

72328-6

72328-6

NO. 72328-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALI ABUKAR MOHAMED,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. PROCEDURAL FACTS	3
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	5
1. THE TRIAL COURT PROPERLY EXCLUDED THE CONFIDENTIAL INFORMANT'S PRIOR CONVICTIONS	5
a. Relevant Facts	6
b. Mohamed Has Not Preserved The Claim He Raises On Appeal	10
c. Even Considering The Bias Theory Raised By Mohamed On Appeal, The Trial Court Properly Exercised Its Discretion In Excluding The Prior Convictions	13
d. Any Error Was Harmless	17
2. MOHAMED MAY NOT CHALLENGE DEJESUS'S GENERAL REMARK THAT THE CONFIDENTIAL INFORMANT IS "HONEST" FOR THE FIRST TIME ON APPEAL, AND ANY ERROR WAS HARMLESS	19
a. Relevant Facts	19
b. Mohamed May Not Raise This Claim For The First Time On Appeal	20
c. Any Error Was Harmless	20

3.	THE TRIAL COURT PROPERLY RULED THAT IT HAD NO AUTHORITY TO TREAT THE SCHOOL ZONE ENHANCEMENTS AS PART OF THE "STANDARD SENTENCE RANGE" THAT COULD BE WAIVED WHEN IMPOSING A DRUG OFFENDER OR PARENTING SENTENCING ALTERNATIVE	22
a.	Relevant Facts	23
b.	A Trial Court Has No Authority To Treat School Zone Enhancements As Part Of The "Standard Sentence Range" When Imposing A Drug Offender Or Parenting Sentencing Alternative	24
4.	ANY ERROR IN THE TRIAL COURT'S APPARENT BELIEF THAT IT HAD NO DISCRETION TO REDUCE THE SCHOOL ZONE ENHANCEMENTS AS PART OF AN EXCEPTIONAL SENTENCE WAS HARMLESS	31
a.	Relevant Facts	32
b.	Because The Trial Court Found That An Exceptional Sentence Was Not Warranted, Any Error As To How Much Of Mohamed's Sentence Could Be Affected By An Exceptional Sentence Was Harmless	33
D.	<u>CONCLUSION</u>	35

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

United States v. Abel, 469 U.S. 45,
105 S. Ct. 465, 83 L. Ed. 2d 450 (1984)..... 16, 17

Washington State:

Gutierrez v. Dep't of Corr., 146 Wn. App. 151,
188 P.3d 546 (2008)..... 22, 25, 27, 28, 29, 31

In re Pers. Restraint of King, 146 Wn.2d 658,
49 P.3d 854 (2002)..... 31

State v. Aguirre, 168 Wn.2d 350,
229 P.3d 669 (2010)..... 13

State v. Brown, 113 Wn.2d 520,
782 P.2d 1013 (1989), opinion corrected,
787 P.2d 906 (Wash. 1990)..... 12, 17

State v. Burke, 163 Wn.2d 204,
181 P.3d 1 (2008)..... 12

State v. Cunningham, 93 Wn.2d 823,
613 P.2d 1139 (1980)..... 18, 20

State v. Emery, 174 Wn.2d 741,
278 P.3d 653 (2012)..... 13

State v. Ferguson, 100 Wn.2d 131,
667 P.2d 68 (1983)..... 11, 12

State v. Garcia, 179 Wn.2d 828,
318 P.3d 266 (2014)..... 12, 13

State v. Gomez, 75 Wn. App. 648,
880 P.2d 65 (1994)..... 16

<u>State v. Hayes</u> , 165 Wn. App. 507, 265 P.3d 982 (2011).....	12
<u>State v. Jacobs</u> , 154 Wn.2d 596, 115 P.3d 281 (2005).....	25, 28
<u>State v. Jones</u> , 101 Wn.2d 113, 677 P.2d 131 (1984).....	17
<u>State v. Kilgore</u> , 147 Wn.2d 288, 5 P.3d 974 (2002).....	16
<u>State v. Lusby</u> , 105 Wn. App. 257, 18 P.3d 625 (2001).....	26
<u>State v. Millante</u> , 80 Wn. App. 237, 908 P.2d 374 (1995).....	16
<u>State v. Murray</u> , 128 Wn. App. 718, 116 P.3d 1072 (2005).....	30, 31
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	11, 20
<u>State v. Smith</u> , 142 Wn. App. 122, 173 P.3d 973 (2007).....	30
<u>State v. Stevens</u> , 58 Wn. App. 478, 794 P.2d 38 (1990).....	20, 21
<u>State v. Wilber</u> , 55 Wn. App. 294, 777 P.2d 36 (1989).....	20, 21

Statutes

Washington State:

Laws of 2000, ch. 28, § 19	27
Laws of 2006, ch. 339, § 301	27
RCW 9.94A.505	24

RCW 9.94A.510	24
RCW 9.94A.517	24, 28
RCW 9.94A.533	23, 24, 25, 26, 27, 28, 29, 30
RCW 9.94A.535	33
RCW 9.94A.589	28, 30
RCW 9.94A.655	25, 26
RCW 9.94A.660	25, 29
RCW 9.94A.662	29
RCW 69.50.435.....	24

Rules and Regulations

Washington State:

ER 403	16
ER 404	12, 16
ER 608	9, 10, 12
ER 609	8, 9, 10, 12
RAP 2.5.....	11, 12, 20

Other Authorities

Sentencing Reform Act	22, 24, 25, 33
Wash. Bill Analysis, 2006 Reg. Sess. S.B. 6239.....	25

A. ISSUES PRESENTED

1. A witness's prior conviction is not admissible as evidence of bias if the probative value is substantially outweighed by the danger of unfair prejudice. Here, the defendant concedes that the confidential informant's prior convictions were not admissible under the only theory he advanced in the trial court; the evidence does not support the theory he advances on appeal; and even if it did, the age of the convictions and the availability of alternative impeachment rendered the probative value of the convictions low in comparison to the danger of unfair prejudice. Did the trial court properly exercise its discretion in excluding the convictions?

