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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THEODORE R. RHONE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda Lee

No. 03-1-02581-1

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On June 2, 2003, the State charged defendant and his two accomplices[1] with one count of unlawful possession of a controlled substance with intent to deliver. CP 1-2. The State further alleged that the defendant and/or his accomplices were armed with a firearm during the commission of the crime. CP 1-2. On July 17, 2003, the court issued a bench warrant after defendant failed to appear for trial. RP 737.

On March 10, 2004, the State amended the information charging defendant as the principal offender and adding charges of first degree

[1] Cortez Brown and Phyllis Burg. CP 1-2.

robbery (Count II), first degree unlawful possession of a firearm (Count III), and bail jumping (Count IV). CP 4-6.

On April 25, 2005, the state filed a second amended information alleging that defendant was armed in the commission of Count II, first degree robbery. CP 60-62.

Before trial, the court held a suppression hearing pursuant to CrR 3.5 and CrR 3.6. RP 97. The court concluded that defendant's custodial statements and all evidence located in the Camaro were admissible against him at trial. CP 117-125.

On April 28, 2005, trial commenced before the honorable Linda Lee. RP 458. The jury returned verdicts of guilty on all four counts as charged. CP 106-108. By special verdict, the jury found defendant was armed while he unlawfully possessed a controlled substance with intent to deliver and during the commission of first degree robbery. CP 112-113.

On November 18, 2005, Judge Lee imposed a life sentence without the possibility of parole on the drug and robbery crimes (Count 1 and II). CP 156-171, RP 1077. For each firearm sentencing enhancement. the court sentenced defendant to 36 months "flat time" on Count I and 60 months "flat time" on Count II. CP 156-171, RP 1077. The court imposed standard range sentences on the first degree unlawful possession of a firearm and bail jumping crimes. 156-171, RP 1079-80.

This timely appeal followed.

2. Facts

a. 3.5 and 3.6 hearing

On May 30, 2003, Deputy Shaffer responded to police dispatch regarding a suspicious vehicle that had left a Jack-in-the-Box at 88th and South Tacoma Way. RP 154. This dispatch reported that three people -- two black males and a white female -- in a red Camaro with license plate number 677HCS had demanded money at a Jack-in-the-Box drive-through window, and displayed a gun. RP 99, 10, 154, State's Ex. No. 4 (CAD report). According to the dispatch, two men sat in front and a women rode in the back. RP 154, State's Ex. No. 4. Deputy Shaffer was familiar with this license plate number from prior surveillance of a residence at 10701 South Tacoma Way; a residence that was associated with narcotics-related activity. CP 122, RP 155, 194.[2] Rather than responding directly to the Jack-in-the-Box, Deputy Shaffer went to the 10701 address in search of the Camaro. RP 155. This residence was located several blocks away from the Jack-in-the-Box. RP 107, 186.

About six minutes after the 911 call, Deputy Shaffer arrived at the suspected drug house. RP 250.[3] The Camaro was parked in front of the

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[2] Deputy Shaffer testified that he was also familiar with Timothy Hale, a tenant at that address. RP 194.

[3] The CAD report was admitted as evidence at the CrR 3.6 hearing. It shows the 911 call occurred at 17:21:04 (5:21.04 p.m.), the dispatch occurred at 17:23:59, and Deputy Shaffer was at 10701 S. Tacoma Way at 17:27:48. State's Ex. No. 4.

house. RP 156. Because of the weather conditions, Deputy Shaffer could not see into the Camaro and did not know if it was occupied. RP 156. As he drove past the Camaro, Rhone stepped out of the passenger side of the Camaro. RP 157. At that point, Deputy Shaffer activated his emergency equipment, pulled his patrol car around, parked behind the Camaro, got out of his patrol car, and drew his weapon. RP 157-58. Based upon the dispatch and his knowledge of the drug house and its connection with the Camaro, Deputy Shaffer believed Rhone was armed. RP 158, 254-55. Defendant furthered Shaffer's belief when he failed to show his hands as Deputy Shaffer commanded him to do. RP 159, 254-55. Defendant was standing between the body of the Camaro and the car door. RP 205. Defendant looked at Deputy Shaffer and reached down into the vehicle. RP 159-60, 205, 254.

Convinced that Rhone was reaching for a gun, Deputy Shaffer moved his finger to the trigger of his handgun. RP 257. In his eleven years as a police officer, this moment was the closest Deputy Shaffer came to shooting someone. RP 256-57. During this event, Ms. Burg is seated in the rear of the Camaro. RP 204. She was very agitated, uncooperative, belligerent, and also was not complying with Shaffer's commands. RP 207.

Eventually, Defendant showed his hands, was handcuffed and detained. RP 162, 225. Brown and Burg were removed from the Camaro, were handcuffed, and were detained. RP 162, 225. A pat down search of

Rhone revealed a knife blade (no handle), a checkbook belonging to another person, and a twenty dollar bill. RP 163-64.

Deputy Shaffer conducted a protective sweep search of the Camaro. RP 225. This search was based on the "type of call and (Rhone's) furtive movements." RP 248. Just prior to the search, Burg stated that, "The gun is in there." RP 213. Shaffer located a handgun behind the driver's seat wrapped in a towel inside a bag. RP 166. Under the driver's seat, Deputy Shaffer found suspected crack cocaine. RP 166-67, 212. In the rear passenger seat area, Shaffer found a Crown Royal bag with cash and two grams of suspected crack cocaine. RP 213. Shaffer secured the handgun and the contraband. RP 167.

During the search or soon thereafter, Shaffer was in phone contact with Officer Miller, who had spoken to the victims of the robbery at the Jack in the Box. RP 167. Officer Miller advised Shaffer that the occupants of the Camaro had contacted an employee at Jack-in-the-Box, had demanded money from him and displayed a weapon before the employee threw $30.00 into the Camaro. RP 167. Officer Miller confirmed that the suspects were two black males and a white female and confirmed that the Camaro's license number was 677HCS. RP 236. The victim, Isaac Miller, knew the suspects as "Bear", "Big T, and "Peaches." RP 237, 252.

After receiving this information from Officer Miller, Shaffer placed all three individuals under arrest. RP 168, 191. At that point,

Shaffer had probable cause to arrest the three suspects for robbery and for cocaine possession. RP 168. After being advised of their Miranda rights, each suspect referred to the others by their street names, "Bear", "T" and "Peaches." RP 251.

After receiving the radio dispatch, Officer Miller responded to 10701 South Tacoma Way before contacting witnesses at Jack-in-the-Box. RP 99. When he arrived at the scene of the parked Camaro, Officer Miller observed Shaffer and Sergeant Strill removing occupants from the Camaro. RP 99-100, 110, 143. Officer Miller did not place anyone under arrest or see anyone place the occupants of the Camaro under arrest. RP 112. Upon observing that the scene was secure, he drove to Jack-in-the-Box and contacted victim Isaac Miller and witness Bambi Meyer. RP 101-02, 111. Each witness provided Officer Miller with their accounts of the robbery. RP 102. Officer Miller relayed this information to Deputy Shaffer who was still involved with the occupants to the Camaro. RP 103.

Meyer advised Officer Miller that she was working at the drive-through window when an unknown male asked for Isaac Miller. She stepped aside to allow Isaac to speak with this individual. RP 138-39. About 30 to 40 minutes later, the same man returned to the drive-through window and again asked for Isaac. RP 138-39. This time, Meyer observed a pistol in the passenger's lap. RP 139.

Isaac Miller advised Officer Miller that he gave some money to someone in the car during the first trip through the drive-through. RP 139-

40. The vehicle returned and someone confronted him again about money and pointed a gun at him. RP 139-40. He tossed what money remained in his pocket into the car. RP 1309-40.

b. Batson Challenge

After the jury was selected and sworn,[4] defendant addressed the court as follows: "I don't mean to be facetious or disrespectful or a burden to the Court. However, I do want a jury of my peers. And I notice that Mr. Oishi took away the black, African-American, man off the jury. ..." The court considered this a Batson[5] challenge. RP 451. The trial court conducted the Batson three-part analysis. RP 451. The court recognized that the prospective juror panel contained only two African Americans of 41 prospective jurors. One of these jurors was excused for cause with agreement by the defendant. RP 452. The State exercised a preemptory challenge on the remaining African American prospective juror. RP 452. Based on this record, the court found that defendant failed to establish a prima facie case of discrimination and denied defendant's request for a new jury pool. RP 453.

c. Trial

Isaac Miller worked at the Jack-in-the-Box at South Tacoma Way. RP 480. Isaac Miller was an acquaintance of the defendant, and knew him

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[4] Voire dire was reported but not transcribed for appeal. RP 429.

as "T" or "Big T." RP 480-81. Miller was also familiar with Cortez Brown, who he knew as "Bear", and a female he knew as "Peaches." RP 482. On May 30, 2003, Isaac Miller was working with Ms. Meyer at the drive-through window at Jack-in-the-Box when this group pulled up to the window in a red Camaro. RP 483-84. Defendant asked Miller for money that Miller owed defendant. RP 486. The debt was about $20.00. RP 485.

