (RP 577-580; 664). The defense did not give any explanation for these inconsistencies.

Finally, the Appellant testified that the deputy hurt his shin on the door but did not actually witness the injury (RP 588). Additionally, he testified that he sneezed on the officer and the saliva from that sneeze traveled two to three feet (RP 576).

IV. ARGUMENT

a. THE APPELLANT OPENED THE DOOR TO FURTHER INQUIRY INTO PRIOR ARRESTS AND CONVICTIONS.

The Appellant, in his case in chief, explicitly elicited testimony that he had previously been arrested for DUI (RP 529). On cross examination of the Appellant, the State of Washington asked two questions directly related to that testimony:

- (1) “[E]arlier you had said that you had been arrested for DUI’s. Our records indicate that from 1986 to December 11, 2008, you’ve been arrested for DUI eleven times, would you agree with that?” (RP 661)
- (2) “Some of those arrests have turned into convictions, would you agree with that?” (RP 661)

The Appellant answered yes to both questions (RP 529).

In this case, there is no doubt that the prior arrests and convictions of the Appellant for driving under the influence are not generally admissible under 404(b). The question becomes whether the Appellant “waived objection” or “opened the door” to admission of these arrests and convictions. The Appellant argues that allowing these two questions was highly prejudicial. Because of this, the Appellant requests a new trial.

It is axiomatic that prior arrests and convictions of a defendant are considered prior bad acts and are generally inadmissible under ER 404(b). This is because prior bad acts, prior arrests and convictions included, are deemed prejudicial. Prior arrests and convictions, however, are properly placed before the court in very limited circumstances. One such circumstance is when the defendant introduces testimony of these arrests or convictions and “opens the door” to rebuttal, explanation, clarification or contradiction of these arrests and/or convictions. Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.14, at 66-67 (5th ed. 2007); *See also* Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.15 (5th ed. 2007). Effectively, the rule allows otherwise inadmissible evidence to become admissible regardless of its

prejudicial effect when the Defendant opens the door to this evidence. *Id.*

The trial court has considerable discretion in administering the “open door” rule. Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.14 (5th ed. 2007); *See also* Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.15 (5th ed. 2007); *RWR Management, Inc. v. Citizens Realty Co.*, 133 Wash.App. 265, 135 P.3d 955 (Div. 3 2006); *State v. Bailey*, 147 Wash. 411, 416, 266 P. 163 (1928) (“The admission of rebuttal testimony rests largely within the discretion of the trial court, and this includes the determination of whether certain testimony is proper rebuttal testimony.”). The court reviews admission of evidence under the “open door” rule for an abuse of discretion. *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969); *State v. Bennett*, 42 Wn.App. 125, 708 P.2d 1232 (Div. 1 1985); *State v. Olson*, 30 Wn.App. 298, 301, 633 P.2d 927 (1981). A trial court abuses discretion when its “decision is manifestly unreasonable, or is exercised on untenable grounds for untenable reasons.” *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

- i. In this case, the trial court did not abuse its discretion. Three facts support this conclusion: (1) Case law overwhelmingly supports further inquiry into the arrests once the “door has been opened”; (2) The Court limited the State’s further inquiry into these arrests; and, (3) The Appellant employed the use of this information as a trial strategy.**

The “open door” rule rests on the principle that the rules of evidence are designed to aid in establishing the truth. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 927 (1981). “[T]o close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might limit the proof to half-truths.” *Id.*

By asking the Appellant if he had previously been arrested for Driving Under the Influence, the Appellant opened the door for rebuttal, explanation, clarification and contradiction of his statement that he had, in fact, been arrested previously for Driving Under the Influence. Allowing two very precise questions concerning the arrests based upon this testimony, after a series of long discussions (RP 554-65; RP 568-571; RP 647-56), is neither manifestly unreasonable nor untenable.