2. A witness's comment on another witness's truthfulness is not an error of constitutional magnitude, and is harmless where there is not a reasonable probability that it affected the verdict. Although a detective described the confidential informant generally as "very honest," the defendant did not object, the informant admitted that he had lied to the detective in the past, and the evidence strongly corroborated the informant's testimony at trial. Has the defendant waived his claim of error, and if not, was any error harmless under the circumstances?

3. The statutory language of the school zone sentencing enhancement requires that each such enhancement run consecutive to all other sentencing provisions. When sentencing a defendant on multiple charges that each carry school zone enhancements, there is no way to include the enhancement time in the "standard sentence range" for purposes of imposing a drug offender sentencing alternative (DOSA) or parenting sentencing alternative (PSA) without violating either the requirement that each enhancement run consecutive to all other sentencing provisions or the prohibition on hybrid sentences. Did the trial court properly rule that it could not lawfully include the sentencing enhancement time when imposing a DOSA or PSA?

4. A trial court may depart from the sentencing guidelines only if the court finds that substantial and compelling reasons justify an exceptional sentence. Although it is possible that the trial court may have been mistaken as to whether an exceptional sentence, if justified, could modify the full enhanced sentencing range or only the base standard range, the record indicates that the trial court exercised its discretion and found that an exceptional sentence was not justified. Under those

circumstances, was any error regarding the potential scope of an exceptional sentence harmless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Ali Abukar Mohamed, by amended Information with five counts of delivery of cocaine, with special allegations on four counts that the crime was committed within 1,000 feet of a school. CP 7-8. The jury found Mohamed guilty of four of the delivery charges and three associated school zone enhancements. CP 68-76. The trial court imposed concurrent standard range sentences on each count, plus the three consecutive school zone enhancements. CP 128. Mohamed timely appealed. CP 133.

2. SUBSTANTIVE FACTS.

On five occasions between April of 2012 and February of 2013, Detective Samuel DeJesus of the Seattle Police Department directed a confidential informant named Yenry Harris to make purchases of crack cocaine from a suspect known to Harris as "Dime," who was later identified as the defendant, Ali Abukar

Mohamed. RP¹ 79-199. The first four “controlled buys” took place at the clothing store run by Mohamed, which was less than 300 feet from an elementary school, and the final controlled buy took place elsewhere in Mohamed’s vehicle. RP 75, 101, 124, 143, 166, 196, 425, 440. The controlled buys were designed to further an investigation of the suspected sale of automatic weapons. RP 98.

Prior to each controlled buy, Harris would speak to Mohamed over the phone in advance to arrange the purchase. RP 312-13. However, during several of the transactions Mohamed utilized intermediaries to avoid personally handing over the cocaine. RP 297-300, 310. During each transaction, Harris wore a hidden camera. RP 91. For the final four purchases, the recording captured both audio and video, and Mohamed appeared in each video. RP 122, 132, 158, 186, 202. In several of the recordings, Mohamed can be heard discussing subjects such as the price of cocaine and the possible sale of firearms, and either handing something to Harris or directing others to deliver it to Harris. RP 133-37, 151-57, 159, 167, 202-05; Ex. 7, 10, 14, 16. For the

¹ The Verbatim Report of Proceedings consists primarily of four consecutively-paginated volumes, which will be referred to in this brief as “RP.” Opening statements were transcribed in a separately-paginated volume entitled “Verbatim Report of Excerpt of CD Recorded Proceedings,” but this brief contains no citations to that volume.

first purchase, however, the recording did not capture audio, and Mohamed did not appear on the video. RP 101, 112-13.

Mohamed testified at trial. He denied the charges, claiming that he had no involvement in the drug purchases Harris made in or near his store, and that the fifth incident, which occurred in Mohamed's vehicle, involved a purchase of clothing rather than cocaine. RP 475, 488, 490-91. The jury acquitted Mohamed of the charge associated with Harris's first purchase, but convicted him of the charges associated with the other four purchases. CP 7-9, 68-72.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXCLUDED THE CONFIDENTIAL INFORMANT'S PRIOR CONVICTIONS.

Mohamed contends that the trial court erred when it excluded evidence of Yenny Harris's prior convictions. This claim should be rejected. The trial court properly rejected the only theories offered by Mohamed for the admissibility of the prior convictions, and even under the theory Mohamed now argues on appeal, any probative value of the prior convictions is substantially outweighed by the danger of unfair prejudice.

a. Relevant Facts.

Yenrry Harris has worked as a confidential informant for the Seattle Police Department ("SPD") since 1986. RP 78. In 1991, Harris signed a written "Informant Agreement" with SPD. Pretrial Ex. 1. The agreement sets the conditions and procedures by which Harris agreed to be bound as an SPD informant. Pretrial Ex. 1. It includes things such as: Harris's acknowledgment that he has no police power and no authority to carry a weapon while acting as an informant; his acknowledgment that he is an independent contractor rather than an employee; his agreement not to divulge his status as an informant; and his agreement to promptly deliver anything of evidentiary value to SPD. Pretrial Ex. 1. It also includes the following provisions:

6. I further agree that my association with the Seattle Police Department does not allow me any special privileges and that I do not have the authority to violate any law and will be held responsible if I do so.