According to Miller, he had already paid his debt to Brown, who had come into the Jack-in-the-Box earlier and collected it for defendant. RP 485, 496. Miller told defendant that Brown, who was driving the Camaro and was seated next to defendant, that he had already collected the debt. RP 486. Brown remained silent during the exchange. RP 486, 501. Miller noticed defendant had his hands on an "old style" rusty revolver lying on his lap.[6] RP 486-488, 505. Not believing Miller, defendant again demanded the money, raised the gun off his lab, and waived the gun back and forth at the drive-through window. RP 488, 509, 513. Scared for his life, Miller threw all the money he had left in his pocket into the car window. RP 488-90, 515. Miller testified that defendant "looked mad, but he looked very calm about it." "Peaches" and Brown were not armed. RP 489. After defendant took Miller's money,

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[5] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).
[6] Miller identified State's Exhibit No. 1, a rusty revolver, as the possible gun defendant used during the robbery. RP 489, 504-05.

Miller observed the Camaro again drove through the drive-through "loop" without stopping. RP 498. Miller told the police that "T", "Bear" and "Peaches" were in the car. RP 510-11.

Prior to the robbery, Phyllis Burg and Cortez Brown gave defendant a ride to Jack-in-the-Box at his request. RP 550, 552. She knew defendant as "Big T." RP 550-51. Defendant met her and Brown at Tim Hale's house. RP 551. Burg owned the red Camaro. RP 552. At that time, Burg and Brown lived together and Brown usually drove Burg's Camaro. RP 562. Burg noticed defendant had a plastic bag in his hands as he got into the Camaro. RP 574.[7] Burg noticed a Crown Royal bag but did not know if defendant put that bag into the car. RP 574. Burg was unaware that narcotics were in the Crown Royal bag and did not place the bag into the car. RP 574, 583. Brown drove the Camaro to Jack-in-the-Box with Rhone seated in the back seat and Burg seated in the front passenger seat. RP 552-53.

Once they arrived at Jack-in-the-Box, defendant moved to the front passenger seat and Burg moved to the back seat behind defendant. RP 554-55, 574. Burg thought it was odd that Brown drove around the drive-through but neither he nor defendant ordered food. RP 555. When she asked what was going on, she got no response. RP 555. Defendant

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[7] That bag carried the gun that defendant threw over the seat during the felony stop. RP 583, 616-619.

threatened Isaac and demanded Isaac pay his $40.00 debit. RP 556. Afterwards, Burg observed money coming through from the drive-through window into the car window. RP 556, 573. Both defendant and Brown then grabbed the money. RP 557. Though Burg screamed she wanted to go home, defendant said he wanted to go back to Hale's house and they drove there. RP 557. Burg was so upset, she was not aware of what route they took to get back to Hale's residence. RP 573.

Soon after arriving at Hale's residence, police surround the Camaro. RP 558. At that point, defendant is exiting the passenger side of the Camaro. RP 560. Burg observed a plastic grocery bag being thrown into the backseat from the front passenger seat. RP 558-59. After defendant threw the bag, she looked inside and noticed a gun and screamed, "There is a gun" to the police. RP 559. The police removed all three people from the Camaro at gunpoint. RP 560-61. Burg was not aware of the gun until defendant threw it into the back seat at her. RP 563, 583.

While Ms. Meyer was working at Jack-in-the Box, she observed a red Camaro come through the drove-through window without its occupants placing a food order. RP 587-90. A man in the car asked to speak with Isaac Miller, her co-worker. RP 589. Miller was standing at the window. RP 591. After exchanging words, the Camaro left only to return about a half hour later. RP 589.

This time, she again observed the driver, a passenger, and Miller exchanging words before noticing the male passenger had a gun in his lap. RP 591-93. She described the gun as a longer-barreled gun. The man had his hand on the end of the gun, which was pointed in the direction of the restaurant. RP 593, 595-98. She also noticed a blonde female was seated in the back of the Camaro. RP 592-93. Meyer observed the Camaro park at a nearby grocery store before traveling down South Tacoma Way. RP 593, 596.

She immediately wrote down the Camaro's license plate number and vehicle description and gave it to her manager who called 911. RP 590-91. Meyer then spoke with 911 operator and reported information about the incident. RP 594.

Shaffer testified he responded to a suspicious vehicle call. RP 604. Officer Miller was the first to respond to the call and was dispatched to Jack-in-the-Box. RP 605. The dispatch indicated that three occupants of a Camaro had gone to a Jack-in-the-Box and asked for money from an employee. RP 605-06. One of the occupants displayed a handgun. RP 606. The dispatch included a vehicle description, red Chevy Camaro, and a license plate number. RP 606. Shaffer was familiar with the Camaro as

being associated with an apartment complex at 107th and Pacific Highway. RP 606-07.[8]

Deputy Shaffer proceeded to that apartment complex and located the Camaro. RP 607. As he was driving past the Camaro, he initially thought the car was unoccupied before seeing the passenger side door open. RP 607-09.[9] After activating his overhead lights, he exited his patrol car with his side arm drown and yelled at the passenger, "Police. Let me see your hands." RP 610-11. Defendant looked at Shaffer and reached down into the car. RP 611. Shaffer was very concerned for his safety. RP 612. After Shaffer gave additional verbal commands, defendant brought his hands out from the car. RP 611. After detaining defendant, Shaffer removed Burg and Brown with the assistance of Sgt. Strip. RP 614. Burg was very agitated before exiting the Camaro. RP 613, 702.

Based on defendant's furtive movements, Shaffer searched the Camaro. RP 615. On the floor behind the driver's seat, Shaffer found a revolver in a plastic bag wrapped in a towel. RP 616-619. Subsequent to finding the revolver, Shaffer found cocaine in a cigarette size plastic tube

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[8] On cross-examination, Shaffer acknowledged that this address was associated with drug activity and that he had seen the Camaro parked there on numerous occasions. RP 698.

[9] Shaffer diagramed this event for the jury. RP 608.

under the driver's seat and in the purple Crown Royal bag under the rear passenger seat. RP 621-23, 630, 703. The seat was askew and appeared to have been moved. RP 703. Inside the Crown Royal bag, there was a plastic bag containing five individually packaged baggies of cocaine with a note that read, "40's," and $30.00 in cash. RP 624-27, 824.

Officer Miller testified that he contacted Isaac Miller and Bambi Meyer after the robbery. RP 720. They gave Officer Miller verbal statements before providing written statements. RP 720. Prior to leaving Jack-in-the-Box, he communicated this information to Deputy Shaffer. RP 720.

Based on this information, Shaffer arrested all three occupants. RP 690. After being taken into custody, defendant initially gave Shaffer a false name. RP 688-89. Post Miranda, defendant told Shaffer he knew Brown as "Bear" and Burg as "Peaches." RP 694. He acknowledged they knew him as "T" or "Big T." RP 696. He met Brown and Burg at the apartment at 107th and Pacific Highway before they gave him a ride to Jack-in-the-Box. RP 694-95. He told Shaffer that he moved from the back seat to the front passenger seat before getting to Jack-in-the-Box. RP 695. Defendant initially denied knowing the gun was in the car but eventually admitted he was holding the gun in his lap, though he did not point it at anyone. RP 696.

