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

STATE OF WASHINGTON,	)	No. 39019-5-III
	)	
Respondent,	)	
	)	
v.	)	OPINION PUBLISHED
	)	IN PART
JAROD ROLAND TAYLOR,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Jarod Roland Taylor appeals his conviction for unlawful possession of a firearm in the second degree. In the published portion of this opinion, we address his arguments that (1) the trial court erred by concluding he was not seized when a police officer held his identification and called dispatch, and (2) the prosecutor committed misconduct during rebuttal closing argument when he told jurors they were not required to find that Mr. Taylor actually knew the firearm was in his truck.

We conclude that Mr. Taylor was not seized because the officer did not use physical force or a show of authority. Absent this, a reasonable person could not believe they were not free to leave *due to* an officer's use of physical force or a show of authority. This is especially true where, as here, the officer assured the person they were not

suspected of any criminal activity.

We further conclude that Mr. Taylor waived his argument of prosecutorial misconduct by failing to object to the prosecutor's misstatement of the law. The prosecutor's misconduct of misstating the law was not flagrant or ill intentioned. He correctly stated the law throughout most of his argument, and a timely objection could have cured his misstatement.

FACTS

We take our facts from the uncontested portions of the trial court's findings[1] and from the arresting officer's audio-video body camera.

On February 2, 2021, at around 9:00 p.m., Moses Lake Police Department Officer Colton Ayers received a report of a theft from the local Lowe's hardware store. Dispatch advised the officer that the suspect was wearing jeans and a white sweatshirt and that he was carrying items from the store. The officer drove to an open field behind Lowe's after a store employee reported the suspect had headed in that direction.

Once in the field, Officer Ayers located a parked Toyota pickup truck. He looked through the windows of the truck for the suspect or the stolen merchandise but found

[1] "[C]hallenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, where the findings are unchallenged, they are verities on appeal." *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

neither. He then ascended a 20-foot high dirt mound near the truck to gain a better view of the field. At the top of the mound, Officer Ayers encountered Jarod Roland Taylor, who was sleeping.

The officer shined a flashlight on Mr. Taylor because it was dark and asked for his identification. At this point, the officer's body camera audio begins. Mr. Taylor asked, "What is going on?" Ex. D1 at 00:31-1:00. The officer replied,

> So someone saw someone running out the back of Lowe's over here in the field with a bunch of stuff in their hands . . . and you don't match the description or anything, but we just gotta, I just gotta get your name just so we have that in case we need to contact you again at some point.

Ex. D1 at 00:31-1:00.

Mr. Taylor handed his identification to Officer Ayers. After the two had a brief cordial discussion, the officer provided Mr. Taylor's name and birthdate to dispatch.[2] Officer Ayers returned Mr. Taylor's identification to him. Mr. Taylor then said the truck was his and asked if it was all right—him being there. The officer responded it was, unless someone complained.

[2] Specifically, Officer Taylor told dispatch: "So, last of Taylor, first of Jarod-john, adam, robert, ocean, david-seven sixteen of eighty-two." Ex. D1 (1:27-1:35).

Soon after, dispatch reported the information to Officer Ayers, and the officer asked Mr. Taylor if he knew he had a felony warrant. Mr. Taylor said he did not, and the officer arrested Mr. Taylor.

Around the same time, Officer Caleb Martin arrived and looked inside the windows of the truck where he saw the barrel of a rifle and two boxes of ammunition. After Officer Martin obtained a warrant, he seized the rifle.

Pretrial procedure

The State charged Mr. Taylor with unlawful possession of a firearm in the second degree. Before trial, Mr. Taylor moved to suppress all statements and evidence gathered by law enforcement during his "warrantless seizure and detention." Clerk's Papers (CP) at 31. He argued that Officer Ayers had no reasonable, articulable suspicion that he was engaged in criminal activity and that he was unlawfully seized when Officer Ayers asked to see his identification. He also argued that the officers lacked authority to search the flatbed of his pickup truck before they obtained a warrant.

The court held a suppression hearing during which both Officer Ayers and Mr. Taylor testified. At the start of the suppression hearing, the State conceded the portion of the motion to suppress related to the search of the flatbed of the pickup truck. During the

hearing, the court admitted and viewed the three-minute audio-video clip from the officer's body camera.

At the end of the hearing, the court announced its findings of fact and conclusions of law. The court determined that there was not "coercion or show of force that would cause a reasonable person to feel they weren't able to break off the contact" and denied Mr. Taylor's motion to suppress. Rep. of Proc. (RP) (Mar. 24, 2022) at 42. The court later entered its written findings of fact and conclusions of law. The court's written conclusions, which actually are findings, provide in relevant part:

> 1. There was nothing about the contact that suggested the defendant was not free to leave prior to the time the officer learned the defendant had a warrant.
> . . . .
> 3. The encounter was brief and cordial. There was no show of coercion or force.
> 4. Officer Ayers did not use any show of authority or force when he requested identification from the defendant.
> . . . .
> 6. Considering the totality of the circumstances, the Court cannot find there was any sort of coercion of [sic] force that would lead a reasonable person to believe he or she was not free to leave.

CP at 53.

Trial

The case proceeded to a jury trial. The State called three Moses Lake Police Department officers to testify. The officers testified consistent with the facts above. In

addition, Officer Ayers testified that Mr. Taylor told him the truck was his and that when he searched Mr. Taylor, he found the keys to the truck.

Mr. Taylor stipulated to the fact that he had a prior felony conviction. The defense rested without calling any witnesses.

Jury instructions

The court instructed the jury on the charged crime. The to-convict instruction required the jury to find that the State had proved three elements beyond a reasonable doubt, including that Mr. Taylor "knowingly had a firearm in his possession or control." CP at 67. The court also instructed the jury on the definition of "knowledge":

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly is required to establish an element of a crime, the element is also established if a person acts intentionally.

CP at 65.

Closing arguments and rebuttal

During the State's initial closing argument, the prosecutor correctly and repeatedly told the jury that the State needed to prove that Mr. Taylor knowingly possessed a

firearm. He read to the jury the instruction that defined "knowledge." From it, the prosecutor argued the circumstances why it should find that Mr. Taylor had knowledge, including that the truck was his, that an officer, when looking through the window, saw the partly exposed rifle, and that after they obtained the search warrant and searched the truck, they found gun scopes inside the center console, a bullet inside the pocket of the front door, and a box of bullets next to the rifle. The prosecutor argued, given these circumstances, it was unreasonable "to believe that the defendant did not know that that gun was in there." RP (Apr. 7, 2022) at 217.