.....

9. Finally, I agree that violation of any of the above enumerated provisions will be grounds for immediate termination and probable criminal charges.

Pretrial Ex. 1.

From approximately 1990 until 2008, Harris's primary contact at SPD was Detective Dan Stokke in the Criminal Intelligence Section. RP 78-80. Around 2004, Stokke began bringing Detective DeJesus, who is a native Spanish speaker, with him when meeting with Harris, who prefers to speak in Spanish. RP 78. DeJesus joined the Criminal Intelligence Section in 2007 or 2008, and became Harris's primary contact upon Stokke's retirement in 2008. RP 78-80.

Prior to trial, the State timely disclosed to Mohamed that Harris had one felony conviction from 1984 and several misdemeanor convictions between 1997 and 2003. CP 145. Harris also disclosed during a defense interview, and again on the witness stand, that he had made an unauthorized purchase of cocaine from Mohamed on one or two occasions during the timespan of DeJesus's investigation. RP 28, 287.

During pre-trial motions, Mohamed raised the issue of the admissibility of Harris's prior convictions, arguing that the convictions should be admitted as evidence of Harris's untrustworthiness because he committed the crimes while working as a confidential informant. CP 148; RP 22. The State asked the trial court to exclude the convictions, arguing that they are

inadmissible under Evidence Rule 609. RP 22. Mohamed argued that they were admissible under ER 609 because “it’s relevant evidence, and . . . it’s not prejudicial to the State.” RP 23.

When the State pointed out that the written agreement doesn’t actually require Harris to refrain from committing crimes as a condition of being a confidential informant, Mohamed asserted that DeJesus stated in a defense interview that he had an agreement with Harris that Harris not commit crimes. RP 24-25. The trial court ruled that the prior convictions were not admissible under ER 609, but indicated that they might be admissible if DeJesus did in fact have an agreement with Harris that Harris not commit crimes, and if the convictions fell within the timeframe of that agreement.² RP 29. Mohamed then asserted that he was not trying to admit the convictions under ER 609. RP 31.

When the parties took up the issue again the following day, Mohamed agreed that if the commission of a crime was not a violation of Harris’s oral agreement with SPD, then the prior convictions should not come in. RP 44. However, Mohamed

² At the time, there was some uncertainty among the parties about when DeJesus had first begun working as Harris’s primary contact. Shortly thereafter, the prosecutor consulted with DeJesus and relayed to the court that May 1, 2008, was the first time DeJesus had ever initiated a case using Harris as an informant. RP 33.

argued, if DeJesus testified that committing crimes was a violation of Harris's agreement with DeJesus, then the prior convictions and Harris's unauthorized purchases of cocaine during the current case should be admitted as relevant to Harris's trustworthiness. RP 44, 46, 50.

The trial court observed that Mohamed sought to use the prior convictions to impeach Harris's credibility, which brought the debate within confines of ER 609, and ruled that the prior convictions were not admissible under ER 609. RP 48. Mohamed then asserted that he was not asking the court to admit the convictions themselves, but merely to admit evidence of misconduct under ER 608 as evidence of Harris's untrustworthiness. RP 49-50.

After some confusion between defense counsel and the trial court as to what misconduct Mohamed was asking the trial court to admit, defense counsel clarified that he was now just asking the trial court to admit evidence regarding Harris's unauthorized purchases and deliveries of cocaine during the pendency of the

investigation targeting Mohamed.³ RP 52-53. The State indicated it had no objection, and the trial court ruled that evidence of Harris's unauthorized illegal activities involving Mohamed would be admissible. RP 54, 86.

Even before Mohamed shifted away from asking the trial court to admit Harris's prior convictions, at no point did he ever argue that the prior convictions were admissible as evidence of bias, or suggest that there was any basis for admitting them other than ER 609 or ER 608. RP 22-58; CP 145-48.

b. Mohamed Has Not Preserved The Claim He Raises On Appeal.

On appeal, Mohamed claims that Harris's prior convictions were properly admissible under the confrontation clause as evidence of bias, despite the strictures of ER 608 and 609, and that the trial court therefore erred in excluding them. Brief of Appellant at 6-8. However, Mohamed never suggested to the trial court that

³ After the trial court ruled that the convictions were inadmissible, defense counsel stated "I'm less concerned with the 609 convictions. I tried to make that clear yesterday. In fact, we'd be willing to including (sic) this under-under witness misconduct under 608 to make it admissible, not 609," and "the criminal conduct-occurred while he was, in fact, a CI" RP 49. However, when the trial court reiterated that the convictions themselves were excluded, and asked defense counsel if he was now just talking about the suspected unauthorized drug transactions, defense counsel said, "The drug trans-we'll be fine with that, Your Honor," and went on to reference Harris's statements that he had bought drugs from Mohamed without DeJesus's knowledge. When the trial court responded, "Right. That's what you're talking about," defense counsel affirmed, "So, that's the kind of thing that-yes, yes," and then added that he was also talking about Harris delivering the illegally purchased drugs to a friend. RP 53-54.

the prior convictions were evidence of bias; instead, he argued only that because Harris's prior convictions constituted violations (in Mohamed's opinion) of Harris's agreement with SPD, they were relevant to show Harris's lack of "trustworthiness."⁴ CP 145; RP 22-58. The claim Mohamed raises on appeal has thus not been preserved for review. See State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (appellate court will not reverse trial court's evidentiary ruling on the basis that the trial court should have ruled differently "under a different rule which could have been, but was not, argued at trial.").