Brown told the jury he could not remember much about what happened on May 30, 2005. RP 652, 661-64. He claimed he did not

know Tim Hale but that he did meet defendant at an acquaintance's house. RP 650, 660. He admitted that he drove defendant to Jack-in-the-Box with Burg in her Camaro. RP660-61. He denied ever calling defendant by the name "T" or "Big T." RP 649. He further denied telling Shafer that he saw a gun in a plastic bag or that defendant got into the car carrying a Crown Royal bag. RP 674. Brown did recall that defendant brought a plastic bag with him into the Camaro. RP 662.

d. Miller's non-testimonial comment

When Isaac Miller was excused from the witness stand, he walked past counsel table and said, "I could make it real easy on everybody and just say that I didn't recognize the gun." Later under oath, Miller explained that he was angry at the court for not being released from the case. RP 525-28. Miller testified that he felt he would lose his job as a store manager for missing so much work and made this angry comment to "blow off steam." RP 530.

Judge Lee did not hear Miller's comment. RP 530. Judge Lee stated that "most of the jurors were already out the door when Mr. Miller left the stand." Judge Lee expressed her belief that because she was closer to counsel table than the exiting jurors, Miller's comment was not an issue she needed to bring before the jury. RP 530-31. At that point, defendant's trial counsel indicated after speaking with defendant, "this is

going to work to Mr. Miller's favor" and requested the court release Miller.

The next day, defendant moved the court to declare a mistrial based on Miller's non-testimonial comment. RP 544. Judge Lee again noted her proximity to counsel table compared to the exiting jurors and reiterated that only two jurors were in the courtroom at the time; one male juror was in the doorway and that another juror was right behind him. RP 545. In denying defendant's motion, the court concluded that "there is no conceivable way that this court can even reach a conclusion, even glimmering, that that juror may have heard it (Miller's comment)." RP 545.

e. Detective Hickman's expert testimony

The state called Detective Hickman as an expert in narcotics investigations pursuant to ER 702. RP 847. Initially, defendant objected to Hickman's testimony on the basis that the subject matter of his testimony was not beyond the common understanding of the jurors. RP 834-35. When given the opportunity, defendant did not object to Hickman's qualification as an expert. RP 847.

Detective Hickman has been involved with hundreds of narcotics investigations and "well over" 100 crack cocaine investigations. RP 841-42. Hickman explained to the jury that street level drug dealing is

dangerous for both users and sellers and that dealers often arm themselves with firearms. RP 843. Hickman testified that crack cocaine is a "smokable" version of cocaine that is cooked with baking soda to form "rocks." RP 845. These rocks are broken off into pieces and typically packaged for sale in Ziploc bags, sell for $20.00, and range from .10 grams to .20 grams. RP 845-46. The rocks of cocaine found in the Crown Royal bag were double in size to the rock cocaine found in the glass tube. Hickman opined that based on the size of the rock, the packaging, and the paper with the notation, "40's" this cocaine was packaged for sale for $40.00 and the approximate street value for the five rocks of cocaine was $200.00. RP 855, 864. Hickman explained that that the average crack cocaine user consumes up his or her cocaine quickly and would not typically hoard his or her supply. RP 854. Hickman further opined that the five individually packaged rocks of cocaine were more associated with a cocaine dealer than the single rock found in the plastic tube. RP 855.

On cross-examination, Hickman testified that a typical cocaine user could ingest the rock of cocaine found in the tube in less than one hour and a crack addict could ingest the other five rocks in one day. RP 856. Hickman further acknowledged that the cocaine involved in this case was not an unusual amount for small groups of people to consume. RP 862, 870. Hickman acknowledged that drug dealers often carry scales,

cell phones, pagers, and crib notes. RP 862. Other than the "40's" note, none of these items were involved in this case. RP 862. In regard to street level bulk purchases of rock cocaine, Hickman opined that such purchases arose suspicion with dealers and are not common. RP 868.

C. ARGUMENT.

1. THE TRIAL COURT'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellate courts review findings of fact regarding a motion to suppress under the substantial evidence standard. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair minded, rational person of the truth of the finding. Id. at 644. Appellate courts review conclusions of law to decide whether they were properly derived from factual findings. State v. Hoang, 101 Wn. App. 732, 738, 6 P.2d 602 (2000) (citing State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)). Review of conclusions of law regarding an order pertaining to suppression of evidence is de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996); State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999). Unchallenged findings of fact are verities on appeal. Cowiche Canyon Conservancy v. Boslet, 118 Wn.2d 801, 808, 828 P.2d 549 (1992); State v. McIntyre, 39 Wn. App. 1, 2, 691 P.2d 587 (1984). Any ambiguity in the finding may be clarified with resort to the

trial court's oral opinion. State v. White, 31 Wn. App. 655, 658, 644 P.2d 693 (1982).

In the instant case, defendant challenges Finding of Fact 2, 5, 8, 9 and 11. Contrary to defendant's claim, the challenged findings are supported by substantial evidence. Defendant claims that there is no evidentiary support of any kind to establish that Deputy Shaffer had investigated robberies of fast food restaurants in which employees at drive-through windows were held up at gunpoint. Brief of Appellant at 21, CP 122. Defendant is mistaken.

Deputy Shaffer testified that he had personal knowledge or experience investigating robberies at fast food restaurants. RP 153. On cross examination, he testified that he had investigated numerous restaurant armed robberies. RP 190. He explained that Lakewood had "[q]uite a few" fast food restaurants and that "stop and robs" at these restaurants were common. RP 153. Moreover, Shaffer testified that the use of firearms was fairly prevalent in these "stop and robs." RP 153. Shaffer did not specify whether these "stop and robs" occurred at the drive-through windows or inside these restaurants. Even without this clarification, the facts support the finding that Shaffer had experience of investigated fast-food restaurant armed robberies in Lakewood. CP 122. More importantly, the legal conclusions the court made would not be affected if the challenged language of Finding number 2 is deleted.

Finding of Fact number 5 indicates that "the defendant reached back into the rear interior of the vehicle." CP 122. Even if this finding was deleted, the court's legal conclusions would not be affected. Shaffer testified that defendant made eye contact with Shaffer before defendant bent down and reached back into the vehicle after Shaffer had commanded defendant to show his hands. RP 159, 254-55. Based on his training and experience, Shaffer believed defendant was either reaching for a weapon or was discarding one. RP 255. At that point, Shaffer put his finger on the trigger of his handgun and came the closest to shooting someone than any other time in his eleven year career. RP 256-57. On cross examination, Shaffer explained that defendant was standing on the inside between the car door and the car body and that defendant reached down into the car, leaning his body into the car, not away. RP 204-05.

These facts are sufficient for the trial court to find defendant was reaching into the rear interior of the car.[10] More importantly, these facts are sufficient for the court to conclude defendant's furtive movements

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[10] It is not clear from the record whether Shaffer demonstrated defendant's actions for the court. Nonetheless, it appears defense counsel understood Shaffer's testimony as indicating defendant was reaching into the rear interior compartment of the Camaro, because counsel elicited testimony from Shaffer regarding how someone engages the front seat latch to move the seat forward to allow the back seat passengers to exit the vehicle. RP 203-04. The thrust of this testimony was to attribute defendant's action to moving the seat forward to allow Burg to exit from the rear of the car, not to throwing a gun into that area. RP 204. Defense counsel argued this point at the suppression hearing. RP 308.

raised Shaffer's reasonable suspicion that defendant was reaching back into the vehicle to retrieve a weapon. CP 124.

Defendant claims Finding number 8 is misleading because it implies that Burg told Shaffer that there was a gun in the Camaro before he searched the car. Brief of Appellant at 22. There is nothing misleading about the court's finding. On cross examination, the flowing exchange took place:

> Q. (Defense counsel) So again, what was the basis for you searching that vehicle?
> A: (Deputy Shaffer) Well, as I'm going over and looking into the vehicle, Burg is telling us "The gun is in there." This corresponds with what I saw, the furtive movements of Mr. Rhone, and the call that I have that he is armed with a gun." RP 213.

Therefore, Shaffer's testimony supports the court's factual finding.

Defendant next challenges Finding number 9 as misleading insofar as it implies that Shaffer observed the plastic bag in the car before physically entering it and that he found the drugs while searching for the gun. Brief of Appellant at 23. The phrase "While surveying the vehicle for a gun ..." is ambiguous. Even if this phrase was deleted, the record is sufficient to support the finding that Shaffer observed the white plastic bag on the floorboard behind the driver's seat that the bag contained a revolver, and that Shaffer found crack cocaine under the passenger and driver's seats. CP 123, RP 166-67. In addition, the sequence of these facts listed in Finding number 9 supports the conclusion that Shaffer found

the gun before he located the drugs. This is consistent with Shaffer's testimony. RP 166-67, 211-13.