1. Case Law
Overwhelmingly
Supports Further Inquiry
Into the Prior Arrests.

In *State v. Mattox*, 12 Wn.App. 907, 532 P.2d 1194 (Div. 3 1975), this court reviewed a conviction of the Defendant for Robbery in the Second Degree. At trial, on direct examination, Mattox referred to his incarceration. On cross examination, the prosecutor asked how long the incarceration was, whether he was convicted of a crime, what class of crime he was convicted of, what the name of the specific crime was and when he was released. The Defendant argued that the prosecution should not have been allowed to ask about the incarceration and the crime. In upholding the State's questioning, this court stated, "The [D]efendant on direct examination referred to his incarceration and, having done so, opened the door for inquiry as to the circumstances surrounding that incarceration... Thus, it was proper to inquire into the nature of the crime for which [the] [D]efendant was incarcerated." *Id.* at 1197 (internal citations omitted). This set of facts is very similar to the case at hand. The Appellant talked about his "arrests" on direct. Pursuant to *Mattox*, the State should be allowed to delve directly into these "arrests" in a limited fashion.

In *State v. Wilson*, 20 Wn.App. 592, 581 P.2d 592 (Div. 1 1978), the Defendant was charged with selling heroin. On direct examination, Wilson was questioned as to a recent prior conviction and incarceration for selling heroin. He responded with comments concerning his rehabilitation in a drug program and stated that he continued to be monitored in that program. On cross examination, the prosecutor pursued the issue of parole. The Defense attorney objected stating it unconstitutionally impaired his right to testify on his own behalf and diminished the effectiveness of his testimony. Division one held that “[b]y testifying as to his prior conviction, incarceration and parole, Wilson opened the door to cross-examination of these subjects.” *Id.* at 594 (internal citations omitted).

The following Washington cases have upheld the trial court’s admission of otherwise inadmissible evidence, where the objecting party first “opened the door”. In each case, just as in *Wilson and Mattox*, the information ultimately elicited had some “prejudicial” effect: *State v. Howard*, 137 Wash. 172, 242 P. 21 (1926) (In a prosecution for a liquor law violation, a generally inadmissible prior liquor law conviction held admissible where Appellant mentioned such conviction during direct examination);

State v. Bennett, 42 Wn.App. 125, 708 P.2d 1232 (1985) (In prosecution for assault on a child, generally inadmissible prior spankings of that child held admissible where defendant testified that he had previously spanked the victim with “far more effort” than the incident in question); *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 927 (1981) (In a prosecution for burglary, the Defendant asked the officer on cross if the Defendant had volunteered to take a lie detector test and asked what the result was. The court upheld the State delving further into what the results of that test meant.); *State v. Hultenschmidt*, 87 Wn.2d 212, 215, 550 P.2d 1155 (1976) (In a prosecution for grand larceny, generally inadmissible documents of convictions for burglary 2nd and Driving Under the Influence were held admissible where the Appellant testified to the convictions on direct.) For cases where the court has admitted otherwise irrelevant evidence see *State v. Tarman*, 27 Wn.App. 645, 651, 621 P.2d 737 (1980).

In each of the cases listed above, the information which came out after the Appellant “opened the door” was, in some sense, prejudicial, otherwise it would not have been objected to. It is important to note that while the Appellant seems to rely upon the fact that multiple arrests were elicited for a reversal, the Appellant

cites no case law that supports the notion that because multiple convictions were elicited, this changes the analysis.

2. The Court Significantly Limited the State's Further Inquiry Into Prior Arrests.

It is very important to note that the trial court in this case significantly limited the State's inquiry. After extremely careful consideration, *see* RP 554-65, RP 568-571 and RP 647-56, the trial court judge in this case limited the examination in two important ways. First, the testimony was limited to two questions. It was short and did not place undue influence on its importance. Second, the testimony was limited in substance. The number of convictions was not relayed to the jury. Nor were the facts of each individual arrest. "The brief cross examination was limited in scope to clarification of [the Appellant's] direct testimony regarding the same subject." *Bennett*, 42 Wn.App. 125, 127; *Gefeller*, 76 Wn.2d 449, 455. Additionally, the court's ruling served an important function in limiting the Appellant from presenting half-truths and improperly self-serving testimony. *Id.*

3. The Appellant Intentionally Elicited the Testimony as a Trial Tactic.

In this case, eliciting testimony regarding the prior arrests was a pre-meditated trial tactic. The Appellant employed this same tactic at the first trial, which resulted in a mistrial. *See* VERBATIM TRANSCRIPT OF A PORTION OF A TRIAL HELD ON MARCH 18 2010 RE THE TESTIMONY OF JOSEPH MILLER at 5. When intentionally eliciting testimony the party eliciting the testimony presumes the opposing party will be able to inquire into that testimony:

“[W]hen a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or re-direct examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.” *Gefeller*, 76 Wn.2d at 455

The Appellant used the tactic to establish credibility with the jurors and perhaps under the guise of an ill-conceived attempt at displaying this was something only in his past. *See State v. Wilson*, 20 Wn. App. 592, 594, 581 P.2d 592 (Div. 1 1978) (“The subject of Wilson’s parole was raised on direct examination in an apparent attempt to show his rehabilitation and to establish his credibility.”).

