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Filed
Washington State
Court of Appeals
Division Two

August 27, 2024

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>THEODORE RUSSELL BONAPARTE,<br><br>Appellant. | No. 57855-7-II<br><br><br><br><br><br>PART-PUBLISHED OPINION |

LEE, J. — Theodore R. Bonaparte appeals his conviction for first degree unlawful possession of a firearm following a jury trial. Specifically, Bonaparte argues that his conviction is in violation of the Second Amendment because the State failed to prove a historical tradition of restricting firearms rights of individuals who have previously been convicted of first degree assault. We hold that because the Second Amendment right to keep and bear arms is not unlimited and Bonaparte is a convicted felon, Bonaparte's Second Amendment claim fails. Accordingly, we affirm Bonaparte's conviction.

In the unpublished portion of this opinion, we address Bonaparte's argument that (1) the prosecutor committed misconduct by (a) violating court rulings, (b) misstating the law, (c) trivializing the State's burden of proof, and (d) impermissibly shifting the burden of proof; (2) even if each individual instance of prosecutorial misconduct is not reversible error, the cumulative effect of the prosecutor's misconduct necessitates reversal; and (3) the crime victim penalty assessment (CVPA) imposed by the trial court should be stricken because he is indigent.

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We hold that because Bonaparte cannot demonstrate either improper conduct or prejudice, the prosecutor did not commit misconduct. However, because Bonaparte is indigent and his case is not yet final, the CVPA is improper. Therefore, we affirm Bonaparte's conviction, but we remand for the trial court to strike the CVPA from Bonaparte's judgment and sentence.

## FACTS

On October 2, 2020, Detective Brandon Smith[1] was dispatched to a hotel in Bremerton in response to a request for help to keep the peace. Bonaparte and his girlfriend, Amber Lewis, had been staying at the hotel for several days and had been trespassed from the premises at the end of September. When Bonaparte and Lewis were trespassed, they left behind "[a]n entire room of belongings." Verbatim Rep. of Proc. (VRP) (Dec. 28, 2022) at 251. Bonaparte and Lewis had arranged with the hotel a time to retrieve their items, and Bonaparte requested Detective Smith's presence.

When the hotel trespasses a guest, hotel policy directs hotel staff to record any belongings left behind and to store those items in a secure area. This includes identifying and logging general items in bags or suitcases. The hotel does so to avoid liability.

The hotel general manager, Chasaba Constable, and the maintenance manager, Thomas Christiansen, catalogued the items in Bonaparte and Lewis's room. One of the items was a blue suitcase. Christiansen opened the suitcase to assess its contents. In the suitcase, Christiansen discovered a loaded gun, along with an extended magazine and 20 extra bullets.

[1] In October 2020, Detective Smith was a patrol officer.

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After Bonaparte's request for law enforcement to accompany him to the hotel to retrieve his belongings, Detective Smith reached out to the hotel. Constable advised Detective Smith of the gun and expressed concern that Bonaparte "might retaliate for being trespassed." Clerk's Papers (CP) at 3. Detective Smith informed Constable that he would arrive in advance of Bonaparte and Lewis to take possession of the gun. Detective Smith then ran both Bonaparte's and Lewis's names through police databases. He discovered that both Bonaparte and Lewis were felons and that Bonaparte was currently on community custody from a prior conviction.

When Detective Smith arrived at the hotel, the hotel staff had piled Bonaparte's and Lewis's belongings on luggage carts. Constable directed Detective Smith to a separate box in which staff had placed the gun and some other items—specifically drugs and drug paraphernalia. Constable told Detective Smith that she and Christiansen had found the gun in the "blue suitcase." VRP (Dec. 28, 2022) at 220. Detective Smith ran the gun's serial number and determined that it had been stolen. He then secured the gun in his vehicle.

Detective Smith called Bonaparte, informed Bonaparte he was at the hotel for the standby, and asked about the gun. Bonaparte denied any knowledge of the gun. The hotel staff moved Bonaparte's and Lewis's items outside the hotel when Bonaparte and Lewis arrived.

While Bonaparte and Lewis collected their items, Detective Smith asked Bonaparte about the blue suitcase. Bonaparte replied that the suitcase was his and that it had "'been with [him] everywhere.'" VRP (Dec. 28, 2022) at 222. Bonaparte and Lewis finished collecting their things and departed.

The next day, Detective Smith returned to the hotel to ask hotel staff follow-up questions regarding the gun. Specifically, Detective Smith sought to confirm the exact details of how the

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gun was discovered, other individuals who might have been in the vicinity, and places Bonaparte's suitcase might have been left unattended. According to Constable, the property of trespassed individuals stays secured and is not generally accessible.

Based on a prior conviction for first degree assault,[2] the State charged Bonaparte with one count of unlawful possession of a firearm in the first degree. Prior to trial, Bonaparte stipulated that he was convicted of a "serious offense" in August 2009. CP at 12. The trial court accepted Bonaparte's stipulation.

The jury found Bonaparte guilty of first degree unlawful possession of a firearm. The trial court sentenced Bonaparte to 48 months' total confinement.

Bonaparte appeals.

## ANALYSIS

Bonaparte argues that under the Second Amendment and *New York State Rifle & Pistol Association, Inc. v. Bruen*,[3] (*New York State Rifle*), the State must prove a "historical tradition of depriving a person of the right to possess a firearm based on a prior conviction for assault in the first degree." Br. of Appellant at 36. Specifically, Bonaparte asserts that the State has failed to prove any such historical tradition, and accordingly, his prohibition against possessing a firearm is unconstitutional and his conviction should be reversed and dismissed with prejudice. We disagree.

[2] Bonaparte's conviction for first degree assault was based on an incident in which Bonaparte attempted to rob the driver of a vehicle by first punching the driver in the face and then during the ensuing struggle, shot the driver in the leg and then fired a second shot through the driver side window in an apparent miss.

[3] 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022).

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A. LEGAL PRINCIPLES

1. Second Amendment

The Second Amendment of the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Second Amendment protects the right of "ordinary, law-abiding citizen[s]." *N.Y. State Rifle*, 597 U.S. at 9.

In *District of Columbia v. Heller*, the United States Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." 554 U.S. 570, 595, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). *Heller* addressed a District of Columbia prohibition on handguns in the home. *Id.* at 574-75. The Court clarified that the individual right to keep and bear arms is not unlimited. *Id.* at 595; *accord United States v. Rahimi*, 602 U.S. ___, 144 S. Ct. 1889, 1897, 219 L. Ed. 2d 351 (2024) (stating "the right was never thought to sweep indiscriminately").

> [N]othing in our opinion should be taken to cast doubt on *longstanding prohibitions on the possession of firearms by felons* and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

*Heller*, 554 U.S. at 626-27 (emphasis added).

This principle of limiting the right to possess firearms was echoed in *McDonald v. City of Chicago*, which addressed a similar ban on handguns in the home. 561 U.S. 742, 750, 786, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

> We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." We repeat those assurances here.

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*Id*. at 786 (citation omitted) (quoting *Heller*, 554 U.S. at 626-27).

In *New York State Rifle* the Court held "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." 597 U.S. at 10. In that case, applicants challenged New York's licensing scheme regarding the right to carry handguns in public for self-defense. *Id.* at 11. New York conditioned "issuance of a license to carry on a citizen's showing of some additional special need" rather than the purely objective criteria of a shall-issue licensing regime. *Id.*

As part of its analysis, *New York State Rifle* clarified a framework under which to analyze Second Amendment challenges. *Id.* at 17. Specifically, the Court held:

> To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

*Id.* (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961)).

