NO. 42599-8

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JUAN JOSE RECINOS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 10-1-00872-3

BRIEF OF RESPONDENT

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2. Defendant's spontaneous statements to law enforcement were admissible because they were not in response to custodial interrogation.

3. The admission of three photos of the defendant in handcuffs was not unduly prejudicial; alternatively, any potential error was harmless.

4. Trial counsel did not error in refraining from objecting to the playing of a recorded jail call of defendant's impeachment statements, therefore his claim of ineffective assistance of counsel fails.

5. The defendant received a fair trial as guaranteed by the Constitution.

B. STATEMENT OF THE CASE.

1. Procedure

On March 9, 2011, the defendant was convicted as charged in the amended information of two counts of attempted murder in the first degree, both firearm enhanced, one count of vehicular assault, and another of failing to remain at the scene of an injury accident. CP 30-34. The convictions stemmed from a February 23, 2010, collision the defendant caused.

The State first charged the defendant by information on February 25, 2010, with nine felonies, including two counts of attempted murder.

CP 1-6. Following arraignment, several changes of counsel, a number of trial continuances, and an amended information, the defendant's trial commenced on February 22, 2011. 1RP 4.

The trial court started with a CrR 3.5 hearing with testimony from two officers. After hearing the testimony, the trial court ruled the defendant's statements to the officers were admissible. CP 180, 1 RP 42.

In addition to the defendant's statements, the trial court also found the 911 call by Mrs. Moreau, victim Recinos' mother, to be an excited utterance pursuant to ER 803(a)(2). 5 RP 649-50. Similarly, the court admitted several photographs of the defendant taken the night of the shooting and collision after he was arrested. Exh. 49-51. The ruling followed the court's evaluation of a number of photos and argument from counsel. 2 RP 205-207. Of the five sought to be admitted, the court admitted three. 2 RP 207. The defendant assigns error to both rulings.

During the cross examination of the defendant, the State played a CD of a recorded jail call, ex. 138, which included statements by the defendant that directly contradicted his trial testimony. 6 RP 767-68. Exhibit 138 was marked and identified, but never admitted. The defendant contends he received ineffective assistance of counsel for trial counsel's failure to object to the tape not being formally admitted. App. Br. at 24.

During the course of the trial, approximately 140 exhibits were admitted and twenty-three witnesses called, including the defendant. On

March 9th, the jury returned verdicts of guilty as charged in the amended information. CP 249-250. After several post-verdict motions, including yet another change of counsel, the defendant was sentenced on August 19, 2011, to 245 total months of confinement. CP 247-260 (Corrected Judgment and Sentence done September 2, 2011).

The defendant timely appeals.

2. Facts

On February 23, 2010, the defendant's wife, Tiffany Recinos, and her friend, Arthur DeVone, sustained serious injuries as the result of a high speed collision the defendant caused by chasing the car in which they were riding, and ramming and shooting at them. 3 RP 277-282.

The defendant and his wife had been experiencing marital difficulties for some time prior to the collision. 3 RP 256. The defendant made comments to several different individuals, including his wife, that if he caught her being unfaithful he would kill her. 3 RP 262-64. 5 RP 605, 636.

On February 23, Mrs. Recinos went to her work as an R.N. at a nearby dialysis center. Mrs. Recinos had begun a romatic relationship with one of her patients, Arthur DeVone, just weeks before the collision. 3 RP 260-61. The defendant began to suspect an affair and confronted his wife, who denied any infidelity. 3 RP 307. However, he began calling incessentaly while she was at work. 3 RP 267-68. On February 23rd, she

obtained permission to leave work early because of the defendant's continous calls. 3 RP 268. She went to Mr. DeVone's home for help. They ultimately left in her Honda Civic and drove to several places in Pierce County. 3 RP 269-74.

Later in the evening, they were returning to the neighborhood near her employer when Mrs. Recinos noticed the defendant driving their family burgandy Odyssey minivan. 3 RP 274. The defendant and his wife made eye contact and this began a dangerous and frightening car chase of the Civic by the defendant in the minivan. The defendant rammed and/or bumped the Civic a number of times. 3 RP 279-81. The Civic swerved several times, but Mr. DeVone, who was driving the Civic, managed to maintain control. *Id.*

However, shortly after the ramming started, DeVone and Mrs. Recinos heard loud noises against the car. 3 RP 278-81. Mrs. Recinos initially thought the defendant was throwing rocks at the car; Mr. DeVone corrected her and told her the defendant was shooting at them. 3 RP 375. There were at least several separate bursts of fire from the minivan at the Civic. The Civic was struck several times in various areas. 3 RP 377. Despite shooting out the rear window of the car, amazingly, neither DeVone nor Mrs. Recinos were hit. 3 RP 414.

