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NO. 61377-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID LAVON MELTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL B. CAREY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Whether the court properly admitted testimony by a gang expert that witnesses in gang-related cases are sometimes reluctant to testify due to “fear of retaliation and being labeled a snitch”?

2. Whether the trial court correctly ruled that the “door had been opened” to testimony by a detective that non-testifying individuals had identified the defendant as “the shooter” when the defense counsel had already elicited the same answer on cross-examination and without objection by defense counsel?

3. Whether the defendant has failed to establish that an inadvertent reference to the accomplice liability instruction by the trial court in response to a jury question was an improper comment on the evidence?

4. Whether alleged cumulative error requires reversal?

5. Whether multiple firearm enhancements violate double jeopardy under a “unit of prosecution” theory?

6. Whether double jeopardy was violated when the jury found the defendant was armed with a firearm and the underlying assault convictions were predicated on the defendant’s being armed with a deadly weapon?

II. STATEMENT OF THE CASE

A. PROCEDURAL FACTS.

David Lavon Melton was charged by amended information with assault in the first degree (count I), three counts of assault in the second degree (counts III to V), and a violation of the uniform firearm act (count II). CP 15-18. The jury convicted him of the lesser included charge of assault in the second degree on count I, and as charged on the remaining four counts.¹ CP 90-99. Each of the assault convictions included a firearm enhancement. CP 91, 92, 94 & 97.

The trial court imposed a standard range sentence. CP 132-42; 20RP 17. Melton filed a timely appeal. CP 143-45.

Post-appeal, the State's motion to remand for entry of additional Findings of Fact was granted. See Notation Ruling of Commissioner Neel, dated June 12, 2009. Pursuant to this ruling, additional Findings of Fact and Conclusions of Law have been entered by the trial court. CP 166-67.

¹ The State refers to the Report of Proceedings as follows: 1RP (10-11-07); 2RP (10-15-07); 3RP (10-16-07); 4RP (10-17-07); 5RP (10-22-07); 6RP (11-28-07); 7RP (11-29-07); 8RP (12-04-07); 9RP (12-05-07); 10RP (12-06-07); 11RP (12-10-07); 12RP (12-11-07); 13RP (12-12-07); 14RP (12-13-07); 15RP (12-17-07); 16RP (12-18-07); 17RP (12-19-07); 18RP (12-20-07); 19RP (12-20-07); 20RP (02-06-08 & 02-22-08).

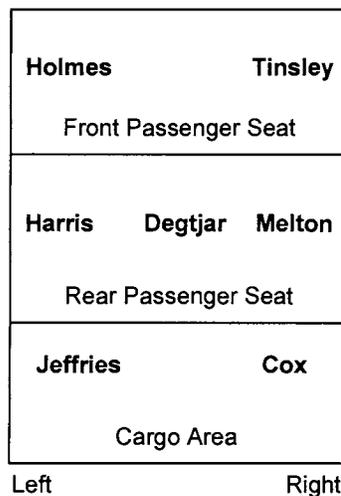
Trial initially commenced before the Hon. Nicole MacInnes. See 1RP to 5RP. After the deputy prosecutor became seriously ill, a mistrial was declared. 5RP 18. A second trial, with two new prosecuting attorneys, commenced one month later before the Hon. Cheryl Carey.

B. SUBSTANTIVE FACTS.

1. Overview.

On April 1, 2006, just after midnight, at the intersection of Rainier and Henderson in Seattle, 14 year-old Shawn Webster was the victim of a drive-by shooting. Webster, who was shot in the head, survived after emergency surgery. Witnesses confirmed that the shots came from inside a Ford Expedition, which was stopped by police within minutes of the shooting.

Seven individuals were in the Expedition: Marcus Holmes (driver), Dimitris Tinsley (front seat passenger), Jeffrey Harris (left rear passenger), Daniel Degtjar (middle rear passenger), David Melton (right rear passenger), Michael Jeffries (left cargo area), and Jaron Cox (right cargo area). The location of these individuals in the Expedition is depicted in the following diagram:



The defendant, David Melton, was sitting in the right rear passenger seat.² The four passengers who testified – Holmes, Tinsley, Harris, and Cox – all denied knowing who fired the shots. Holmes and Tinsley, however, confirmed that the shots came from the back seat. Cox testified – and Melton admitted – that Melton tossed a firearm to him after police pulled over the Expedition. A shell casing found below where Melton was sitting was fired from this weapon. Finally, Melton – both in his statement to police and at trial – admitted that he had fired out the window of the Expedition, claiming he did so in self-defense.

2. Testimony of witnesses inside Ford Expedition.

On the evening of March 31, 2006, Marcus Holmes went to pick up his niece at a dance at Franklin High School. He was driving a Ford Expedition, which belonged to Dimitris Tinsley. 10RP 42; 15RP 667; 15RP 668. There were seven individuals in the Expedition – Holmes, Tinsley, Harris, Degtjar, Melton, Jeffries, and Cox – seated as indicated above.

While parked near Franklin High, Holmes claimed that someone shot at the Expedition. 15RP 668-69. Holmes believed the shooters were

² The position of the individuals in the car was confirmed by the testimony of Holmes (15RP 670), Harris (14RP 548), Cox (13RP 411-12), Tinsley (10RP 43-45), and Melton himself (15RP 738-39). See also Exhibit 43.

from the "South End" of Seattle, given the long-standing rivalry between the South End and Central District.³ 15RP 671-72.

Melton, like everyone else in the car, was mad they had been shot at.⁴ 15RP 672-73. As they left Franklin High, Melton was yelling at Holmes (the driver) that they should go to the South End to find out who shot at them. 15RP 685. Melton yelled, "What are you doing, why are you going back to the Central, we're going to the South End to find these niggers." Melton also said, "I'm not going to let people shoot me and get away with it." 15RP 691.

Instead of driving home (north of Franklin High), Holmes drove toward the South End. 15RP 673-74. Holmes drove south on Rainier, following a Metro bus. 15RP 675. As they turned left on Henderson, Holmes recalled seeing the bus pull away from the curb and a group of four or five teenagers standing near a bus stop on Henderson. 15RP 670, 676, 678.

Melton then said, "Let's see who that is, let's see who they are." Holmes began to drive slowly. 15RP 686-87. As he slowed down,

³ There was a bullet hole in the side of the Ford Expedition. 8RP 49-50. Holmes claimed the bullet hole wasn't there earlier that night. 15RP 696. Tinsley, whose mother owned the Expedition, didn't know when the bullet hole occurred. 10RP 61-64. In one detective's opinion, the bullet hole didn't look new. 1RP 229-30.

⁴ Melton's nickname is "David Blaze" and he is sometimes referred to that way in the report of proceedings. 10RP 54-55, 61-62; 11RP 262.

Melton said something like, "Yeah, drive slow." 15RP 687. Tinsley (front seat passenger) heard someone in the back seat say, "Who was that right there? That's South End, South End Cats, let's go back around." 10RP 49, 69.

Holmes then heard a sound like a gun being loaded. He wasn't sure what it was, so he continued to drive. 15RP 687. After Melton yelled at Holmes to slow down, Holmes knew Melton's window was rolled down. 15RP 688-89. As Holmes drove past the bus stop, he heard two shots coming from the back passenger seat of the vehicle.⁵ 15RP 676, 679. Tinsley (front seat passenger) also heard two shots that were very close, behind him, and inside the Expedition.⁶ 10RP 49-51, 57-59.