Finally, it is worth noting that the jury was instructed to consider evidence that the defendant was previously involved in a

crime only in deciding what weight to give his testimony and for no other purpose. Jurors are presumed to follow court instructions. *State v. Hanna*, 123 Wn.2d 704, 711, 871 P.2d 135 (1994).

In this case, the State's further inquiry into the Appellant's testimony regarding previous arrests was in accordance with the law. Even the Appellant, at trial, freely admitted after direct examination that the prosecutor "should be able to ask some questions (RP 558)." In order to find that the trial court abused its discretion, this court would have to find that two questions were untenably too many.

There are three reasons why the State's cross examination was in accordance with the law and the court did not abuse its discretion. First, case law interpreting the "open door" rule allows the State to further inquire into the Appellant's testimony in a reasonable fashion. Second, the court significantly limited the scope of the State's inquiry in this case. Finally, the Appellant intentionally elicited testimony regarding the arrest as a trial tactic.

"It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further

inquiries about it.” *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 927 (1981).

For these three reasons, the trial court’s decision to allow responsive inquiry into the prior arrests of the Appellant was not manifestly unreasonable nor was it exercised on untenable grounds for untenable reasons. Therefore, the court did not abuse its discretion.

- b. THE STATE DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT. THE INQUIRY TO THE APPELLANT WAS IN DIRECT RESPONSE TO ASSERTIONS MADE ON DIRECT EXAMINATION. IF THE COURT FINDS THAT MISCONDUCT WAS, IN FACT, COMMITTED, IT WAS NEITHER FLAGRANT NOR ILL-INTENTIONED. THEREFORE, THE LAW DOES NOT SUPPORT A NEW TRIAL.

There was no prosecutorial misconduct in this case. If the court finds there was misconduct, it was neither flagrant nor ill intentioned. Therefore, the Appellant’s request for a new trial is not in accordance with the law and should be denied.

On June 30, 2009, three days after the alleged criminal conduct, the Appellant was interviewed by Theresa Schuknecht, an internal investigations officer for Yakima County (RP 573; 665).

Ms. Schuknecht asked the Appellant about the events in question and took pictures (RP 662-664).

At trial, after the interview was brought up in the Appellant's case in chief, the Appellant was cross examined. The State asked Mr. Miller about that conversation (RP 573). Immediately after that colloquy, the following testimony occurred:

Q: Mr. Miller, you are alleging some very serious misconduct, misconduct against Deputy Wolfe, Deputy Miller, and another Deputy on the Scene—

Mr. COLBY: Object.

Q: aren't you?

THE COURT: Sustained. Rephrase.

MR. HOTCHKISS: Okay.

Q: Well, you said you were never speeding that afternoon, is that correct?

A: I was speeding earlier that day.

Q: Okay. But when you got pulled over by Deputy Lowry, you weren't speeding, is that your —

A: No, I was not.

Q: Okay. The officer said you were speeding is that correct?

A: They said I was, yes.

Q: Okay. So he would be being dishonest about that, is that correct?

MR. COLBY: I'm going to —What? I didn't, I didn't hear the question.

THE COURT: Wait a minute. What? I didn't hear the question. What was your —

MR. HOTCHKISS: I said, "So you're saying he's being dishonest about that, is that correct?"

THE COURT: Who's being dishonest?

A: That's your opinion.

THE COURT: Just a second.

MR. HOTCHKISS: Correct.

THE COURT: Who was being dishonest?

MR. HOTCHKISS: Deputy Lowry.

THE COURT: Sustained. The jury will disregard that question.

Q: But you are, you are saying that the deputies made up a reason to search your car, is that correct?

A: Yes

Q: Okay. You are saying the deputies essentially made up the entire assault on you, is that correct?

A: Yes

Q: And you're saying the officers hit you with a night stick and tased you without any reason, is that correct?