Finally, defendant claims that Finding number 11 is misleading because it implies that Officer Miller immediately called Deputy Shaffer after speaking with Isaac Miller and Bambi Meyers at Jack-in-the-Box. Defendant is mistaken. After he obtained statements from Mr. Miller and Ms. Meyer, Officer Miller communicated this information to Shaffer. RP 104. Officer Miller, who was still at Jack-in-the-Box, believed Shaffer was at the scene of the Camaro during this communication. RP 104.

On cross examination, defense counsel established that Miller arrived at Jack-in-the-Box after 5:46 p.m. RP 118. Miller interviewed the witnesses for about 20 minutes and before they completed their written statements, he relayed their account of the robbery to Shaffer. RP 127-28.

Shaffer testified that during his search of the Camaro or soon thereafter, he spoke with Officer Miller about what Miller had learned at Jack-in-the-Box. RP 167. Shaffer did not formally arrest the occupants of the Camaro until Officer Miller had relayed the witnesses' account of the robbery. RP 168, 248. Accordingly, there is sufficient evidence for the court to find Officer Miller immediately relayed the information before Shaffer arrested the occupants of the vehicle. More importantly, the record supports the court's legal conclusion that Shaffer had probable cause to arrest the occupants for robbery after Miller relayed this information to Shaffer. CP 125.

a. The protective search of the Camaro was lawful.

Under article I, section 7 of the Washington Constitution, the search incident to arrest exception to the warrant requirement is narrower than under the Fourth Amendment. State v. O'Neill, 148 Wn.2d, 564, 584, 62 P.3d 489 (2003). Brief investigative stops, also referred to as "Terry stops," are among those categorical exceptions to the warrant requirement in which it is predetermined that a warrantless seizure is reasonable. State v. Acrey, 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003). To justify a Terry stop under the Fourth Amendment and article I, section 7, a police officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968); State v Mendez, 137 Wn.2d 208, 233, 970 P.2d 722 (1999). The level of articulable suspicion necessary to support an investigative detention is "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). A police officer may conduct an investigative stop based on less evidence than is needed for probable cause to make an arrest. State v. Glover, 116 Wn.2d 509, 519, 806 P.2d 760 (1991) (citing Terry v. Ohio, 392 U.S. 1, 25-26, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

In evaluating the reasonableness of an investigative stop, the court considers the totality of the circumstances, including the location of the

stop, the purpose, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained. Glover, 116 Wn.2d at 514. Another important factor comprising the totality of circumstances which must be examined is the nature of the suspected crime; a violent felony crime provides an officer with more discretion to act than does a gross misdemeanor. State v. Randall, 73 Wn. App. 225, 229-30, 868 P.2d 207 (1994); State v. Thierry, 60 Wn. App. 445, 803 P.2d 844 (1991).

A lawful Terry stop is limited in scope and duration to fulfilling the investigative purpose of the stop. State v. Williams, 102 Wn.2d 733, 739-41, 689 P.2d 1065 (1984). If the results of the initial stop dispel an officer's suspicions, then the officer must end the investigative stop. If, however, the officer's initial suspicions are confirmed or are further aroused, the scope of the stop may be extended and its duration may be prolonged. Id. at 739-40. There is no bright line rule governing the length of a Terry stop. See State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). Detentions of 20 minutes or longer have been upheld in Washington when the delay was due to investigation or officer safety reasons and not merely harassment. See e.g., State v. Moon, 48 Wn. App. 647, 739 P.2d 1157 (1987).

Police officers making a lawful investigative stop may protect themselves by conducting a search for concealed weapons whenever "[the officer] has reason to believe that the suspect is armed and dangerous." Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612

(1972). An officer may make a limited search of the passenger compartment of a vehicle to assure a suspect person in the car does not have access to a weapon within the suspect's or passenger's area of control. State v. Ellwood, 146 Wn.2d 670, 678, 49 P.3d 128 (2002). "The scope of the search should be sufficient to assure the officer's safety." State v. Glossbrener, 146 Wn.2d 670, 678, 49 P.3d 128 (2002)(quoting State v. Kennedy, 107 Wn.2d 1, 12, 726 P.2d 445 (1986)). "A protective search for weapons must be objectively reasonable, though based on the officer's subjective perception of events." State v. Larson, 88 Wn. App. 849, 853-54, 946 P.2d 1212 (1997). The entire circumstances of the traffic stop should be evaluated in determining whether the search was reasonably based on officer safety concerns. Glossbrener, 156 Wn.2d at 679.

In the instant case, Deputy Shaffer cleverly located the red Camaro within minutes of the armed robbery. The radio dispatch provided Shaffer with a description of the Camaro and the three occupants and a license plate number. RP 154, State's Ex. No 4. Being familiar with the Camaro from an earlier drug investigation, Shaffer found this Camaro within blocks of the scene of the robbery. While Shaffer demanded defendant show his hands while defendant was exiting the Camaro, defendant made eye contact with Shaffer and failed to obey his commands. Defendant leaned back into the Camaro and reached back inside. Based on the nature of the dispatch, (armed robbery) and defendant's furtive movements, Shaffer reasonably feared for his life and even came close to shooting

defendant. Fortunately defendant removed his hands from the car before complying with Shaffer's insistent commands.

Armed with the knowledge of the radio dispatch, defendant's furtive movements, and Burg's comments about a gun, Shaffer reasonably believed defendant was armed and may gain access should he return to the vehicle. Shaffer then conducted a protective search of the Camaro. This search was limited in scope to finding weapons. Shaffer's suspicion was confirmed when he found a revolver on the floorboard behind the driver's seat to the Camaro. Shaffer was not obligated to stop his search of the Camaro upon finding one handgun.[11] There were three occupants and other weapons could have be located in the Camaro. Shaffer stopped his search after looking under the car seats where he located the cocaine.

Defendant contends that because all the occupants had been removed from the vehicle, handcuffed, and placed into patrol cars, that there was no legitimate safety risk and the search was unnecessary. Defendant is mistaken. Had Shaffer not located cocaine inside the vehicle and had the three occupants been eliminated as suspects in the robbery, Shaffer would have released the occupants. RP 248. It was only after locating the cocaine and after Officer Miller relayed details of the robbery

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[11] See e.g., State v. Olson, 78 Wn. App 202, 895 P.2d 867 (1995)(officer who was informed by driver that he was carrying a knife had grounds for frisking driver to determine whether he was carrying additional weapons); State v. Swaite, 33 Wn. App 477, 481, 656 P.2d 520 (1982)(officer was justified in frisking detainee for additional weapons where detainee had a knife in his belt).

to Shaffer, that Shaffer had probable cause to arrest this group. Thus, the justification for the stop continued until Shaffer confirmed that the three occupants were the suspects of the Jack-in-the-Box armed robbery. Similarly, Shaffer's concern for his safety continued until his reason for conducting the felony stop (robbery investigation) was dispelled or confirmed.

To adopt defendant's reasoning would thwart the rationale regarding protective search during Terry stops. As stated in Kennedy, "It would be unreasonable to limit an officer's ability to assure his own safety." Kennedy, 107 Wn.2d at 12. If there were multiple weapons in a vehicle, if would be peculiar to limit police from continuing a protective search once one weapon is discovered. Obviously, the vehicle is not secure for officer safety purposes until all the weapons are secured. Accordingly, defendant's contention that Shaffer's search was unlawful or that he exceeded the scope of a lawful search is without merit.

b. Applicability of inevitable discovery doctrine.

As argued above, Shaffer's search of the Camaro was a lawful protective search for weapons based on his reasonable belief that defendant was armed and dangerous. If this court agrees, the inevitable discovery rule is inapplicable as the doctrine presumes the police unlawfully searched for evidence. If this court finds Shaffer's search of

the Camaro was unlawful or that Shaffer exceeded the scope of an otherwise lawful protective search for weapons, than the inevitable discovery should be considered.