Nevertheless, the Court also stated:

> To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. . . . [A]nalogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.

*Id.* at 30 (emphasis in original). To that end, "shall-issue" licensing regimes, "which often require applicants to undergo a background check or pass a firearms safety course," are lawful because

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they do not infringe upon "'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry."[4] *Id.* at 38 n.9 (quoting *Heller*, 554 U.S. at 635).

Most recently in *Rahimi*, the United States Supreme Court held that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed" without violation of the Second Amendment. 144 S. Ct. at 1891. *Rahimi* reiterated *Heller*'s directive that prohibitions on the possession of firearms by felons and the mentally ill are presumptively lawful. *Id.* at 1902. Further, *Rahimi* reemphasized the analysis under *New York State Rifle* that instructs courts to examine our Nation's historical tradition of firearms regulations. *Id.* at 1896-99. Specifically, "the appropriate analysis involves considering whether the challenged regulation is consistent with *the principles* that underpin our regulatory tradition." *Id.* at 1998 (emphasis added). If a challenged regulation does not exactly "match its historical precursors," it may still pass constitutional muster. *Id.*; *see id.* at 1901 (discussing how historical surety laws and "going armed laws," though not historical twins, provided a sufficient analogue for 18 U.S.C. § 922(g)(8)).

2. Washington Unlawful Possession of a Firearm Statute

Washington's unlawful possession of a firearm statute provides: "A person . . . is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, accesses, has in the person's custody, control, or possession, or receives any firearm after having previously

[4] In his concurrence, Justice Alito stated that nothing in *New York State Rifle* "disturbed anything that [the Court] said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns." 597 U.S. at 72 (Alito, J., concurring). Similarly, Justice Kavanaugh stated, "Properly interpreted, the Second Amendment allows a 'variety' of gun regulations." *Id.* at 80 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 636).

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been convicted . . . in this state or elsewhere of any serious offense." RCW 9.41.040(1)(a). However, in certain circumstances, individuals who have been prohibited from possessing firearms under RCW 9.41.040 have a mechanism under which to restore their firearm rights. RCW 9.41.041.

Courts presume statutes are constitutional and the challenger bears the burden of proving otherwise. *State v. Batson*, 196 Wn.2d 670, 674, 478 P.3d 75 (2020); *State v. Ross*, 28 Wn. App. 2d 644, 646, 537 P.3d 1114 (2023), *review denied*, 2 Wn.3d 1026 (2024). The constitutionality of a statute is reviewed de novo. *Batson*, 196 Wn.2d at 674.

In *Ross*, the court held that RCW 9.41.040(1) is facially constitutional. 28 Wn. App. 2d at 651. *Ross* also held that "consistent with *Heller*, *McDonald*, and [*New York State Rifle*], the Second Amendment does not bar the state from prohibiting the possession of firearms by felons." *Id.*

B. BONAPARTE'S SECOND AMENDMENT CLAIM FAILS

As discussed above, the Second Amendment does not bar the state from prohibiting the possession of firearms by felons. *Heller*, 554 U.S. at 626-27. And RCW 9.41.040, which prohibits the possession of firearms by felons, is constitutional. *Ross*, 28 Wn. App. 2d at 651.

However, Bonaparte highlights his specific prior conviction for first degree assault and challenges whether our nation has a historical tradition of restricting firearms rights of "people with prior assault convictions." Br. of Appellant at 40. Without saying so directly, Bonaparte appears to mount an as-applied challenge. Thus, our opinion addresses the constitutionality of RCW 9.41.040 as applied to Bonaparte.

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Prior to trial, Bonaparte stipulated that he was convicted of a "serious offense." CP at 12. A prior conviction for a serious offense is a required element of unlawful possession of a firearm. RCW 9.41.040(1)(a). A jury found that the State met its burden as to the elements of unlawful possession of a firearm and found Bonaparte guilty.

Bonaparte's case is similar to that of the appellant in *Ross*. Ross had been convicted of first degree unlawful possession of a firearm based on a prior conviction for second degree burglary, a serious offense. *Ross*, 28 Wn. App. 2d at 645-46. Ross argued, as Bonaparte does here, that under the Second Amendment and *New York State Rifle*, RCW 9.41.040 was unconstitutional as applied to him. *Id.* at 645. Specifically, and again similar to Bonaparte, Ross contended that the "government [could not] justify restricting the possession of firearms for those with nonviolent felony convictions." *Id.* at 646. The court rejected Ross' contention, largely based on the recognition by the United States Supreme Court that "the Second Amendment did not preclude prohibitions on felons possessing firearms." *Id.* at 649. We hold the same.[5]

Bonaparte argues that "'[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct.'" Br. of Appellant at 38 (quoting *N.Y. State Rifle*, 597 U.S. at 17). Therefore, Bonaparte asserts, although he has a prior conviction for first degree assault, he has a constitutional right to keep and bear arms. However, the United States Supreme Court has stated *and reiterated* that the Second Amendment protects the right of "ordinary, law-abiding citizens" to keep and bear arms. *N.Y. State Rifle*, 597 U.S. at 9; *accord*

[5] Following submission of the parties' briefs, *Ross* was denied review by the Washington Supreme Court. *State v. Ross*, 2 Wn.3d 1026, 544 P.3d 30 (2024).

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*Rahimi*, 144 S. Ct. at 1897. Bonaparte fails to persuade us that the Constitution prohibits a restriction on the right to keep and bear arms for persons convicted of a felony.

In *New York State Rifle*, the Court found the New York licensing regime unconstitutional because it restricted the rights of "'law-abiding, responsible citizens.'" 597 U.S. at 38 n.9 (quoting *Heller*, 554 U.S. at 635). *New York State Rifle* articulated that courts should analyze "how and why the [challenged] regulations burden a *law-abiding citizen's* right to armed self-defense." *Id.* at 29 (emphasis added).

*Heller*, *McDonald*, and *Rahimi* functionally recognized the same principle. *Heller*, 554 U.S. at 635; *McDonald*, 561 U.S. at 786; *Rahimi*, 144 S. Ct. at 1896. Indeed, "the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'" *McDonald*, 561 U.S. at 786 (quoting *Heller*, 554 U.S. at 626). Thus, the framework articulated in *New York State Rifle* of the government's need to demonstrate that a firearm restriction is "consistent with this Nation's historical tradition" applies to restrictions on a law-abiding citizen's right to bear arms and is simply not applicable here because Bonaparte has been convicted of a felony, first degree assault, which is a serious offense.

Bonaparte cites to *Range v. Attorney General United States of America*, 69 F.4th 96 (3d Cir. 2023), *vacated and remanded sub nom, Garland v. Range*, No. 23-374, 2024 WL 3259661 (U.S. July 2, 2024), for the proposition that Second Amendment protections are not limited to only law-abiding, responsible citizens. In that case, Range sought a declaratory judgment that the federal "felon-in-possession" law violated the Second Amendment as applied to him. *Range*, 69 F.4th at 100. Range had pleaded guilty to "one count of making a false statement to obtain food stamps in violation of Pennsylvania law" and served three years' probation as a result. *Id.* at 98.

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Even though the transgression was classified as a misdemeanor, the offense was technically punishable by up to five years in prison. *Id.* The federal statute at issue, 18 U.S.C. § 922(g)(1), prohibited possession of a firearm of one "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." Therefore, Range's prior conduct was captured by the federal statute.