In order to raise his claim for the first time on appeal, Mohamed must demonstrate that the alleged error is (1) manifest, and (2) of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5. Evidentiary rulings regarding the admissibility of prior convictions or prior bad acts are not of constitutional dimension, and are reviewed for abuse of discretion.

⁴ On appeal, Mohamed claims that his argument at trial was that "nearly all the convictions should be admissible because they took place while Mr. Harris was working for the SPD, yet he was never terminated." Brief of Appellant at 6. However, he offers no citation to the record to support this characterization of his trial argument. The record reveals that Mohamed's argument at trial consistently focused on what the alleged violations of the informant agreement revealed about Harris's character, and not on SPD's reaction to the convictions and any perverse incentives that might have been created as a result. RP 22, 50. This was a logical tactical choice by Mohamed given the absence of any evidence establishing that SPD considered Harris's prior convictions to be violations of the informant agreement but did not sanction Harris for them.

State v. Brown, 113 Wn.2d 520, 554-55, 782 P.2d 1013 (1989) opinion corrected, 787 P.2d 906 (Wash. 1990) (nonconstitutional error standard applies to both ER 609(a) and ER 404(b)); State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (ER 608 errors do not meet requirements of RAP 2.5 to warrant review for first time on appeal); State v. Garcia, 179 Wn.2d 828, 846, 318 P.3d 266 (2014) (evidentiary rulings are reviewed for abuse of discretion).

Furthermore, the error alleged by Mohamed is not manifest. A manifest error is “an error that is ‘unmistakable, evident or indisputable,’” and that has “practical and identifiable consequences in the trial of the case.” State v. Hayes, 165 Wn. App. 507, 514-15, 265 P.3d 982 (2011) (quoting State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008)). As explained in section C.1.c below, the trial court’s ruling was not an error, let alone an “unmistakable, evident, or indisputable” error. Because Mohamed has failed to establish (and indeed, does not even attempt to establish) that the trial court’s ruling was a manifest constitutional error, this court should decline to review his claim.

- c. Even Considering The Bias Theory Raised By Mohamed On Appeal, The Trial Court Properly Exercised Its Discretion In Excluding The Prior Convictions.

A trial court's decision to exclude evidence or limit cross-examination of a witness for impeachment purposes is reviewed for abuse of discretion. State v. Aguirre, 168 Wn.2d 350, 361-62, 229 P.3d 669 (2010); Garcia, 179 Wn.2d 828, 846. A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). Even considering the argument raised by Mohamed on appeal that the prior convictions were relevant to show Harris's bias, the trial court properly exercised its discretion in excluding them.

Mohamed's theory on appeal appears to be as follows:

- (1) Harris's criminal convictions constituted violations of his informant agreement with SPD;
- (2) SPD's failure to impose any sanctions or terminate Harris from his informant role as a result of those violations sent the message to Harris that misbehavior would be tolerated as long as Harris helped SPD obtain convictions; and
- (3) as a result, Harris was biased in favor of SPD and/or had a

motive to fabricate his testimony in this case. Brief of Appellant at 8.

Mohamed appropriately conceded in the trial court that the prior convictions are in no way relevant absent evidence establishing that a criminal conviction violated Harris's agreement with SPD. RP 44. The only evidence of any agreement between Harris and SPD that required him to refrain from committing crimes as a condition of his status as an informant was Detective DeJesus's testimony that he felt Harris was "not supposed to commit crimes" while working as DeJesus's informant. RP 229-30. However, Harris's first contact with DeJesus was sometime around 2004, after all of his criminal convictions, and he did not begin working directly for DeJesus until 2008. RP 78-80.

The only evidence of the terms of Harris's agreement with SPD prior to 2004 is the written Informant Agreement that Harris signed in 1991. Pretrial Ex. 1. Although that agreement notifies Harris that his status as an informant does not authorize him to break the law and that he will not receive any special treatment if he does so, it does not require that he abstain from illegal activity in order to work as an informant. Pretrial Ex. 1. While Mohamed's argument is premised on the assumption that it was a violation of

the informant agreement for Harris to break the law in any regard, this interpretation is inconsistent with the plain language of the agreement and DeJesus's testimony that almost all of SPD's informants have criminal history because the best way to catch criminals is to use informants who are also criminals. RP 230, 278.

Harris's criminal convictions did not constitute violations of his written informant agreement, and predated any oral agreement with DeJesus; therefore, in accordance with Mohamed's concession, they were not relevant and not admissible. RP 44. Furthermore, even if the prior convictions had constituted violations of the informant agreement, there is no evidence that SPD did not in fact sanction Harris for his behavior. To the contrary, Harris testified that he had been sanctioned by SPD for improper behavior in the past. RP 380. There is thus no evidence to support Mohamed's theory on appeal that the prior convictions are relevant evidence of Harris's bias or motive to fabricate his testimony. The trial court therefore properly exercised its discretion in excluding the convictions.

Even if there had been evidence to suggest that SPD had knowingly ignored what it considered to be violations of Harris's informant agreement, the prior convictions were still inadmissible

under ER 404(b) and ER 403 because any slight probative value was substantially outweighed by the danger of unfair prejudice. ER 403; State v. Kilgore, 147 Wn.2d 288, 292, 5 P.3d 974 (2002) (evidence of prior bad acts inadmissible under ER 404(b) if probative value is substantially outweighed by danger of unfair prejudice). Harris's only felony conviction occurred before he first began working with SPD, and thus is not relevant under any theory. CP 145; RP 78. All of the prior misdemeanor convictions were between 17 and 11 years old at the time of trial, and all occurred before DeJesus began supervising Harris's informant activities.