During the State's rebuttal closing, the prosecutor argued:

> [Defense counsel] states that the [S]tate has not proved to you that the defendant knew that a firearm was inside the truck. And again, I just want to quickly . . . refresh your memory about . . . the definition of knowledge.
>
> It states in the second paragraph, if a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> *So based on the circumstances, it's not required that you find that he knew*. But the question is did [Mr. Taylor] have information that would lead a reasonable person to believe that a firearm was in that truck?

RP (Apr. 7, 2022) at 230-31 (emphasis added). Defense counsel did not object to the prosecutor's misstatement of the law. Soon after, toward the end of his closing rebuttal, the prosecutor told the jury, "the [S]tate's burden in this case is to prove that the defendant possessed a firearm knowingly." RP (Apr. 7, 2022) at 232.

The jury returned a guilty verdict. The court sentenced Mr. Taylor to 20 months of confinement and imposed the $500 victim penalty assessment (VPA). The court also found Mr. Taylor to be indigent.

Mr. Taylor timely appealed.

ANALYSIS

NO SEIZURE

Mr. Taylor contends the trial court erred when it denied his motion to suppress because he was unconstitutionally seized. We disagree.

Whether police have seized a person is a mixed question of law and fact. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). The trial court is tasked with resolving issues of credibility and weighing evidence, and we give great deference to its factual findings. *State v. Budd*, 186 Wn. App. 184, 196, 347 P.3d 49 (2015), *aff'd*, 185 Wn.2d 566, 374 P.3d 137 (2016). The ultimate determination of whether those facts constitute a seizure is one of law and is reviewed de novo. *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009).

Challenged findings entered after a suppression hearing that are supported by substantial evidence are binding and, where findings are unchallenged, they are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). "Substantial

evidence" is enough to persuade a fair-minded person of the truth of the stated premise. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

Article I, section 7 of the Washington Constitution protects against unwarranted governmental intrusion into a person's private affairs. The Fourth Amendment to the United States Constitution provides similar protection, prohibiting unreasonable searches and seizures. Because article I, section 7 of the Washington Constitution "'grants greater protection to individual privacy rights than the Fourth Amendment,'" we evaluate whether a seizure occurred under the Washington Constitution. *State v. Flores*, 186 Wn.2d 506, 512, 379 P.3d 104 (2016) (quoting *Harrington*, 167 Wn.2d at 663).

"A seizure occurs only 'when, in view of all the circumstances surrounding the incident, a reasonable person would have believed [they were] not free to leave' or 'free to otherwise decline an officer's request and terminate the encounter' due to an officer's use of 'physical force or a show of authority.'" *State v. Meredith*, 1 Wn.3d 262, 270, 525 P.3d 584 (2023) (alteration in original) (internal quotation marks omitted) (quoting *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998)). The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained. *Harrington*, 167 Wn.2d at 663. The defendant bears the burden of proving a seizure occurred in violation of article I, section 7. *Id*. at 664.

Washington courts distinguish between a warrantless social contact, which article I, section 7 generally permits, and a warrantless seizure, which it generally prohibits. *Id*.; *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993). During a social contact, an officer need not warn the citizen of his right to remain silent or walk away. *State v. Mote*, 129 Wn. App. 276, 281, 120 P.3d 596 (2005). Because courts have not defined a social contact, the term "occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying 'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention." *Harrington*, 167 Wn.2d at 664.

Interactions that our Supreme Court has confirmed do not indicate a seizure include officers asking for identification, or obtaining identification, or calling dispatch for information about the subject. *See, e.g., O'Neill*, 148 Wn.2d at 572, 581 (asking for identification, obtaining car registration and insurance); *Armenta*, 134 Wn.2d at 6, 11, 21 n.10 (asking for identification, obtaining driver's license, calling dispatch for information about the subject). Conversely, interactions that our Supreme Court has confirmed might indicate a seizure includes "'the threatening presence of several officers, the display of a weapon by an officer, physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" *Young*, 135 Wn.2d at 512 (quoting *United States v. Mendenhall*,

446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). "'When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.'" *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668 (2000) (quoting *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)).

Challenged "conclusions" supported by substantial evidence

Mr. Taylor assigns error to the trial court's conclusions of law 3 and 4. The former states, "The encounter was brief and cordial. There was no show of coercion or force." CP at 53. The latter states, "Officer Ayers did not use any show of authority or force when he requested identification from the defendant." CP at 53. These challenged conclusions are mislabeled findings of fact. We review a mislabeled finding of fact or conclusion of law for what it really is. *State v. Conway*, 8 Wn. App. 2d 538, 552 n.8, 438 P.3d 1235 (2019).

To the extent the mislabeled conclusions are findings, they are supported by substantial evidence. The audio-video of the encounter is helpful in this regard. It shows the encounter was brief and cordial. There was nothing in Officer Ayer's words or conduct that can be construed as displaying physical force or authority until the officer learned of Mr. Taylor's outstanding warrant.

Purported seizure

Mr. Taylor argues he was unconstitutionally seized when Officer Ayers obtained his identification and called dispatch for an identification check. The State points to *State v. Hansen*, 99 Wn. App. 575, 994 P.2d 855 (2000) as refuting Mr. Taylor's argument.

In *Hansen*, the court analyzed whether a seizure occurred when two police officers approached Mr. Hansen and asked for his identification. *Id*. at 576-78. Although the officers were not in uniform, their guns and badges were visible. *Id*. at 576-77. One officer asked Mr. Hansen for his identification. *Id*. at 577. Mr. Hansen complied by handing the officer his driver's license. *Id*. The first officer passed the license to the second officer, who then wrote down Mr. Hansen's name and date of birth and handed the license back to him. *Id*. The second officer held onto Mr. Hansen's license for "approximately five to 30 seconds." *Id*. The first officer continued to talk with Mr. Hansen while the second officer conducted a warrants check. *Id*. We concluded that the encounter did not ripen into an unlawful detention, explaining, "There is no reason handing the license to another officer standing beside the first would have led a reasonable person to believe that he was not free to leave." *Id*. at 579.

Mr. Taylor argues this case is less like *Hansen* and more like *State v. Crane*, 105 Wn. App. 301, 19 P.3d 1100 (2001), *overruled on other grounds by O'Neill*, 148 Wn.2d

at 571. In *Crane*, a police officer was monitoring a house while other officers obtained a warrant to search the residence for stolen property. *Id.* at 304. The officer saw a car pull into the driveway. *Id*. The officer pulled his patrol car into the driveway and blocked the car as three men got out and walked toward the house. *Id*. The officer got out of his car and "asked or told" the men to stop. *Id*. The men complied and walked toward the officer. *Id*. At that point, a woman came out of the house to ask what was going on. *Id*. The officer told the woman to remain inside and not come out and that the police were not allowing people to come in and out of the house because they were obtaining a warrant. *Id*. The officer asked each man for his identification and stood with the men while he radioed to check for warrants. *Id*. at 304-05. The warrants check took a couple of minutes and returned a warrant for Mr. Crane. *Id*. at 305. At that point, the officer arrested Mr. Crane and located a bag of cocaine that had fallen from his wallet. *Id*. Mr. Crane moved the trial court to suppress the cocaine, arguing he was illegally seized. *Id*. The trial court denied his motion and found him guilty of possession of a controlled substance. *Id*.