The Third Circuit held that Range was included among "'the people'" protected by the Second Amendment. *Range*, 69 F.4th at 106. Further, the government failed to demonstrate "a longstanding history and tradition" of restricting firearms rights of people like Range. *Id.*

*Range* is distinguishable as it addressed an entirely different set of circumstances not applicable here. First, Bonaparte is a felon who committed a serious offense,[6] unlike the challenger in *Range*. Second, the federal felon-in-possession statute is not comparable to Washington's unlawful firearm possession statute. And third, we are not bound by the Third Circuit Court of Appeals. Moreover, we note that the Third Circuit's holding was a "narrow one," and the United States Supreme Court recently granted certiorari, vacated judgment, and remanded to the Third Circuit "for further consideration" in light of *Rahimi*. *Id.*; *Range*, 2024 WL 3259661, at *1.

Furthermore, other circuit courts post-*New York State Rifle* have recently upheld prohibitions on the possession of firearms by non-violent felons. In *United States v. Dubois*, appellant Andre Dubois, a convicted felon, attempted to ship a box containing firearms to the Commonwealth of Dominica. 94 F.4th 1284, 1288 (11th Cir. 2024). Dubois had a prior felony

[6] *Rahimi* bolsters this distinction. Indeed, its holding aside, *Rahimi* states, "From the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others." 144 S. Ct. at 1899. The record establishes, and as evidenced by his conviction for first degree assault, that Bonaparte harmed another.

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conviction for drug trafficking. *Id.* at 1291. He argued that the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), violated his Second Amendment right to bear arms and that *New York State Rifle* abrogated prior Circuit precedent upholding the federal felon-in-possession statute. *Id.*

In *Dubois*, the 11th Circuit articulated *New York State Rifle*'s holding—namely that it rejected "the second part of a two-step test that then prevailed in most circuits." *Id.* at 1292. However, the *Dubois* court noted that *New York State Rifle* approved the first step of the framework as "'broadly consistent with *Heller*,'" which asks "whether the challenged law burdened conduct that falls within the scope of the Second Amendment," as historically understood. *Id.* (quoting *N.Y. State Rifle*, 597 U.S. at 19). As discussed above, *Heller* has been interpreted "as limiting the [Second Amendment] right to 'law-abiding and qualified individuals' and as clearly excluding felons from those categories by referring to felon-in-possession bans as presumptively lawful." *Id.* at 1293 (quoting *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir.), *cert. denied*, 560 U.S. 958 (2010)). While Bonaparte may argue that *New York State Rifle* says nothing of felons, "[*New York State Rifle*] repeatedly stated that its decision was faithful to *Heller*," which clearly holds that longstanding prohibitions on the possession of firearms by felons is presumptively lawful. *Id.* at 1293.

Indeed, Bonaparte neglects to address the United States Supreme Court's repeated articulation that prohibitions on the possession of firearms by felons are presumptively lawful or more general language that the Second Amendment right to keep and bear arms is "not unlimited." *Heller*, 554 U.S. at 595. Only in his reply brief does Bonaparte assert that we should disregard such language because no court has "explain[ed]" the "historical basis" for presumptive lawfulness of such laws. Reply Br. of Appellant 18. This argument is unpersuasive.

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Furthermore, Bonaparte's attempt to distinguish "people with prior assault convictions" is, much like the appellant's argument in *Ross*, a making of his own construct. *See Ross*, 28 Wn. App. 2d at 651. As the *Ross* court stated, "Neither [*New York State Rifle*] nor *Heller* frame[s] the analysis in terms of violent versus nonviolent felons," let alone "people with prior assault convictions" versus "people with prior non-assault convictions." *See id.* Thus, the distinction of "people with prior assault convictions" is of no moment.

An individual's right to keep and bear arms is not unlimited. *Heller*, 554 U.S. at 595. In applying the "historical tradition" framework articulated in *New York State Rifle*, courts analyze "how and why the [challenged] regulations burden a *law-abiding citizen's* right to armed self-defense." *N.Y. State Rifle*, 597 U.S. at 29 (emphasis added). As the unlawful possession of a firearm statute, RCW 9.41.040(1)(a), does not burden a law-abiding citizen's right to keep and bear arms and Bonaparte is a convicted felon, the "historical tradition" framework articulated in *New York State Rifle* is not applicable to his challenge. Therefore, we hold that Bonaparte's claim fails.[7]

[7] Bonaparte also spends multiple pages of his brief discussing how gun restrictions historically prohibited people of color from possessing firearms and how race-neutral restrictions still disparately affect people of color, such as Bonaparte, today. Bonaparte argues, "By strictly limiting when the government can deprive a person of their firearm rights, this Court can achieve the goals of the Second Amendment and work to reduce racial disparity." Br. of Appellant at 45. However, Bonaparte does not appear to actually raise a racial disparity challenge to RCW 9.41.040 nor argue that he was treated in a discriminatory manner. To the extent this is a policy argument, "[p]olicy arguments 'are more properly addressed to the Legislature, not to the courts.'" *Ross*, 28 Wn. App. 2d at 653 n.4 (quoting *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 258, 11 P.3d 883 (2000)).

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## CONCLUSION

We affirm Bonaparte's conviction for first degree unlawful possession of a firearm, but we remand for the trial court to strike the CVPA from Bonaparte's judgment and sentence.

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 shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

## UNPUBLISHED PORTION

Bonaparte argues that that the prosecutor committed misconduct by (1) violating court rulings, (2) misstating the law, (3) trivializing the State's burden of proof, and (4) impermissibly shifting the burden of proof. Bonaparte also asserts that even if each individual instance of prosecutorial misconduct is not reversible error, the cumulative effect of the prosecutor's misconduct necessitates reversal. Finally, Bonaparte argues that the CVPA imposed by the trial court should be stricken because he is indigent.

Because Bonaparte cannot demonstrate either improper conduct or prejudice, we hold that the prosecutor did not commit misconduct. However, because Bonaparte is indigent and his case is not yet final, we remand to the trial court to strike the CVPA from Bonaparte's judgment and sentence.

## ADDITIONAL FACTS

### A. MOTION IN LIMINE

Before trial, Bonaparte made an oral motion to exclude mention of other items found in the hotel room in addition to the gun; specifically, "controlled substances, paraphernalia, and . . . allegations of stolen mail." VRP (Dec. 19, 2022) at 33-34. Bonaparte argued that the State had

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not charged him with any crimes related to those other items nor was the State seeking to actually introduce evidence of those items.

The State agreed with Bonaparte that there was not "a legitimate basis for the jury to hear about the fact that the firearm was stolen, the fact that there [were] other items which potentially were stolen . . . and certainly no discussion of the fact that there were drugs there. That would be highly prejudicial." VRP (Dec. 19, 2022) at 34. The trial court granted the motion and instructed the State to advise its witnesses to not "discuss the fact that the weapon was stolen and there were drugs found or other paraphernalia." VRP (Dec. 19, 2022) at 34.

B. WITNESS TESTIMONY

During trial, Detective Smith, Constable, and Christiansen testified on behalf of the State. During direct examination of Detective Smith, the State introduced into evidence the firearm that had been found in the blue suitcase. The State requested Detective Smith to identify the firearm, which had been stored in a paper bag:

| | |
|---|---|
| [STATE:] | . . . Do you recognize what I just handed you? |
| [DETECTIVE SMITH:] | Yes. |
| [STATE:] | I know you can't see in it, but what are we looking at right now from the outside? |
| [DETECTIVE SMITH:] | The outside is a—it's a paper bag. It has my writing here on the case number, the item number or evidence number, and the date and time which it was packaged, and then my signature "B. Smith" and "444," my badge number. Later on evidence tags this little description on here and it's described as a stolen firearm. |
| [STATE:] | Okay. Tell me, is that—is what's inside that bag the firearm you saw on October 2, 2020? |

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[DETECTIVE SMITH:] Yes.