Thus, any minimal value the pre-2004 convictions might have had in establishing a bias or motive for Harris to fabricate his testimony ten or more years later was substantially outweighed by the danger of unfair prejudice. See State v. Gomez, 75 Wn. App. 648, 652, 880 P.2d 65 (1994) (“[T]he older a conviction is, the less probative it is of the defendant's credibility.”); State v. Millante, 80 Wn. App. 237, 246, 908 P.2d 374 (1995) (noting “high risk of prejudice inherent in prior conviction evidence”). Furthermore, other more recent evidence of bias was admitted at trial, as discussed in section C.1.d below, further decreasing the value and importance of the prior convictions. United States v. Abel, 469 U.S.

45, 50-52, 105 S. Ct. 465, 468-69, 83 L. Ed. 2d 450 (1984) (“[T]he Confrontation Clause requires a defendant to have some opportunity to show bias on the part of a prosecution witness.” (emphasis added)); State v. Jones, 101 Wn.2d 113, 121-22, 677 P.2d 131 (1984) (prior convictions are more prejudicial if they are “unnecessarily cumulative”), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

Because the evidence did not support the bias theory articulated by Mohamed on appeal, and because even if it had, any minimal probative value would have been outweighed by the danger of unfair prejudice, the trial court properly exercised its discretion in excluding Harris’s prior convictions.⁵

d. Any Error Was Harmless.

Even if this Court were to find that the trial court abused its discretion in excluding Harris’s prior convictions, any error was harmless. A non-constitutional error is harmless if there is not a reasonable probability that the outcome of the trial would have

⁵ Mohamed also claims that the trial court should have admitted the prior convictions to rebut a witness’s statement that Harris was “completely honest.” Brief of Appellant at 8. However, Mohamed never asked the trial court to do so. The trial court did not abuse its discretion by failing to grant a remedy Mohamed never asked for, and Mohamed has failed to preserve this claim for review.

been materially affected had the error not occurred. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Here, Mohamed was able to successfully attack Harris's credibility at trial even without the prior convictions. He elicited evidence that Harris had twice purchased and delivered cocaine without DeJesus's permission during the investigation into Mohamed, that Harris had previously been punished for doing "the exact same thing as the person [he] w[as] targeting," that Harris had twice lied to DeJesus on matters unrelated to the investigation into Mohamed, and that when Harris would improperly deliver cocaine to other people while working as a confidential informant, SPD would "just scold [him]." RP 350, 379-80.

With that evidence before the jury, Mohamed was able to argue in closing argument that Harris "was violating the law, and Det. DeJesus turned a blind eye" just as effectively as he would have been able to had the jury heard about the prior convictions. RP 537. There is thus no reasonable probability that the jury's verdict would have been different had the prior convictions been admitted, and any error in excluding them was harmless.

2. MOHAMED MAY NOT CHALLENGE DEJESUS'S GENERAL REMARK THAT THE CONFIDENTIAL INFORMANT IS "HONEST" FOR THE FIRST TIME ON APPEAL, AND ANY ERROR WAS HARMLESS.

In a single page of his brief, Mohamed contends that his convictions should be reversed because Detective DeJesus improperly vouched for Harris by stating that Harris is "very honest." Brief of Appellant at 9. This claim should be rejected. Mohamed may not raise this claim for the first time on appeal because the alleged error is not of constitutional magnitude, and any error was harmless in light of Harris's admission that DeJesus's comment was inaccurate and the other evidence strongly corroborating Harris's testimony.

a. Relevant Facts.

On direct examination, the prosecutor asked Detective DeJesus to describe Yenrry Harris's appearance and background. RP 82. DeJesus responded, "Oh, he's about five-eight, kind of dark-skinned, 63 years old, very nice guy, great worker, very honest, and very—well, he's been with us for 20 years, so he's very professional when it comes to the work" RP 82. DeJesus then went on to describe the methods by which Harris was compensated for his work as a confidential informant. RP 82.

Mohamed never objected to DeJesus's description of Harris.

RP 82.

b. Mohamed May Not Raise This Claim For The First Time On Appeal.

Because Mohamed did not object to DeJesus's comment that Harris is "very honest" at trial, he must demonstrate that the alleged error is a manifest constitutional error in order to raise his claim for the first time on appeal. RAP 2.5(a); O'Hara, 167 Wn.2d at 98. However, a witness's improper testimony about another witness's truthfulness is not an error of constitutional magnitude. State v. Stevens, 58 Wn. App. 478, 495, 794 P.2d 38 (1990) (testimony that child sex abuse victims do not lie was not error of constitutional magnitude); State v. Wilber, 55 Wn. App. 294, 299, 777 P.2d 36 (1989) (officers' improper testimony that witness was being truthful was not error of constitutional magnitude). Therefore, this Court should decline to review Mohamed's claim.

c. Any Error Was Harmless.

Even if this Court reviews Mohamed's claim, any error was harmless. A non-constitutional error is harmless if there is not a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. Cunningham, 93 Wn.2d at 831. Here, DeJesus's comment touched on

DeJesus's perception of Harris's honesty in general rather than a specific comment on the truthfulness of Harris's statements in the current case. RP 82. Mohamed was also able to establish that DeJesus's perception was inaccurate by eliciting Harris's admission that he had lied to DeJesus about other topics in the past. RP 350. Furthermore, the video recordings corroborated Harris's account of each drug transaction, and DeJesus's personal observations further corroborated some or all of Harris's account of each transaction. Ex. 7, 10, 14, 16; e.g., RP 108, 167. Finally, the fact that the jury acquitted Mohamed on the only count where the video did not corroborate Mohamed's involvement indicates that Harris's personal credibility was not the most important factor in the jury's decision-making. CP 68; RP 112-13.