On appeal, we explained that Mr. Crane's case "falls between the situation . . . where the officer walks away with the identification and runs a warrants check and the situation in *Hansen*, where the officer merely records information from the identification

and returns it." *Id*. at 311. We determined that a reasonable person in Mr. Crane's position would not feel free to leave because the contact did not occur in public, the officer parked his car behind the car Mr. Crane arrived in, the officer retained Mr. Crane's identification while he ran the warrant check, and the officer made Mr. Crane aware that he had entered an area that the police had secured. *Id*. Our review of *Crane* convinces us of a more principled reason why a seizure had occurred: a reasonable person in Mr. Crane's position would not feel free to leave due to the police officer's show of authority. There, the officer displayed his authority by blocking the car in the driveway, directing the home's occupant to go back inside, and telling everyone they were not allowed to go in or out of the house because a warrant was being obtained.

We believe this case is similar to *Hansen* and distinguishable from *Crane*. As in *Hansen*, Officer Ayers held onto Mr. Taylor's identification briefly and spoke with him while dispatch obtained information about Mr. Taylor. As opposed to the officer in *Crane*, Officer Ayers did not display his authority by blocking Mr. Taylor from leaving nor did he issue any verbal commands. Because Officer Ayers did not use physical force or display authority, a reasonable person in Mr. Taylor's position would not have believed he was unable to leave or terminate the encounter "*due to* an officer's use of 'physical

force or a show of authority.'" *Meredith*, 1 Wn.3d at 270 (emphasis added) (quoting *Young*, 135 Wn.2d at 510).

Mr. Taylor cites two cases to support his argument that a seizure can occur even if an officer is cordial. We agree. The first case he cites is *State v. Beito*, 147 Wn. App. 504, 195 P.3d 1023 (2008). The second case he cites is *Meredith*.

In *Beito*, officers drove by a convenience store at 3:40 a.m. and noticed two people standing near a car parked in the lot. 147 Wn. App. at 507. Minutes later, they drove by again and noticed the two people now sitting in the car. *Id.* To ensure the safety of the premises, the officers parked directly behind the parked car. *Id.* One officer approached the driver and the other approached the passenger, Mr. Beito. *Id.* After a short discussion, the driver asked if she could go. *Id.* The officer near her said she could not. *Id.* The officer near Mr. Beito asked for his identification but Mr. Beito did not have any, so he gave his name. *Id.* A police data base search showed Mr. Beito had a warrant for his arrest. *Id.* In a search incident to arrest, the officers found a stolen gas card in Mr. Beito's back pocket. *Id.* The State charged him with second degree possession of stolen property. Mr. Beito filed a motion to dismiss. The trial court granted the motion and dismissed the charge. *Id.* at 507. On appeal, we affirmed because the totality of the circumstances showed that Mr. Beito was not free to leave. *Id.* at 510-11.

Beito is readily distinguishable. There, the officers displayed their authority by blocking the driver's car from leaving and by later telling the driver she was not free to go. A reasonable person in the passenger seat would not have felt free to leave or terminate the encounter due to the officers' show of authority.

In *Meredith*, two deputies boarded a public bus and checked whether Mr. Meredith had paid the fare. 1 Wn.3d at 263-66. One of them, in a conversational tone, asked Mr. Meredith for his proof of payment. *Id.* at 265, 274. Mr. Meredith could not prove payment, and the deputies removed him from the bus at the next stop and detained him. *Id*. at 266. The majority of justices concluded that Mr. Meredith was unconstitutionally seized, but *when* that seizure occurred was a source of the fractured opinion.

The lead opinion, relied on by Mr. Taylor, garnered only three signatures. It noted that a conversational tone weighed against the notion that Mr. Meredith was seized but added, "we must consider the language the deputy used, in addition to his tone of voice." *Id*. at 274.

This point cuts across Mr. Taylor's argument. Here, Officer Ayers's language would have assured a reasonable person that the officer was not making a show of authority: the officer assured Mr. Taylor he was not a suspect, but wanted to "get [his] name just so we have that in case we need to contact you again at some point in time."

Ex. D1 at 00:51-1:00. Context matters. Here, a reasonable person in Mr. Taylor's position would not feel he was being detained. *See Harrington*, 167 Wn.2d at 663 (The relevant question is whether a reasonable person in the defendant's position would feel they were being detained.).

Our dissenting colleague would proffer a new rule: whenever an officer retains a citizen's driver's license, no matter how brief, the citizen is seized. Dissent at 9. This new rule is premised on the notion that an officer's request for identification is sufficiently coercive to amount to a show of authority. Dissent at 9. It would apply to all encounters, whether the citizen is a suspect, a witness, or a crime victim. Later, to render this new rule "consistent" with *O'Neill*, the dissent amends it to: a seizure occurs when the officer has the driver's license *and* calls dispatch for a warrants check. Dissent at 10-11. This is not the law in Washington. A show of authority requires more than obtaining a subject's driver's license and calling dispatch for information about the subject. *See, e.g.*, *Armenta*, 134 Wn.2d at 6, 11, 21 n.10 (seizure did not occur when officer obtained Armenta's driver's license and called dispatch for a driver's check, especially, as in the

case here, when not investigating criminal activity).[3]

We reject Mr. Taylor's arguments that he was unconstitutionally seized. We conclude that the trial court did not err when it denied Mr. Taylor's suppression motion.

PROSECUTORIAL MISCONDUCT CLAIM WAIVED

Mr. Taylor contends the prosecutor committed misconduct in rebuttal closing argument when he misstated the mens rea element, actual knowledge. As explained below, we conclude he waived this error.

The defendant bears the burden of showing that the prosecutor's comments were improper and prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). A prosecuting attorney commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015).

However, where, as here, the defendant fails to object or request a curative instruction, the issue of misconduct is waived unless the prosecutor's conduct was so flagrant and ill intentioned that an instruction could not have cured the resulting

[3] The dissent attempts to distinguish this case from *Armenta* by saying here, the officer requested a warrants check while the officer in *Armenta* requested a driver's check. Not so. Here, the recorded video shows the officer providing only Mr. Taylor's name and date of birth to dispatch; he did not ask dispatch to check for warrants. It is mere semantics, whether one refers to such calls as a "driver's check," an "identification check," or a "warrants check." Regardless of semantics, invariably, the officer provides dispatch with a name and date of birth, and dispatch runs them through its database.

prejudice. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that (1) "'no curative instruction would have obviated any prejudicial effect on the jury'" and (2) the misconduct resulted in prejudice that "'had a substantial likelihood of affecting the jury verdict.'" *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). The focus should be less on whether the prosecutor's misconduct was flagrant and ill intentioned and more on whether the resulting prejudice could have been cured. *Id*. at 762. We review the purported misconduct in the context of the entire argument, the issues in the case, and the instructions given to the jury. *See State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Jurors are presumed to follow jury instructions. *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 172, 410 P.3d 1142 (2018).

