

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TYREEK DEANTHONY SMITH,

Appellant.

39077-9-II

(CONSOLIDATED WITH

No. 39081-7-II)

STATE OF WASHINGTON,

Respondent,

v.

Darrel Kantreal jackson,

Appellant.

PUBLISHED IN PART OPINION

Hunt, J. — Darrel Kantreal Jackson and Tyreek Deanthony Smith appeal their joint jury trial convictions and weapon-enhanced sentences for two counts of aggravated first degree murder, first degree robbery, and first degree burglary. Jackson argues that the trial court violated his constitutional rights to (1) a public trial, by sealing juror questionnaires without first applying the five-factor *Bone-Club*¹ test; (2) due process and a fair trial, by allowing the

¹ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

prosecutor to vouch for a State witness's credibility on direct examination; and (3) freedom from double jeopardy, by imposing firearm and deadly weapon enhancements for first degree robbery and first degree burglary, which crimes include weapons as elements. Smith argues that the trial court violated his constitutional rights (1) to confront his accusers, by denying his motion to sever trials when his redacted codefendant's confession referenced him without satisfying CrR 4.4(c) or the *Bruton*² rule; and (2) to be free from double jeopardy, by imposing firearm and deadly weapon enhancements for first degree burglary, which included these weapons as elements of the crime. We affirm.

FACTS

I. Murders, Robbery, and Burglary

On September 23, 2007, police found Ruben Doria and Abraham Warren Abrazado³ stabbed to death in their apartment. Doria's body had duct tape over his mouth and around his hands and feet.

Doria, who had a medical marijuana license to grow marijuana for personal medicinal use, had also engaged in the illegal sale of marijuana to friends and acquaintances. He generally required everyone to telephone before arriving at his apartment. He kept the money from his sales, large amounts of marijuana, and prescription pills in a safe, which caused his friends concern for his safety. About two to three months before his murder, Doria had begun selling marijuana

² *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

³ Much of the record refers to Mr. Abrazado's middle name "Warren," the name he commonly used.

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to Darrel Jackson almost daily. Instead of requiring payment for each transaction, Doria “front[ed]” marijuana to Jackson, who, consequently, owed Doria money. 6 Verbatim Report of Proceedings (VRP) at 691.

Jackson lived with Tyreek Smith, who had previously sold cigars to Doria. Smith knew Pierre Spencer, from whom he purchased a .357 revolver some time before the murders.

The night before the murders, Jackson, Smith, and Spencer met to discuss robbing Doria, whom, they believed, would not call the police because of his drug dealings. They planned that Jackson would call Doria under the pretext of purchasing marijuana, but in reality, they would be seeking an opportunity to gain entrance to Doria’s apartment. They did not discuss murder or using masks or duct tape. Spencer offered an inactive cell phone to aid during the robbery. Jackson, Smith, and Spencer purchased a phone card to activate service on the phone, which Smith generally possessed.

That same night, the three men drove to Doria’s apartment, Jackson phoned Doria with the newly activated cell phone, and Jackson went inside and purchased marijuana from Doria. Because several others were present inside Doria’s apartment, Jackson, Smith, and Spencer abandoned the robbery plan and decided to try again the next day. The next morning, Spencer picked up Smith and drove him to an acquaintance’s apartment, which Smith entered briefly; Smith returned with a rifle wrapped in a blanket.

Spencer and Smith picked up Jackson, and they returned to Doria’s apartment to commit the planned robbery. After they saw Doria’s roommate, Warren Abrazado, drive away, Jackson called Doria from the newly activated cell phone,⁴ and Doria let Spencer, Smith, and Jackson

inside his apartment. Jackson had the .357 revolver that Smith had previously purchased from Spencer; Smith had a four to six inch serrated knife attached on his belt and the rifle. Brandishing the revolver at Doria, Jackson instructed Spencer to bind Doria's hands, legs, and mouth with duct tape. Jackson, Smith, and Spencer then put on gloves. Smith bound Doria as instructed. Smith turned up the stereo volume, pointed the rifle at Doria, and helped Spencer gather marijuana plants. Jackson instructed Spencer to look for "a little safe" in the bedroom. 11 VRP at 1447. When Spencer could not locate Doria's safe, Jackson began looking for it. Smith pointed the revolver at Doria and hit him on the head with it, causing Doria to bleed.

When Jackson returned to the front room with the safe, Smith said they had to "get rid of" Doria because he could potentially identify them. 11 VRP at 1450. Someone knocked on the door, and Doria's phone began to ring. After the person at the door left, Spencer resumed carrying marijuana plants to the front room. When Spencer next returned, he saw Smith stabbing Doria. Because they "were in this all together," Smith handed the knife to Jackson, who stabbed

⁴ Phone records showed that this call was made at 1:46 pm, and that the newly activated cell phone also called Doria's phone at 1:44 pm, and 1:51 pm.

Phone records showed the following additional earlier calls on the day of the robbery and murders: (1) two phone calls between the newly activated cell phone and Smith's ex-girlfriend (Natausha Sabin-Lee) shortly after 11:00 am; (2) a call between the newly activated cell phone and Smith's relatives in Georgia at 11:23 am; (3) a call from Smith's relatives to the newly activated cell phone at 12:17 pm; (4) a call from the newly activated cell phone to Spencer's cell phone at 1:14 pm; and (5) a call from the newly activated cell phone to Smith's ex-girlfriend's work place at 1:16 pm.