In light of those facts, there is no reasonable probability that the jury's verdict would have been different had the challenged testimony not occurred; any error was therefore harmless. Stevens, 58 Wn. App. at 495 (testimony that children in general do not lie is less prejudicial than testimony that specific child victim was telling the truth); Wilber, 55 Wn. App. at 299 (improper testimony about other witness's truthfulness was harmless where evidence corroborated other witness's account).

3. THE TRIAL COURT PROPERLY RULED THAT IT HAD NO AUTHORITY TO TREAT THE SCHOOL ZONE ENHANCEMENTS AS PART OF THE “STANDARD SENTENCE RANGE” THAT COULD BE WAIVED WHEN IMPOSING A DRUG OFFENDER OR PARENTING SENTENCING ALTERNATIVE.

Mohamed contends that the trial court erred when it ruled that it had no authority to treat the three 24-month school zone enhancements as part of the “standard sentence range” that could be waived if the trial court imposed a drug offender sentencing alternative (DOSA) or parenting sentencing alternative (PSA). This claim should be rejected. The statutory language of the school zone enhancement requires that it run consecutive to all other sentencing provisions, and the DOSA and PSA statutes constitute “other sentencing provisions”; furthermore, irreconcilable contradictions with other parts of the Sentencing Reform Act (SRA) arise from the interpretation Mohamed proposes. This Court should therefore decline to follow the reasoning of Division Three of the Court of Appeals in Gutierrez v. Dep’t of Corr.,⁶ and should instead hold that the trial court was correct that it had no statutory authority to waive the imposition of the school zone enhancements as part of a DOSA or PSA.

⁶ 146 Wn. App. 151, 188 P.3d 546 (2008).

a. Relevant Facts.

At sentencing, Mohamed faced a standard sentence range of 20 to 60 months on each of the four convictions for delivery of cocaine, and an additional 24 consecutive months on each of the three school zone enhancements. CP 125-26; RCW 9.94A.533(6).

Mohamed asked the court to impose a Drug Offender Sentencing Alternative (DOSA) or a Parenting Sentencing Alternative (PSA). CP 105-16. The State argued that if the court granted a DOSA or a PSA, it would only apply to the 20-60 month base sentence for each charge, because that is the “standard sentence range.” CP 151-52. Thus, the State argued, even if Mohamed received a DOSA or PSA, he would still have to serve the 72 months of enhancement time in prison in addition to that. CP 151-52. The State recommended that the court impose concurrent 20-month standard range sentences plus the 72 months comprising the three consecutive enhancements. CP 158-59.

The trial court agreed with the State's arguments regarding the DOSA and PSA, finding that it had no discretion to include the enhancement time when granting a sentencing alternative. RP 594. The court imposed concurrent low-end standard range sentences of 20 months on each count, plus the three consecutive

24-month school zone enhancements, for a total sentence of 92 months. RP 618; CP 128.

- b. A Trial Court Has No Authority To Treat School Zone Enhancements As Part Of The "Standard Sentence Range" When Imposing A Drug Offender Or Parenting Sentencing Alternative.

Under the SRA, when a defendant is convicted of a felony, the sentencing court "shall impose . . . a sentence within the standard sentence range established in RCW 9.94A.510 or 9.94A.517,"⁷ "unless another term of confinement applies." RCW 9.94A.505(2)(a)(i). When the State charges and proves the sentencing enhancement that the defendant committed a drug crime within 1,000 feet of a school (commonly referred to as a "school zone" enhancement), an additional 24 months must be added on top of the defendant's "standard sentence range." RCW 9.94A.533(6); RCW 69.50.435. Like RCW 9.94A.505, RCW 9.94A.533 specifically states that the term "standard sentence range" as used in that statute refers to the range "determined by RCW 9.94A.510 or 9.94A.517." RCW 9.94A.533(1).

When a school zone enhancement is imposed, it "shall run consecutively to all other sentencing provisions, for all offenses

⁷ RCW 9.94A.510 and RCW 9.94A.517 consist of the sentencing grids for non-drug and drug offenses, respectively.

sentenced under this chapter.” RCW 9.94A.533(6). This means that school zone enhancements must run consecutive not only to all other sentences and enhancements, but to each other.

Gutierrez v. Dep’t of Corr., 146 Wn. App. 151, 156-57, 188 P.3d 546 (2008); Wash. Bill Analysis, 2006 Reg. Sess. S.B. 6239 (noting need to clarify ambiguity identified in State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005)).

Under the SRA, there are sentencing alternatives that can be imposed in certain circumstances in lieu of a standard range sentence. The DOSA statute states that, for an eligible offender, the sentencing court may “waive imposition of a sentence within the standard sentence range” and instead impose either a prison-based DOSA or a residential-treatment-based DOSA. RCW 9.94A.660(3). The PSA statute similarly provides that for an eligible offender, the sentencing court may “waive imposition of a sentence within the standard sentence range” and instead impose a sentence consisting only of twelve months of community custody. RCW 9.94A.655(4).