The State charged Mr. Taylor with unlawful possession of a firearm in the second degree under RCW 9.41.040(2). Although the statute does not contain an express mens rea element, our Supreme Court recognized an essential knowledge mens rea element implied in the statute. *State v. Anderson*, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000).

Our Supreme Court's precedent requires the State to prove a subjective standard of "actual knowledge" whenever the State must prove the mens rea of knowledge. *Allen*,

182 Wn.2d at 374; *State v. Shipp*, 93 Wn.2d 510, 515-17, 610 P.2d 1322 (1980). Despite this, Washington courts allow the jury to be instructed, as was Mr. Taylor's jury, of a permissible presumption of actual knowledge by a finding of constructive knowledge. *State v. Jones*, 13 Wn. App. 2d 386, 404-05, 463 P.3d 738 (2020). Despite this permissive presumption, the jury must still find subjective actual knowledge. *Id*. at 405.

Here, the State concedes the prosecutor's misstatement of the law in his rebuttal argument was improper. We accept the State's concession. During rebuttal, the prosecutor said: "*So based on the circumstances, it's not required that you find that he knew*." RP (Apr. 7, 2022) at 231. This misstated the law. The jury *was* required to find that Mr. Taylor had actual knowledge that he possessed the rifle. However, because Mr. Taylor's defense counsel did not object, well-settled law results in the error being waived unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *Stenson*, 132 Wn.2d at 719.

The State argues that an objection and curative instruction could have cured any resulting prejudice and that Mr. Taylor cannot show the statement likely affected the jury's verdict. We agree.

As detailed above, the prosecutor correctly and repeatedly argued the required knowledge element during his initial closing argument and also toward the conclusion in

his rebuttal argument. He also correctly argued that the instruction defining "knowledge" allowed the jury to consider all of the circumstances that would cause a reasonable person to know the rifle was in the truck. Defense counsel responded that there was no evidence Mr. Taylor had touched the rifle and no evidence he actually knew the rifle was there.

In rebuttal, the prosecuting attorney again reminded jurors that they were permitted but not required to find that Mr. Taylor had knowledge of the gun, "if a person has information that would lead a reasonable person in the same situation to believe that a fact exists." RP (Apr. 7, 2022) at 230. The prosecutor then misstated the law, "So based on the circumstances, it's not required that you find that he knew. But the question is did he have information that would lead a reasonable person to believe that a firearm was in that truck?" RP (Apr. 7, 2022) at 231.

Defense counsel could have timely objected to the prosecutor's misstatement. A correct ruling by the court would have sustained the objection, and a proper curative instruction would have reminded the jurors that the law requires the State to prove actual knowledge. Because a curative instructive would have cured any resulting prejudice, we conclude Mr. Taylor waived his prosecutorial misconduct claim.

Mr. Taylor argues that under our Supreme Court's decision in *Allen* and our recent decision in *Jones*, a prosecutor's misstatement of the knowledge element constitutes

flagrant and ill-intentioned conduct that need not be preserved with an objection and that an objection could not have cured the resulting prejudice. We disagree. In *Allen*, the State charged Mr. Allen with being an accomplice to aggravated first degree murder and needed to prove that Mr. Allen knew the murder victims were police officers. 182 Wn.2d at 370-73. During closing arguments, the prosecuting attorney repeatedly used the phrase "should have known" when describing the definition of "knowledge." *Id*. at 371-72. The prosecutor repeated this phrase at least five times during closing argument—in a slide show shown during closing multiple times, in rebuttal argument, and in four slides shown during rebuttal. *Id*. at 376-77. Defense counsel twice objected, and the trial court overruled both objections. *Id.* at 372. During jury deliberations, the jury sent a question to the court: "'If someone "should have known" does that make them an accomplice?'" *Id.* The court instructed the jury to refer back to its instructions. *Id*. at 373. The jury returned guilty verdicts. *Id*.

On appeal, the Supreme Court reversed, concluding that the prosecuting attorney's arguments were both improper and prejudicial. *Id.* at 373-80. The court reasoned that the prosecutor misstated a key element of the State's case multiple times and that the repetitive misstatements could have had a cumulative effect. *Id*. at 375-76. The court also reasoned that the trial court's overruling of defense counsel's objections "potentially

[led] the jury to believe that the 'should have known' standard was a proper interpretation of the law." *Id*. at 378. Because defense counsel twice objected to the prosecutor's misstatements of law, the *Allen* court did not discuss the heightened flagrant or ill-intentioned standard for prosecutorial misconduct, nor did it hold that a prosecutor's misstatement of the knowledge element satisfied that standard. *See id*. at 378-80.

In *Jones*, the State charged Mr. Jones for possession of a stolen vehicle. 13 Wn. App. 2d at 389. The prosecutor told the jury at least five times that they could convict if Mr. Jones "'should have known.'" *Id*. at 405. Unlike defense counsel in *Allen*, defense counsel in *Jones* did not object to the prosecutor's misstatements. *Id.* at 398. The jury convicted Mr. Jones. *Id*. On appeal, the lead and majority opinions concluded that the prosecutor committed misconduct and that the conduct satisfied the flagrant and ill-intentioned standard. *Id*. at 406. The concurring opinion, signed by a majority of the panel, emphasized the flagrant and ill-intentioned nature of the prosecutor's repeated misstatements of law: "By blatantly inviting the jury to convict based on a lesser standard of proof, the prosecutor deprived Mr. Jones of a fair trial." *Id.* at 409 (Pennell, C.J., concurring).

Here, the prosecutor correctly and repeatedly argued to the jury that the State was required to prove Mr. Taylor knowingly possessed the rifle. Soon after the prosecutor's

misstatement in rebuttal, he corrected it. The prosecutor's misstatement was not flagrant or ill intentioned and, just as important, a timely objection could have allowed the trial court to cure any resulting prejudice by reminding the jury that the State must prove actual knowledge. For the foregoing reasons, we conclude that Mr. Taylor waived the claimed error.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Taylor argues his trial counsel was ineffective for failing to object and request a curative instruction after the prosecutor misstated the law. We disagree.

We review a claim of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Criminal defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018).