Phone records for calls made during the time of the robbery and murders showed that the newly activated cell phone called Spencer's cell phone at 3:04 and 3:14 pm; Spencer's cell phone called the newly activated cell phone at 3:22 pm; for the fourth time that day, the recently activated cell phone called Doria's number at 4:21 pm; four minutes later, at 4:25 PM, the recently activated cell phone called Smith's relatives in Georgia; and the same newly activated cell phone made another call to Smith's ex-girlfriend, Sabin-Lee, at 5:33 pm.

Doria once; Jackson then handed the knife to Spencer, who also stabbed Doria once. 11 VRP at 1458. After checking Doria's pulse, Smith slit Doria's throat.

Jackson, Smith, and Spencer were about to load the plants into their vehicle when they heard keys unlocking Doria's apartment door. Abrazado entered, saw Doria's body, and said, "Oh, my God, please don't kill me!" 11 VRP at 1464. Jackson and Smith grabbed Abrazado and pulled him into the apartment; Jackson slit Abrazado's throat. Jackson, Smith, and Spencer loaded into Doria's vehicle the marijuana plants, a video-game console, a laptop computer, and the safe; after unloading at Jackson's apartment, Jackson then drove Doria's vehicle to a local casino, with Spencer following him in his vehicle, where Jackson and Spencer abandoned the stolen vehicle.

On returning to Jackson's apartment, Smith told Jackson and Spencer that he realized they had left their used latex gloves in Doria's apartment. All three men returned to Doria's apartment; Smith went inside, retrieved the gloves, and took another marijuana plant and a bag of marijuana. About four months later, police arrested Jackson and Smith on suspicion of the crimes. Jackson and Smith made incriminating statements against each other. Police also arrested and charged Spencer, who confessed and gave a statement implicating all three men.

II. Procedure

The State charged Jackson, Smith, and Spencer with two counts of aggravated first degree murder, one count of first degree robbery, and one count of first degree burglary, with deadly weapon enhancements on each count. The State later amended the information to add two counts of felony murder against Jackson and Smith and a firearm sentencing enhancement to all

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counts.

A. Spencer's Plea Agreement with the State

Spencer entered into a plea agreement with the State, under which he would “immediately enter guilty pleas” to the original charges but if he testified truthfully at Jackson and Smith’s trial he may withdraw his guilty pleas and instead plead guilty to first degree murder and first degree manslaughter, for which, instead of life imprisonment without parole, he would receive a sentence between 240 and 320 months (20-26 years) for first degree murder with his sentence for first degree manslaughter running consecutively by law, and with the further understanding that his term of confinement may not be reduced by “good time” credit. Ex. 263. Jackson and Smith moved in limine for permission to cross-examine Spencer about collateral matters to impeach his credibility. The trial court ruled that Jackson and Smith could ask Spencer initial questions about collateral matters to show prior inconsistent statements for the purpose of attacking his credibility.

B. Joinder and Redaction of Codefendants’ Statements

After conducting separate CrR 3.5 hearings for Jackson, Smith, and Spencer, the trial court ruled their statements admissible. Smith and Jackson moved for separate trials under CrR 4.4(c)(1) and *Bruton*,⁵ arguing that their heavily-intertwined statements violated their confrontation rights. The trial court denied the motions to sever and asked for all parties’ cooperation in redacting problematic portions of Smith’s and Jackson’s statements to protect them from testifying against each other and to let “a fair trial triumph.” VRP (Dec. 30, 2008) at 30.

The parties and the trial court worked cooperatively to redact the statements. Despite

⁵ *Bruton*, 391 U.S. 123.

maintaining that redaction would be insufficient and that only severance would cure the constitutional violation, Smith participated in these efforts to redact the statements. Based on Smith's expressed preference, the trial court redacted Spencer's name, in addition to Jackson's name; the other parties deferred to Smith's preference.

C. Juror Selection

The parties agreed to the use and to the content of the juror questionnaires, including the following language telling the jurors that the court clerk would seal their information:

The information obtained through this questionnaire will be used solely for the purpose of selecting a jury. The questionnaire will become part of the court's permanent record and will not be distributed to anyone except the lawyers and the judge. The original will be filed under seal and no one will be allowed access except by court order.

Jackson Clerk's Papers (JCP) at 296 (emphasis added).

When the State asked about sealing the juror questionnaires, the trial court explained its normal procedure: After completing jury selection, the parties return their copies of the juror questionnaires to the court's judicial assistant for shredding. The court retains the original set of questionnaires and orders them sealed, giving the jurors "some expectation of privacy[.]" 1 VRP at 70. Following this explanation, the trial court specifically asked Jackson if this procedure was satisfactory; Jackson replied that it was. Jackson, Smith, and the State then signed a stipulation, agreeing to the trial court's proposal for sealing the jury questionnaires.