VRP (Dec. 28, 2022) at 206-07. Bonaparte did not object.

Later, during cross-examination, Detective Smith again mentioned that the gun was stolen:

[DEFENSE COUNSEL:] . . . And [Detective Smith] you indicated that you engaged [Bonaparte] in conversation about the suitcase; is that correct?

[DETECTIVE SMITH:] Correct.

[DEFENSE COUNSEL:] And presumably you were engaged in conversation not just to be friendly; is that correct?

[DETECTIVE SMITH:] Correct.

[DEFENSE COUNSEL:] You're there to try to get him to . . . give you information about the suitcase?

[DETECTIVE SMITH:] The initial contact for the standby was to make sure that both parties were safe. During the course of doing that standby, as a help to the community, as a help to Mr. Bonaparte, I learned additional information about a firearm that was in his property. While there on scene, before Mr. Bonaparte arrived, I ran the serial number on the firearm and learned that it was stolen out of Des Moines.

[DEFENSE COUNSEL:] Objection, Your Honor. Move to strike.

[TRIAL COURT:] Sustained. The jury is instructed to disregard the last remark.

VRP (Dec. 28, 2022) at 229-30.

After Detective Smith testified, the State called Constable to the stand. During direct examination, the State asked Constable to describe the process for trespassing individuals from the

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hotel and then more specifically about Bonaparte. The State asked Constable to describe what Bonaparte had left behind in his hotel room:

> [STATE:] What did he leave behind?
>
> [CONSTABLE:] An entire room of belongings.
>
> [STATE:] Okay. Give me an idea of what that means.
>
> [CONSTABLE:] There [were] suitcases, printer, acetone. There was clothing. There [were] drugs.

VRP (Dec. 28, 2022) at 251-52. Bonaparte objected, and the trial court sustained his objection. The trial court then instructed the jury to disregard Constable's statement about drugs.

The State called Christiansen as its final witness. The State also asked Christiansen to describe the process of trespassing hotel guests and what happens to items left behind.

> [STATE:] I guess I'm saying you've got all this stuff. It doesn't necessarily fit in the lost and found room. What are you guys doing with it?
> The person's just been trespassed. You go into their room and go, "Wow. That's a lot of items."
>
> [CHRISTIANSEN:] We start going to [sic] through it and log it in our logbook.
>
> [STATE:] What's the next step?
> You've logged it in your logbook. Do you try and find a secure place for it?
>
> [CHRISTIANSEN:] It depends if we find drugs and weapons, like in this case.
>
> [STATE:] I guess we'll go to—specifically in this case you found a weapon; is that correct?
>
> [CHRISTIANSEN:] Yes.

VRP (Dec. 28, 2022) at 264. Bonaparte did not object.

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C. STATE'S USE OF PUZZLE ANALOGY

During voir dire, the State discussed circumstantial evidence with prospective jurors. The State asked the juror pool whether anyone had done a jigsaw puzzle. The State proceeded:

> But let's say I gave you the full jigsaw puzzle with all the pieces and ask you to add them together. Could you do that and work out what the full picture was and then tell me what the importance of that one piece was, you know, say this piece was actually showing this bit of the Seattle skyline.
>
> . . . .
>
> . . . So I guess my way of saying this is, when you're putting those pieces together, isn't it important to not just stare at this one piece but instead look out and look at, you know, the context and meaning of each little piece in order to reach that full picture.

VRP (Dec. 27, 2022) at 111-12. Bonaparte did not object.

During opening statements, the State again mentioned puzzles:

> [T]he State's burden to prove this charge is beyond a reasonable doubt. I embrace that burden.
>
> After all the evidence is presented, you'll have to make a decision, a decision of if you have an abiding belief in the truth of the charge; that is, an abiding belief that the defendant knowingly possessed the firearm in question.
>
> Much like we discussed in voir dire, you'll need to take all the evidence and use them like pieces of the puzzle, putting them together to create a picture and adding them up to see their value individually and then their value in that full puzzle.

VRP (Dec. 28, 2022) at 194. Bonaparte did not object.

The State returned to the puzzle analogy during closing arguments as it recounted evidence presented during the trial:

> And we talked about how you use circumstantial evidence. You take all of the pieces and put them together like a puzzle. And then after you put those pieces together, you get the full picture.

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> However, unlike the picture we discussed in voir dire of the Seattle skyline, this picture spells out four [sic] words: guilty beyond a reasonable doubt.
>
> What does that mean? It doesn't mean certainty. It doesn't mean perfection like [defense counsel] will tell you it does. It means an abiding belief in the truth of the charge, in the truth of the fact that this was his gun . . . this gun in [Bonaparte]'s bag, in [Bonaparte]'s room, the bag that he took away afterwards, the bag that he acknowledged was his, that he took everywhere. It's an abiding belief that this was his gun.

VRP (Dec. 28, 2022) at 305. Bonaparte did not object.

Finally, during rebuttal closing, the State argued:

> When making a puzzle—and we've talked about puzzles a lot and how to use a puzzle as a comparison to your job as a jury. When making a puzzle, think back to the Seattle skyline. You don't need every single piece to know that's the Seattle skyline.
>
> You need many pieces, most pieces, but if a piece or two here or there is missing, you can still say no, beyond a reasonable doubt that's the Seattle skyline I'm looking at. I see the Space Needle. I see something else. I see mountains in the background. I know that's the Seattle skyline.
>
> So even if you feel there's a hole, a hole does not mean not beyond a reasonable doubt. If you can look at the puzzle and it spells out beyond a reasonable doubt the answer, you can still go ahead and convict.
>
> . . . The evidence gives you an answer that it was [Bonaparte]'s [gun]. Look at that evidence, piece together the puzzle, follow it, and if you form an abiding belief that was [Bonaparte]'s gun, go ahead and convict him, because he had that gun and he committed this crime.

VRP (Dec. 28, 2022) at 317-18. Bonaparte did not object.

D. JURY INSTRUCTIONS

The parties agreed on several instructions to provide to the jury. Those relevant to this appeal include Instructions 6, 8, 9, and 11.

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Instruction No. 6 stated: "A person commits the crime of unlawful possession of a firearm in the first degree when he has previously been convicted for a serious offense and knowingly owns or has in his possession or control any firearm." CP at 27.

Instruction No. 8 provided the definition of "knowingly":

> A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact.
>
> 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.

CP at 29.

Instruction No. 9 pertained to Bonaparte's stipulation to a prior conviction:

> The parties have agreed that certain facts are true. You must accept as true that the person before the court, who has been identified in the charging document as Defendant, Theodore Russell Bonaparte, was convicted on August 2, 2009, of a serious offense in State of Washington v. Theodore Russell Bonaparte, Kitsap County Superior Court Cause No. 09-1-01076-3.
>
> The stipulation is to be considered evidence only of the prior conviction element. You are not to speculate as to the nature of the prior conviction. You must not consider the stipulation for any other purpose.

CP at 30.

Instruction No. 11 provided the to-convict instructions for unlawful possession of a firearm. CP at 32. It stated in pertinent part:

> [E]ach of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or between September 18, 2020, and October 2, 2020, the defendant knowingly had a firearm in his possession or control;
>
> (2) That the defendant had previously been convicted of a serious offense; and;
>
> (3) That the possession or control of the firearm occurred in the State of Washington;
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

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> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 32.