Washington follows the *Strickland*[4] standard for reversal of criminal convictions based on ineffective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). A defendant bears the burden of showing that (1) his counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and, if so, (2) there is a reasonable probability that but for counsel's poor performance, the outcome of the proceedings would have been different. *See id*. at 32-35. If either prong is not satisfied, the inquiry ends. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Focusing on the second prong, Mr. Taylor cannot demonstrate there is a reasonable chance that, but for defense counsel's failure to object, the outcome would have been different. The to-convict instruction and the "knowledge" instruction were correct statements of the law and they informed the jury that the State was required to prove that Mr. Taylor knowingly possessed a firearm. Jurors are presumed to follow jury instructions. *Phelps*, 190 Wn.2d at 172. Also, the prosecutor generally stated the law correctly and, of particular importance, toward the end of his rebuttal argument, the prosecutor told the jury it was the State's burden to prove Mr. Taylor possessed a firearm

[4] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

knowingly. The jury was not confused on the law.

VPA

Mr. Taylor argues that recent changes in the law require us to direct the trial court to strike the VPA from his judgment and sentence. We agree.

Under former RCW 7.68.035(1)(a) (2018), the sentencing court was required to impose a VPA on any individual found guilty of a crime. Effective July 1, 2023, the legislature amended former RCW 7.68.035 to preclude superior courts from imposing a VPA on a defendant who, at the time of sentencing, is found to be indigent as defined in RCW 10.01.160(3). *See* LAWS OF 2023, ch. 449, § 1(1), (27). Statutory amendments related to costs imposed upon conviction generally apply to all cases pending on direct appeal that are not yet final. *See, e.g.*, *State v. Wemhoff*, 24 Wn. App. 2d 198, 201-02, 519 P.3d 297 (2022); *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018).

Here, the trial court found Mr. Taylor to be indigent. Because his direct appeal was pending when the amendment became effective, the amendment applies to him. We direct the trial court to vacate the VPA from Mr. Taylor's judgment and sentence.

Affirmed, but remanded to strike VPA.

Lawrence-Berrey, J.

I CONCUR:

Pennell, J.

No. 39019-5-III

FEARING, C.J. (dissenting) — I dissent from the majority's holding that Officer Colton Ayers of the Moses Lake Police Department did not seize Jarod Taylor for purposes of article I, section 7 of the Washington Constitution. A seizure occurred when Ayers requested that Taylor tender his identification card and particularly when Officer Ayers employed the card to perform a warrant check. I would suppress evidence of a gun being inside the vehicle driven by Taylor.

SEIZURE OF TAYLOR

As odd as it may seem, a weary Jarod Taylor climbed atop a 15-foot dirt dune to doze at 9:00 p.m. on a dark, frigid night, with the pickup truck he drove parked nearby. Officer Colton Ayers clambered up the same rise of soil to reconnoiter the area surrounding a Lowe's Home Improvement store, where a theft had earlier transpired. Taylor did not match the description of the pilfering suspect as radioed by police dispatch.

After reaching the summit of the hillock, Officer Colton Ayers awoke a startled Jarod Taylor. Ayers stood over Taylor and flashed a light at Taylor. Taylor testified that the light shone in his face, although the trial court entered no such finding. The Axon video of the encounter shows that, if the light flashed in Taylor's face, direct light into the eyes was only momentary. Ayers wore a police uniform with a service belt that holstered

a gun and a taser. Ayers told Taylor that he did not match the description of the suspect, but that Ayers still intended to ask questions. Officer Ayers asked Jarod Taylor: what are you doing here? Taylor answered he did not feel good. Ayers asked Taylor for identification. Taylor testified that Ayers spoke with an authoritative tone, although the trial court found Ayers spoke politely. Taylor handed the officer an identification card, presumably a driver's license. The officer called dispatch. Dispatch informed Ayers of an outstanding warrant for Taylor.

Regardless of how sanguinely Officer Colton Ayers spoke, any unreasonable or reasonable person in the prone position, in which Jarod Taylor lay, would conclude that he could not ignore the directions of Officer Ayers to surrender identification and he could not casually walk from the presence of the officer who towered above him with a gun and taser at his ready. A reasonable person, under these circumstances, would conclude that Ayers asserted authority over him or her. These conclusions arrive even easier when considering Taylor's disorientation when awakened from sleep.

The majority opinion, holding otherwise, illustrates an inability of judges to view a police encounter from the perspective of a common person. The holding of the majority corroborates an observation expressed in an earlier concurring opinion that preached that pampered judges lack qualifications to assess how a reasonable person would act or think when contacted by a law enforcement officer. *State v. Carriero*, 8 Wn. App. 2d 641, 667, 439 P.3d 679 (2019) (Fearing, J., concurring). The majority opinion here also ignores the

known consequences of a citizen ignoring an officer's request no matter how benign the request may be.

If a defendant testifies that he or she did not deem himself or herself free to exit or free to ignore the officer's requests, the court ignores such testimony. *State v. Carriero*, 8 Wn. App. 2d 641, 655-56 (2019); *State v. Mote*, 129 Wn. App. 276, 292-93, 120 P.3d 596 (2005). Still, Jarod Taylor testified to the obvious and he spoke to the sentiments of all people, including suspect or nonsuspect, criminal or saint, child or nonagenarian, misfit or connected, logical or illogical, educated or unlettered, reasonable or unreasonable people. Taylor declared that police officers immediately intimidate him and he was intimidated on this occasion. He thought he was guilty of a crime. The officer would not leave him alone. Officer Ayers asked a series of questions that Taylor believed he was obliged to answer. When posing the questions, Ayers kept the flashlight on Taylor and stood over him with a badge and gun showing. Taylor grows defensive when someone beams a flashlight at him. On this occasion, he felt like he was being interrogated. When Officer Ayers asked for identification, Taylor concluded he had no choice. In short, Taylor believed he could not terminate the conversation or leave the officer's presence because of a show of authority.

Courts pay lip service to the principle that the court must look to the totality of the circumstances but, when discrete factors favor a holding that no seizure occurred, we seize on one or more of those factors to rule in favor of the government. For example, Washington Supreme Court precedent has made clear that an officer's use of a flashlight

or spotlight to illuminate a person, without a show of authority or command, does not raise an encounter to the level of a seizure. *See State v. O'Neill*, 148 Wn.2d 564, 578, 62 P.3d 489 (2003); *State v. Young*, 135 Wn.2d 498, 512-13, 957 P.2d 681 (1998). In *State v. O'Neill*, the law enforcement officer shined a flashlight into the driver's side of the car in order to see Matthew O'Neill. In *State v. Young*, an officer aimed a spotlight on Kevin Young as he walked on a sidewalk. Neither officer hovered over a prone, weary man, however.

The United States Supreme Court has rejected any per se rules and denied that any one discrete act by officers necessarily constitutes a seizure. *Florida v. Bostick*, 501 U.S. 429, 439, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). Instead, a court must consider the totality of circumstances surrounding the encounter. *Florida v. Bostick*, 501 U.S. 429, 439 (1991); *State v. Carriero*, 8 Wn. App. 2d 641, 656 (2019).