Where police illegally seized evidence, the evidence may be exempt from suppression if the state can establish by a preponderance of the evidence that (1) the police did not act unreasonably or to accelerate the discovery of the evidence in question; (2) proper and predictable investigatory procedures would have been utilized; and (3) those procedures would have inevitably resulted in the discovery of the evidence in question. See State v. Reyes, 98 Wn. App. 923, 993 P.2d 921 (2000). The Washington State Supreme Court has refused to apply this narrow exception to a search conducted after police had probable cause to make a warrantless arrest, but before the police advised defendant he was under arrest. State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2003).

Relying on O'Neill, defendant argues the inevitable discovery rule cannot be applied here because Shaffer's search of the Camaro was not reasonable where Shaffer had probable cause to arrest, but searched prior to affecting a lawful arrest. Brief of Appellant at 28. Defendant's reliance on O'Neill is misplaced.

In State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2003) Officer West contacted O'Neill who was in vehicle parked in front of a store that had twice been victimized by burglars in the previous month. Id. at 572. West was also aware the vehicle had been recently impounded

regarding a drug issue. West requested the O'Neill provide identification, to which he replied that his driver's license had been revoked. Id. at 572. The vehicle was registered to another person and O'Neill claimed to be that person. Id. When O'Neill stepped out of the vehicle, West observed a narcotic cook spoon on the floorboard of the vehicle. Id. West pressured O'Neill to consent to a search of the vehicle by advising O'Neil that he did not need a search warrant but could simply search the car incident to O'Neil's arrest. Id. at 573. After O'Neill consented to the search, West found a drug pipe and cocaine. Id.

On appeal, the Washington State Supreme Court concluded that the cook spoon was admissible because West was justified in requesting O'Neill exit the vehicle and the cook spoon, which West recognized as drug paraphernalia, was in plain view. Id. at 583, 592. The court concluded the drug pipe and cocaine were inadmissible. Id. at 592. The court rejected the State's argument that West would have inevitably found the drug pipe and cocaine if he had searched the car incident to O'Neil's arrest. Id. at 592. Central to the court's conclusion was that West chose not arrest O'Neill after learning O'Neill's license had been revoked or upon West's discovery of the small amount of controlled substance he viewed on the cook spoon. Id. at 592.[12] Accordingly, the court properly

[12] The court further noted that West could not have arrested O'Neill for possession of drug paraphernalia or use of drug paraphernalia. Id. at 584 n. 8.

concluded that West could not search the car incident to a lawful arrest until he lawfully arrested O'Neill. Id. at 593.

In the instant case, Shaffer lawfully arrested defendant after confirming his suspicion that defendant was involved in the armed robbery at Jack-in-the-Box. Shaffer did not have probable cause to arrest defendant or the other occupants for the armed robbery until he got additional information from Officer Miller. The defendant was lawfully seized during this time. Once Shaffer confirmed that the Camaro and its occupants fit the description of the vehicle and three people involved in the robbery, he lawfully arrested them. A search incident to that lawful arrest would have revealed the weapon and the cocaine. In this scenario, Shaffer would have utilized proper and predictable procedures that would have inevitably resulted in the discovery of the cocaine.

O'Neill is therefore distinguishable because Shaffer conducted a protective search which occurred before he had probable cause to arrest the defendant for armed robbery. In addition, if Shaffer exceeded the scope of his lawful protective search, under the inevitable discovery rule the drugs are admissible evidence. In sum, the application of the inevitable discovery rule here does not circumvent the requirement that a lawful custodial arrest must actually occur before a warrantless search incident to that arrest may be conducted.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY EXCLUDING DEFENDANT'S EXPERT FROM TESTIFYING AT THE CrR 3.6 HEARING AND PERMITTING THE STATE'S EXPERT TO TESTIFY AT TRIAL.

Evidence rule 702 provides the following:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The evidence of expert opinion must be relevant to be admissible. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence is presumed to be admissible unless the party seeking to exclude the evidence shows that its probative value is substantially outweighed by the danger of misleading the jury. Carson v. Fine, 123 Wn.2d 206, 225, 867 P.2d 610 (1994); see also ER 402, ER 403. "An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial." State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610

(1990). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. Thomas, 150 Wn.2d at 856; Guloy, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

a. Exclusion of defendant's expert witness at CrR 3.6 hearing.

In the instant case, defendant claims that the court erred when it denied the testimony of his expert witness, Mr. Crowe at the suppression hearing. In defendant's offer of proof, he claimed that Mr. Crowe was an expert in police procedures, could explain the "discrepancies" in the CAD report and provide information from Crowe's interview with Shaffer that contradicted Shaffer's testimony. RP 272.

Mr. Crowe's proffered testimony regarding police procedures is not admissible as it is not relevant and would invade the province of the trial judge who must determine the legality of the search and seizure in this case. In regard to the CAD history, Mr. Crowe was not present at either scene involved in the CAD report nor did he have personal

knowledge of the events contained in the report. Crowe's understanding of "how people arrive, when they left" (RP 272) would not shed additional light on Shaffer's testimony. Thus, the evidence is irrelevant and not likely to help the court determine a fact in issue.

Finally, defendant proffered Crowe's testimony as a way to impeach Deputy Shaffer. According to the defendant's proffer, Crowe would testify that as Shaffer's former supervisor, he could establish some level of Shaffer's incompetence. In addition, Crowe would testify about facts taken from an interview with Officer Miller that contradict Shaffer's testimony.[13] Neither method of impeachment is proper. For the suppression hearing, the ultimate arbiter of Shaffer's credibility is the trial judge. Under ER 608[14], it is improper for Crowe to testify that Shaffer makes numerous mistakes and therefore his testimony is not credible. Shaffer admitted that he was mistaken when wrote in his report that he searched the Camaro incident to defendant's arrest. RP 178, 209. Thus there was nothing for Crowe to impeach.

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[13] After making this offer of proof, defense counsel stated he "misspoke" that Mr. Crowe would testify about Millers' interview to impeach Shaffer. RP 277. Yet this goal remained part of his offer of proof. RP 278.

[14] ER 608 provides that "specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence."

Moreover, it is improper impeachment to have Crowe testify about alleged statements Officer Miller told Crowe in a pre-trial interview that may contradict Shaffer without first giving Shaffer or Miller the opportunity to address the subject matter of these statements.[15] Accordingly, the court did not err in ruling Crowe's expert testimony was inadmissible.

b. Admission of the State's narcotics expert's opinion at trial.

In the instant case, the State elicited expert opinion testimony regarding street-level narcotics sales. This evidence helped the jury understand the significance of the cocaine found in the Camaro and how the jury could find defendant intended to deliver the five rocks of cocaine that were in his constructive possession. Hickman explained the role the five small rocks of cocaine could have in this scenario. Without this information, the jury would not be aware of the typical size of a rock of cocaine, the typical user amount, the typical street-level cost, how it is packaged for sale, or the meaning of the "40's" note found with the cocaine. The average juror would not likely understand how such seemingly small amounts of cocaine could be indicative of cocaine delivery. Defendant was not charged with actual delivery, thus this

[15] Apparently, Mr. Crowe would testify that Officer Miller said they (Shaffer and Stril) were "tearing apart the car" when Miller arrived on scene. RP 278.

information was helpful to the jury to understand how defendant could intend to deliver the rock cocaine, based upon the method of packaging, size of rocks, and the note describing the rocks as "40's". Hickman's testimony also provided and explanation why defendant was armed when he robbed Miller to collect Miller's debt.

Even if the court committed error it is not reversible error as this evidence did not materially affect the outcome of the trial. When the State sought to have Hickman declared an expert in the field of street-level narcotics transactions, defendant did not object. Notably, defendant elicited favorable testimony from Hickman that the amount of cocaine was indicative of consumption, not cocaine sales. For example, multiple cocaine users or one cocaine addict could consume five similar rocks of cocaine in one day. RP 856. Not surprisingly, counsel argued this point to the jury in closing. RP 956.

Moreover, Hickman acknowledged that items commonly associated with drug dealers like scales, cell phones, or pagers were not involved in this case, that he did not investigate this case, and did not know if defendant was in possession of the cocaine. RP 859-862. Therefore, the defendant curtailed Hickman's opinion and provided the jury with other plausible explanations for five rocks of cocaine.

3. DEFENDANT HAS FAILED TO SHOW THAT THE PROSECUTOR IMPROPERLY USED PEREMPTORY CHALLENGES TO EXCLUDE POTENTIAL JURORS SOLELY ON THE BASIS OF THEIR RACE OR THAT HE TIMELY PRESERVED THIS ISSUE FOR REVIEW.

In Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Supreme Court held that the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause.

Batson and its progeny utilize a three-part test to determine whether a peremptory challenge is race based:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995). The party raising a Batson challenge must first establish a prima facie case of purposeful discrimination. State v. Evans, 100 Wn. App. 757, 763-64, 998 P.2d 373 (2000)(citing State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995)). A prima facie case exists if two criteria are met. Evans, 100 Wn. App. at 764. First, the challenge must be exercised against a member of a "constitutionally cognizable" group. Evans, 100 Wn. App. at 764. Second, that fact and "other relevant circumstances"

must raise the inference that the challenge was based on the juror's membership in the group. Evans, 100 Wn. App. at 764. "Relevant circumstances" may include a pattern of strikes against members of the group or the particular questions asked during voire dire. Evans, 100 Wn. App. at 764. A mere challenge to a person of color does not constitute a prima facie case of discrimination. Evans, 100 Wn. App. at 770. Even if the challenged juror is the only African American on the panel, this factor in and of itself does not create a prima facie case of racial discrimination. See State v. Wright, 78 Wn. App. 93, 102, 896 P.2d 713 (1995) (courts are hesitant to find a discriminatory motivation based on numbers alone).

Although Batson does not address the timeliness issue, i.e., when an objection to the jury selection process must be raised, the courts which have considered the issue have concluded that a Batson motion is timely when made at any time before the jury is sworn. In Ford v. Georgia, 498 U.S. 411, 422, 111 S. Ct. 850, 856, 112 L. Ed. 2d 935 (1991), the Supreme Court explained, "The requirement that any Batson claim be raised not only before the trial, but in the period between the selection of the jurors and the administration of their oaths, is a sensible rule." Id. The court noted that "local practices would indicate the proper deadlines in the contexts of the various procedures used to try criminal cases" and therefore left it to state courts to implement Batson. The court acknowledged that a state could adopt a general rule that a Batson claim is

untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected. Ford, 111 S. Ct. at 857.

Although no Washington case[16] addresses the timeliness requirement for a Batson motion, Washington law is clear that challenges to jurors must be made during jury selection. CrR 6.4. Sound reasoning supports such a practice because the trial court's ability to grant relief is very limited after the jury is sworn. Indeed, after the jury is sworn and the other members of the venire are released, the trial court has little, if any, ability to restore an excused juror to service in a particular case.

In the instant case, defendant delayed making his motion until the jury had been sworn. RP 429, 438-39, 451. Further, the prospective venire persons were most likely long gone. Thus, in this case, defendant's motion was untimely and deprived the trial court of any ability to fashion relief and was inadequate to preserve the issue for appeal.

Moreover, the trial court properly found that defendant failed to establish a prima facie case for racial discrimination. Here, defendant contends the trial court erred by refusing to give a race neutral reason for excusing an African-American prospective juror. Brief of Appellant at 33. The State exercised a preemptory challenge on one African American

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[16] In State v. Morales, 53 Wn. App. 681, 686, 769 P.2d 878 (1989), the court noted that a Batson challenge should be brought before the taking of evidence rather than in a motion for new trial to avoid the question of waiver. However, as the timeliness issue was not raised by the parties, this dicta was not supported by any briefing or analysis. State v. Morales, 53 Wn. App. at 686.

prospective juror. The defendant agreed the other African American prospective juror be excused for cause. After observing the empanelled jurors were not African-American, defendant requested a new jury panel. He did not allege the State had exercised its preemptory challenge on racial grounds nor request the State to justify this preemptory challenge.

Defendant asserts that the mere fact the State's used a preemptory challenge on the one African-American remaining on the prospective juror sufficiently raises the inference the State's action was racially discriminatory. As the trial court correctly concluded, the mere fact that the State exercised a preemptory challenge on the one remaining African juror without more, is insufficient to establish a prima facie case for racial discrimination. To supplement the record after the court's ruling, the prosecutor indicated to the judge that the jury panel was ethnically diverse. RP 547. Having failed to establish this prima facie case, the court was not required to ask the State to articulate race neutral reasons for excusing this prospective juror. State v. Hicks, 2006 Wash. App. LEXIS 1674 *21.

4. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR A RATIONAL JURY TO REASONABLY CONCLUDE THAT DEFENDANT POSSESSED COCAINE WITH INTENT TO DELIVER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle

v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003), State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, courts must defer to the trier of fact on issues of conflicting testimony, credibility determinations, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trier of fact is free to reject even uncontested testimony as not credible as long as

it does not do so arbitrarily. State v. Tocki, 32 Wn. App. 457, 462, 648 P.2d 99, review denied, 98 Wn.2d 1004 (1982).

To convict a person of unlawful possession of a controlled substance with intent to deliver the State must prove that the person knowingly had a controlled substance with intent to deliver. RCW 69.50.401(a). Possession of property may be actual or constructive. State v. Bradford, 60 Wn. App. 857, 808 P.2d 174 (1991). A person constructively possesses a controlled substance if he had dominion and control over it or the premises where the controlled substance is found. State v. Amezola, 49 Wn. App. 78, 86, 741 P.2d 1024 (1987). A vehicle is considered a "premises" for purposes of determining constructive possession. Id. Exclusive control is not necessary to establish constructive possession. Id. Mere proximity to the drugs without more is insufficient to show the dominion and control necessary to establish constructive possession. Id.

When defendant challenges the sufficiency of the evidence, proof of dominion and control over the premises raises a rebuttable presumption there is dominion and control over the contraband in the premises. State v. Tadeo-Mares, 86 Wn. App. 813, 817, 939 P.2d 330 (1997). An appellate court will look at the totality of the situation to determine if there is substantial evidence to establish circumstances from which the jury can

reasonably infer that the defendant had dominion and control of the drugs and was thus in constructive possession of them. State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977). Whether a passenger's occupancy of an area of an automobile constitutes dominion and control over drugs in that area depends on the facts in each case. State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942 (1971).

While not overwhelming, there is sufficient evidence to support the jury's determination that defendant knowingly possessed cocaine, a controlled substance with intent to deliver. The State adduced the following evidence at trial: (1) Defendant committed armed robbery to collect a $20.00 debt Miller owed him; (2) Brown collected this debt before the robbery; (3) At gunpoint, Isaac Miller gave additional money to the defendant; (4) Before arriving at the Jack-in-the-Box, defendant moved from the back seat to the front passenger seat; (5) Deputy Shaffer found five rocks of cocaine in a Crown Royal bag under the rear passenger seat; (6) this rock cocaine was valued at $40.00 per rock and individually packaged for sale; (7) A paper with the notation, "40's and $30.00 in cash was with the rock cocaine; (8) Shaffer was familiar with the Camaro and had seen the vehicle parked many times at Hale's residence, a known

"drug house";[17](9) Minutes after the robbery, the Camaro had parked in front of this house before Shaffer conducted the felony stop; (10) Brown and Burg each denied knowledge of the cocaine in the Camaro. RP 563,674[18]; (11) Brown, not Burg, normally drove the Camaro. RP 562; and (12) Brown, whose testimony demonstrated that he did not want to be a "snitch", effectively "admitted" that he had told the police that defendant put the Crown Royal bag under the back seat. RP 674-75. Based on this evidence, a rationale jury could reasonably believe defendant committed armed robbery to collect a drug debt that he was a cocaine dealer, and possessed the rock cocaine with intent to deliver.

5. THE COURT DID NOT DENY DEFENDANT HIS RIGHT TO AN IMPARTIAL JURY WHERE ISAAC MILLER MADE A COMMENT OUTSIDE THE PRESENCE OF THE JURY.

Defendant next claims that under the Sixth Amendment and Const. art. 1, Sec. 22, he was denied his right to trial by a fair and impartial jury. In support of his position, defendant asserts that Isaac Miller's non-testimonial comment as he walked past counsel table constituted unauthorized contact between jurors and third parties that may

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[17] Burg testified she was a drug counselor and counseled Hale who lived at this residence. RP 566. This is consistent with Shaffer's testimony regarding the nature of this residence.