The entire jury voir dire occurred on the record in open court. When individual jurors indicated a preference to discuss specific issues privately, the trial court and counsel questioned them in open court, on the record, in the presence of all parties. The trial court neither closed the

courtroom nor excluded the public at any time. After the parties completed voir dire, the trial court ordered the jury questionnaires sealed.

D. Trial

1. Opening statements

The State's opening statement outlined Jackson and Smith's participation in the robbery, told the jury that they had given statements to police, and explained about Spencer's participation in the crimes and his plea bargain with the State:

The third villain who was responsible will also be here in court. His name is Pierre Spencer. He will come here and tell you how Warren Abrazado and Ruben Doria died and why. He was a codefendant with the two defendants here before you. *He has agreed with the State of Washington to tell you the truth about what happened in exchange for a fairly modest leniency.* He has stepped up. He has pled guilty to the charges against him. You will learn that he is looking at approximately 30 years of hard time in prison. I don't mean 30 years' sentence, serve five years, and get out on [parole]. The evidence will show you that he looking at three decades in prison as punishment for his role, and that is after providing truthful testimony to you.

5 VRP at 516-17 (emphasis added). Neither Smith nor Jackson objected.

Smith's opening statement told the jury that Spencer's testimony would be "incredible"⁶; that Smith's counsel was "going to have a lot of questions for Mr. Spencer"⁷; and that Smith had participated in the planning and commission of the robbery, had been "present when the dummy phone was activated," but that "he was not present in the apartment when Mr. Doria and Mr. Abrazado were stabbed." 5 VRP at 558.

Jackson's opening statement told the jury that Jackson had clearly been involved in

⁶ 5 VRP at 555.

⁷ 5 VRP at 573.

planning the robbery. But when Jackson’s counsel inadvertently mentioned co-defendant Smith’s first name, “Tyreek,” as having gone with Jackson and others to Doria’s apartment the night of the robbery, Smith objected and moved for a mistrial. 5 VRP at 577. Smith argued that by naming him, Jackson had rendered futile the redacted codefendants’ statements and the other accommodations for their joint trial. The trial court denied Smith’s motion for mistrial and, instead, accepted Jackson’s offer to tell the jury that he had been mistaken. Again addressing the jury, Jackson’s counsel rephrased, “[L]et me back up and tell you that I misspoke in my last statement. That Mr. Jackson, in his statement, said that he *and others* went to the apartment.” 5 VRP at 579 (emphasis added). Smith did not ask the trial court to give the jury a cautionary instruction to disregard Jackson’s reference to “Tyreek.” 5 VRP at 577.

2. Spencer’s testimony

Out of the jury’s presence, the State offered two exhibits—Spencer’s redacted plea agreement with the State and Spencer’s statement on plea of guilty. The State explained that the parties had previously agreed to redact the section discussing polygraph tests from Spencer’s plea agreement. When the trial court asked whether this section had “been redacted to everybody’s satisfaction,” Jackson, Smith, and the State all responded, “Yes.” 10 VRP at 1349. The trial court then admitted both Spencer’s redacted plea agreement and his guilty plea statement without objection by Jackson or Smith.

After the jury returned to the courtroom, the State asked Spencer on direct examination what type of information he was bound to provide under his plea agreement with the State. Spencer replied that he was obligated to cooperate with the investigation and to give a truthful

account of the events that had occurred in Doria's apartment. This portion of Spencer's testimony proceeded as follows:

[Prosecutor]: And was it, basically, your understanding that you had *an ongoing duty to provide truthful information* in connection with this case?

[Spencer answered in the affirmative.]

[Prosecutor]: . . . [I]f you have failed to comply with the Plea Agreement, what's your understanding as to what happens?

[Spencer]: It is life without parole.

[Prosecutor]: *If you provide information that is not truthful*, what is your understanding of what happens to you?

[Spencer]: That, I will get life without parole.

. . .

[Prosecutor]: *If you provide truthful information*, if you cooperate, if you meet with the attorneys for both sides, do everything that you are supposed to do, how much time do you understand that you are looking at at that point?

[Spencer]: 25 years, something like that.

10 VRP at 1354-55 (emphasis added). Neither Smith nor Jackson objected.

After reviewing the agreement terms with Spencer, the State asked:

[Prosecutor]: *So what happens to you today, Mr. Spencer, if you say something that is not true?*

[Spencer]: My plea agreement is void.

[Prosecutor]: What happens to you?

[Spencer]: . . . I will get life without parole.

10 VRP at 1362 (emphasis added). Again, neither Smith nor Jackson objected.

On cross-examination by Smith, Spencer testified that when giving his initial statement to police, he had not been aware that the State was considering offering him leniency. Smith also asked whether (1) under the terms of the plea agreement, Spencer would plead guilty to first degree murder and first degree manslaughter; and (2) Spencer expected to be sentenced to 25 years in prison. Spencer replied, "Yes," to both questions. 11 VRP at 1515. On redirect, the State asked Spencer:

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Is it your understanding that you will be allowed to withdraw your plea and enter a plea to reduced charges of Murder in the First Degree and Manslaughter in the First Degree no matter what you say here today or no matter whether you tell the truth?

11 VRP at 1591. The trial court sustained Jackson’s objection that this question “mischaracterize[d] the agreement.” 11 VRP at 1591. The State then rephrased the question:

[Prosecutor]: [I]s it your understanding that you will get that deal *regardless of whether you tell the truth?*

[Spencer]: No sir.