Their good fortune came to an abrupt end when being pursued at a high rate of speed by the defendant, DeVone ran a red light at the intersection of 168th and Meridian. Mr. DeVone entered the intersection at

a high rate of speed just as Ms. Kim entered the intersection 90' to their right in her Scion. 3 RP 380. The Scion struck the front passenger side of the Civic. The cars were diverted and came to rest.

The defendant avoided being physcially involved in the collision. 4 RP 488. Mrs. Recinos sufferend severe and extensive injuries and was not responsive. 3 RP 283-284, 381. Mr. DeVone did not lose consciouness but sustained a severe leg injury rendering him unable to walk immediately after the collision. 3 RP 381.

Mr. DeVone saw the defendant park the van alongside the road and approach the Civic. 3 RP 382. The defedant initially approached his wife's side of the car, but found her unresponsive. 3 RP 383. He came around to the driver's side, where he found Mr.DeVone on the ground where he lay from his injuries. 3 RP 385. The defendant produced his 9mm Glock semi automatic handgun and hit DeVone in the head several times with it. 3 RP 388-389. He hit him so hard that one of the blows left the imprint of the word "Glock" on his temple. 4 RP 441-44, 450-52. The defendant uttered the comment, "I should just kill you." 3 RP 386, 4 RP 439.

The defendant testified at trial that, despite the testimony of his father-in-law, his wife, and a friend, he never threatened to kill his wife. 6 RP 734. He told the jury that his wife was overdue from work and he began checking the family credit card for activity to determine her location. 6 RP 743-44. He left their four young sleeping children home

alone and went looking for his wife. 6 RP 744. He was in the family burgandy Odyssey minivan; his wife in their Honda Civic. 6 RP 744-45. He also testified he took his firearm with him. 6 RP 744.

He testified that when driving in the neighborhood looking for his wife, he saw her car with her in the passenger seat. 6 RP 746. He claimed she yelled for help through her rolled down window. 6 RP 746-47. He claimed he thought she had been kidnapped and proceeded to follow the Civic until the back up lights suddenly came on and the Civic "rammed" him before taking off. 6 RP 748-49. He told the jury that of the options he felt he had, he decided to use the gun he brought with him and fired the gun, he believed "four or five times." 6 RP 750. He claimed he fired because he "tried to get her out of the car." 6 RP 750-51.

He continued to follow them down Meridian at what he estimated, "80, 90, close to 100 miles an hour." 6 RP 754. He continued pursuing them as they approached a red light at 168th and Meridian. 6 RP 755. A white Scion driven by Mu Kim 'T-boned' the Civic. 6 RP 755. He described his wife's car as being in a "V" shape after the collision. *Id.*

He next claimed he approached the car after the collision and that Mr. DeVone turned toward him and started swinging at him requiring him to "fight back." 6 RP 756. He claimed DeVone was not getting hurt in the fight, but he, the defendant, was. *Id.* He claimed he was compelled to "pistol-whip[] him on the temple." *Id.* He then explained that he caused DeVone to become dizzy and at this point the defendant said he wrestled

DeVone to the ground, put him face down, hands behind his back, and told him not to move. *Id.* He said he initially was going to sit and wait for emergency personnel, *Id.,* but then realized he was armed and "It clicked,...my kids are home alone....so all I could think of is go get my kids." 6 RP 758. He said he "panicked and [] left the scene." *Id.*

Instead of going to his children, the defendant drove to his in-laws' home, changed from his bloody clothes into some of his father-in-law's, and asked him to drive him to the scene. 6 RP 759. His mother-in-law, Mrs. Moreau, upon hearing the defendant's truncated account of events realized her four young grandchildren were home alone and immediately left to go check on them. 5 RP 586.

When asked about the blood, the defendant explained the blood was from a cut to his hands that "happened with the gun that I had. The slider is what cut me." 6 RP 760.

On cross-examination, he explained he fired his gun out of the driver's side window, but was also able to aim at times with his right hand. 6 RP 766. The defendant was asked if he had ever told a different story to anyone, the defendant claimed to have always told the truth about what happened. 6 RP 767. However, the State played a portion of a jail call (ex. 138) wherein the defendant is heard speaking to a friend, "Jim," denying ever having shot at his wife's car. The CD was marked but not offered nor admitted. Exh. 138.