Washington courts have issued a string of decisions occasioning a law enforcement officer asking a citizen for identification despite the officer lacking reasonable suspicion for a stop. In *State v. O'Neill*, 148 Wn.2d 564 (2003), Matthew O'Neill stopped his car in a parking lot of a closed business that recently had been burglarized. Bellingham Police Sergeant West approached the car and asked O'Neill for identification. O'Neill replied that he had been driving with his license revoked. O'Neill gave the officer a false name. Our Supreme Court ruled that an officer does not seize the citizen by asking for the person's name and requesting identification.

State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997), involved the unusual circumstances of two men, Huberto Armenta and David Cruz, while transporting cocaine from Parma, Idaho to Seattle, approaching Prosser Police Officer G.J. Randles at a truck stop to inquire about the location of a mechanic. The two later accepted the clever officer's offer to assist in repairing their car, in which the cocaine rested. On the route to the car, Officer Randles asked both men for their identification so he could inform dispatch as to his location. Randles explained that requesting identification was standard operating procedure for officer safety. Armenta handed Randles an Arizona driver's license. We do not know if Randles took possession of the driver's license and, if so, for how long. Cruz claimed his name to be Luis Perez. Cruz told Randles that he had lost his wallet in Idaho and did not currently have any identification on his person. Officer Randles noticed a bulge in one of Cruz's pockets and asked him if the bulge was a wallet. Cruz said "no" and removed a wad of money with a $20 bill on top, wrapped with a rubber band. Randles then asked Cruz how much money he carried. Cruz said he had $1,000. Armenta then voluntarily produced three bundles of money, each with a $20 bill on top and wrapped with a rubber band, while volunteering that he had three bundles of $1,000 each.

After the production of the bills, Officer G.J. Randles called dispatch for a driver's license check on the names Huberto Armenta and David Cruz. We do not know if Officer Randles then held the license of Armenta. The dispatcher notified Randles that the car was registered to Armenta, that Armenta's Arizona driver's license had been

suspended, and that Armenta had only an identification card in Washington. The dispatcher told Randles that there was no record of a "Luis Perez." Randles then requested assistance from other officers. He also placed the bundles of money in his patrol car for safekeeping. Further contact led to Randles asking about the presence of any drugs or weapons in the vehicle and a request to search the car. After Armenta expressed consent, Randles found baggies of cocaine in the car trunk.

On appeal, the Supreme Court held that Officer G.J. Randles did not seize Huberto Armenta and David Cruz when he asked them for identification. The court held, however, that the officer seized the two men when he placed the money in his patrol car because a reasonable person would not have then considered himself or herself free to leave by that time.

In *State v. Mote*, 129 Wn. App. 276, 120 P.3d 596 (2005), Sheriff Deputy Steve Cox patrolled a neighborhood experiencing drug problems. Cox parked his patrol car behind a second car he deemed suspicious because of the late night and because of a dome light and tail light activated in and on the car. Cox approached the car and asked the driver for identification. When the driver complied, Deputy Cox politely asked the passenger, Curtis Mote, for his identification. Mote knew of an outstanding warrant for his arrest, but complied with Cox's request. He believed compliance was required. Cox returned to his car and learned from dispatch of the arrest warrant. Cox arrested Mote and found the ubiquitous plastic baggie with a white powdery substance inside.

Mote sought to suppress evidence on the basis that he was seized when Sheriff Deputy Cox asked for his identification.

The trial court denied Curtis Mote's motion to suppress and this court affirmed. This court reasoned that Mote, as a passenger in a car parked in public, stood in the same status as a pedestrian. The court followed the rule that the asking of identification from a pedestrian does not constitute a seizure. The court gave no thought to whether the citizen genuinely believes he retains the right to ignore the officer.

Numerous accused, like Curtis Mote, testify that they believed they lacked a choice when asked by a law enforcement officer to provide information or hand the officer identification. Courts never challenge the veracity of such testimony, but rule the testimony irrelevant. Washington courts, after such consistent testimony from accused and no studies showing that a reasonable person considers himself or herself free to ignore the officer, should finally recognize that, when an officer approaches a citizen and asks for identifying information, a reasonable person believes they must comply because of a show of authority. An officer asks for identification only because of his or her authority as a law enforcement officer.

In *State v. Hansen*, 99 Wn. App. 575, 994 P.2d 855 (2000), two officers approached Michael Hansen and asked him for identification. Hansen complied. One officer handed Hansen's license to the other officer, who recorded Hansen's name and birth date and returned the license to Hansen. The second officer held the driver's license for five to thirty seconds. We do not know how long the first officer held the license.

A records check confirmed an arrest warrant for Hansen. A search incident to arrest netted controlled substances. This court held that the handing of the license from one officer to another, when both officers remained in Hansen's presence, did not constitute a seizure.

Numerous decisions pose the circumstances when a citizen, with an outstanding warrant and illegal drugs on his or her person, cooperates with law enforcement officers by giving identification instead of walking away from the officer. No reasonable person would cooperate under these circumstances unless he or she believed the law compelled him or her to obey the officer's request. Walking away is in the citizen's penal interest. If Washington courts truly wish to apply a reasonable person standard, the courts need to recognize the compelling and frightening nature of an officer confronting a citizen.

In four decisions, this court held that the taking of an identification card constituted a seizure. One may differentiate between the facts in those four cases, from the facts already recited in *State v. O'Neill*, *State v. Hansen*, and *State v. Mote*, but the distinctions lack any intellectual satisfaction.

In *State v. Thomas*, 91 Wn. App. 195, 955 P.2d 420 (1998), this court held that a seizure occurred when an officer, while retaining the defendant's identification, took three steps back to conduct a warrant check on his hand-held radio. In *State v. Dudas*, 52 Wn. App. 832, 764 P.2d 1012 (1988), this court determined that the defendant was seized under the Fourth Amendment to the United States Constitution when the sheriff deputy took his identification card and returned to the patrol car, thus immobilizing the

defendant. In *State v. Ellwood*, 52 Wn. App. 70, 757 P.2d 547 (1988), a seizure occurred when Steven Ellwood verbally identified himself and the officer told him to "wait right here" while the officer ran a warrant check on Ellwood's name. In *State v. Crespo Aranguren*, 42 Wn. App. 452, 711 P.2d 1096 (1985), this court found that a seizure occurred when an officer took the defendants' identification documents to his vehicle to write their names down and run warrants checks. The seizure occurred at the time of retaining the identification to determine the existence of any outstanding warrants.