11 VRP at 1591-92 (emphasis added). Neither Jackson nor Smith objected to the State’s rephrasing of the question or to Spencer’s answer.

On re-cross examination by Jackson, Spencer testified:

[Jackson’s counsel]: Isn’t it true that the person who decides whether or not you are being completely truthful is sitting right here, the prosecutor?

[Spencer]: I don’t think so, sir.

[Jackson’s counsel]: These 14 people, here, don’t decide, do they?

11 VRP at 1599. The trial court sustained the State’s objection that the statement was argumentative.

3. Motions for mistrial and to dismiss

After the State rested, Smith renewed his motions for mistrial and severance. Pointing to Jackson’s redacted statements—which substituted “someone else” for “Spencer” as the person who had first approached, hit, and stabbed Doria—Smith argued that the jury would attribute the described actions to him, rather than to Spencer, and that such attribution would prejudice him (Smith). 13 VRP at 1820. The trial court denied Smith’s motions, ruling that the redactions complied with *Bruton* and that the jury had been properly instructed.

4. Closing arguments

During closing argument, the State asked the jury to evaluate Spencer's demeanor on the stand, reminded them that they were the sole judges of credibility, and argued:

[Spencer] was told, from day one, you need to tell the truth. Never was he told, hey, you need to implicate Jackson; you need to implicate Smith; you need to make the State's case work. What he was told, from day one, was that you have to tell the truth. He knows because he has signed this written plea agreement that tells [him] in no uncertain terms, if you don't tell the truth, life in prison, no parole. That is a huge incentive for him to come in here and take his oath seriously and tell you the truth.

14 VRP at 1884-85. Neither Smith nor Jackson objected.

In Smith's closing argument, he emphasized the trial court's instruction for the jury to evaluate Spencer's testimony with "great caution." 14 VRP at 1950. In rebuttal, the State agreed, reiterating that it was appropriate for the jury to look at Spencer's testimony with caution.

E. Verdicts and Sentences

The jury found both Jackson and Smith guilty of all six counts; the jury also answered "yes" on the special verdicts for the aggravating sentencing factors and the deadly weapon enhancements (being armed with both a knife and a gun). JCP at 255-64, Smith Clerk's Papers (SCP) at 82-88. At sentencing, the trial court merged counts 1 and 3 and also merged counts 2 and 4, imposed sentences of life in prison without parole for the aggravated murder counts and high standard-range sentences for the first degree robbery and first degree burglary counts, and added the weapon enhancements.

Jackson and Smith appeal their convictions and enhanced sentences.

ANALYSIS

I. Sealing of Jury Questionnaires

Jackson argues that the trial court violated his right to a public trial by sealing the jury questionnaires without first conducting a courtroom-closure analysis under *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). This argument fails. We hold that the trial court’s sealing of the confidential juror questionnaires did not constitute a courtroom closure and, therefore, no *Bone-Club* analysis was required.

In response to the State’s question at the beginning of voir dire, the trial court explained its normal procedures for sealing juror questionnaires: (1) Only counsel and the trial court would view the questionnaires; (2) the questionnaires would not be available to the general public; and (3) the court clerk would seal the questionnaires after voir dire. Jackson agreed to the language in the juror questionnaires that explained these procedures and expressly affirmed that he was satisfied with these procedures. Thereafter, Jackson actively participated in voir dire, using the questionnaires to his advantage by identifying and engaging with jurors who asked to be questioned individually.

As we recently held in *In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 180-81, 248 P.3d 576 (2011), the trial court’s sealing of juror questionnaires after voir dire is not “structural error”;⁸ nor does it render the trial fundamentally unfair. As was the case in *Stockwell*, Jackson had full access to the questionnaires and benefitted from the trial court’s promise to the

⁸ An error is “structural” when it renders a criminal trial “fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Stockwell*, 160 Wn. App. at 180-81 (quoting *State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321 (2009) (quoting *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)), *cert. denied*, 131 S. Ct. 160 (2010)).

prospective jurors that their questionnaires would be sealed after voir dire; this assurance of confidentiality made it more likely that the jurors would candidly reveal in their questionnaires information that Jackson might use to challenge them for cause. *See Stockwell*, 160 Wn. App. at 180-81.

As we noted in *Stockwell*, sealing juror questionnaires after voir dire, at most, affects only the public's right to "open" information connected to the trial. 160 Wn. App. at 181. Here, however, the sealing procedure did not affect the public's right to open information because Jackson and Smith used the "content of the questionnaires" to question the jurors "in open court, where the public could observe." *Stockwell*, 160 Wn. App. at 183. Under these circumstances, there was no courtroom closure and, therefore, no need for the trial court to consider the *Bone-Club* factors.⁹ Accordingly, we hold that the trial court did not err in sealing the jurors' questionnaires after voir dire without first conducting a *Bone-Club* analysis.