E. CLOSING ARGUMENTS

During closing arguments, the State discussed jury instructions with the jurors. The State highlighted the issue of knowledge and whether Bonaparte knowingly possessed a firearm. The State explained: "Someone acts knowingly or with knowledge if they are aware of something. So if they know something is happening or if they have information that would lead a reasonable person to believe that thing is happening." VRP (Dec. 28, 2022) at 301. The State further argued:

> It's ridiculous to think that a defendant would spend 11 days in a hotel room with a gun sitting covered in clothes but not properly covered, a gun with an extended magazine—a loaded gun with an extended magazine sitting in his suitcase, with all his clothes, items he takes everywhere with him, and he never knew. That just doesn't make any sense.
>
> A reasonable person would know if a loaded gun with an extended magazine was sitting in their suitcase along with their clothes for the next day. After all, Mr. Christiansen, he looked in that. He moved stuff, and he found it almost immediately. This wasn't an extensive search. This wasn't cutting open secret compartments. It was sitting there in the suitcase. So [Bonaparte] knew that the gun was there.

VRP (Dec. 28, 2022) at 302. Bonaparte did not object.

During its rebuttal closing, the State argued:

> I am going to preface these comments, just because it's important, by saying again I have the burden of proof, so [Bonaparte] doesn't have to prove a thing to you.
>
> [Defense counsel] just made some arguments. He told you why . . . he thinks you should find [Bonaparte] not guilty. And you have a right to weigh those arguments, so I'm going to just respond to a few of them.
>
> First I have a question for you. My question is: Whose gun was it?

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> We know there was a gun found in [Bonaparte]'s hotel room in a blue suitcase. That's not in question. If it's not [Bonaparte]'s gun, whose gun was it?
>
> . . . .
>
> I want you to think about how else could that gun have got there. [Defense counsel] says the State hasn't proven that was [Bonaparte]'s gun. There [were] holes. No one saw him with it, as I mentioned. There's not fingerprints.
>
> But what other reasonable—and that's the key because it's proof beyond a reasonable doubt. What other reason would there be for a gun to get into his suitcase.

VRP (Dec. 28, 2022) at 312-13. Bonaparte did not object.

The State further argued:

> In voir dire [defense counsel] spoke to a juror, and the juror said, "I share my car with my wife. Sometimes I see an item or so lying around." And I'm like, "Oh, how did that get there?"
>
> You know, I'm sure it's happened to everyone. Pens, other small items, you lose it. You suddenly look, and you're like, "How did it get there?"
>
> This is a loaded gun with an extended magazine in it with over 20 bullets. That's not something you just leave lying around. That's especially true when you've been convicted of a serious offense and it is a crime for which 14 jurors will be gathered in court to try you for doing it.
>
> It is totally incredible to think that [Bonaparte] was blissfully unaware that there was a gun burning a hole in his suitcase and he just never knew. He didn't possess that gun. It wasn't his, but it was there burning a hole in his suitcase.
>
> He said it wasn't his gun, but [Bonaparte] knows the truth. He's sitting by [defense counsel] right now, knowing that's his gun because, of course, it was his gun.

VRP (Dec. 28, 2022) at 316-17. Bonaparte did not object.

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F. JURY VERDICT AND SENTENCING

The jury found Bonaparte guilty of first degree unlawful possession of a firearm. At sentencing, the trial court imposed a $500 CVPA and signed an order of indigency for Bonaparte's appeal.

## ANALYSIS

A. PROSECUTORIAL MISCONDUCT

Bonaparte argues that the State committed "flagrant, ill-intentioned, and incurable misconduct" when the State (1) violated court rulings, (2) misstated the law, (3) trivialized the State's burden of proof, and (4) impermissibly shifted the burden of proof, each instance of which requires reversal of Bonaparte's conviction. Br. of Appellant at 8. Bonaparte also argues that even if the individual instances of alleged misconduct alone would not warrant reversal, the cumulative effect of each instance prejudiced him, and he requests this court to reverse and remand for a new trial. We disagree.

1. Legal Principles

Criminal defendants are guaranteed the right to a fair trial. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Gouley*, 19 Wn. App. 2d 185, 200, 494 P.3d 458 (2021), *review denied*, 198 Wn.2d 1041 (2022). "Where there has been prosecutorial misconduct in obtaining a conviction, the criminal defendant may have been deprived of the constitutional right to a fair trial." *Gouley*, 19 Wn. App. 2d at 200.

In claiming prosecutorial misconduct, the defendant bears the burden of proving (1) improper conduct and (2) prejudice. *State v. Scherf*, 192 Wn.2d 350, 393, 429 P.3d 776 (2018). Courts "first evaluate whether the prosecutor's conduct was improper." *State v. Houser*, 30 Wn.

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App. 2d 235, 544 P.3d 564 (2024), *pet. for review filed in* No. 1030029 (Apr. 26, 2024). If so, courts next assess whether that conduct was prejudicial. *Id.*

There are two different standards to establish prejudice. *Scherf*, 192 Wn.2d at 393. If a defendant timely objects to the alleged misconduct, "he 'must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict.'" *Id.* (quoting *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012)). However, if the defendant fails to object, the objection is waived unless he demonstrates "that the prosecutor's comments were both flagrant and ill intentioned" and "the effect of the improper comments could not have been obviated by a curative instruction." *Gouley*, 19 Wn. App. 2d at 201. Courts "look at a prosecutor's comments in the context of the whole argument, the issues of the case, the evidence addressed in argument, and the instructions given to the jury." *Scherf*, 192 Wn.2d at 394.

2. In Limine Rulings

Bonaparte argues that the State committed flagrant and ill-intentioned misconduct when its witnesses testified to evidence that had been excluded by the trial court's previous in limine rulings; specifically, evidence that the gun was stolen and that drugs were also found in Bonaparte's hotel room. Bonaparte further argues such evidence resulted in incurable prejudice.

a. Legal principles

Attorneys have a duty to prepare witnesses for trial. *State v. Montgomery*, 163 Wn.2d 577, 592, 183 P.3d 267 (2008). This includes explaining to witnesses any orders in limine entered by the trial court. *Id.* Further, attorneys must not intentionally elicit excluded or inadmissible evidence from witnesses. *Id.* at 593.

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Trial courts have wide discretion to cure irregularities that result from improper witness statements. *State v. Christian*, 18 Wn. App. 2d 185, 199, 489 P.3d 657, *review denied*, 198 W.2d 1024 (2021). Courts also presume that juries follow a trial court's instruction to disregard improper evidence. *Id.* In some circumstances, "'curative instructions are insufficient in removing the prejudicial effect of evidence.'" *State v. Gogo*, 29 Wn. App. 2d 107, 115, 540 P.3d 150 (2023) (quoting *Christian*, 18 Wn. App. 2d at 199). For instance, an instruction is not actually curative if it fails to inform the jury that a witness comment was improper and should not be considered. *Id.* at 116. However, if a court sustains an objection and instructs a jury to disregard the improper testimony, a defendant is less likely to establish a substantial likelihood that the testimony affected the jury's verdict. *See In re Pers. Restraint of Pheth*, 20 Wn. App. 2d 326, 341, 502 P.3d 920 (2021).

b. Bonaparte cannot establish prejudice

The record shows that the trial court entered an in limine ruling that excluded mention of the fact that the gun was stolen or that drugs were also found in Bonaparte's hotel room. Additionally, the trial court instructed the State to inform its witnesses of the ruling.

Bonaparte challenges four specific remarks from the State's witnesses: Detective Smith's two references to the gun having been stolen, and Constable's and Christiansen's mention of drugs. Bonaparte objected to Detective Smith's second reference to the gun being stolen and Constable's mention of drugs. However, Bonaparte did not object to Detective Smith's first comment about the gun being stolen or Christiansen's comment regarding drugs.