A: They tased me after I reached for the telephone.

Q: Okay. Without any good reason, then, is that correct?

A: Yes.

Q: Okay. But you never told Theresa Schuknecht anything about these events on that day, did you?

A: No, she asked about the beating.

Q: Okay, You never said anything to her about any of these other incidents, though?

A: No.

(RP 574-76).

The Appellant alleges that by asking Mr. Miller if the deputies "made up," (1), a reason to search the car and, (2), the assault on the deputies, the prosecutor committed misconduct. Because of this inquiry, the Appellant contends he is entitled to a new trial.

For a new trial to be granted in this context two factors must be present: (1) there must have been prosecutorial misconduct; and, (2) there must have been prejudice to the Appellant. *State v. Stenson*, 132 Wn.2d. 668, 718, 940 P.2d 1239

(1997). The Appellant bears the burden of establishing the conduct was both improper and prejudicial. *Id.*

- i. There was no flagrant and ill-intentioned misconduct in this case. The inquiry was in response to assertions made on direct examination and was within the proper scope of cross examination.**

The Appellant appeals three questions: The first inquiry into the Appellant speeding, which was objected to, sustained and stricken; the second inquiry into the search of the car; finally, the inquiry into the assault.

The first inquiry is not properly before this appellate court. Counsel argues there was an objection as to the first question and that that objection was sustained. Appellant's Brief at 11. For the sake of argument, the state will concede that there was an objection (the state's position, however, is that there was, in fact, no articulated objection). However, it is important to note that in addition to being sustained, the question was stricken from the record: "Sustained. The jury will disregard that question." (RP 575). An objection that is sustained and stricken is no longer part of the record. *State v. Miles*, 154 Wash. 412, 282 P. 485 (1929). In addition, a jury is presumed to have followed a court order, specifically, an order to disregard. *State v. Hanna*, 123 Wn.2d

704, 711, 871 P.2d 135 (1994). Based upon this, the court should only consider the final two inquiries in its analysis.

Ultimately, however, whether there was no objection or the objection was sustained and the testimony stricken, the court operates under the same standard. As either the objection was sufficient, it was sustained and stricken or the objection was insufficient.

A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth. *State v. Jerrels*, 925 P.2d 209-- -- (internal citations omitted). This type of question "places irrelevant information before the jury and potentially prejudices the Defendant." *Id.* It is important to keep in mind that, if the misconduct is found, to warrant a new trial the conduct in question must be "so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice." *State v. Echevarria*, 71 Wash.App. 595, 597, 860 P.2d 420 (1993); *State v. Suarez-Bravo*, 72 Wash.App. 359, 367, 864 P.2d 426 (1994).

The state did not participate in misconduct. From the context of the questions, it is evident the prosecutor had two purposes: (1) to clarify and respond to testimony on direct that

deputies fabricated the criminal assault and a reason to search the car; and (2) to ask the Appellant, if he was alleging serious deputy misconduct, why he did not tell the internal investigations officer of this misconduct. Under either circumstance, the information was relevant to trial and directly related to testimony explicitly elicited during direct examination. For these reasons, there was no prosecutorial misconduct in this case, let alone misconduct that rises to the level of flagrant and ill-intentioned.

- a. On direct examination the Appellant asserted that the officers fabricated the assault charge on the Appellant and fabricated a reason to search the car. Therefore, asking the Appellant if he is alleging that the deputies “made up” the assault and a reason to search the car is proper.

The Appellant testified on direct examination that he did not kick the officer (RP 531). In fact, when asked if he had kicked Deputy Lowry, the Appellant responded by saying the officer had hurt his shin on the door frame of the Appellant’s vehicle (RP 531). The Appellant further testified that, after this happened, Deputy Lowry stated “well, it looks like, looks like Mr. Miller kicked you,” and Deputy Wolfe agreed saying, “Yeah, I think we could make it work (RP 531).” Mr. Miller was clearly implying

the deputies conspired to fabricate the assault charge against the Appellant. After that statement, the Defense attorney asked, in follow-up, “And here we are?” The Appellant stated yes (RP 531). On cross examination the State responded by clarifying this issue and asked if the Appellant was alleging that the deputies “made up” the charges against him.