Melton, sitting in the rear passenger seat, had his window half-way down. Tinsley, in the front seat, had his window down a crack. 15RP 677-78, 688. In Holmes's opinion, Melton fired the shots because he was the only person whose window was down. 15RP 688-89. Jaron Cox, in the cargo area of the Expedition, claimed he was asleep and only woke up

⁵ When asked at trial if he heard any shots outside the car, Holmes stated, "Um, I think so." 15RP 679. He later agreed that he had never told investigating detectives that he heard shots outside the car and had told them that he only heard two shots from inside the car. 15RP 689, 699, 703.

⁶ Tinsley initially claimed that these shots came from inside and outside the car. Tinsley admitted, however, that in his original statement to police, he only said the shots came from inside the Expedition. 10RP 50-51. Tinsley subsequently testified that the shots did in fact come from inside the Expedition. 10RP 57-59.

when he heard shots being fired and did not see who fired the shots.⁷

13RP 415-16. Jeffrey Harris (left rear passenger) claimed that he had been smoking marijuana all day and that he passed out in the Expedition and didn't wake up until the police stopped the vehicle. 14RP 547-50.

Harris admitted that he was carrying a gun, which he threw into the back cargo area of the car when he woke up.⁸ 14RP 551.

Immediately after the shooting, Holmes began to drive north.

15RP 680. Minutes later, a police car signaled the Expedition to pull over.

10RP 56. Melton, and everyone else in the car, told Holmes to keep driving. Melton was cussing and telling everybody not to say anything.

14RP 681. Holmes, however, pulled over. 15RP 682. As he did so, both Melton and Harris threw guns into the back cargo area of the Expedition.

13RP 417. Jaron Cox, who was in the back cargo area, hid the gun that Melton had thrown inside a pair of jeans. 13RP 417-20.

Holmes denied having a gun and claimed he didn't know that anyone else in the car had a gun. 15RP 679, 698-99. Holmes denied seeing Tinsley (front seat passenger) with a semi-automatic pistol.

⁷ As impeachment evidence, the prosecutor established that Cox never told detectives that he slept through the shooting and in fact stated that he saw Melton firing the gun at the individuals at the bus stop. Cox denied making this statement to detectives. 13RP 435-36; 14RP 615-20.

⁸ Harris initially identified his gun as the Smith and Wesson (Exhibit 61) and then denied that was his gun. 14RP 551-52.

15RP 697. Holmes also claimed he did not see any guns being tossed into the cargo area of the car. 15RP 697-98.

3. Testimony of Webster, Butler, and Williams.

On the evening of March 31, 2006, Shawn Webster, Jeremiah Butler, and Joseph Williams were outside Franklin High School when the dance got out.⁹ They all saw fights breaking out, but did not hear any gunshots. 10RP 121-22; 14RP 565-68. All three, along with other teenagers, got on a Metro bus near Franklin High School. 10RP 101-02, 120-24; 14RP 568-69. They got off the bus at Rainier and Henderson. 10RP 106, 124; 14RP 571-72.

As they walked back toward Rainier, Butler and Webster recognized the Ford Expedition, having seen it earlier near Franklin High. 10RP 106-07; 14RP 572-73. Butler saw a gun pointing out of one of the Expedition's windows on the passenger side and started to run.¹⁰ 10RP 107-08. The Expedition was right in front of the bus shelter when the shooting started. 10RP 114. Butler was uncertain how many shots he heard, first saying "a couple" then "three or four." 10RP 109. All of the

⁹ Butler and Williams were cousins. They did not know Webster.

¹⁰ Butler testified that he believed the gun was sticking out of the front window of the Expedition. But he wasn't certain, stating that because everything happened so fast he was only "70 percent sure." 10RP 111. The gun was pointing toward the bus shelter. RP 111-12.

gunshots came from the Expedition. 10RP 110. Butler said that the shooter was a Black male and the gun was black. 10RP 107, 115.

Williams also saw the Expedition turning onto Henderson, but did not pay too much attention to it. 10RP 127-29. He couldn't see inside the vehicle because the windows were tinted. 10RP 129. The Expedition was probably driving about ten miles an hour and was right next to them when the shots started. 10RP 129-30. Williams heard about five or six shots, all of which came from inside the Expedition.¹¹ 10RP 130, 135. After the incident, Williams realized there was a bullet hole in the arm of his sweatshirt. 10RP 135-37, 140-41.

Webster remembered several shots being fired from the Expedition, but not any more details about the assault. He couldn't see who was firing the shots. He was hit by a bullet in the head and does not remember much more until he woke up in the hospital. 14RP 575, 78. Neither Butler nor Williams was hit. When Butler and Williams stood up, they saw Webster lying on the ground. There was a hole in Webster's head and a "massive amount of blood." Butler and Williams called 911. 10RP 109-12, 132-34.

¹¹ Williams testified he thought there were two guns because the shots came so quickly. He also said that it could also have been an automatic. Finally, Williams said that the gunfire sounded like it came from a "Glock." 10RP 143.

4. Injuries suffered by Shawn Webster.

Paramedics responding to the scene found Webster unconscious with a gunshot wound to the head. He could not talk or respond in any way and was rushed to Harborview Hospital. Webster's condition was extremely critical. 11RP 274-80.

Webster was treated by Dr. Marcelo Vilea, Assistant Professor at the University of Washington Department of Neurological Surgery, an expert in head trauma. 13RP 464-65. Surgery involved enlarging the hole in Webster's head, removing bone fragments and a small portion of the brain that was now dead, and repairing a blood clot. Both the bone fragments or the blood clot were life threatening. Subsequently, a second surgery was performed when the initial site became infected. The missing portion of Webster's skull was not replaced and Webster had to wear a protective helmet for one year.¹² 13RP 466-87; 14RP 581-83.

The hole in Webster's skull was eventually covered with a synthetic implant. Post-surgery, Webster had to have considerable therapy and rehabilitation to learn how to talk and walk. 14RP 597-605. In

¹² No metal fragments or shrapnel were removed from Webster's brain during surgery. Dr. Vilea opined, however, that the damage was consistent with a high velocity injury from a firearm. The lack of shrapnel doesn't mean that Webster wasn't shot as the injury could have been caused by a bullet grazing the skull. 13RP 497-98. Other tests suggest that a foreign metallic object, consistent with a bullet, remains lodged in the right frontal lobe of Webster's brain. 13RP 494-95. In Dr. Vilea's opinion, Webster's injury could not have been caused by falling on the pavement. 13RP 490-91.

Dr. Vilea's opinion, without surgery it was unlikely that Webster would have survived. 13RP 472.

5. Seattle Police Department investigation.

Seattle Police Department ("SPD") patrol officers and Gang Unit detectives responded to Rainier and Henderson.¹³ After the area was secured, paramedics attended to Webster. A search of the entire intersection did not find any shell casings. 10RP 24-25.

SPD Ofc. Stewart proceeded to the scene by a back route, hoping to intercept the suspect vehicle. 8RP 14-16. He saw a Ford Expedition that matched the descriptions given by witnesses, pulled it over, and (after back-up units arrived) oversaw the removal of seven individuals from the vehicle.¹⁴ 8RP 16-18. The seven individuals were transported in separate patrol cars to the precinct station or gang unit.¹⁵ 8RP 21-35. Detectives

¹³ The following testimony concerned the initial police response to Rainier and Henderson: Ofc. Washington, 12RP 335-37; Ofc. Reyes, 12RP 363-73; Det. Waters, 12RP 389-93; Det. Mooney, 14RP 610-15; Det. Solan, 10RP 5-25, 79-87.

¹⁴ The first radio call came out at 12:50 a.m. on April 1, 2006. 8RP 20. Ofc. Stewart saw the Expedition about ten minutes later. 8RP 21.