[18] The State dismissed charges against Burg before trial. RP 452. Brown pleaded guilty to unlawful possession of a controlled substance with intent to deliver. RP 675.

compromise his right to an impartial jury. Defendant's argument fails because he does not establish there was improper contact with jurors.

After Miller was excused from the witness stand, he walked past counsel table and said, "I could make it real easy on everybody and just say that I didn't recognize the gun." Judge Lee did not hear this comment. RP 530. Judge Lee noted that when Miller made this comment one juror was in the doorway of the courtroom and another was right behind him, but no other jurors were in the courtroom. Judge Lee noted her proximity to counsel table was closer than the two jurors and determined that "there is no conceivable way" that this court can even reach the conclusion, even glimmering, that a juror may have hear it." RP 545. Defendant refers to Miller's comment as an "outburst" (Brief of Appellant at 43). In so far as this term connotes a loud vocal statement, the record simply does not support that Miller's statement could be heard by the two exiting jurors.

6. THE PROSECUTOR'S COMMENT IN REBUTTAL CLOSING ARGUMENT WAS NOT IMPROPER BECAUSE IT WAS A REASONABLE INFERENCE FROM THE EVIDENCE ADDUCED AT TRIAL.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815,

820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962); State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

A defendant claiming prosecutorial misconduct in argument bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996), overruled in part on other grounds, State v. Kilgore, 147 Wn.2d 288, 294; 53 P.3d 974; (2002). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Id.; Dhaliwal, 150 Wn.2d at 578. Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Brown, 132 Wn.2d 529, 561,

940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998); State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998). Prejudice on the part of the prosecutor is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." Dhaliwal, 150 Wn.2d at 578, quoting Pirtle, 127 Wn.2d at 672; accord Brown, 132 Wn.2d at 561.

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences there from. Dhaliwal, 150 Wn.2d at 577; State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). A prosecutor may comment on a witness' veracity as long as he does not express it as a personal opinion and does not argue facts beyond the record. Smith, 104 Wn.2d at 510-11. This includes the ability to make reasonable inferences from the testimony with regard to credibility of witnesses. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990). Finally, a prosecutor's remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements. State v. Gentry, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995).

Here, the defendant asserts that the prosecutor committed misconduct in closing argument when he argued that Isaac Miller's debt to defendant was a drug debt. Defendant further asserts that the court committed error when the court failed to sustain defendant's objection to this argument. Defendant is mistaken.

In closing, defense counsel argued to the jury that his client was in the driver's seat at the drive-through window simply talking to Miller. RP 966. Counsel drew the analogy that defendant's presence at the drive-through was similar to that of a family ordering food; that the driver relays information from the passenger to the attendant. RP 966. Counsel then argued that Brown had the money and gun and had failed to inform defendant that he had previously collected the debt. RP 965.

In rebuttal, the prosecutor argued that this trip was a robbery not a family trip to McDonalds. RP 988. The prosecutor then argued that contrary to defense counsel suggestion, Miller owed defendant a debt and that the defendant was engaged in the business of dealing drugs. RP 989. After explaining how the witnesses all "danced around this money", the prosecutor argued that Miller had been naïve for getting into the "wrong type of activity with Mr. Rhone." RP 989. At this point, the prosecutor stated, "Mr. Miller is engaging in probably some illegal conduct on his own, on his own accord, dealing with dope." RP 989. Defense counsel objected that "those are facts that are not in evidence." RP 989. The court permitted the prosecutor to continue. RP 989. Viewed in context of the prosecutor's entire rebuttal argument, this statement was a logical inference drawn from the evidence. The evidence supported the State's theory that defendant committed armed robbery to collect a drug debt. It naturally follows that Miller was engaged in illegal activity if he owed money for cocaine. Though Miller claimed his debt to defendant was

simply a loan, the jury chose to disbelieve him. Moreover, defendant has not demonstrated how a comment about Miller's probable illicit activity (possession of cocaine) affected the outcome of the jury's verdict.

Even if improper, the prosecutor's statement was not "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Defense counsel did not request a curative instruction. The court gave the standard instruction that the jurors are not to consider counsels' closing argument as evidence. CP 71. Accordingly, defendant has not shown the prosecutor committed misconduct or that he was prejudiced by this comment.

Tangentially, defendant argues that even if the prosecutor did not argue facts not in evidence, than he must have elicited perjured testimony without making an attempt to correct the false impression. Brief of Appellant at 45. Defendant is again mistaken.

Here the prosecutor elicited testimony from Burg and Miller that the jury chose not to believe. The prosecutor essentially asked the jury not to believe their testimony regarding the debt and to use common sense to conclude defendant committed robbery to collect a drug debt. The prosecutor would have committed misconduct had he deliberately elicited false testimony and then argued to the jury that this false testimony was the truth. This did not occur in this case.

7. THE DEFENDANT RECEIVED A FAIR TRIAL BECAUSE THERE WAS NOT CUMULATIVE ERRORS OR EGREGIOUS CIRCUMSTANCES THAT WARRANTED REVERSAL.

The cumulative error doctrine applies only where there have been several trial errors that alone may not be sufficient to justify reversal, but when combined denied the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 928, 10 P.3d 390 (2000). Cumulative error does not turn on whether a certain number of errors occurred. Compare State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (three errors did not amount to cumulative error) and State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (same). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial. The defendant is not entitled to a new trial when the errors had little or no effect on the outcome of the trial. Greiff, 141 Wn.2d at 928.

As stated above, the defendant has not established that any error occurred at his trial. The defendant in this case adds summary of arguments. Even if this court finds there were errors, a complete review of the record shows they could not have constituted egregious circumstances that denied the defendant a fair trial.

8. DEFENDANT'S SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE DOES NOT OFFEND BLAKELY.

Defendant contends that because his sentence under the Persistent Offender Act (POAA) exceeds the standard range sentences of each offense under counts I and II, his sentence is unconstitutional under Blakey v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Under the POAA, a court must sentence a persistent offender to life imprisonment without parole. RCW 9.94A.570.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the Court held that New Jersey's "bias crimes" aggravating factor could not be used to enhance a defendant's maximum sentence based on a finding by the sentencing judge alone; rather, this factor had to be proved to a jury beyond a reasonable doubt. In framing its holding, the Court quoted from a footnote in Jones:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Id. at 476 (quoting Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999)).

Like Jones, the Apprendi court noted the historical and constitutional differences between recidivist facts and other potential aggravating factors. Apprendi, 530 U.S. at 487-88. The Court also

observed that the defendant in Almendarez-Torres had not challenged the fact of his criminal history, which also differentiated that case from Apprendi. Id. at 488. And although the Apprendi court stated in dicta that perhaps Almendarez-Torres was incorrectly decided, the Court ultimately exempted recidivist facts from its holding. Id. at 489-90. Moreover, while Justice Thomas wrote a concurrence in which he stated that recidivist facts should also be proved to a jury – at least under a recidivist statute – no other justice joined this portion of his concurrence. Id. at 519-22 (Thomas, J., concurring).

The Supreme Court specifically applied the rule it expressed in Apprendi to the SRA in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Unlike Apprendi, there are no concurring opinions in Blakely that question the wisdom of exempting recidivist facts from Apprendi's jury trial requirement.

The Washington Supreme Court has agreed that recidivist factors need not be submitted to a jury and proved beyond a reasonable doubt. See State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909, 124 S. Ct. 1616, 158 L. Ed. 2d 256 (2004); State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996, 122 S. Ct. 1559, 152 L. Ed. 2d 482 (2002).

Following Wheeler, this court held the POAA is neither an exceptional sentencing statute subject to a Blakely analysis nor is it an enhanced sentence statute. State v. Ball, 127 Wn. App. 956, 960, 113 P.3d

520 (2005). Rather a life sentence imposed under the POAA is a standard sentence. See Ball, 127 Wn. App. at 959-60. In the face of such clear precedent, this court should reject defendant's request to retreat from the sound reasoning in Ball and declare the POAA unconstitutional under Blakely.

Moreover, defendant effectively waived his right to a jury trial to determine his prior "strike "convictions because he ultimately stipulated to those convictions at sentencing. CP 154. A jury need not find the aggravating facts that support sentence enhancements if the defendant stipulated to those facts or waived his Apprendi rights. State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)(citing Blakely, 124 S. Ct. at 2541). Because the defendant stipulated to the underlying "strike" offenses, he cannot now challenge his sentence as unconstitutional.