Since a reasonable person does not wish to leave his or her location until an officer returns the driver's license and since the officer knows that one will not leave the location until the return of the license, the law should deem the citizen seized at least by the time of the handing of the driver's license to the law enforcement officer. The citizen reasonably believes the officer expects him or her to stay, and the citizen rationally concludes that he or she must remain in the officer's presence until the return of the identification. Whether the officer stands back three feet, hands the license to another officer three feet away, or walks to the patrol car bears no importance to the belief of the reasonable person. A reasonable person does not make such silly distinctions. Only judges do. The reasonable person believes he or she should stay in place regardless of whether or not the officer instructs the person to stay put and regardless of the tone of voice used. Any direction to surrender one's identification entails a display of the law enforcement officer's authority.

Other courts have recognized that a suspect is effectively immobilized when an officer takes the license. *United States v. Jordan*, 958 F.2d 1085, 1087 (D.C. Cir. 1992); *United States v. Thompson*, 712 F.2d 1356 (11th Cir. 1983); *State v. Painter*, 296 Or. 422, 676 P.2d 309 (1984). Courts have observed the impractical and unrealistic option of a reasonable person in modern society to abandon one's identification, since an individual practically becomes immobilized without adequate identification. *United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995); *State v. Martin*, 2011-0082, p. 9 (La. 10/25/11), 79 So.3d 952, 957; *State v. Daniel*, 12 S.W.3d 420, 427 (Tenn. 2000). The United States District Court, in *United States v. Washington*, 992 F. Supp. 2d 789, 793 (N.D. Ohio 2014), characterized an officer's retention of a driver's license as a "virtual leash."

Jarod Taylor could not cease his contact with Officer Ayers after relinquishment of his identification. He would have abandoned his driver's license, which he needed to drive the pickup truck, if not purchase many goods on credit. Officer Ayers thereby seized him.

Because of the lack of horizontal stare decisis within the Washington Court of Appeals, I am not bound by dubious, or even reliable, previous decisions of this court. *In re Personal Restraint Petition of Arnold*, 190 Wn.2d 136, 138, 410 P.3d 1133 (2018). I am bound by decisions of the Washington Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). If I could not readily distinguish Matthew O'Neill's interaction with Bellingham Police Sergeant West, in the Supreme Court's decision in

State v. O'Neill, from the circumstances of Jarod Taylor's encounter with Officer Colton Ayers, I would reluctantly join in the majority's ruling. But *O'Neill* can be readily distinguished, albeit for a silly reason, but a reason employed by Washington courts. Sergeant West did not call for a warrant check on Matthew O'Neill.

I would also hesitantly join the majority if I could not distinguish *State v. Armenta* or if I concluded that *Armenta* stood for the proposition that an officer can, without reasonable suspicion of criminal activity, ask for and seize one's driver's license for the purpose of conducting a warrant check. The facts, in *State v. Armenta*, include Huberto Armenta handing the officer his driver's license, but we do not know if the officer took it and, if so, for how long. He could have only read the license, while in the hand of Armenta, and remembered the name when later performing a driver's license check. Since either Armenta or David Cruz had driven the car in the state of Washington, a driver's license check was permissible. Under RCW 46.61.020, any person, while operating or in charge of any vehicle, must surrender their driver's license on the request of a law enforcement officer. One's privilege in driving on Washington roads entails an obligation to possess, carry, and surrender the license. RCW 46.61.020 does not authorize the officer to employ the license for a warrant check. Officer G.J. Randles did not perform a warrant check. *State v. Armenta* does not stand for the proposition that a law enforcement officer does not seize a citizen when taking identification and using the identification to perform a warrant check.

After appropriating Jarod Taylor's identification, Officer Colton Ayers immediately requested a warrant search. In *Commonwealth v. Cost*, 657 Pa. 104, 224 A.3d 641 (2020), the Pennsylvania high court held that an officer performs a seizure within the meaning of the federal and state constitutions when asking for identification and using the identification for a warrant investigation. The Oregon Court of Appeals also ruled that retaining a defendant's driver's license while conducting a warrant check effectuated a seizure. *State v. Holcomb*, 203 Or. App. 35, 37-38, 125 P.3d 22 (2005). By a show of authority, the officer demands, from the citizen, information that could directly lead to an arrest.

The majority writes that Officer Colton Ayers never asked for a warrant check, and the majority adds that a driver's license check, performed in *State v. Armenta*, is no different from a warrant check. Regardless, dispatch considered Officer Ayers to desire a warrant check and provided one to him. Ayers used the check to arrest Jarod Taylor. No facts reported in *State v. Armenta* suggest that law enforcement searched any database for an arrest warrant.

The majority writes that Washington law does not support the dissent's rule that an officer seizes a citizen when taking the citizen's driver's license and calling dispatch for information about the citizen. I am not concerned, however, about Colton Ayers calling dispatch for information as to the status of the driver's license. I base the dissent on Ayers calling for information on arrest warrants. When using the road, one consents

to providing information about one's driver's license, but not as to an arrest warrant. A warrants check, just like engaging in criminal activity, can lead directly to incarceration.

If the majority, by its characterization of the dissent's proposed rule, seeks to highlight that no Washington decision expressly holds that an officer seizes a citizen when taking his driver's license and conducting a warrant check, I agree with the majority. Nevertheless, the converse is also true. No Washington case holds that the officer remains within the confines of article I, section 7 of the state constitution when, without reasonable suspicion of a crime, he or she takes the citizen's identification and performs a warrant check. The dissent's rule aligns with the Washington principle that courts look at the totality of the circumstances, follows the general rule that courts analyze the situation in light of the expectations of a reasonable person, affiliates with common sense, and coincides with the persuasive opinions of other courts. Anyway, the majority's and dissent's quibble over the difference between a driver's license search and a warrant check and the nitpicking over whether the officer stepped away from the citizen and, if so, how far the officer walked illustrates the inanity now prevalent in search and seizure law and the fictions promulgated by Washington decisions.

The State emphasizes that Officer Colton Ayers told Jarod Taylor that the latter did not fit the description of the suspect, but that the officer presumably wanted Taylor's identification only in case law enforcement needed to contact Taylor later. One wonders why law enforcement would need to contact Taylor again when Officer Ayers lacked any knowledge that Taylor had seen the burglar. Regardless, law enforcement is entitled to

deceive a citizen. *State v. Lively*, 130 Wn.2d 1, 20, 921 P.2d 1035 (1996); *State v. Markwart*, 182 Wn. App. 335, 348, 329 P.3d 108 (2014). Officer Ayers could have been deceiving Taylor in order to gain his confidence so that Taylor would share information implicating himself.

When resolving whether a reasonable person deems himself or herself free to leave the presence of a law enforcement officer or to disregard an officer's request, courts disregard the known consequences to a citizen of ignoring an officer's requests. Relatedly, this court's majority fails to ask what steps Officer Ayers would have taken if Jarod Taylor refused to answer questions or hand his identification card to Ayers.