¹⁵ Testimony concerning the stop of the Expedition and removal of the passengers were provided by: Ofc. Stewart, 8RP 14-50 (felony stop, transported Cox); Ofc. Chris Johnson, 13RP 444-58 (felony stop, transported Holmes, statement from Holmes); Ofc. Warner, 12RP 377-89 (felony stop, preliminary search of Expedition); Ofc. Smith, 8RP 55-62; 9RP 7-9 (felony stop, transported Jeffries); Ofc. Thorp, 67-72 (felony stop); Ofc. Briskey, 21-31 (felony stop, transported Melton, read Melton Miranda warnings); Ofc. Ambrosio, 9RP 34-39 (felony stop, transported Degtjar, read Miranda warnings to Tinsley); Ofc. Patterson, 9RP 44-69 (felony stop, initial search of Ford Expedition).

and officers then questioned the seven suspects individually, to prevent them from coordinating their testimony. 10RP 32.

Two witnesses were driven from the scene of the shooting. They were able to identify the Expedition as the vehicle from which the shots had been fired, but could not identify any specific person as the shooter. 12RP 338-59.

A preliminary search of the vehicle uncovered a firearm under the rear passenger seat. The Expedition was impounded, transported to a secure location, and searched. 9RP 49-56; 11RP 219-30. The search of the Expedition uncovered three different firearms and a spent shell casing, as follows:

- **Exhibit 18A-D:** .40 caliber Glock Model 27, and a magazine that fits this weapon underneath the right rear passenger seat. 9RP 3-27; 12RP 382-89; 14RP 518.
- **Exhibit 60:** 9mm Glock 17 pistol, and magazine with 15 rounds, in the cargo area inside a pair of blue jeans.¹⁶ 11RP 226-27, 235-37; 14RP 525-26.
- **Exhibit 61:** 9mm Smith and Wesson Luger and 13 rounds, in left cargo area. 11RP 240.
- **Exhibit 58:** 9mm shell casing, on the right floorboard of rear passenger area. 11RP 232-34.

The firearms and fired cartridge case were examined by the Washington State Crime Laboratory. All three weapons were operational.

¹⁶ The Glock 17 can hold 18 rounds (17 in the magazine, one in the chamber). 11RP 238; 14RP 526. So potentially three rounds could have been fired from this weapon.

14RP 520-26. After test-firing the weapons and conducting a cartridge comparison, the forensic scientist concluded that the fired cartridge case (Exhibit 58) was fired from the Glock 9mm pistol (Exhibit 60).¹⁷

14RP 528. This casing was found on the floorboard below Melton's seat.¹⁸ 11RP 232-34.

Melton was inadvertently released from custody on April 3, 2006.

14RP 646-68. Detectives subsequently searched for Melton but were unable to locate him. Detectives then learned that Melton had left Washington and travelled to Atlanta, Georgia. 14RP 448-69. After a "Crime Stoppers" show appeared on television, Melton turned himself in. 14RP 651.

Det. Cobane testified concerning the rivalry between Central District ("CD") and South End gangs, that Franklin High was CD gang location, that Henderson and South Rainier was a locus of South End gang activity, and that gang members sometimes retaliate by engaging in a drive-by shooting. 11RP 244-61.

¹⁷ All three weapons were tested for fingerprints, but no latent prints were found. 12RP 302-13. Identifiable "ridge detail" (fingerprints) were found on the rounds in Exhibit 18 (Glock 27 under Melton's seat), but did not match Melton, Tinsley, Harris or Jeffries. 12RP 305-12. The ridge detail was not of sufficient quality to run through the automated AFIS fingerprint system. 12RP 312-13.

¹⁸ Exhibit 58 was the only shell casing found inside the Expedition. 9mm shell cannot be fired from .40 caliber firearms without that fact being obvious to the firearm examiner. 11RP 234, 267-68; 14RP 539. Thus, the casing could not have been fired from the .40 caliber Glock (Exhibit 18) found under Melton's seat.

6. Melton's statement to Detective Solan.

After his arrest on April 1, 2006, Melton was interviewed by, and gave a statement to, Detective Solan. 10RP 26-27; see also Exhibit 31.

Melton's statement in its entirety was read into the jury, and said in part:

When I got into the car tonight, I touched a black gun. I don't know what type of gun it was. When the group at Henderson saw us, they shot at us. I was scared so I shot back at them. I was trying to protect myself and the others who were with me. They were my family and friends.

10RP 29.

7. Testimony of David Melton.

Melton testified at trial. He admitted he was in the Ford Expedition with Holmes, Tinsley, Harris, Degtjar, Jeffries, and Cox at the time of the shooting. 15RP 727-29. Melton claimed someone shot at the Expedition while they were at Franklin High. 15RP 730-31. Melton said that everyone in the car was saying they were going to do something about the shooting by going down to the South End. Melton claimed they were actually going to go to the Skyway bowling alley to meet girls. 15RP 731. Melton confirmed that he was in the rear passenger seat, behind Tinsley. 15RP 738-39.

As the Expedition turned onto Henderson, Melton saw a group of people at the bus stop. According to Melton, words were exchanged with the individuals on the street and shots were fired at the Expedition from

the street. 15RP 732-33. Melton testified that he grabbed a gun that belonged to someone else in the vehicle and shot several times out the window of the Expedition and into the air. Melton denied pointing the gun at anyone. 15RP 733-34. He denied knowing the gun was loaded or loading it himself. 15RP 737. Melton admitted tossing the gun into the cargo area just before they were arrested. 15RP 734-35.

Melton claimed other people inside the Expedition fired guns as well. 15RP 749. Melton, however, denied knowing who else fired the shots from inside the Expedition or where the shots came from.¹⁹ 15RP 759-51. Melton admitted that he never saw a gun pointed at him or at the Expedition. 15RP 743. Nor did he see muzzle flashes, or shots. RP 744. Finally, Melton admitted that he knowingly picked up the firearm and that he had previously been convicted of a felony. 15RP 737.

III. ARGUMENT

A. **THE TRIAL PROPERLY ALLOWED TESTIMONY THAT WITNESSES IN GANG CASES ARE SOMETIMES AFRAID OF RETALIATION.**

Relying exclusively on State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997), Melton argues that the trial court abused its discretion in allowing the State to elicit testimony from a gang unit detective that

¹⁹ On cross-examination, the prosecutor established that Melton never told the detectives that anyone else in the car had fired a weapon. 15RP 748-49.

witnesses in gang cases may be reluctant to testify due to fear of retaliation or being labeled a snitch. Under the facts of this case, Bourgeois is not controlling and the trial court did not abuse its discretion in allowing this testimony. Alternatively, any error in this regard was harmless.

1. Relevant facts.

During pre-trial motions, the State indicated it would not seek to introduce the testimony of an expert on gang culture, although there would be gang-related testimony by some witnesses. 6RP 16-24; 7RP 52-58, 65-66. The prosecutor also indicated that the State would not introduce evidence that witnesses who had not appeared for trial were afraid of retaliation.²⁰ The trial court ruled that the State could not “make comments or argue to the jury that witnesses will not be appearing because they are afraid because this is a gang related case.” 7RP 53-54.

Several days into the trial, the State sought permission of the court to introduce the testimony of SPD Det. Mooney as an expert on gang culture in the Seattle area. 11RP 148-66. After hearing argument of counsel, the court allowed this testimony. 11RP 166-70.

²⁰ The prosecutor assumed that Cox would testify, consistent with his statement to detectives, that Melton said he wanted to “put on his hood” and shoot guys in the bus stop, and that Melton had said he was a member of the Deuce Eights gang. 6RP 20-21; see also 7RP 58-509 (State’s offer of proof).