9. DEFENDANT'S CHALLENGE TO HIS OREGON FIRST DEGREE ROBBERY CONVICTION IS MOOT BECAUSE HE DOES NOT DISPUTE HIS OTHER TWO PRIOR "STRIKE" OFFENSES.

Appellate courts "...will not consider a question that is purely academic. A case is moot if a court can no longer provide effective relief." State v. Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995) (footnote omitted) (citing Grays Harbor Paper Co. v. Grays Harbor County, 74 Wn.2d 70, 73, 442 P.2d 967 (1968); Washam v. Pierce County

Democratic Cent. Comm., 69 Wn. App. 453, 457, 849 P.2d 1229 (1993), review denied, 123 Wn.2d 1006, 868 P.2d 872 (1994))

Here defendant claims his Oregon first degree robbery conviction is not comparable to a Washington most serious offense and therefore he is not a three strikes candidate under the POAA. On appeal, defendant does not dispute his prior Washington first degree robbery conviction or his Oregon second degree assault conviction. At sentencing, defendant did not dispute his prior Washington robbery was a "strike" offense. RP 1042, 1056. The trial court then found that the Oregon assault offense was comparable with a Washington vehicular assault offense, a most serous offense. RP 1067-69. Therefore, even if defendant's Oregon first degree robbery conviction was not comparable to a Washington "strike" offense, defendant's sentence under the POAA is still valid as he has a "strike" to spare.

10. THE COURT PROPERLY COUNTED DEFENDANT'S OREGON ROBBERY CONVICTION AS A MOST SERIOUS OFFENSE UNDER THE POAA.

Defendant contends that his Oregon conviction for first degree robbery is not comparable to a Washington "strike" offense under the

POA[19] because Oregon law does not require a robber to be in the presence of the person from whom he is taking property. As discussed below, defendant's Oregon robbery conviction is comparable to a Washington "most serious offense."

A challenge to the classification of an out-of-state conviction is reviewed de novo. State v. McCorkle, 88 Wn. App. 485, 493, 945 P.2d 736 (1997), aff'd, 137 Wn.2d 490, 973 P.2d 461 (1999). In addition to proving the existence of an out-of-state conviction, the State must show that the out-of-state felony is comparable to a Washington felony. McCorkle, 137 Wn.2d at 495. Out-of-state convictions are classified according to comparable Washington offense definitions and sentences for the purposes of a defendant's offender score. RCW 9.94A.525(3). To determine if a prior out-of-state conviction is analogous to a Washington conviction, a trial court must compare elements of the out-of-state crime to the elements of a Washington crime in effect when the foreign crime was committed. In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); State v. Weiand, 66 Wn. App. 29, 34, 831 P.2d 749 (1992).

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[19] RCW 9.94A.030(32). That section defines a persistent offender as one who has been convicted in Washington of a "most serious offense" and convicted of two prior "most serious offenses" in Washington or another jurisdiction. RCW 9.94A.030(32). A most serious offense includes any class A felony or felony attempt to commit any of the felonies listed in RCW 9.94A.030(28). Convictions from other jurisdictions that are analogous to Washington's "most serious offenses" are counted as prior convictions. RCW 9.94A.030(28)(u).

In comparing out-of-state convictions to Washington offenses, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). If the elements are comparable as a matter of law, the out-of-state convictions count toward the defendant's offender score. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If this requirement is met, there is no need to look to the facts of the crime. Lavery, 154 Wn.2d at 255.

"If the elements are not identical, or if the foreign statute is broader than the Washington definition of the particular crime, the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute." Morley, 134 Wn.2d at 606.

Although the facts of a prior case must be admitted by the defendant or found by a jury, a trial court may need to review the record of a previous case before calculating an offender score. E.g., Lavery, 154 Wn.2d at 257-58 (determining that a federal robbery conviction is neither factually nor legally comparable to Washington statute).

In 1981, Defendant was convicted in Oregon of first degree robbery. State's Sentencing Ex. 1. The relevant Oregon statute defines the general crime of robbery as third degree robbery. ORS 164.395 (2003). That section provides in pertinent part:

> (1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft... the person uses or threatens the immediate use of physical force upon another person with the intent of:

Oregon law defines "theft" as follows.

> A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person (1) takes, appropriates, obtains or withholds such property from an owner thereof ... ORS 164.015.

A person commits first degree robbery if the person violates ORS 164.395 and is armed with deadly weapon, or uses or attempts to use a dangerous weapon, or causes or attempts to cause serious physical injury to any person.

Under the relevant Washington law, robbery is defined as follows: The legislature defines robbery as follows:

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial...

RCW 9A.56.190.

Similar to Oregon law at the relevant time, the Washington legislature classified the most serious level of robbery as first degree and is defined as follows:

> (1) A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he:
>
> (a) Is armed with a deadly weapon; or
> (b) Displays what appears to be a firearm or other deadly weapon; or
> (c) Inflicts bodily injury.

RCW 9A.56.200.

"The unit of prosecution for a robbery must encompass both a taking of property and a forcible taking against the will of the person from whom or from whose presence the property is taken." State v. Tvedt, 153 Wn.2d 705, 720, 107 P.3d 728 (2005).

Defendant contends that the Oregon statute is broader than the Washington statute because it criminalizes the act of taking property outside the presence of the person from whom the property is taken. Defendant does not provide Oregon authority that has interpreted this statute in this manner. The logical interpretation of the Oregon robbery statute reveals that a person commits robbery in the presence of another because the crime occurs *during* the course of committing or attempting to commit theft and the perpetrator uses or threatens *immediate* use of physical force upon another person with intent of preventing or resistance

to that taking or to retention of that of the property *immediately* after the taking. Implicit in such an immediacy requirement is that the victim of the robbery be present. Though defendant maintains that someone can commit robbery in Oregon outside the victim's presence, a rationale reading of the Oregon statute does not lead to this absurd result.

Even if the Oregon crime is not legally comparable to the Washington crime, an examination of the Oregon indictment reveals that was in the presence of his victim. In sum, the charging language states that defendant threatened the immediate use of physical force upon his victim and was armed with a firearm while in the course of committing theft of clothing and a watch, with the intent of preventing resistance to defendant's taking and retention immediately after the taking of this property. State's Sentencing Ex. No. 1. Implicit in the indictment is the immediacy of defendant's threatened use of force to take property of another and to prevent his victim's resistance to his taking and retention of this property immediately after this taking. No reasonable interpretation of these allegations supports defendant's contention that he could have committed this robbery outside his victim's presence over the telephone or otherwise.

a. Constitutionality of Oregon robbery conviction.

Defendant maintains that because Oregon law permits criminal convictions where only ten of twelve jurors need to agree on a guilty verdict, his Oregon first degree robbery conviction must be invalid. As argued above, defendant ultimately stipulated to the validity of his convictions and waived his Blakely challenge to the determination of his criminal history. RP 154. Therefore he cannot now claim that his Oregon conviction is invalid.

Moreover, the State need not prove the constitutionality of a prior conviction before it may use that conviction as part of a defendant's criminal history unless another court has determined the prior conviction unconstitutional. State v. Gimarelli, 105 Wn. App. 370, 375, 20 P.3d 430 (2001)(citing State v. Ammons, 105 Wn.2d 175, 187, 713 P.2d 719, 718 P.2d 796 (1986)). Under the Full Faith and Credit Clause of the federal constitution, a judgment from any other state is valid in Washington unless the foreign court lacked jurisdiction or the conviction is constitutionally invalid. Gimarelli, 105 Wn. App. at 377. To be constitutionally invalid, the conviction must be invalid under either the United States Constitution or the constitution of the state where the conviction was entered. Id. As long as the conviction is constitutional on its face, the State may use the conviction as part of the defendant's criminal history. Id. at 375.

In the instant case, defendant cites no authority that the Oregon robbery conviction is invalid under the federal or Oregon State constitutions. Moreover, defendant's claim that his Oregon conviction is unconstitutional under Blakely lacks merit, as discussed above. Accordingly, the trial court correctly included defendant's Oregon robbery conviction as a Washington "strike" offense.

D. CONCLUSION.

For the foregoing reasons, the State respectfully request this court affirm defendant's convictions and affirm defendant's sentence under the POAA.

DATED: SEPTEMBER 6, 2006

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

Date Signature

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