The proper scope of cross examination is what is elicited upon direct examination. *State v. Robinson*, 61 Wn.2d 107, 377 P.2d 248 (1962). This inquiry was well within this proper scope of cross examination.

Next, the Appellant testified that while the officer was looking in the Appellant’s vehicle, he found a lighter and stated, “Now we have probable cause to search the car;” (RP 531). By stating that the officers were going to use a lighter as some sort of guise to get into the vehicle, the Appellant was saying the deputies “made up a reason to search the car.”

Again, the State was squarely within the scope of cross examination. Both questions to which the Appellant assigned error are squarely within proper cross. It is important to note that to both questions the Appellant responded “yes.”

- b. The context of the inquiry was intended to determine why the Appellant did not report officer misconduct to an internal affairs officer, not to seek comment on the credibility of a witness. Therefore, it was within the proper scope of cross examination or, at least, a question that was asked in good faith.

To determine whether a prosecutor, in fact, participated in misconduct, the court must look at the totality of the circumstances. *Suarez-Bravo*, 72 Wash.App. at 367, 864 P.2d 426 (1994). Additionally, as in any legal setting, it is important to look at the purposes behind the rule. The purpose behind prohibiting a prosecutor from asking a defendant about the credibility of another witness is to ensure irrelevant information is not placed before the jury and to ensure the Appellant gets a fair trial. *Id.* After examining both the totality of the circumstances and the purpose behind the misconduct rule, the conduct assigned error in this case is not misconduct.

In addition to alleging that the deputies fabricated the assault and a reason to search the car, the Appellant alleged other instances of deputy misconduct: (1) The Appellant testified that he was tased after doing everything the officers asked him to do (RP 528), after reaching for his phone (RP 535), and after he told

the officers they can't be "beating" him (RP 537); (2) He testified that the officers rubbed his face in the ground for no reason (RP 536); (3) He testified he sneezed on Deputy Wolfe, at which time they proceeded to "beat" the Appellant solely because of the sneeze (RP 541); (4) After the sneeze, the Appellant testified that Deputy Wolfe stated, "you spit on me." (RP 544).

In determining whether there was misconduct in this case, it is important to examine the entire inquiry (RP 574-76). Mr. Miller was interviewed by Theresa Schuknecht from Yakima County Department of Corrections, internal affairs division, three days after the incident. The State, on cross, set up an inquiry by asking whether Mr. Miller was alleging serious misconduct. This question evidences the prosecutor's frame of mind, as does the rest of the inquiry. The prosecutor went over the misconduct Mr. Miller was alleging, point by point: That the deputies tased the Appellant three times for no justifiable reason; That the deputies fabricated the assault charges; That the deputies fabricated a reason to search the car, and; that the deputies beat the Appellant for no justifiable reason (RP 574-576).

The prosecutor was simply pointing out that the Appellant was alleging all these bad acts and did not tell internal affairs

officer Theresa Schuknecht, presumably investigating the incident, three days later about any of it. This is the precise person you would expect an aggrieved party to tell.

A defendant may be vigorously cross-examined in the same manner as any other witness. *State v. Graham*, 59 Wn.App. 418, 426, 798 P.2d 314 (Div. 1 1990). When a defendant impugns the credibility of a witness, a prosecutor may ask the jury to consider whether the defense theory is credible. *Id.* at 428-429. In this case, the state was asserting its right to vigorously cross-examine the defendant and attack his underlying theory based upon his own testimony on direct. This was within the province of a proper cross examination.

ii. If the court finds there was misconduct, the law does not support a new trial.

Without a proper objection, request for a curative instruction, or a motion for mistrial, the Appellant cannot raise the issue of misconduct on appeal unless it is material to the trial's outcome and could not have been remedied. *State v. Echevarria*, 71 Wash.App. 595, 597, 860 P.2d 420 (1993); *State v. Suarez-Bravo*, 72 Wash.App. 359, 367, 864 P.2d 426 (1994). The misconduct must have been "so flagrant and ill intentioned that a

curative instruction could not have obviated the resulting prejudice.” *Id.*; *see also, State v. Belgarde*, 110 Wash.2d 504, 507, 755 P.2d 174 (1988). To determine whether the misconduct warrants reversal, the court considers its prejudicial nature and its cumulative effect. *Id.*

- a. THE EVIDENCE AGAINST THE DEFENDANT WAS OVERWHELMING. THEREFORE, THE DEFENDANT WAS NOT PREJUDICED BY ANY MISCONDUCT.