After Det. Mooney testified about general gang-related issues, the prosecutor asked whether he had assisted in locating witnesses for trial. Det. Mooney indicated that he had used “all the means at his disposal” to try and locate Holmes, Tinsley, Degtjar, Harris, Cox, and Jeffries. 14RP 627-28.

Det. Mooney testified that Jaron Cox’s family had not been cooperative until he (Mooney) had spoken with Cox’s grandmother, after which he agreed to testify. 14RP 628. Cox testified at trial. 13RP 406-41. Likewise, Jeffrey Harris was initially uncooperative, but after Det. Mooney spoke with his grandmother he agreed to testify. 14RP 630.

According to the detective, Michael Jeffries’ parents were “completely uncooperative.” Det. Mooney was never able to speak with Jeffries, who did not testify at trial.²¹ 14RP 629. Det. Mooney was also unable to locate Daniel Degtjar. 14RP 629-30. The detective had been unable to locate Tinsley (although Tinsley had in fact already testified at trial). 14RP 630. Finally, Det. Mooney was unable to locate two witnesses who had not been in the Expedition, Terry Black and Carlos Pace. 14RP 630-31.

²¹ In his brief on appeal, Melton indicates that Jeffries testified at trial. See App. Br. P. 40. This is not correct; Jeffries was never located and did not testify.

The prosecutor then asked the detective, “in your experience in the gang unit in these types of cases, is the lack of cooperation you have encountered usual or unusual?” Over objection, Det. Mooney indicated that it was usual. 14RP 631. The prosecutor then asked, “What are some of the reasons that witnesses, in your training and experience, give not to testify in cases like this?” Det. Mooney replied, over objection, that the “primary reason that I’ve found witnesses to be uncooperative in such cases is fear of retaliation and being labeled a snitch.” 14RP 632.

The prosecutor never mentioned the missing witnesses, or the alleged fear of retaliation of any witness in her closing or rebuttal argument. 16RP 802-33; 17RP 869-82.

2. State v. Bourgeois is not controlling.

Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997), the sole case relied upon by Melton in addressing this issue on appeal, presents a different factual scenario from the present case.

In Bourgeois, three State’s witnesses, in response to questions from the prosecutor, testified that they were afraid and reluctant to appear in court. Id. at 393-95. This included testimony by witnesses that they “did not want to be [in court],” that they were “fearful of getting hurt, [of] my family being hurt,” and “fearfulness” and “nervousness” about testifying. Id. Moreover, three witnesses admitted that they only appeared

to testify after being arrested on material witness warrants. Id. One witness testified about threats which she perceived were intended to intimidate her into not testifying. Bourgeois, 133 Wn.2d at 395.

Finally, in Bourgeois, the prosecutor emphasized in closing argument that the case was about “retaliation and the reasonable fear of it” and used the material witnesses warrants as evidence of the fear felt by the witnesses. Id. at 396. The prosecutor argued that the fact that the witnesses had been afraid to testify, but nevertheless did so, should be considered by the jury when evaluating the credibility of their testimony. Id. at 397.

Under these circumstances, the Court in Bourgeois held that it was error for the prosecutor to elicit on direct examination of several of its witnesses that they were reluctant to appear in court or were afraid to testify, although the error was harmless. 133 Wn.2d at 389.

The facts in the present case are fundamentally different from Bourgeois and its holding is not controlling. First, and most basically, the testifying witnesses – Holmes, Tinsley and Cox (from the car); Webster, Butler and Williams (from the street) – were never asked by the prosecutor about their reluctance to testify or fear of retaliation. Unlike Bourgeois, this is not a case in which the witnesses were themselves asked or testified about their fear of appearing in court.

Second, none of the testifying witnesses in the present case was arrested or forced to appear in court by the use of a material witness warrant. In contrast to the witnesses in Bourgeois, the witnesses who testified in this case ultimately came into court on their own accord.

Third, in the present case several witnesses did not testify (e.g., Jeffries, Degtjar, Pace, and Black). To this extent, unlike Bourgeois, this is not a case in which the State sought to bolster witness credibility, as these witnesses did not provide any evidence for the State.

Fourth, unlike the testimony of the witnesses in Bourgeois, Det. Mooney's comments were hypothetical and applied generically to any gang case. In addition, Det. Mooney did not indicate that it was only fear of retaliation that made witnesses reluctant to cooperate, but also "being labeled a snitch."

Finally, in contrast to Bourgeois, the prosecutor in the present case never alleged that any witness was afraid or reluctant to testify during closing argument. Nor did the prosecutor argue to the jury that a witness's testimony was credible or believable because the witnesses were afraid or reluctant to testify. Unlike Bourgeois, this is not a case in which the State sought to bolster the credibility of any witness based on their reluctance to testify.

In sum, there are stark differences between the facts of the present case and the facts of Bourgeois. Melton's reliance on Bourgeois as a basis to reverse his conviction is without merit and should be rejected.

3. The trial court did not abuse its discretion in admitting the testimony of Det. Mooney.

A trial court's evidentiary rulings are reviewed on appeal for manifest abuse of discretion. State v. Boot, 89 Wn. App. 780, 788, 950 P.2d 964 (1998). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The testimony of the witnesses inside the Ford Expedition was obviously central to this case. The jury undoubtedly expected to hear from all of the witnesses inside the vehicle. The State's failure to produce these witnesses, without explanation, would likely be presumed to be deliberate. Moreover, the improper conclusion might be drawn that the prosecutor did not want the jury to hear this testimony. Indeed, the failure of the State to explain why witnesses are not produced for trial might justify a "missing witness" jury instruction and the associated inference that the missing testimony would hurt the State. See, e.g., State v. Blair, 117 Wn.2d 479, 488, 816 P.2d 718 (1991); State v. Davis, 72 Wn.2d 271, 276, 438 P.2d 185 (1968); see also, Tegland, Washington Practice:

Evidence, § 402.8 & 402.9 (2007) (“[I]f a party fails to call a particular witness when it would seem natural to do so, a . . . inference arises that the witnesses testimony would have been unfavorable.”).

In these circumstances, it was appropriate for the prosecutor to elicit testimony about the efforts the State undertook to locate the missing witnesses for trial. Moreover, the brief testimony elicited by the prosecutor as to why witnesses in general – without reference to any specific testifying or non-testifying witness – might not want to appear in a gang case (fear of retaliation, fear of being labeled a snitch) provides a context for the jury to understand the difficulties that face the State in producing each and every witness for trial.

Further, when Det. Mooney testified, Tinsley, Cox and Harris had already appeared on the stand. Each of them denied knowing who fired the shots from the Expedition: Cox said he was asleep; Harris said he was passed out, and Tinsley claimed that he heard shots outside the Expedition. In some cases, this was a recantation of statements made hours after the shooting. Det. Mooney provided a context and explanation for why witnesses in a gang case might be motivated to change their testimony.²²

²² This is related to the point made in Bourgeois that when there is an attack upon a witness’s credibility, sustaining evidence (in the form of the fact that a witness is testifying despite being afraid to do so) is allowed. Bourgeois, 133 Wn.2d 400-02.

On appeal, Melton points out that the prosecutor had agreed during pre-trial motions that the State would not argue that the absence of witnesses was due to fear of retaliation. This agreement, however, was reached before the changed testimony of the witnesses and before the trial court granted the State's subsequent motion to allow the testimony of Det. Mooney as an expert on gang culture. It is clear that the prosecutor at trial understood the subsequent, and more sweeping, motion superseded the trial court's initial ruling. Certainly, the trial court, in overruling the defense objections, concluded that the brief questions concerning why witnesses might be reluctant to testify was not improper and that the original pre-trial ruling was not compromised.