The State concedes improper conduct on behalf of the prosecutor insofar as the prosecutor should have better prepared Detective Smith, Constable, and Christiansen as to what could be

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testified to. Accordingly, at issue here is whether the testimony was so prejudicial to Bonaparte such that there is a substantial likelihood that it affected the jury's verdict. *Scherf*, 192 Wn.2d at 393. Courts look to the overall context of the offending remarks, the issues in the case, and instructions to the jury. *Id.* at 394.

i. Stolen gun

Here, when the State first introduced the gun into evidence, the prosecutor handed a paper bag to Detective Smith to identify. The prosecutor asked, "I know you can't see in it, but what are we looking at right now from the outside?" VRP (Dec. 28, 2022) at 206. Detective Smith responded:

> The outside is a—it's a paper bag. It has my writing here on the case number, the item number or evidence number, and the date and time which it was packaged, and then my signature "B. Smith" and "444," my badge number. Later on evidence tags this little description on here and it's described as a stolen firearm.

VRP (Dec. 28, 2022) at 206-07. Bonaparte did not object. Because Bonaparte did not object, he waives any objection unless he shows "that the prosecutor's comments were both flagrant and ill intentioned" and "the effect of the improper comments could not have been obviated by a curative instruction." *Gouley*, 19 Wn. App. 2d at 201.

Based on the context of the remarks, it is evident that the prosecutor's line of questioning was not flagrant or ill-intentioned. The prosecutor asked a general question that Detective Smith could have answered satisfactorily for the purposes of admitting evidence of the gun without mentioning what exactly the description tag stated. Immediately following Detective Smith's answer, the prosecutor emphasized the gun itself and the chain of custody, ignoring Detective Smith's comment describing the gun "as a stolen firearm." VRP (Dec. 28, 2022) at 207.

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Furthermore, Detective Smith's comment could have been obviated by a curative instruction—indeed, the trial court did instruct the jury to disregard improper comments that were subsequently objected to. Therefore, because Bonaparte fails to show that the prosecutor's conduct was flagrant and ill-intentioned and that a curative instruction could not have cured any alleged improper conduct, Bonaparte waives any objection to Detective Smith's first remark about the stolen firearm.

Later, it was defense counsel on cross-examination who elicited Detective Smith's second comment about the gun being stolen. Similar to the State, defense counsel asked a general question about Bonaparte and the blue suitcase, to which Detective Smith responded in part, "While there on scene, before Mr. Bonaparte arrived, I ran the serial number on the firearm and learned that it was stolen out of Des Moines." VRP (Dec. 28, 2022) at 230. However, in this instance, defense counsel immediately objected. The trial court sustained the objection and stated, "The jury is instructed to disregard the last remark." VRP (Dec. 28, 2022) at 230.

When a court sustains an objection and instructs a jury to disregard improper testimony, a defendant is less likely to establish a substantial likelihood that the testimony affected the jury's verdict. *See Pheth*, 20 Wn. App. 2d at 341. Courts also presume that juries follow a trial court's instructions. *Christian*, 18 Wn. App. 2d at 199.

Here, the trial court explicitly told the jury to disregard Detective Smith's remark. Moreover, considering the only issue at trial was whether Bonaparte knowingly had a firearm in his possession, whether the firearm was stolen or legally registered to Bonaparte would not change his alleged possession of it. *Scherf*, 192 Wn.2d at 394. Therefore, Bonaparte fails to show

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prejudice. Thus, Bonaparte's claim of prosecutorial misconduct with regard to Detective Smith's second remark about the stolen gun fails.

ii. Drugs

Both Constable and Christiansen mentioned finding drugs in Bonaparte's room on direct examination by the State. In Constable's case, the record shows that the prosecutor sought to establish through Constable that Bonaparte had been staying at the hotel, Bonaparte had been trespassed, and Bonaparte left items in his hotel room. The prosecutor asked Constable:

> What did he leave behind?
>
> [CONSTABLE:] An entire room of belongings.
>
> [STATE:] Okay. Give me an idea of what that means.
>
> [CONSTABLE:] There [were] suitcases, printer, acetone. There was clothing. There [were] drugs.

VRP (Dec. 28, 2022) at 251-52. Bonaparte immediately objected, which the trial court sustained. The trial court stated: "The jury will be instructed to disregard that last statement." VRP (Dec. 28, 2022) at 252. Because Bonaparte objected to Constable's statement about drugs, Bonaparte must show that the Constable's comment resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Scherf*, 192 Wn.2d at 393.

Bonaparte is unable to demonstrate that Constable's testimony had a substantial likelihood of affecting the jury's verdict. First, the trial court instructed the jury to disregard Constable's mention of drugs. Again, courts presume that juries follow a trial court's instructions. *Christian*, 18 Wn. App. 2d at 199. Furthermore, as was the case with Detective Smith and his remark about

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the gun being stolen, whether or not Bonaparte also possessed drugs would not change his alleged possession of a gun.

With regard to Christiansen's comment, the prosecutor was inquiring about the hotel's general procedures for trespassing guests and the policy for belongings left behind.

| | |
|---|---|
| [STATE:] | What's the next step?<br>You've logged [items] in your logbook. Do you try and find a secure place for [the items]? |
| [CHRISTIANSEN:] | It depends if we find drugs and weapons, like in this case. |
| [STATE:] | I guess we'll go to—specifically in this case you found a weapon; is that correct? |
| [CHRISTIANSEN:] | Yes. |

VRP (Dec. 28, 2022) at 264. Bonaparte did not object. Thus, Bonaparte waives any objection to the prosecutor's conduct unless he shows that the prosecutor's conduct was flagrant and ill-intentioned and any resulting prejudice could not be obviated by a curative instruction.

The record shows that the prosecutor had not yet asked Christiansen about Bonaparte specifically and that the prosecutor was not attempting to elicit excluded evidence. Christiansen simply did not give a direct answer to the prosecutor's question. The record also shows that the prosecutor attempted to adjust his line of questioning to direct Christiansen to the gun that was found. Based on the record, Bonaparte cannot establish that the prosecutor's question was flagrant or ill-intentioned. Moreover, a curative instruction from the trial court would have obviated any resulting prejudice. Therefore, Bonaparte has waived any objection to the prosecutor's conduct with regard to Christiansen's comment.

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iii. No prejudice

Thus, even assuming the prosecutor failed to properly inform the State's witnesses of the court's in limine rulings, based on the context of the testimony, the issue in the case, other evidence presented, and trial court's instructions to the jury, Bonaparte cannot establish prejudice resulting from any individual instance.[8] Because Bonaparte cannot establish prejudice, his claim of prosecutorial misconduct based on violations of the trial court's in limine rulings fails.

3. Misstatement of Law

Bonaparte argues the State misstated the knowledge element of unlawful possession of a firearm during closing arguments. We disagree.

a. Legal principles

Under RCW 9.41.040(1)(a), "[a] person . . . is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, accesses, has in the person's custody, control, or possession, or receives any firearm after having previously been convicted . . . of any serious offense." A "serious offense" includes any crime of violence. RCW 9.41.010(42)(a). In prosecutions for unlawful possession of a firearm, the State must prove knowing possession. *State v. Lee*, 158 Wn. App. 513, 517, 243 P.3d 929 (2010).

A person has knowledge if "[h]e or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense" or "[h]e or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a

[8] Because we hold that all of Bonaparte's claims of prosecutorial misconduct fail, Bonaparte's arguments regarding the cumulative effect of misconduct for failing to instruct the witnesses as to the trial court's ruling on motions in limine also necessarily fails.