II. No Prosecutorial Misconduct—"Vouching"

Jackson next argues that we should reverse his first degree premeditated murder convictions because prosecutorial misconduct deprived him of his constitutional due process right to a fair jury trial, a challenge that he attempts to raise for the first time on appeal. More specifically, he argues that (1) the prosecutor acted with ill-intention in recounting Spencer's plea agreement to testify truthfully, thereby impliedly assuring Spencer's veracity; and (2) this

⁹ We decline to follow *State v Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009), in which Division One of our court held that the trial court was required to conduct a *Bone-Club* analysis before sealing juror questionnaires that contained information about the jurors' sexual history. *See also State v Tarhan*, 159 Wn. App. 819, 246 P.3d 580 (2011). We find more persuasive Judge Van Deren's concurring opinion in *Stockwell*, 160 Wn. App. at 182.

improper vouching was flagrant and ill-intentioned and allows him (Jackson) to raise this challenge for the first time on appeal, despite his failure to object below. We disagree.

Because Jackson clearly announced at the trial's outset his intent to attack Spencer's credibility based on his plea bargain with the State, the State was entitled to engage in anticipatory rehabilitation of this witness. Therefore, the State's direct examination of Spencer about his plea bargain agreement to testify truthfully cannot be said to have been "flagrant and ill-intentioned," the standard that Jackson must but cannot meet where he failed to object below.¹⁰ *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)).

At the outset, we acknowledge our Supreme Court's recent decision in *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010), addressing the admissibility of witness plea-agreement truthfulness provisions¹¹ similar to the one at issue here: Four justices characterized eliciting testimony about this plea-agreement provision as proper method to "pull the sting" on direct examination from anticipated cross-examination of the witness. *Ish*, 170 Wn.2d at 206 (Madsen, C.J., concurring). Four other justices characterized this testimony as a "mild form of vouching" not warranting reversal. *Ish*, 170 Wn.2d at 197 (emphasis added) (citing *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007)). One dissenting justice characterized this testimony as reversible-error vouching. *Ish*, 170 Wn.2d at 206. Ultimately, although five justices

¹⁰ In so holding here, it is not our intention to condone or to invite improper vouching.

¹¹ After similarly redacting a provision requiring a State's witness to take a polygraph, the trial court admitted the plea agreement over Ish's objection and allowed the State to examine the witness about his promise to testify truthfully. *Ish*, 170 Wn.2d at 194.

characterized as “vouching” the State’s eliciting a witness’s testimony about his plea-agreement promise to testify truthfully, eight justices agreed and held that, under the facts of *Ish*, this conduct was not reversible error. *Ish*, 170 Wn.2d at 200, 201. Applying *Ish* to the analogous facts here, we, too, hold that the trial court did not commit reversible error in allowing the State on direct examination to elicit Spencer’s testimony about his plea-agreement promise to testify truthfully.

A prosecutor has reasonable latitude to draw inferences from the evidence, including inferences about witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Nevertheless, it is improper for the State to vouch for the credibility of a government witness; vouching may occur when the prosecution places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness’s testimony. *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980), *cert. denied*, 452 U.S. 942 (1981). Four justices, plus the dissenting justice in *Ish*, stated that the type of questioning in which the State engaged constituted “vouching” with the four characterizing it as only “mild” vouching. *Ish*, 170 Wn.2d at 197. Regardless of whether characterized as “vouching” or not, however, a majority of eight justices agreed that this questioning was not improper under the facts of *Ish* and was not reversible error. *Ish*, 170 Wn.2d at 191, 206.

Both the lead and concurring opinions in *Ish*, again, eight justices, also noted that, under the circumstances in that case, it was not reversible error for the State to have anticipated a credibility attack on its witness and to rehabilitate its witness in advance of this inevitable attack: Where “there is little doubt” that the defendant will attack the veracity of a State’s witness during

cross-examination, for example, the State is entitled to engage in preemptive questioning of its witness on direct to “take the sting” out of the inevitable damaging cross-examination. *Ish*, 170 Wn.2d at 199 n.10. Such is the case here. During pre-trial motions in limine seeking permission to address Spencer about collateral matters, both Jackson and Smith indicated their intent to impeach Spencer’s credibility.

As expected, Smith immediately attacked Spencer’s credibility in his opening statement:

When somebody says something is incredible, it can be either astonishing and shocking or it can be not believable.

You are going to hear testimony at this trial from a witness that is going to be incredible. When I use that word, I mean—I’m using it with both of its meanings. Both of its connotations. That witness is Pierre Spencer. Pierre Spencer is going to give you incredible testimony. In order to understand why his testimony is incredible, we need to back up and start at the beginning of the story.

5 VRP at 556.

Mr. Spencer had an advantage. He knew what the police knew. . . . His attorney has access to . . . police reports, autopsy reports, witness statements, Mr. Smith’s statement, Mr. Jackson’s statement.

. . .
The prosecutor’s office was interested in hearing his side of the story. The prosecutor’s office believed that they had the three right people, Mr. Spencer, Mr. Smith, and Mr. Jackson. They wanted confirmation. They were willing to make a bargain in exchange for that information.

Mr. Spencer . . . told an incredible story.

. . .
Mr. Spencer entered into a deal . . . where he pled guilty to two offenses. I believe the first was for the murder. If he comes in and testifies and if he tells you all the same story that he told the police . . . he will be allowed to withdraw his guilty plea, and he will get one count of First Degree Murder and one count of First Degree Manslaughter. He will be sentenced to approximately 30 years in prison. He is a young man, mid-20’s. His option was life without [parole] or to get out in his 50’s.