Under the facts of this case, the trial court did not abuse its discretion in admitting Det. Mooney's testimony.

4. Any error in admitting Det. Mooney's testimony was harmless.

Improper testimony relating to a witness's fear or reluctance to testify may be harmless. Bourgeois, 133 Wn.2d at 403-05. An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. Id. at 403. Because such error results from violation of an evidentiary rule, not a constitutional mandate, the more stringent "harmless error beyond a reasonable doubt" standard is not applied. Id.

(citing State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980) and State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). Instead, the error “is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Id. (citing Tharp, 96 Wn.2d at 599 and State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993)). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Id. (citing Nghiem v. State, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994)).

Assuming *arguendo* that the admission of Det. Mooney’s testimony concerning the reluctance of witnesses to testify in gang cases is error, the outcome of the trial was not materially affected within reasonable probabilities and any error is harmless.

First, as discussed above, none of the State’s witnesses testified that they were afraid to come into court. There was simply a general and hypothetical statement by Det. Mooney that witnesses in gang cases may be reluctant to testify because they are fearful of retaliation or being labeled a snitch. This error was far less prejudicial than the testimony of the witnesses in Bourgeois that reflected their fear of testifying and actual threats not to testify, which was deemed harmless.

Second, Det. Mooney's testimony was not the only reference during this trial to gang culture and retaliation. Witnesses testified about the ongoing hostility between Central District and the South End. Holmes had explicitly testified that Melton wanted to go to the South End to retaliate for the fact that someone shot at the Expedition. Det. Mooney had testified fairly extensively about gang culture, drive-by shootings, and gang retaliation. Given this background, it was not a great leap for the jury to grasp that a witness might be afraid to testify. The testimony Melton objects to on appeal was readily apparent to the average juror.

Third, the testimony that Melton was the shooter (or one of the shooters) was compelling. Most basically, Melton admitted firing a handgun out of the vehicle. Melton admitted, and Cox confirmed, that he tossed the weapon he fired into the back seat of the Expedition. A shell casing fired from that weapon was found on the floor of the vehicle below where Melton was sitting. Holmes testified that prior to the shooting Melton had said he was "not going to let people shoot me and get away with it." Holmes and Tinsley confirmed that the shots had been fired from the back seat. Together, this evidence demonstrates beyond a reasonable doubt that Melton was either the shooter or an accomplice in the shooting.

Fourth, in light of the defense theory at trial, the alleged error in admitting Det. Mooney's testimony was not prejudicial. Melton argued

below – and indeed it was his consistent theory throughout the trial – that Tinsley (the front seat passenger) was the shooter. See, e.g., 842 (“The evidence would show, rather, that it was Dimitris”). Given this theory, it is equally likely that the testifying and missing witnesses were reluctant to appear in court due to fear of retaliation from Tinsley. This reluctance would be entirely consistent with Melton’s theory of the case. Thus it is difficult to see what prejudice attaches uniquely to Melton.²³

Fifth, the prosecutor made no effort to take advantage of the alleged error. Indeed, after Det. Mooney made the statement now complained about on appeal, the statements were never mentioned or referenced again. These passing statements, made in the middle of a long and complex trial, are not reasonably likely to have affected the verdict.

In sum, the testimony of the State’s witnesses was not specifically “bolstered” by Det. Mooney’s comments, the comments were consistent with the rest of the properly admitted testimony and not outside the common knowledge of the jury, the evidence against Melton was compelling, the prejudice was ambiguous, and the prosecutor did not take

²³ The theory that Tinsley was the shooter was not supported by the evidence. Among other points, the only weapon that Tinsley could have used was the .40 caliber Glock Model 27 (Exhibit 18) that was found under Melton’s seat (Melton and Harris tossed the other handguns into the rear cargo area of the Expedition). Exhibit 18, however, had a fully loaded magazine, indicative that it had not been fired.

advantage of any error. Det. Mooney's testimony was of minor significance in reference to the overall, overwhelming evidence and any error was harmless.

B. THE TRIAL COURT PROPERLY RULED THE "DOOR HAD BEEN OPENED" TO TESTIMONY THAT OTHER INDIVIDUALS IDENTIFIED MELTON AS THE SHOOTER.

Melton asserts that the court erred in allowing Det. Solan to testify that the other individuals in the Expedition had identified Melton as the shooter. While this testimony would normally be considered hearsay and a violation of the confrontation clause, under the facts of the present case, the trial court correctly ruled that the defense counsel had opened the door to the prosecutor's question and Det. Solan's answer. Alternatively, if the court erred in this ruling, the error was harmless.

1. Relevant facts.

The question, response, and ruling by the trial court that Melton objects to on appeal occurred during the State's redirect examination of Det. Solan:

Q. . . . Can you walk us through how you came to identify the defendant as the shooter in this case?

A. Based on the suspects within the vehicle Mr. Melton was taken out of, they identified him as being the sole shooter. And based upon –

MR. MAHONEY: I would object as hearsay.

MS. JACOBSEN-WATTS: Could we have a sidebar?

THE COURT: Actually, I'm going to overrule the objection. The door is opened.

11RP 192.

The "door is opened" ruling by the court was based on defense counsel's prior cross-examination of Det. Solan. Defense counsel had challenged the basis upon which detectives concluded that Melton had been the person who fired from the Expedition. After a series of questions about what the detective knew about the "show-up" identification conducted after the Expedition was stopped, defense counsel asked the following questions:

Q. . . . did you ever receive the results of the show-up?

A. I believe the results were the witnesses were able to identify the suspect vehicle that had committed the shooting. As far as the other parts of the statement, I could read Officer Washington's statement for you.

Q. What I asked you, sir, was if anyone from the scene of the arrest provided you with information as to who was identified by the witnesses transported to the show-up.

A. Well, the suspects pointed to Mr. Melton as the shooter within the vehicle. The witnesses.

11RP 179.

2. The trial court did not abuse its discretion in admitting Det. Solan's testimony.

Det. Solan's testimony that other individuals (two of whom, Jeffries and Degtjar, did not testify) identified Melton as the shooter does

not violate the confrontation clause because the trial court correctly ruled that defense counsel had “opened the door” to this 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 redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.” State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), overruled on other grounds by State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994); see also State v. Mak, 105 Wn.2d 692, 711, 718 P.2d 407 (1986); Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d 787, 792 (2003); State v. Russell, 125 Wn.2d 24, 73, 882 P.2d 747 (1994). As the Court in Gefeller noted:

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. Rules of evidence are designed to aid in establishing the truth. To 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 well limit the proof to half-truths.

76 Wn.2d 455 (citation omitted).

Significantly, a party may open the door to otherwise inadmissible hearsay evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995). The trial court has considerable discretion in administering the “open-door” rule. See also 5 WASHINGTON

PRACTICE, EVIDENCE § 103.14 (4th ed.). Finally, a trial court's evidentiary rulings are reviewed on appeal for manifest abuse of discretion. State v. Boot, 89 Wn. App. 780, 788, 950 P.2d 964 (1998).

In the present case, defense counsel had challenged the basis on which Det. Solan concluded that Melton was the shooter. The detective answered defense counsel's question (as to whether the detective had received the results of the show-up identification) precisely and accurately, stating: "I believe the results were the witnesses were able to identify the suspect vehicle that had committed the shooting." 11RP 179.