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statute defining an offense." RCW 9A.08.010(b). Thus, the State may prove actual knowledge through circumstantial evidence. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). This is distinguishable from a "should have known" standard. *Id.* Additionally, Washington courts allow juries to be instructed "of a permissible presumption of actual knowledge by a finding of constructive knowledge." *State v. Jones*, 13 Wn. App. 2d 386, 404, 463 P.3d 738 (2020). A jury may not convict a defendant based on constructive knowledge, but it may determine that constructive knowledge is evidence of subjective knowledge. *Id.* at 405.

A prosecutor commits misconduct by misstating the law. *Id.* at 403. "The prosecuting attorney misstating the law of the case to the jury constitutes a serious irregularity bearing a grave potential to mislead the jury." *Id.*

However, prosecutors have wide latitude during closing arguments to argue reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Additionally, "[d]eference is . . . owed to the trial court's ability to oversee the administration of justice, defense counsel's judgment about whether an objection was worth raising, and a jury's ability to independently assess the merits of the case." *In re Pers. Restraint of Richmond*, 16 Wn. App. 2d 751, 754, 482 P.3d 971 (2021).

b. No misstatement of law

Bonaparte challenges statements made by the prosecutor during closing argument regarding the knowledge element of unlawful possession of a firearm. Specifically, Bonaparte argues that the prosecutor's alleged misstatements lowered the State's burden of proof.

During trial, Bonaparte did not object to the alleged misstatements he now challenges. Therefore, in order to establish prosecutorial misconduct, Bonaparte must establish not only

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improper conduct, but that the prosecutor's statements were so flagrant and ill-intentioned that they could not be remedied by a curative instruction. *Gouley*, 19 Wn. App. 2d at 201.

First, Bonaparte challenges the prosecutor's description of knowledge. The prosecutor stated: "Someone acts knowingly or with knowledge if they are aware of something. So if they know something is happening or if they have information that would lead a reasonable person to believe that thing is happening." VRP (Dec. 28, 2022) at 301. Bonaparte points to the jury instructions and argues the latter part of the prosecution's definition is not the definition of knowledge. We disagree.

Here, Jury Instruction No. 8, the instruction defining knowledge, states in part: "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." CP at 29. This instruction is consistent with Washington's culpability statute, RCW 9A.08.010(b)(ii), which states that a person has knowledge or acts knowingly when "[h]e or she has information which would lead a reasonable person in the same situation to believe that facts exist." The prosecutor merely echoed these definitions. Therefore, the prosecutor did not misstate the law.

Second, the prosecutor stated:

> A reasonable person would know if a loaded gun with an extended magazine was sitting in their suitcase along with their clothes for the next day. After all, Mr. Christiansen, he looked in that. He moved stuff, and he found it almost immediately. This wasn't an extensive search. This wasn't cutting open secret compartments. It was sitting there in the suitcase. So [Bonaparte] knew that the gun was there.

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VRP (Dec. 28, 2022) at 302. Bonaparte argues "evidence a reasonable person in the same situation would have known a fact is only relevant because the jury may infer from that evidence the defendant knew that fact. It does not prove actual knowledge on its own." Br. of Appellant at 18. This is true. Juries may find that constructive knowledge is evidence of subjective knowledge. *Jones*, 13 Wn. App. 2d at 405. However, Bonaparte fails to explain what exactly about the prosecutor's statement is a misstatement of the law.[9]

Prosecutors have wide latitude during closing arguments to argue reasonable inferences from the evidence. *Thorgerson*, 172 Wn.2d at 448. Here, the State's theory of the case was based on circumstantial evidence—that is, a loaded gun with an extended magazine was discovered in a blue suitcase in a room Bonaparte occupied; Bonaparte confirmed the blue suitcase belonged to him; and Bonaparte told Detective Smith that he took the suitcase "'with [him] everywhere.'" VRP (Dec. 28, 2022) at 222. The prosecutor argued, "[a] reasonable person would know if a loaded gun with an extended magazine was sitting in their suitcase along with their clothes." VRP (Dec. 28, 2022) at 302. Based on the evidence, the prosecutor's argument was a reasonable inference.

Moreover, the jury instructions—which all parties agreed upon—clearly informed the jury that it was permitted to find actual knowledge "[i]f a person has information that would lead a reasonable person in the same situation to believe that a fact exists." CP at 29. Based on the jury verdict, the jury apparently inferred actual knowledge. Courts presume jurors follow instructions

[9] Bonaparte focuses his argument on the impropriety of arguing a "'should have known'" standard when actual knowledge is an element of an offense. Br. of Appellant at 19. However, at no point during closing arguments did the prosecutor argue that Bonaparte should have known about the gun.

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given by the court. *In re Pers. Restraint of Arntsen*, 2 Wn.3d 716, 729, 543 P.3d 821 (2024). The prosecutor did not misstate the law.

Because the prosecutor did not misstate the law, there was no improper conduct. Because the prosecutor did not engage in improper conduct, there was no prosecutorial misconduct when the prosecutor discussed the knowledge element during closing arguments.

4. Puzzle Analogy

Bonaparte argues that the prosecution committed misconduct and trivialized the State's burden of proof when the prosecutor used a "flawed jigsaw puzzle analogy." Br. of Appellant at 24. We disagree.

a. Legal principles

Courts review a prosecutor's use of a jigsaw puzzle analogy on a case by case basis and consider "the context of the argument as a whole." *State v. Fuller*, 169 Wn. App. 797, 825, 282 P.3d 126 (2012), *review denied*, 176 Wn.2d 1006 (2013). Puzzle analogies that quantify the level of certainty needed for the State to satisfy its burden of proof are improper. *See State v. Lindsay*, 180 Wn.2d 423, 435, 326 P.3d 125 (2014); *State v. Johnson*, 158 Wn. App. 677, 682, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011). However, a State's "comments about identifying a puzzle before it was complete [are] not improper." *Lindsay*, 180 Wn.2d at 435; *State v. Curtiss*, 161 Wn. App. 673, 701, 250 P.3d 496 ("Here, the State's comments about *identifying* the puzzle with certainty before it is complete are not analogous to the weighing of competing interests inherent in a *choice* that individuals make in their everyday lives.") (emphasis in original), *review denied*, 172 Wn.2d 1012 (2011).

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b. Puzzle analogy not improper

Bonaparte asserts that the prosecutor, during closing arguments, "urged the jury to overlook missing evidence or holes and argued it did not keep the jury from finding Mr. Bonaparte guilty, just like a puzzle with missing pieces." Br. of Appellant at 26. Bonaparte further asserts that the puzzle analogy misstated and trivialized the State's burden to prove guilt beyond a reasonable doubt.

Bonaparte did not object to the prosecutor's arguments relating to puzzles. Therefore, "the flagrant, ill intentioned, incurable prejudice standard applies to our review." *Curtiss,* 161 Wn. App. at 699.

The record shows that the prosecutor repeatedly emphasized the State's burden of proof—beyond a reasonable doubt. The record also shows that the prosecutor used the puzzle analogy to describe the relationship between pieces of evidence and the beyond a reasonable doubt standard, not to quantify the burden of proof or imply that "'a reasonable doubt may not arise from a lack of evidence.'" Br. of Resp't at 20; *see Curtiss,* 161 Wn. App. at 700-01.