Misconduct constitutes prejudicial error if a substantial likelihood exists the misconduct affected the jury’s verdict. *Stenson*, 132 Wn.2d at 718-719. There are at least four factors we consider when considering whether a Defendant was prejudiced by comments of a prosecutor: (1) whether the prosecutor was able to provoke the defense witness to say that the State’s witness must be lying; (2) whether the State’s witness’ testimony was believable and/or corroborated; (3) whether the defense witness’ testimony was believable and/or corroborated, *State v. Padilla*, 29 Wn.App. at 300; finally (4) we look at the totality of the evidence. *Id.* at 301. In this case, it is important to first look at the totality of the evidence, factor “4.”

i. THE EVIDENCE AGAINST THE DEFENDANT WAS OVERWHELMING. THEREFORE, THERE IS NOT A SUBSTANTIAL LIKELIHOOD THAT ANY MISCONDUCT AFFECTED THE OUTCOME OF THE TRIAL.

The evidence against the Appellant on all three charges was overwhelming. Therefore, any prejudice the court may find did not rise to the standard in this case. In other words, there is NOT a “substantial likelihood that [any] misconduct affected the outcome of the trial.”

1. The Driving Under the Influence Charge.

a. The State's case

The evidence against Mr. Miller at trial was overwhelming on all three charges. None more so, however, than the Driving Under the Influence of Intoxicants charge. Both parties presented evidence that Mr. Miller was driving (RP 215-217; 517; 525). Additionally, three witnesses testified that the Appellant was obviously intoxicated to extremely intoxicated (RP 260; 355; 457). One of those witnesses, Randy Garcia, an EMT was an independent witness, not involved in the investigation (RP 450-452). Neither was he involved in the assault. Each witness testified independently, to the specific indicia that led to their individual conclusions. Deputy Lowry testified to the following:

that he smelled the odor of intoxicants emitting from the car and from the person of the Appellant; that he noticed slow, deliberate movements of the Defendant; that his speech was slurred; that there was extremely poor coordination; that the Appellant was combative; that his eyes were bloodshot and watery; and that the Appellant has slurred speech (RP 217-261). Deputy Wolfe testified to the following: that he smelled the odor of intoxicants coming from the Appellant's person; that his coordination was poor; that the Appellants eyes were bloodshot and watery; that his face was flushed; that he was combative; that he had slurred speech; and that the Appellant had slow movements (RP 334-351). Finally, Randy Garcia, testified that the Appellant had slurred speech, a flushed face, could not walk on his own, smelled of intoxicants and was combative (RP 450-457). Each of these witnesses' testimony was detailed and corroborated the other's testimony.

b. The Appellant's case

Mr. Miller's testimony, on the other hand, generally, was unbelievable and essentially, stood by itself, uncorroborated. He testified that he had approximately three drinks twelve hours

before, but had not had anything since then (RP 518-521). He testified that he was not speeding (RP 521). That his legs were cramped from the long drive and that he had allergies that led to some of the symptoms testified to by the Appellant (RP 529). This testimony is severely at odds with the testimony of Deputy Lowry, Deputy Wolfe and Ernie Lowry and, in light of other evidence and testimony, was unbelievable.

2. **Assault in Third Degree on Deputy Wolfe**

The Appellant was charged with spitting in the face of Deputy Eric Wolfe.

a. The State's Case

Deputy Wolfe and Deputy Lowry testified that while the Appellant was lying face down on the cement, he turned over his shoulder and spit in the face of Deputy Wolfe (RP 239; 339; 345). Mr. Garcia testified that when he arrived one of the deputies was looking for something to wipe his face off with (RP 452-453). A Lieutenant with the Glead fire department, Mr. Garcia also testified that when he arrived on the scene there was a glob of spit on the face of one of the deputies (RP 450-453). He specifically, ruled out snot from a sneeze as a possibility (RP 465).

b. The Appellant's case

Mr. Miller testified that he did not spit on Deputy Lowry (RP 542-544). He, however, admitted telling Ms. Schuknecht three days after the incident that he did spit on someone (RP 573). He stated that the “snot” got on Deputy Lowry because he had sneezed (RP 576). The “snot” flew two to three feet through the air and landed on Deputy Lowry’s face in a big glob (RP 576). The testimony of Mr. Miller was inconsistent with previous statements, unbelievable and in contradiction with other testimony, including that of the independent witnesses Randy Garcia and Theresa Schuknecht.