But defense counsel did not accept this answer, and stated: "What I asked you. . . was if anyone from the scene of the arrest provided you with information as to who was identified by the witnesses transported to the show-up?" In response to this confusing question, and because his original (and entirely correct) answer was apparently not responsive, the detective provided the next layer of detail that formed the basis of his conclusion that Melton was the shooter: that others in the Expedition had also indentified Melton as the shooter. 11RP 179. Significantly, defense counsel did not object to the detective's answer and did not move to strike it from the record or ask the court to instruct the jury to disregard the detective's statement. Id.

Moreover, if defense counsel believed that the answer was improper or prejudicial, an objection could and should have been made at the time the testimony was given. Defense counsel's decision not to do so undoubtedly suggested to the trial court that defense counsel was not opposed to Det. Solan's response.

Later, during redirect examination by the prosecutor, the trial court appropriately concluded that defense counsel had opened the door to the prosecutor's inquiry about why the detective identified Melton as the shooter. The detective's answer was in a response to a question asked by defense counsel. The detective's initial (and correct) response to a similar question had been rejected by defense counsel. Det. Solan was not required to guess or speculate whether defense counsel's question was proper or would result in inadmissible testimony. Defense counsel, having asked the question and accepted the answer, had waived the right to object to follow-up questions by the prosecutor on this issue.

Significantly, it was the defendant's theory that Detective Solan rushed to judgment, considered only the statements of some witnesses (the individuals in the Expedition), and did not consider the testimony of other witnesses (the individuals on the street). The detective's testimony – that he relied upon the statements of the other suspects inside the Expedition – can be viewed as confirming the defense theory that the detective ignored

the testimony of the witnesses at the scene and the show-up identification evidence.

Finally, on appeal Melton also objects to the detective's answer during the final redirect examination that Melton was identified as the shooter by "six people and himself." 11RP 204. The question was clearly in response to defense counsel's extensive re-cross examination about the statements the detective reviewed, including the statements made by witnesses that shots were fired from the front seat of the Expedition, and defense counsel's suggestion that there was evidence that Dimitris Tinsley was the shooter. 11RP 199-203. Moreover, there was no objection to either the question or Det. Solan's answer. 11RP 204. Even defense counsel recognized that the door had been opened to the prosecutor's question. The prosecutor's response to the suggestion that other witnesses had identified Tinsley as the shooter, when this in fact was not the case, was a proper topic for redirect examination

3. The alleged error was harmless.

Assuming *arguendo* that the trial court erred in admitting Det. Solan's testimony, the error was harmless beyond a reasonable doubt. Confrontation clause error may be harmless.²⁴ State v. Davis, 154 Wn.2d

²⁴ As Melton points out, because the statements were also hearsay a reduced standard of whether the testimony was harmless also applies. For convenience, this analysis will focus on the more stringent constitutional error standard.

291, 304, 111 P.3d 844 (2005); State v. Shafer, 156 Wn.2d 381, 395, 128 P.3d 87 (2006). Washington courts apply the “overwhelming untainted evidence test” as the standard for harmless error. In applying this test, the properly admitted evidence is reviewed to determine whether it necessarily points to guilt. State v. Palomo, 113 Wn.2d 789, 799, 783 P.2d 575 (1989). An error is harmless if, beyond a reasonable doubt, a jury would have reached the same result without error. State v. DeSantiago, 149 Wn.2d 402, 430, 68 P.3d 1065 (2003); State v. Mason, 127 Wn. App. 554, 565, 110 P.3d 245 (2005).

The strength of the State’s case has already been discussed in the previous section. Briefly, Melton admitted shooting from the Expedition and physical evidence (the shell casing fired from the gun he admitted to tossing in the back cargo area) confirms that he did so. This evidence, combined with Melton’s statements, as reported by Holmes that, “we’re going to the South End to find these niggers” and “I’m not going to let people shoot me and get away with it” demonstrate that Melton was, at a minimum, an accomplice to the drive-by shooting.

Further, any prejudice from Det. Solan’s statement is also minimized by the fact that there was already testimony – as impeachment evidence – that other witnesses in the vehicle had identified Melton as the shooter. Cox admitted that he had identified Melton as the shooter in his

statement to detectives, although he then denied he had actually said this in his interview with detectives. 13RP 433-34.

Finally, the prosecutor made no use of Det. Solan's allegedly improper statements during closing or rebuttal argument. This is not a case in which the prosecutor elicited improper testimony and then asked the jury to rely on it, or used it to bolster or attack the credibility of witnesses. Rather, the prosecutor was appropriately responding to the defense suggestion that detectives improperly focused their attention on Melton, and ignored evidence that others may have fired shots from the Expedition. The prosecutor did not further emphasize this point in closing or rebuttal argument.

In sum, the alleged error in admitting Det. Solan's testimony was harmless beyond a reasonable doubt.

C. THE REFERENCE TO THE ACCOMPLICE LIABILITY INSTRUCTION IN RESPONSE TO A JURY INQUIRY WAS NOT AN IMPROPER COMMENT ON THE EVIDENCE.

For the first time on appeal, Melton complains that the trial court, in responding to a written question during jury deliberations, inadvertently directed the jury to consider the accomplice liability instruction. The court's erroneous response, however, was not a comment on the evidence. In any event, defense counsel explicitly acquiesced in this response and

may not raise this issue for the first time on appeal. Finally, under the facts of this case, the alleged error was not prejudicial to Melton.

1. Relevant facts.

During its deliberation, the jury sent a written request to see victim “Shawn Webster’s testimony on the stand.” CP 126. In a telephone conference call, the court consulted with the parties and indicated that it would instruct the jury to consider the instruction that “makes it clear very clear to the jurors that you will not rehear or hear testimony twice.” 18RP 889. The parties agreed that this was appropriate. 18RP 889-90. However, the court inadvertently directed the jury to consider instruction number 30, relating to accomplice liability (CP 83), rather than instruction number 31, relating to rehearing testimony (CP 84). CP 127.

The following day, the trial judge gave defense counsel and the prosecutor an opportunity to review the written response. The court stated “if there’s any disagreement that that’s what took place, please let me know.” After reviewing the answer, defense counsel responded that he had “no objections.” 18RP 889-90.

Finally, jury instruction number 1 contained the following admonition to the jury:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about

the value of the testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during the trial or in giving these instructions, you must disregard the apparent comment entirely.

CP 53.

2. Melton may not raise this error for the first time on appeal.

Melton is precluded from raising this alleged error for the first time on appeal by both RAP 2.5 and the invited error doctrine. Issues raised for the first time on appeal are generally not subject to review. A recognized exception to this rule exists if there is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be “manifest.” That is, it must be “truly of constitutional magnitude.” Scott, 110 Wn.2d at 688. A defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights in order to obtain appellate review. Id. at 688; see generally State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The reference to a jury instruction that correctly states the law, and which had no bearing on the jury’s question, is not a “manifest

constitutional error.” Melton has made no showing that the reference to the correct accomplice liability instruction actually affected his rights. Accordingly, Melton is precluded from raising this issue for the first time on appeal.

For similar reasons, Melton is precluded from raising this issue by the invited error doctrine. The invited error doctrine states that a party may not set up a potential error at trial and then claim that the trial court erred on that basis on appeal. See, e.g., In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). A claim of trial court error cannot be raised “if the party asserting such error materially contributed thereto.” In re K.R., 128 Wn.2d at 147. Such material contribution includes acquiescence as well as direct participation. See, e.g., State v. Bailey, 114 Wn.2d 340, 787 P.2d 1378 (1990); State v. Lewis, 15 Wn. App. 172, 548 P.2d 587 (1976), receded from on other grounds State v. Stephens, 22 Wn. App. 548, 591 P.2d 827 (1979). Invited error bars a claim even if that claim impacts a constitutional right. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002).