5 VRP at 568-71. Jackson and Smith left no doubt they would attack Spencer’s credibility based

on his plea agreement once Spencer took the witness stand.

Given these background facts, the State correctly anticipated a defense attack on Spencer's credibility as a witness, based on his plea agreement. Jackson failed to object below to Spencer's testimony about his plea bargain agreement to testify truthfully. Jackson now fails on appeal to show that the State's elicitation of this testimony on direct examination was "flagrant and ill-intentioned." Br. of Appellant Jackson at 34. Accordingly, we hold that Jackson cannot raise this issue for the first time on appeal as grounds for reversing his conviction, and we do not further consider it.

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.

III. Joint Trial

Smith separately argues that the trial court erred in denying his motion to sever his trial from Jackson's because (1) the redacted form of Jackson's confession left a clear reference to Smith, and (2) Jackson's counsel implicated Smith by name in his opening statement. Smith also argues that the trial court erred in denying his related motions for a mistrial based on the same reasons. Smith's argument fails.

A. Standards of Review; Burdens of Proof

1. Redacted codefendant's confession

We review *de novo* alleged violations of a criminal defendant's constitutional right to confront the witnesses against him,¹² including a non-testifying codefendant's post-arrest

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confession. *State v. Larry*, 108 Wn. App. 894, 901-02, 34 P.3d 241 (2001), *review denied*, 146 Wn.2d 1022 (2002). When a codefendant's confession naming the other defendant is admitted at their joint trial at which the codefendant does not testify and thus does not subject himself to cross-examination by the other defendant, the non-testifying codefendant essentially becomes one of the defendant's accusers. *Bruton*, 391 U.S. at 134.

Nevertheless, the trial court may properly admit a codefendant's confession that redacts all reference to the other defendant because such a statement is not "incriminating on its face" and becomes incriminating "only when linked with evidence introduced later at trial (the defendant's own testimony)." *Richardson v. Marsh*, 481 U.S. 200, 208, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). Redactions are insufficient, however, if the parties replace the defendant's name with a blank space or the word "deleted." *Gray v. Maryland*, 523 U.S. 185, 195, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998). We have previously articulated Washington's general rule as follows:

Redacted statements must be (1) facially neutral, i.e., not identify the non-testifying defendant by name (*Bruton*); (2) free of obvious deletions such as "blanks" or "X" (*Gray*); and (3) accompanied by a limiting instruction (*Richardson*).

Larry, 108 Wn. App. at 905.

2. Joint trial

Separate trials are not favored in Washington; thus, the defendant bears the burden to show that a joint trial is so manifestly prejudicial that it outweighs concerns for judicial economy. *State v. Jones*, 93 Wn. App. 166, 171, 968 P.2d 888 (1998), *review denied*, 138 Wn.2d 1003 (1999). To prevail, a defendant must show specific, undue prejudice from the joint trial. *State v.*

¹² U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend. 10).

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Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). The trial court’s decision regarding severance of trials is discretionary. We review a trial court’s decision on a motion for severance under CrR 4.4(c)(2) for manifest abuse of discretion. *State v. Wood*, 94 Wn. App. 636, 641, 972 P.2d 552 (1999).

3. Mistrial

Trial courts “should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *State v. Rodriguez*, 146 Wn.2d 260, 270, 45 P.3d 541 (2002) (quoting *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986), overruled on other grounds by *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994)). We review a trial court’s denial of a motion for mistrial for abuse of discretion. *Rodriguez*, 146 Wn.2d at 269. We will find abuse of discretion only when “no reasonable judge would have reached the same conclusion.” *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989)). Before we will overturn a trial court’s denial of a motion for mistrial, there must be a “substantial likelihood” that the error prompting the mistrial affected the jury’s verdict. *Rodriguez*, 146 Wn.2d at 269-70. We find no such error here.

We examine three factors to determine whether a trial court abused its discretion in denying a motion for mistrial: (1) the seriousness of the irregularity, (2) whether the comment was cumulative to other evidence properly admitted, and (3) whether the trial court could have cured the irregularity by an instruction to the jury. *State v. Crane*, 116 Wn.2d 315, 332, 804 P.2d 10 (1991) (citing *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)). We find no

such abuse of discretion here.

B. Smith's Redacted Statement

Jackson and Smith both made implicating statements to police. Jackson gave two statements, which the trial court admitted into evidence and from which detectives read in redacted format during the joint trial. The parties had redacted Smith's and Spencer's names, replacing them with pronouns (e.g. "others," "someone," "he"). 13 VRP at 1762-1773, 1784-1812. Smith argues that Jackson's redacted statements' inclusion of the substituted words "others" or "another" clearly implied that Jackson was working with two other people and, thereby, prejudiced him (Smith). Br. of Appellant Smith at 18.

At trial, Detective Gene Miller testified about his interview with Jackson using the following redacted statements with plural pronouns:

Jackson said that he and *the others* went [to Doria's apartment] together to do a, quote, lick. . . . According to Jackson, he was just supposed to . . . be *their* way in.