Mohamed argues that the “standard sentence range,” as that term is used in the DOSA and PSA statutes, includes any time an offender must serve as part of a sentencing enhancement. Brief of

Appellant at 14-17. Under that interpretation, the enhancement time could be waived as part of a DOSA or PSA. However, the school zone enhancement statute dictates that an additional 24 months *must* be added to an offender's sentence, consecutive to all other sentencing provisions. RCW 9.94A.533(6); State v. Lusby, 105 Wn. App. 257, 265, 18 P.3d 625 (2001) (school zone enhancement is mandatory).

By making the enhancement consecutive to each other and all other sentencing provisions, the legislature ensured that a defendant's total sentence would always be longer with a school zone enhancement than without it. Yet if the enhancement were considered part of an offender's standard range when imposing a sentencing alternative, then for any offender who received a PSA, his or her final sentence would be no different than if the enhancement had not been imposed at all, as a PSA consists of 12 months of community custody regardless of the defendant's standard range. RCW 9.94A.655(4). This contradicts the clear intent of the legislature.

Furthermore, the DOSA sentencing provisions already existed at the time that the school zone enhancement statute was amended in 2006 to explicitly state that all school zone

enhancements “shall run consecutively to all other sentencing provisions.” Laws of 2006 ch. 339 § 301 (amending school zone enhancement); Laws of 2000 ch. 28 § 19 (inserting new section regarding DOSA). Thus, the legislature’s directive that the sentencing enhancement run consecutive to “**all other** sentencing provisions” must be taken at face value, requiring that the sentencing enhancement run consecutive to any sentence imposed under the DOSA sentencing provisions, or other later-enacted provisions such as the PSA provisions. RCW 9.94A.533(6) (emphasis added).

Mohamed relies on Gutierrez, 146 Wn. App. at 153-57, for the proposition that school zone enhancement time is considered part of the “standard sentence range” when imposing a DOSA or PSA. Although Gutierrez did so hold, this Court should decline to adopt Division Three’s analysis in that case, because it ignores the statutory requirement that school zone enhancements run consecutively to each other and to all other sentencing provisions. The Gutierrez court instead treated the requirement of consecutiveness with “all other sentencing provisions” as if referred only to the other enhancement provisions within RCW 9.94A.533. Id. at 156.

The Gutierrez court based this conclusion on its observation that the amendment adding the “consecutively to all other sentencing provisions” language was, at least in part, prompted by a Court of Appeals decision holding that it was unclear under the former version of RCW 9.94A.533(6) whether multiple enhancements under that subsection were intended to run concurrently or consecutively with each other. Id. (citing Jacobs, 154 Wn.2d 596). The court in Gutierrez concluded that once a school zone enhancement was applied, it became part of the “standard sentence range” and could be waived under the DOSA provisions. Id. at 155-57.

The fault in the logic of Gutierrez comes to light when faced with a case like this one, where a defendant is convicted of multiple counts with separate school zone enhancements. With an offender score of three, Mohamed’s standard sentence range on each count of delivery of cocaine is 20 to 60 months. CP 126; RCW 9.94A.517. Absent an exceptional sentence, the trial court must impose concurrent sentences on those counts. RCW 9.94A.589(1)(a). However, the three 24-month enhancements must be imposed consecutively to each other and to the underlying sentences, adding an additional 72 months onto whatever standard

range sentence Mohamed receives on the underlying charges. RCW 9.94A.533(6). This results in a total sentence as low as 92 months and as high as 132 months.

At sentencing, Mohamed appeared to argue that if the trial court wanted to impose a DOSA, it could do so on the entire total range of 92 to 132 months. RP 594. If the enhancements are considered part of the standard sentence ranges as described in Gutierrez, however, Mohamed's standard ranges become 44 to 84 months on counts two, three, and four, and 20 to 60 months on count five. CP 126. The midpoint of Mohamed's standard range would then be 64 months on counts two through four, and 40 months on count five.

A prison-based DOSA (the only kind of DOSA for which Mohamed is eligible⁸) consists of confinement for half the midpoint of the standard range, followed by an equal term of community custody. RCW 9.94A.662(1). If the trial court were to grant Mohamed a DOSA on each count, under the logic of Gutierrez the result would be concurrent DOSA sentences of 32 months in custody and 32 months of community custody on counts two

⁸ A residential-treatment-based DOSA is available only if the midpoint of the standard range is 24 months or less. RCW 9.94A.660(3).

through four, and 20 months in custody and 20 months of community custody on count five.

The court would have no discretion to run any portion of the DOSA sentences consecutive to each other. RCW 9.94A.589(1)(a) (absent an exceptional sentence, the trial court must impose concurrent sentences for multiple current offenses that are not serious violent offenses); State v. Smith, 142 Wn. App. 122, 127, 173 P.3d 973 (2007) (DOSA may not be partially concurrent with and partially consecutive to another sentence); State v. Murray, 128 Wn. App. 718, 726, 116 P.3d 1072 (2005) (sentencing court may not impose a DOSA as an exceptional sentence).

This result would directly contravene the explicit requirement of the school zone enhancement statute that the enhancements must run consecutive to each other. RCW 9.94A.533(6). Conversely, if a trial court tried to follow that requirement by first adding the consecutive enhancements to the base sentencing range to reach the correct total sentence range of 92 to 132 months, and then were to impose a DOSA on that total range, as Mohamed appears to have requested in this case, such a sentence would also be unlawful, because “92 to 132 months” is not the standard sentence range for any of the counts on which Mohamed

was being sentenced. See Murray, 128 Wn. App. at 726 (departure from midpoint of standard range when setting in-custody and community custody terms on a DOSA created unlawful exceptional-DOSA hybrid sentence).