In evaluating a prosecutor's statements, courts look at the statements "in the context of the whole argument, the issues of the case, the evidence addressed in argument, and the instructions given to the jury." *Scherf,* 192 Wn.2d at 394. In that view, the prosecutor's statements did not misstate or trivialize the State's burden of proof and do not rise to the level of flagrant or ill-intentioned comments that could not be remedied through curative instruction. Therefore, we hold that the prosecutor did not commit misconduct in using the puzzle analogy.

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5. Burden of Proof

Bonaparte argues that the State committed misconduct because "the prosecution undermined the presumption of innocence and improperly shifted the burden of proof with its arguments in rebuttal." Br. of Appellant at 33. We disagree.

a. Legal principles

"'Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct.'" *State v. Crossguns*, 199 Wn.2d 282, 297, 505 P.3d 529 (2022) (quoting *Lindsay*, 180 Wn.2d at 434). Prosecutors may not argue during closing that the defense was required to have presented certain evidence or witnesses. *State v. Gantt*, 29 Wn. App. 2d 427, 451, 540 P.3d 845, *review denied*, 3 Wn.3d 1002 (2024). However, "'[a] prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case.'" *Id.* (quoting *State v. Sells*, 166 Wn. App. 918, 930, 271 P.3d 952 (2012), *review denied*, 176 Wn.2d 1001 (2013)). Merely mentioning the lack of evidence does not rise to the level of prosecutorial misconduct or shifting the burden of proof. *Id.*

b. Prosecutor did not shift the burden of proof

Bonaparte complains that the prosecutor "began" their rebuttal closing with the following statements: "'My question is: Whose gun was it? . . . If it's not [Bonaparte]'s gun, whose gun was it? . . . What other reason would there be for a gun to get into his suitcase.'" Br. of Appellant at 33 (quoting VRP (Dec. 28, 2022) at 313). Bonaparte also challenges the prosecutor's later statement: "[Bonaparte] said it wasn't his gun, but [Bonaparte] knows the truth. He's sitting by [defense counsel] right now, knowing that's his gun because, of course, it was his gun." VRP (Dec. 28, 2022) at 317.

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Bonaparte did not object to the prosecutor's statements. Thus, again, he waives any objection unless he demonstrates "that the prosecutor's comments were both flagrant and ill intentioned" and "the effect of the improper comments could not have been obviated by a curative instruction." *Gouley*, 19 Wn. App. 2d at 201.

Here, the record shows that during closing arguments, the defense argued there was no direct evidence that Bonaparte knowingly possessed the gun. The record also shows that the prosecutor did not actually begin their rebuttal with the statements: "My question is: Whose gun was it? . . . If it's not [Bonaparte]'s gun, whose gun was it? . . . What other reason would there be for a gun to get into his suitcase." VRP (Dec. 28, 2022) at 313. Instead, the prosecutor opened their rebuttal with the following:

> I am going to preface these comments, just because it's important, *by saying again I have the burden of proof, so [Bonaparte] doesn't have to prove a thing to you*.
>
> [Defense counsel] just made some arguments. He told you why . . . he thinks you should find [Bonaparte] not guilty. And you have a right to weigh those arguments, so I'm going to just respond to a few of them.
>
> First I have a question for you. My question is: Whose gun was it?
>
> We know there was a gun found in [Bonaparte]'s hotel room in a blue suitcase. That's not in question. If it's not [Bonaparte]'s gun, whose gun was it?
>
> . . . .
>
> I want you to think about how else could that gun have got there. [Defense counsel] says the State hasn't proven that was [Bonaparte]'s gun. There [were] holes. No one saw him with it, as I mentioned. There's not fingerprints.
>
> But what other reasonable—and that's the key because it's proof beyond a reasonable doubt. What other reason would there be for a gun to get into his suitcase.

VRP (Dec. 28, 2022) at 312-13 (emphasis added).

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The record also shows that the prosecutor's later statement was in reference to knowledge:

> In voir dire [defense counsel] spoke to a juror, and the juror said, "I share my car with my wife. Sometimes I see an item or so lying around." And I'm like, "Oh, how did that get there?"
>
> You know, I'm sure it's happened to everyone. Pens, other small items, you lose it. You suddenly look, and you're like, "How did it get there?"
>
> This is a loaded gun with an extended magazine in it with over 20 bullets. That's not something you just leave lying around. That's especially true when you've been convicted of a serious offense and it is a crime for which 14 jurors will be gathered in court to try you for doing it.
>
> It is totally incredible to think that [Bonaparte] was blissfully unaware that there was a gun burning a hole in his suitcase and he just never knew. He didn't possess that gun. It wasn't his, but it was there burning a hole in his suitcase.
>
> He said it wasn't his gun, but [Bonaparte] knows the truth. He's sitting by [defense counsel] right now, knowing that's his gun because, of course, it was his gun.

VRP (Dec. 28, 2022) at 316-17.

The record clearly demonstrates that the prosecutor first reiterated the State's burden of proof and even explicitly stated that Bonaparte did not need "to prove a thing." VRP (Dec. 28, 2022) at 313. Contrary to Bonaparte's contention, the prosecutor did not argue that Bonaparte should have presented certain evidence or explain the evidence. Rather, the prosecutor was commenting on a lack of evidentiary support for the defense's theory of the case, which the prosecutor is entitled to do. *Gantt*, 29 Wn. App. 2d at 451.

Further, as stated above, Bonaparte did not object to the prosecutor's statements so he waives any objection unless he can demonstrate that the prosecutor's comments were flagrant and ill-intentioned, with any resulting prejudice incurable by an instruction. Bonaparte fails to do so. Because the prosecutor did not shift the burden of proof to Bonaparte nor did the prosecutor

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undermine the presumption of innocence, Bonaparte's claim of prosecutorial misconduct based on shifting the burden of proof fails.

6. Cumulative Effect

Bonaparte argues that we should reverse and remand for a new trial based on the cumulative effect of multiple instances of "misconduct." Br. of Appellant at 34. Generally, "the cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of instructions could erase their combined prejudicial effect." *State v. Cook*, 17 Wn. App. 2d 96, 106, 484 P.3d 13 (2021). Here, however, because we hold that all of Bonaparte's claims of prosecutorial misconduct fail, Bonaparte's arguments regarding the cumulative effect of misconduct also necessarily fail.

B. CRIME VICTIM PENALTY ASSESSMENT (CVPA)

Bonaparte requests that the imposed CVPA be stricken because he was indigent at time of sentencing. The State concedes and agrees that the CVPA should be stricken. We accept the State's concession and remand to the trial court to strike the CVPA from Bonaparte's judgment and sentence.

Under RCW 7.68.035(5), a court shall waive any CVPA imposed prior to July 1, 2023, if that defendant is indigent as defined in RCW 10.01.160(3). RCW 7.68.035 applies prospectively to cases still on direct appeal. *State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023), *pet. for review filed in* No. 1023782 (Sep. 14, 2023); *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018).

Here, the parties do not dispute that Bonaparte was indigent at the time of his sentencing. The trial court found Bonaparte indigent for the purposes of this appeal and entered an order of

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indigency. Therefore, Bonaparte is indigent. While RCW 7.68.035 went into effect after Bonaparte's sentencing, his case is not yet final as it is on appeal. *See* ENGROSSED SUBSTITUTE H.B. 1169, 68th Leg., Reg. Sess. (Wash. 2023); *Ellis*, 27 Wn. App. 2d at 16. Accordingly, RCW 7.68.035(5) applies to Bonaparte.

CONCLUSION

We affirm Bonaparte's conviction for first degree unlawful possession of a firearm. However, we remand to trial court to strike the CVPA from Bonaparte's judgment and sentence.

Lee, J.

We concur:

Maxa, P.J.

Che, J.