3. Assault in the Third Degree on Deputy Lowry

The Appellant was charged with assault in the third degree for kicking Deputy Lowry.

a. The State's case

Deputy Lowry testified that Mr. Miller, before being taken to the ground, turned, looked over his shoulder in the general direction of Deputy Lowry, and kicked toward him, injuring his leg with a quarter sized scrape. Deputy Wolfe said he saw the Appellant kicking his legs but did not see him strike Deputy

Lowry. Deputy Wolfe's testimony and Deputy Lowry's testimony corroborate each other.

b. The Appellant's case

One last time, Mr. Miller's testimony was unbelievable and uncorroborated. He testified that Deputy Lowry received the injury to his leg by skinning the leg on the door of the car (RP 531). However, he testified he never actually saw this. Only that after he reached in the car the deputy looked at the other deputy and said, "look what happened." The Deputies then fabricated the assault charge. He says the deputy got excited because he saw a lighter in the car (Why he would be excited over that, I don't know.) and skinned his knee (RP 531). The manner in which he says the injury occurred and the story about the lighter are unbelievable. Mr. Miller's testimony was also uncorroborated.

ii. MR. MILLER'S TESTIMONY WAS A SEVERE ISSUE FOR THE DEFENSE, AS IT LACKED CREDIBILITY, WAS UNCORROBORATED AND UNBELIEVABLE.

The Appellant's credibility on the stand was a very significant issue for the defense from the beginning. The Appellant admitted he spit on the officer to Ms. Schuknecht, then denied it on the stand. He told four separate stories about how he

received a wound to his chest (RP 577-580; 664). Finally, as previously indicated, generally, his testimony was unbelievable and uncorroborated by any other evidence.

b. Case Law Does Not Support a New Trial for the Defendant. Cases with Similar Facts Have Been Found Not to Warrant a New Trial. Cases Cited by the Appellant are Factually Distinct from the Case at Hand.

i. CASE LAW DOES NOT SUPPORT A NEW TRIAL UNDER THESE FACTS. IN TWO CASES, WITH SIMILAR FACTS, QUESTIONS, AND WHERE THE DEFENDANT DID NOT OBJECT, WASHINGTON COURTS USED THE FLAGRANT AND ILL-INTENTIONED STANDARD TO DENY THE DEFENDANT A NEW TRIAL.

In two cases, Washington courts have denied the defendant a new trial using the flagrant and ill-intentioned standard under similar circumstances.

In *State v. Neidigh*, 78 Wn.App. 71, 895 P.2d 423 (Div. 1 1995), the prosecutor asked the Appellant if an informant in a drug case was “absolutely lying,” whether the testimony was “invented”, and whether witnesses were “conspiring to get old Mr. Neidigh.” *Id.* at 76. The Appellant did not object. In applying the “flagrant and ill intentioned standard,” the court ruled that the problems could have been cured by objection and found the Appellant was not entitled to a new trial.

In *State v. Stith*, 71 Wn.App. 14, 856 P.2d 415 (Div. 1 1993), the Appellant was charged with possession of cocaine, with intent to deliver. The prosecutor on cross asked if the officers were lying, to which the Appellant said yes. *Id.* at 18. Additionally, the prosecutor asked the Appellant if the officers were making the whole thing up. *Id.* Again, the Appellant responded yes. *Id.* The court held that while the Appellant's credibility was at issue and the question was damaging, the prejudice could have been prevented by a proper objection or cured by an appropriate instruction. *Id.* at 20. The facts of *Stith* are very similar to the facts in our case. In each case, there were only two questions, the defendant commented on the deputies' veracity and there was no objection. In *Stith*, the court did not grant the defendant a new trial.

ii. THE APPELLANT CITES TWO CASES FOR THE PROPOSITION THAT MR. MILLER IS ENTITLED TO A NEW TRIAL, STATE V. PADILLA, AND STATE V. JERRELS. THESE CASES ARE FACTUALLY DISTINCT FROM THE CASE AT HAND.