Here, defense counsel was given the opportunity to review the written response to the jury question. This occurred the morning after the

judge had provided the written response to the jury.²⁵ The court explicitly stated it was handing the response down so the parties could see “exactly what I asked the jurors to do.” The court stated “if there’s any disagreement that that’s what took place, please let me know.” After reviewing the answer, defense counsel responded that he had “no objections.” 18RP 889-90. Had defense counsel objected, there would have been an opportunity to correct the error and properly advise the jury and respond to the written jury question. Defense counsel’s direct acquiescence in the erroneous response to the jury question precludes Melton from raising this issue for the first time on appeal.

3. This was not a comment on the evidence.

Article IV, section 16 of the Washington Constitution prohibits a judge from conveying to the jury his or her personal opinion about the evidence in a case or instructing a jury that “‘matters of fact have been established as a matter of law.’” State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). A court's statement constitutes a comment on the evidence “if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement.” State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). In determining

²⁵ The jury had submitted its question at 3:45 of the previous day. 18RP 889.

whether a trial judge's conduct or remarks amount to a comment on the evidence, the facts and circumstances of the case as a whole are evaluated. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970); State v. Sivins, 138 Wn. App. 52, 58, 155 P.3d 982 (2007).

Under the facts of this case, the judge's inadvertent reference to the accomplice liability instruction was not a comment on the evidence. The jury had asked to see the testimony of Shawn Webster, the victim who had been shot in the head. Webster could not identify who fired the shots, could not see from where in the Expedition the shots came from, and had no prior or subsequent interaction with Melton or any of the other individuals in the Expedition. Had the jury asked to review the testimony of the defendant or one of the individuals in the Expedition, a reference to the accomplice liability instruction might be taken as an indirect comment on the evidence. Here, however, the reference can only be viewed as a meaningless *non sequitur* having no bearing on the jury's request.

One circumstance considered by reviewing courts when evaluating article IV, section 16 claims is whether the trial court's remarks were isolated or cumulative. See, e.g., State v. Eisner, 95 Wn.2d 458, 462-63, 626 P.2d 10 (1981). In the present case the alleged comment was isolated; it is not an example of a judge entering into the "fray of combat." Id. at 463, 626 P.2d 10.

Likewise, Article IV, section 16 violations have also been found when a trial judge remarks on a witness's credibility or gives a jury instruction that resolves a contested fact. See, e.g., Levy, 156 Wn.2d at 721 (jury instruction used the word "building," which improperly suggested to the jury that the apartment was a building as a matter of law); Lane, 125 Wn.2d at 839, 889 P.2d 929 (trial judge communicated to the jury his opinion of a witness's testimony); Jackman, 156 Wn.2d at 744, 132 P.3d 136 (instructions referenced the victims' birth dates, a critical element of the crime).

None of these circumstances apply here. The alleged comment in no way involved the credibility of a witness, nor resolved a contested fact, nor defined a term that was a critical element of the crime. To this extent, the alleged improper comment was completely opaque; it simply referenced a completely accurate statement of the law without implying what, if any, weight should be given to that instruction. The State requests that this Court recognize the reality of this situation, that the court's inadvertent reference to the wrong jury instruction was not intended, and could not be perceived as, a judicial "comment on the evidence."

4. The erroneous jury response was not prejudicial.

Assuming *arguendo* that the court's incorrect response to the jury question was a comment on the evidence, that the issue may be raised for

the first time on appeal, and that the error was not invited, Melton was not prejudiced by the error.

Judicial comments are not structural errors or prejudicial per se; that is, prejudicial without further analysis. A judicial comment in a jury instruction is presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). The fundamental question underlying the analysis of judicial comments is whether the mere mention of a fact in an instruction conveys the idea that the fact has been accepted by the court as true. Id. at 726-27.

First, the jury was correctly instructed. The instructions inform the jury that it would not have an opportunity to re-hear testimony and that the only evidence they were to consider was the testimony of witnesses and the exhibits that were actually admitted at trial. The accomplice liability instruction correctly stated the law. The jury was properly instructed as to the elements of the charged and lesser-included crimes.

Second, and most basically, the jury was explicitly instructed by the court that the state constitution prohibits a trial judge from making a comment on the evidence, that it would be improper for the trial court to do so, and that if it appeared that the court had commented on the

evidence, the jury was to disregard the apparent comment entirely. Jurors are assumed to follow the court's instructions. State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993). If the inadvertent reference was even perceived by the jury as a comment on the evidence, the jury was properly instructed to disregard the alleged comment.

Third, as previously discussed, the evidence indicating that Melton participated in the drive-by shooting is compelling. Most basically, Melton admitted that he fired a handgun out of the window of the Expedition. In this context, issues of accomplice liability are essentially moot. Rather, the central issues are Melton's claim of self-defense (rejected by the jury) and the question of intent to commit great bodily injury (apparently accepted by the jury as indicated by the acquittal of the assault in the first degree count and the finding of guilt on the lesser included charge of assault in the second degree). The court's inadvertent reference to the accomplice liability instruction did not prejudice the outcome of the trial.

D. THERE IS NO CUMULATIVE ERROR REQUIRING REVERSAL.

The cumulative error doctrine is limited to instances where multiple significant trial errors occurred that, standing alone, may not justify reversal, but together denied the defendant a fair trial. See, e.g.,

State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984) (more than seven different significant errors at trial required reversal). Where any errors had little or no effect on the outcome at trial, the doctrine is inapplicable. See, e.g., State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

In this case, considering the trial as a whole, it is clear that Melton received a fair trial. While the State concedes that the trial court inadvertently referenced the incorrect jury instruction in responding to a jury inquiry, that reference nevertheless correctly stated the law and was not improper comment on the evidence. The trial court also did not abuse its discretion in admitting brief and limited testimony concerning the fear of retaliation in gang cases and the basis for the lead detective's conclusion that Melton fired a handgun from the Expedition. There is no cumulative error requiring reversal.

E. MELTON COMMITTED FOUR ASSAULTS AND THUS FOUR FIREARM ENHANCEMENTS WERE PROPER.

Melton argues that the four firearm enhancements were improper, claiming that a unit of prosecution analysis bars enhancements for a "single incident and single weapon." This argument fails because the unit of prosecution for assault is each victim assaulted. There were four victims in this case and four separate assaults. Pursuant to statute, the mandatory firearm enhancement was properly imposed for each assault.

1. Relevant facts.

Melton was convicted of four counts of assault in the second degree. CP 98 (count I), 95 (count III), 93 (count IV), 90 (count V). On each count, the jury also found that he was armed with a firearm. CP 97 (count I), 94 (count III), 92 (count IV), 91 (count V). Pursuant to RCW 9.94A.553, the trial court's sentence included a mandatory term of confinement of 36 months for each firearm enhancement. The firearm enhancement time is to be served consecutively. CP 135.

2. The unit of prosecution for assault is one count of assault per victim assaulted.

“[W]hen a defendant is convicted of multiple violations of the same statute, the double jeopardy question focuses on what ‘unit of prosecution’ the Legislature intends as the punishable act under the statute.” State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). If the legislature does not specify the proper “unit of prosecution,” then courts apply the rule of lenity and construe any ambiguity in favor of the defendant. In the Matter of the Personal Restraint Petition of Davis, 142 Wn.2d 165, 172, 12 P.3d 603 (2000).