There is thus no way to lawfully impose a DOSA on multiple offenses and multiple school zone enhancements under the interpretation of “standard sentence range” adopted in Gutierrez and advocated by Mohamed. This Court therefore should decline to follow Gutierrez and should hold that the trial court properly ruled that it could not include the school zone enhancement time as part of the “standard sentence range” when imposing a DOSA or PSA.⁹

4. ANY ERROR IN THE TRIAL COURT’S APPARENT BELIEF THAT IT HAD NO DISCRETION TO REDUCE THE SCHOOL ZONE ENHANCEMENTS AS PART OF AN EXCEPTIONAL SENTENCE WAS HARMLESS.

Mohamed contends that the trial court erred when it ruled that it had no discretion to impose an exceptional sentence that reduced the 72 months of enhancements. Although the record is

⁹ Such a holding would not require Mohamed to serve the enhancement time “in total confinement” as he alleges. Brief of Appellant at 16-17. The requirement that deadly weapon and firearm enhancements be served “in total confinement” operates to prohibit the Department of Corrections from transferring an offender to work release or a vocational educational program during such enhancement time. In re Pers. Restraint of King, 146 Wn.2d 658, 664, 49 P.3d 854 (2002). Because there is no such requirement in the school zone enhancement statute, Mohamed’s eligibility for work release or any other partial confinement program would not be affected during the 72 months he serves on the enhancements.

not entirely clear on this point, the State agrees that it appears that the trial court may have believed that it could not reduce the enhancement time even if it found that an exceptional sentence was appropriate. Whether the trial court could in fact do so is not a settled question. However, because the record indicates that the trial court exercised its discretion and determined that an exceptional sentence was not warranted in this case, any error was harmless.

a. Relevant Facts.

At sentencing, Mohamed also asked the trial court to impose an exceptional sentence of three to nine months in work release. CP 105-16. The State argued that an exceptional sentence was not warranted, and recommended that the court impose a standard range sentence plus the 72 months comprising the three consecutive enhancements. CP 158-59.

The record suggests that the trial court may have believed it had no discretion to reduce the enhancement time or run the enhancements concurrently even if it found that an exceptional sentence was warranted. RP 594, 618. The trial court considered and rejected the justifications for an exceptional urged by Mohamed, and imposed concurrent low-end standard range

sentences of 20 months on each count, plus the three consecutive 24-month school zone enhancements, for a total sentence of 92 months. RP 618; CP 128.

- b. Because The Trial Court Found That An Exceptional Sentence Was Not Warranted, Any Error As To How Much Of Mohamed's Sentence Could Be Affected By An Exceptional Sentence Was Harmless.

Under the SRA, a trial court may impose a sentence outside the standard sentence range if the court finds that substantial and compelling reasons justify an exceptional sentence. RCW 9.94A.535. The State is aware of no published case that addresses whether a trial court may modify a school zone enhancement as part of an exceptional sentence. This Court need not reach that issue, because even if the trial court erred in believing that it could not modify the consecutive school zone enhancements as part of an exceptional sentence, the error was harmless.

The record indicates that the trial court knew that it had the discretion to impose exceptional sentences on Mohamed's base sentences (rather than a sentence within the standard range of 20 to 60 months) if it found that an exceptional sentence was warranted. RCW 9.94A.535(1); RP 618-19. Because Mohamed

had requested an exceptional sentence of three to nine months, the trial court had to determine whether to impose one even after deciding that it had no discretion as to the enhancement time. CP 108; RP 618. Mohamed's argument for an exceptional sentence focused primarily on claims of "sentencing entrapment" and arguments that Mohamed was induced to commit the offenses by others.¹⁰ CP 108-14.

The trial court declined to impose an exceptional sentence, instead imposing concurrent 20-month sentences, the low end of the standard range, on each count, with the enhancements running consecutively to that. RP 619. Just before announcing that sentence, the trial court explained that it was imposing that sentence "not because I feel like my hands are tied," but because "I find absolutely no evidence of entrapment. I don't find any evidence of sentencing entrapment here." RP 618. This indicates that the trial court considered Mohamed's arguments that an exceptional sentence was warranted and rejected them, finding no basis to depart from the presumptive sentence.

¹⁰ Although Mohamed also cited in his briefing the statutory mitigating factor that the multiple offense policy results in a presumptive sentence that is clearly excessive, he went on to write that "it cannot be reasonably argued that the operation of the multiple offense policy has resulted in a presumptive guideline range that is exceedingly excessive."

The record indicates that the trial court's analysis turned not on whether the enhancements could be reduced as part of an exceptional sentence, but on the absence of a sufficient basis to depart from the standard range at all. RP 618-19. Thus, even had the trial court believed that an exceptional sentence could be used to reduce the enhancements or run them concurrently, the result would have been the same. Any error in the trial court's apparent belief that it could not reduce the enhancements as part of an exceptional sentence was therefore harmless.

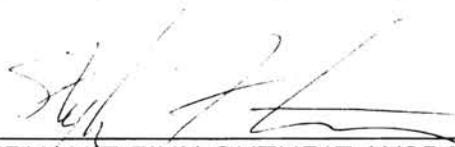
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Mohamed's convictions and sentences.

DATED this 26th day of January, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
STEPHANIE FINN GUTHRIE, WSBA #43033
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to David Zuckerman, the attorney for the appellant, at David@DavidZuckermanLaw.com, containing a copy of the BRIEF OF RESPONDENT, in State v. Ali Abukar Mohamed, Cause No. 72328-6, 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.

Dated this 26th day of January, 2015.

U Brame

Name:

Done in Seattle, Washington

72328-6
1/26/15