The Appellant cites only two cases for the proposition that Mr. Miller is entitled to a new trial, *State v. Padilla* and *State v. Jerrels*. Each case is easily distinguishable to the case at hand. In *Padilla*, on a different set of facts and under different

circumstances, the court used a different standard to grant the Defendant a new trial. In *Jerrels*, a child rape and molestation case, under a set of facts that put undue focus on the testimony of the victims' mother, the court granted a new trial. The court can not rely on these cases to grant the Defendant a new trial.

The Appellant relies up *Padilla*, 69 Wash.App. 295, 846 P.2d 564 (Div.1 1993), in support of a new trial. In *Padilla*, the Defendant was charged with delivering drugs. Only two people testified at trial, the arresting officer and the Defendant. At trial, on cross examination, the court overruled an objection by defense counsel when the State asked the Appellant if he thought the arresting officer was "lying." 69 Wash.App. at 298. The appellate court applied a standard not applicable in this case to determine that the Appellant was entitled to a new trial. There are at least three major distinctions between *Padilla* and the case at hand. First, the court overruled an objection by defense counsel, leaving the jury to think this testimony was appropriate. In our case, there was no objection, or at least not one that was overruled. Second, the outcome was dependent, entirely, upon the credibility of two witnesses, the officer and the defendant. In our case, the testimony consisted of as many as five witnesses. Finally, because of the

overruled objection, Division One used a standard not applicable in this case to determine the defendant was entitled to a new trial.

In *Jerrels*, 925 P.2d 209, 83 Wn.App. 503 (Div.2 1996), the Appellant was charged with rape and molestation of the Appellant's children. The mother of two of the children testified. Upon cross examination, the mother was asked several different times if she believed her children were telling the truth. She responded that she did believe them. Defense counsel never objected to these questions, nor their answers. The court applied the "flagrant and ill intentioned" standard to determine that the questioning did, in fact, warrant a new trial. In support of its opinion, the court stated, "Because credibility played such a crucial role, the prosecutor's improper questions were material and highly prejudicial. A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so." *Id.* at 212. In this case, the relationship between the witness alleging untruthfulness and the actual witness is adverse. Therefore, *Jerrels*, is utterly distinct from the case at hand.

The cases cited by the Appellant do not support a new trial. The case law, however, does support the Respondent's position that no new trial should be granted.

iii. THE APPELLANT HAD IMPLIED THE OFFICERS WERE MAKING UP THEIR TESTIMONY BEFORE ON DIRECT EXAMINATION. THEREFORE, WHILE THE APPELLANT DID COMMENT ON THE DEPUTIES FABRICATING A STORY ON CROSS, ITS PREJUDICIAL EFFECT IS NON-EXISTENT AS THE APPELLANT WAS THE FIRST TO RAISE THE ISSUE ON DIRECT.

The Appellant testified on direct that the officers fabricated the assault and a reason to search the vehicle. Therefore, any prejudice the court may find is tempered by his prior testimony and therefore, did not affect the outcome of the trial.

V. CONCLUSION

For the foregoing reasons, the State asks the court to affirm the trial court's rulings.

Respectfully submitted this 6th day of July 2011,



Tyler D. Hotchkiss WSBA #40604
Deputy Prosecuting Attorney
Yakima County, State of Washington

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B:

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

STATE OF WASHINGTON,)	NO. 292410
)	
Respondent,)	SWORN STATEMENT OF SERVICE
)	BY MAIL and BY E-MAIL
vs.)	
)	
JOSEPH C. MILLER, JR.,)	
)	
Appellant.)	

I, Elaine Chartrand, state that I am and was at the time of the service of the Respondent's Brief, herein referred to, a citizen of the United States, residing at Yakima, Yakima County, Washington; that I am over the age of twenty-one years and am not a party to the within entitled action.

That on the 6th day of July, 2011, I served a copy of the aforementioned upon Julia A. Dooris, Gemberling & Dooris, P.S., P O Box 9166, Spokane, WA 99209, Attorney for Appellant, and Joseph Christopher Miller, Jr. 31 S. Falen Avenue, Harrah, WA 98933, the appellant herein, a copy of the aforementioned instrument, by putting the same, enclosed in sealed envelopes, postage paid, into the post office.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


Elaine Chartrand
July 6, 2011
at Yakima, WA