. . .

Jackson claimed that he did not go over to Ruben's apartment on Saturday . . . but that *the others* did go there to do the robbery.

. . .

Jackson said that he and *the others* then all went over to Ruben's. . . . According to Jackson, *the others* pushed Ruben into the apartment and he followed.

. . .

Jackson replied that *someone else* was doing most of the talking.

. . .

Jackson described one of *the others* stabbing Ruben and then, quote, slitting his throat.

13 VRP at 1762-67 (emphasis added). We disagree with Smith that the substituted words prejudiced him. See Br. of Appellant Smith at 18

Jackson's redacted statements comply with the above *Larry* requirements as follows: (1)

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Working together, the parties redacted both Jackson's and Smith's statements to omit all references to each other, rendering the statements facially neutral; (2) the parties deleted the names of all three co-defendants (including Spencer who pled guilty) and substituted neutral pronouns such as "others," "another," or "someone," (*see* 13 VRP at 1771), leaving no obvious deletions with blacked out or stricken words, blank spaces or "Xs" in spaces left behind by removed words; and (3) the trial court instructed the jury not to consider one codefendant's statement against another codefendant. *Larry*, 108 Wn. App. at 905.

Although acknowledging the rule we annunciated in *Larry*, Smith argues that *Larry* does not go far enough to comply with *Gray*, 523 U.S. at 195, namely that using neutral pronouns is an "obvious alteration" and, as such, they are also "directly accusatory." Br. of Appellant Smith at 24 (quoting *Gray*, 523 U.S. at 194) (emphasis omitted). But, as we noted in *Larry*,

Since *Gray*, the federal Courts of Appeal have issued divergent opinions on whether the use of neutral pronouns in redacted statements adequately protect the non-testifying defendant. Several courts have found neutral pronouns proper: *United States v. Logan*, 210 F.3d 820 (8th Cir., 2000) (use of "another individual" did not violate confrontation clause); *United States v. Verduzco-Martinez*, 186 F.3d 1208, 1213-14 (10th Cir., 1999) (use of "another person" did not violate confrontation clause); and *United States v. Akinkoye*, 185 F.3d 192, 198, (4th Cir., 1999) *cert. denied*, 528 U.S. 1177, 120 S. Ct. 1209, 145 L. Ed. 2d 1111 (2000) (use of "another person" and "another individual" did not violate confrontation clause);^[13]

Larry, 108 Wn. App. at 903.

Smith does not persuade us that the parties' agreed use of the neutral pronouns in

¹³ We also noted other federal Courts of Appeals' criticizing use of some neutral pronouns, including "someone," in a different context. But these cases held such uses to be harmless error, where violation of the *Bruton* rule did not result in prejudice "so devastating that the jury could not be expected to disregard it if the district court had instructed them to do so." *Larry*, 108 Wn. App. at 904 n.2 (quoting *United States v. Guerrero*, 756 F.2d 1342, 1348 (9th Cir. 1984)).

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Jackson's statements violated his confrontation rights under *Bruton*, nor that we should alter the rule in *Larry*. We hold, therefore, that the trial court did not abuse its discretion in admitting Jackson's redacted statement.

C. Motion To Sever

Smith next contends that the trial court abused its discretion in denying his motion to sever his trial from Jackson's because redaction of Jackson's statements did not eliminate the prejudice from admission of the statement. Again, we disagree.

CrR 4.4(c), which governs the severance of codefendants' trials, provides in part:

(1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:

- (i) the prosecuting attorney elects not to offer the statement in the case in chief; or
- (ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

As we explain above, working cooperatively, the parties omitted all reference to Smith from Jackson's police statements to create the redacted documents admitted into evidence. These redactions complied with the requirements set forth in *Larry*, 108 Wn. App. at 905. Meeting these *Larry* requirements also shows that the redactions meet CrR 4.4(c)(1)(ii)'s requirement that deletion of references to Smith "eliminate any prejudice to him from the admission of the statement."

As we also explain above, the redacted statements omitted all named references to other codefendants and substituted neutral pronouns for the codefendants' names. The trial court considered Smith's input and made fairly severe redactions in an effort to alleviate Smith's concerns. Moreover, the trial court expressly instructed the jury not to consider one codefendant's statement against another codefendant, which instruction we presume the jury followed. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

We hold, therefore, that (1) Smith has failed to carry his burden to show that his joint trial with Jackson was so manifestly prejudicial that it outweighed concerns for judicial economy, *Jones*, 93 Wn. App. at 171; and (2) the trial court did not abuse its discretion in denying his motion to sever.

D. Motion for Mistrial

Smith also argues that the trial court erred in denying his motions for a mistrial because (1) Jackson’s counsel used his codefendants’ names “Smith” and “Spencer” in his opening statements,¹⁴ and (2) substituting neutral pronouns for his codefendants’ names in Jackson’s redacted statements unfairly prejudiced him. Br. of Appellant Smith at 13. Both arguments fail.