A defendant can only be convicted once if he or she committed one “unit of prosecution.” State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). A person is guilty of second degree assault when, under circumstances not amounting to assault in the first degree, one assaults

another with a deadly weapon. RCW 9A.36.021(1)(c). Therefore, assaulting another person with a deadly weapon comprises the criminal activity measured by the “unit of prosecution.” See, e.g., State v. Smith, 124 Wn. App. 417, 431, 102 P.3d 158 (2004).

3. Each firearm enhancement must be served consecutively to the base sentence.

The standard range sentencing grid, RCW 9.94A.510(1), is enhanced by RCW 9.94A.533(3) if the defendant or an accomplice was armed with a firearm. Before 1995, only one deadly weapon enhancement existed. Subsequently, the Hard Time for Armed Crime Act of 1995 (Initiative 159) removed “firearm” from the definition of “deadly weapon” and created an additional, more severe firearm enhancement.²⁶ Laws of 1995, ch. 129, § 2.

²⁶ The sentence enhancement statute, RCW 9.94A.533, was originally enacted, without amendment, after the voters passed Initiative 159, entitled the Hard Time for Armed Crime Act. The statute mandates additional punishment for crimes committed with a firearm, or with a deadly weapon other than a firearm:

...

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, *if the offender or an accomplice* was armed with a firearm as defined in RCW 9.41.010. . . .

...

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, *if the offender or an accomplice* was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010. . . .

RCW 9.94A.533(3), (4) (emphasis added).

If an offender is sentenced for more than one offense, “the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm [or deadly weapon] enhancement.” RCW 9.94A.510(3).²⁷ In 1998, the Washington Supreme Court interpreted this language to mean that while the statute required multiple sentence enhancements to run consecutive to base sentences, they could run concurrently to each other. See In re Post Sentencing Review of Charles, 135 Wash.2d 239, 254, 955 P.2d 798 (1998). The legislature then amended the statute, adding the emphasized language to subsection (e):

Notwithstanding any other provision of law, all ... enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, *including other firearm or deadly weapon enhancements,....*

RCW 9.94A.510(3)(e) (firearm) and RCW 9.94A.510(4)(e) (other deadly weapon) (emphasis added); Laws of 1998, ch. 235, § 1.

Thus, as the Supreme Court has subsequently recognized, *all firearm and deadly weapon enhancements are mandatory and, where multiple enhancements are imposed, they must be served consecutively to*

²⁷ RCW 9.94A.533(3) was previously codified at RCW 9.94A.510 (3). The re-codification was effective July 1, 2004. The relevant language remains unchanged.

base sentences and to any other enhancements. See State v. DeSantiago, 149 Wn.2d 402, 415, 68 P.3d 1065 (2003).

4. The trial court properly imposed four firearm enhancements.

Here, Melton fired at least one – and probably more – shots out the window of the Expedition at a crowd of individuals on the sidewalk.²⁸ In doing so, he assaulted at least four individuals: Webster, the individual who was hit, and the three others whom he narrowly missed. See, e.g., Smith, 124 Wn.2d at 431 (firing one bullet into the vehicle with three individuals inside results in three units of prosecution, not one); State v. Wilson, 125 Wn.2d 212, 220, 883 P.2d 320 (1994) (where the shots fired by the defendant missed two intended victims but struck two unintended ones, the defendant committed four assaults, involving four victims, and these assaults constituted four separate and distinct criminal acts-one act for each victim). Significantly, Melton has not challenged the sufficiency of the evidence supporting each of his four convictions. Nor has he argued that four assault convictions are barred by a unit of prosecution analysis.

²⁸ The number of shots is irrelevant in determining how many assaults were committed. Melton claimed he fired a single shot. 10RP 29. Other passengers in the Expedition claimed to hear two shots. 10RP 49-51, 57-59; 15RP 676, 679. Victims on the street heard two or more shots. 10RP 109, 130, 135.

Applying the unit of prosecution analysis, Melton committed four assaults. A jury found that he was armed with a firearm while committing each assault. Pursuant to RCW 9.94A.510(3)(e), and consistent with the holding of DeSantiago, the trial court was required to run the time to be served on each firearm enhancement consecutively.

F. THE FIREARM ENHANCEMENTS DO NOT VIOLATE THE PRINCIPLE OF DOUBLE JEOPARDY.

Melton argues that each firearm enhancement violates the principle of double jeopardy because the underlying convictions for assault in the second degree were predicated on his being armed with a deadly weapon. This argument has previously been explicitly rejected by the Court of Appeals, but is currently pending in the Washington Supreme Court. The State urges this Court to reject Melton's argument based on existing precedent, with the understanding that if the Supreme Court subsequently changes the law any new rule of criminal procedure will apply to Melton.

1. Melton's double jeopardy argument was rejected in State v. Nguyen.

The Washington Supreme Court has previously rejected the argument that sentencing enhancements violate double jeopardy. In State v. Claborn, 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981), the Court held that because sentencing enhancements are not "offenses," double jeopardy is not implicated. 95 Wn.2d at 637.

As Melton concedes on appeal, his double jeopardy claim has been rejected by this Court in State v. Nguyen, 134 Wn. App. 863, 866, 142 P.3d 1117 (2006), which stated: “It is well settled that sentence enhancements for offenses committed with weapons do not violate double jeopardy *even where the use of a weapon is an element of the crime.*” 134 Wn.2d 866 (emphasis added). The analysis in Nguyen is controlling and adopted without repetition by the State in the present case. See also State v. Tessema, 139 Wn. App. 483, 492-93, 162 P.3d 420 (2007).

Nguyen was decided after the decisions in Blakely v. Washington,²⁹ Apprendi v. New Jersey,³⁰ and State v. Recuenco.³¹ The effect of these decisions on the issue of firearm enhancements and double jeopardy was explicitly considered in Nguyen and the same arguments that Melton now makes on appeal were rejected. See 134 Wn. App. at 868-72. Blakely, Apprendi, and Recuenco are not new cases that require this Court to reconsider its previous rejection of Melton’s argument.

²⁹ 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

³⁰ 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

³¹ 154 Wn.2d 156, 110 P.3d 188 (2005), cert. granted, 546 U.S. 960, 126 S. Ct. 478, 163 L. Ed. 2d 362 (2005), rev’d on other grounds, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

2. The Washington Supreme Court has accepted review on this issue.

As Melton points out, the Washington Supreme Court has recently accepted review in two cases that raise the question of whether double jeopardy principles are violated in a second degree assault conviction when the use of a firearm was both an element of the charge and a basis for imposing a firearm sentence enhancement. See State v. Kelley, 146 Wn. App. 370, 189 P.3d 853, rev. granted, 165 Wn.2d 1027 (2009); State v. Aguirre, COA No. 36186-8-II, rev. granted, 165 Wn.2d 1036 (2009).

The State believes that this Court's analysis in Nguyen is correct and presumes that this will be the conclusion adopted by the Supreme Court. Ultimately, however, Kelley and Aguirre will be controlling on this issue. Absent contrary authority at this time, the State urges this court to apply its holding in Nguyen and reject Melton's double jeopardy argument. The State agrees and accepts that if Kelley and Aguirre are decided contrary to Nguyen, then the holdings of those cases will apply to Melton.

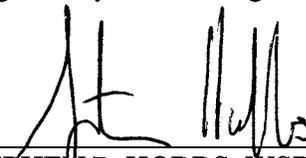
IV. CONCLUSION

For the reasons outlined above, the State of Washington respectfully requests that Melton's convictions for four counts of assault in the second degree and his sentence be affirmed.

DATED this 29th day of September, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DAVID MELTON, Cause No. 61377-4-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

9/29/09
Date

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