The majority's ruling creates societal consequences beyond the narrow facts of Jarod Taylor's detention. "The talk" given by African-American parents to children has become legendary. According to *The Talk: Race in America*, "the talk" usually includes instructions such as:

> If you are stopped by the police: Always answer 'yes sir, no sir'; never talk back; don't make any sudden movements; don't put your hands in your pockets; *obey all commands*; if you think you are falsely accused, save it for the police station. I would rather pick you up at the station than the morgue.

(PBS television broadcast Feb. 20, 2017) (emphasis added). The African-American and other minority communities know that a "request" by a law enforcement officer equates to a "command."

African-American teenager D.E.D. learned the consequences of ignoring a law enforcement officer's "request" the difficult way. *State v. D.E.D.*, 200 Wn. App. 484,

402 P.3d 851 (2017). Wapato Police Department Officer Michael Deccio responded to a call from a woman complaining about a group of youths who did not belong in her neighborhood. When responding, Officer Deccio, instead of seeing a group of youths, saw D.E.D. walking in the middle of the street by himself. Deccio knew that D.E.D. was walking in the direction of his home, three blocks away. Deccio knew that he lacked reasonable suspicion to detain D.E.D., but he drove alongside the teenager in his patrol car and asked, "'what's going on?'" *D.E.D.*, 200 Wn. App. 484, 487-88 (2017). D.E.D. responded with profanity and accused the officer of bothering him. Officer Deccio persisted by parking and exiting his car to speak with D.E.D.

As Officer Michael Deccio departed from his patrol car, the police dispatch advised that another caller had reported a group of kids, one of whom displayed a gun, outside the caller's front yard in another area of town. Officer Deccio detained D.E.D. anyway. Deccio told the youth he was not under arrest. Nevertheless, Deccio tried to handcuff D.E.D. The young man pulled his arm away and demanded that the officer not touch him. The officer directed D.E.D. to put his arms behind his back, but the teenager refused. After a two-minute scuffle, Officer Deccio overpowered D.E.D. and handcuffed him. The juvenile court convicted D.E.D. of obstructing a law enforcement officer. D.E.D. procured a reversal on appeal, but the criminal justice system interrupted and detoured D.E.D.'s life for two years because he ignored an officer's request despite being entitled to do so.

Unpleasant consequences also happen to white citizens who ignore "requests" of a law enforcement officer despite supposedly possessing the right to leave the presence of the officer and disregard the requests. On August 14, 2023, Kevin Hinton drove home from a long-distance trip to see his newborn grandchild. Sarah Al-Arshani, *Washington Sheriff's Deputy Accused of Bloodying 62-Year-Old Driver Who Pulled Over to Sleep*, USA Today (Oct. 9, 2023, 3:13 PM), https://www.usatoday.com/story/news/nation/2023/10/09/spokane-sheriff-deputy-clay-hilton-excessive-force-case/71116920007/. He stopped outside a Spokane park gate to nap at night. Al-Arshani, *supra*. An hour later, Spokane County Sheriff Sergeant Clay Hilton shined his light into Hinton's window and told Hinton that he could not be in the park after hours. Al-Arshani, *supra*. Hilton falsely accused Hinton of committing a crime. Al-Arshani, *supra*. Deputy Hilton requested Hinton to show his identification. Al-Arshani, *supra*. Hinton refused to do so, while denying he committed any crime. Al-Arshani, *supra*. Hilton barked: "'You are refusing to tell me who you are, and you are probably going to end up going to jail.'" Al-Arshani, *supra*. Hinton retorted: "'Oh, for not giving you, my name?'" Al-Arshani, *supra*. Deputy Hilton placed his hands on Hinton and commented: you are "'going to get hurt.'" Al-Arshani, *supra*. Hinton told the sergeant to remove his hands. Al-Arshani, *supra*. Hilton violently arrested Hinton. Al-Arshani, *supra*. Hinton suffered eight broken ribs, including some with multiple breaks and others that were dislocated from the sternum, a punctured lung, and memory loss. Al-Arshani, *supra*.

Spokane County prosecutors charged Kevin Hinton with resisting arrest and obstructing a law enforcement officer. Prosecutors dismissed the charges after Hinton's counsel showed a body camera video to the prosecutors. Emma Epperly, *Spokane County Sheriff's Deputy Placed on Leave after Video Surfaces of Him Bloodying 62-Year-Old Man*, SPOKESMAN REV. (Wash.) (Oct. 6, 2023, 8:54 PM), https://www.spokesman.com/stories/2023/oct/06/spokane-county-sheriffs-deputy-placed-on-leave-aft/; Al-Arshani, *supra*. Kevin Hinton sustained serious bodily injury for ignoring an officer's request despite Washington courts proclaiming he enjoyed the right to ignore the officer. If we rolled the police cam footage in reverse to the point when Deputy Hinton first asked for Hinton's identification, the majority would insist that Hinton never seized Hilton because Hilton had the right to flout the deputy's demand for identification.

CLOSING ARGUMENT

Because I would reverse and suppress evidence of the firearm found in the pickup truck, I need not address whether the State's attorney engaged in misconduct during closing. Counsel remarked during argument: "So based on the circumstances, it's not required that you find he knew. But the question is did he have information that would lead a reasonable person to believe that a firearm was in the truck?" 1 Report of Proceedings (Apr. 7, 2022) at 231.

The State's closing argument illustrates the confusion in the law recognized by the dissenting opinion in the unpublished opinion in *State v. Lorrigan*, No. 36379-1-III,

(Wash. Ct. App. Apr. 7, 2020) (Fearing, J., dissenting) (unpublished), https://www.courts.wa.gov/opinions/pdf/363791_unp.pdf. Under constitutional principles, convicting the accused of a crime demanding knowing misconduct on a theory of constructive knowledge is unconstitutional. *State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015); *State v. Shipp*, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980). Nevertheless, RCW 9A.08.010(1)(b)(ii) directs the jury to find knowledge based on constructive knowledge.

The majority principally relies on the principle that the prosecutor may speak one misstatement of the law without the wrong statement becoming reversible misconduct. I question this conclusion under the setting of the prosecutor suggesting to a jury that the State need only show constructive knowledge for a crime with a mens rea of "knowing." The Washington Supreme Court and this court have warned counsel not to intimate to the jury that constructive knowledge suffices. *State v. Allen*, 182 Wn.2d 364 (2015); *State v. Jones*, 13 Wn. App. 2d 386, 463 P.3d 738 (2020). Although this court's majority did not reverse the conviction in *State v. Lorrigan*, the opinion reads as a third warning. One, two, or three mistakes may not require reversal, but four may be one too many.

I respectfully dissent:

Fearing, J.

Fearing, C.J.