Smith moved for a mistrial after Jackson’s attorney inadvertently mentioned Spencer’s name and Smith’s first name in his opening statement:

. . . Darrel[] admitted, first of all, that he was involved in planning this robbery. He was involved in it. No doubt about it. He admitted that he took *Mr. Spencer* and Mr. Jackson¹⁵ over to Ruben’s apartment on Friday night with the plan being that there was going to be a robbery. He admitted that he went in, and there was too many people there, so it did not occur. He admitted that he went back—actually, there was [sic] four people there that night. He went back the next day with Pierre, or as he was known, Mexico, and *Tyreek*.

5 VRP at 577 (emphasis added). Smith objected. The trial court excused the jury and heard argument. The State pointed out that Smith’s attorney had just finished telling the jury in his

¹⁴ Jackson did not use Smith’s last name during his opening statement. Instead, he said: “Mr. Spencer,” “Mr. Jackson,” and “Tyreek,” Smith’s first name; he later referred to Spencer’s first name, “Pierre” or “Mexico,” without using Spencer’s last name. Jackson also stated that, a fourth person, evidently not a codefendant, had been present. 5 VRP at 577.

¹⁵ In line three of this quote, the record clearly says, “Mr. Jackson,” not, “Mr. Smith.” 5 VRP at 577. If this was a mistake, apparently no one ever corrected it under RAP 9.5(c), RAP 9.9, or RAP 9.10.

opening statement that Smith had participated in the planning of the criminal episode; therefore, theoretical harm was minimal. Jackson's attorney offered to tell the jury he had misspoken and that he would like to correct his statement, which he immediately did.

Clearly, Jackson's attorney made a mistake in mentioning Smith's and Spencer's names. But the prejudice, if any, was minimal. First, in Smith's own opening statement, defense counsel disclosed Smith's participation as follows:

My client, Mr. Smith, participated in the planning of this robbery. He was present, depending on how you view the timeline, half-hour, five hours. It was a little unclear on the timeline. Certainly, less than a day. He was present with the other participants in this robbery. He helped plan it. He was present when the dummy phone was activated at the 7-Eleven. Certainly, we can fault Mr. Smith for the actions that he took on September 21st in that regard.

5 VRP at 557-58 (emphasis added). Thus, the only portion of the Jackson's opening statement that Smith did not repeat in his own opening statement was Jackson's comment: "He went back the next day with Pierre, or as he was known, Mexico, and Tyreek." 5 VRP at 577.

In our view, Jackson's brief inadvertent mention of Smith's first name did not so manifestly prejudice Smith that the trial court was required to grant Smith a new separate trial in order to be tried fairly. *Rodriguez*, 146 Wn.2d at 270. Nor do we conclude that there existed a "substantial likelihood" that Jackson's slight error affected the jury's verdict when the evidence supporting Smith's jury conviction included phone records, testimony from his ex-girlfriend, and his own statements, and where Jackson's counsel immediately corrected his mistake in front of the jury, telling them he had misspoken. *Rodriguez*, 146 Wn.2d at 269. Because this minor mistake took place at the beginning of a very long trial and the parties immediately corrected the mistake, we hold that a reasonable judge could have reached the conclusion that mistrial was not

appropriate, and, therefore, the trial court did not abuse its discretion in denying a new trial. *Hopson*, 113 Wn.2d at 284.

Smith renewed his motion for mistrial at the end of the State's case, arguing that Jackson's redacted statement's reference to "someone else," instead of to Spencer's name, would cause the jury to assume that Jackson was referring to Smith. 13 VRP at 1820. As the State noted on the record at the time, it was Smith who had requested, and had achieved, removal of all mention of Spencer's name from Jackson's statements. Satisfied that the redaction comported with *Bruton* and that it had properly instructed the jury to use Jackson's statement against Jackson only, the trial court denied this later motion for a mistrial as well. We hold that under these facts and circumstances, the trial court did not abuse its discretion when it denied Smith's second motion for mistrial.

IV. Double Jeopardy

Jackson and Smith both argue that the trial court's imposition of firearm and deadly weapon sentence enhancements for their first degree burglary convictions violated constitutional prohibitions against double jeopardy because being armed with a deadly weapon is an element of first degree burglary. Jackson also makes the same argument to challenge the enhanced sentence for his first degree robbery conviction. These arguments fail.

As the State correctly notes, our Supreme Court recently resolved this issue in *State v. Kelley*, 168 Wn.2d 72, 82, 226 P.3d 773 (2010). In *Kelley*, the Supreme Court held that imposition of a firearm enhancement under RCW 9.94A.533(3) is mandatory and does not constitute double jeopardy, even where use of a weapon is an element of the underlying crime.

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Kelley, 168 Wn.2d at 79. *Kelley* controls, and defendants’ arguments fail.

We affirm.

Hunt, J.

We concur:

Worswick, A.C.J.

Van Deren, J.

Hunt, J. (concurring) — To the extent that my having signed the majority opinion in *Stockwell*¹⁶ implies that I intended to hold that sealing juror questionnaires constitutes a partial courtroom closure, I now correct that impression. I agree with Judge Van Deren’s concurring opinion statement in *Stockwell*: “I would hold that under the particular facts of this case, there does not appear to be any closure during voir dire triggering the requisite *Bone–Club/Waller* analysis.” *Stockwell*, 160 Wn. App. at 183.

I concur

Hunt, J.

¹⁶ *In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 248 P.3d 576 (2011).