Lastly, the defendant explained his contact with officers that evening. He told the jury that from watching T.V. shows, he knew the police would "turn it around" and make him look bad. 6 RP 761. He testified that night he told the police, "I plead the Fifth and I want to talk to an attorney." *Id.*

As a result of the collision, Mrs. Recinos spent one month at Tacoma General Hospital, three weeks of which were in ICU. 3 RP 283-284. She sustained a fractured tibia (several places), fractured femur, severely shattered hip, broken back, fractured jaw, and 6 broken ribs. 3 RP 283-284. She underwent six surgeries. 3 RP 284.

Mr. DeVone spent approximately one week in the hospial, but two months in a physical rehabilitation center. 3 RP 393. He sustained a badly broken femur requiring significant implants and now suffers from migraines. 3 RP 393.

Ms. Mu Kim was driving the white Scion that entered the intersection with a green light. 4 RP 460, 461. She suffered a fractured clavicle and suffers severe pain and aches to the left side of her body as a result of the collision. 4 RP 463.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING A PORTION OF THE 911 TAPE AS AN EXCITED UTTERANCE PURSUANT TO ER 803(A)(2).

The crucial question regarding the admissibility of a statement as an excited utterance is whether the statement was made while the declarant was still under the influence of the event to the extent the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment. ***State v Hieb, III***, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), *reversed on other grounds*, 107 Wn.2d 97, 727 P.2d 239 (1986). When the conditions are satisfied, the evidence is properly admitted pursuant to ER 803(a)(2).

The principal elements of an excited utterance are a startling event and a spontaneous declaration caused by that event. ***Hieb, III***, 39 Wn.App. at 278, *citing* 5A K. Tegland, Wash. Prac., Evidence at 206-07 (2d ed. 1982). Unlike a statement of present sense impression, an excited utterance need not be contemporaneous to the event. Nor must the statement be completely spontaneous; responses to questions may be admissible. ***State v. Downey***, 27 Wn. App. 857, 861, 620 P.2d 539 (1980).

The defendant's argument that Mrs. Moreau was not sufficiently "excited" for purposes of the excited utterance exception is without merit. As noted above, the focus of the inquiry with respect to whether a

declarant is "excited" or still under the influence of the event is to preclude any chance of fabrication, intervening influences, or the exercise of choice or judgment. ***Johnson v. Ohls***, 76 Wn.2d 398, 406, 457 P.2d 194 (1969). Washington case law does not require any particular indicia of distress. Indeed, shock is as likely a reaction to a traumatic experience as is hysteria. ***State v. Bryant***, 65 Wn. App. 428, n. 4, 828 P.2d 1121 (1992).

Defendant argues Mrs. Moreau sounded 'calm' on the 911 tape. However, the trial court had the unique perspective of viewing Mrs. Moreau during her trial testimony and on the 911 tape. The State pointed out that her demeanor and voice were different in court than on the 911 tape. 5 RP 648. The trial court was in the best position to make such observations. *See*, ***State v. Williams***, 136 Wn. App. 486, 499, 150 P. 3d 111 (2007). A determination concerning the admissibility of statements offered as excited utterances is within the sound discretion of the trial court and is reviewable only for abuse of discretion. ***State v. Bryant***, 65 Wn. App. 428, 432, 828 P.2d 1121, citing ***Brewer v. Copeland***, 86 Wn.2d 58, 73, 542 P.2d 445 (1975).

Mrs. Moreau testified the defendant called late in the evening and awoke her from a sound sleep. 5 RP 584. The defendant sounded flustered on the phone and was "stressed and flustered" when he appeared at her sliding glass door. 5 RP 584-85. He was bloody and the only words she could understand from him, "I found them together. I shot," and something that lead her to believe the defendant had 'T-boned' her

daughter in her car. 5 RP 585. She immediately tried to determine where her four young grandchildren were and realized they were home alone. 5 RP 586. She responded to the information by grabbing her phone and car keys and headed out the door without even checking on her husband. 5 RP 586. As she was backing out of her driveway she called 911. 5 RP 587. She was still so upset that when she arrived at the Recino home, her hands were shaking so badly she could not get the key in the lock. 5 RP 587-588. She ultimately had to return to her house and get help from a neighbor to unlock the door. RP 587, 589.

Mrs. Moreau provided a detailed description of the sudden and frightening events that evening regarding the defendant, his behavior, and what he told her that involved both her daughter and grandchildren. The nature of the event was startling and disturbing. She was made part of the events as a result of the defendant's actions. The few statements admitted as excited utterances all pertain to the startling event, and while she clearly was under its influence.

Alternatively, all of defendant's comments to Mrs. Moreau would similarly be admissible as admissions by a party opponent, ER 801 (d)(2). The statements made by the defendant could easily be considered as both excited utterances, given Mrs. Moreau's repeated description of the defendant as being "flustered" and "stressed." 5 RP 585. Additionally, as the defendant, his statements would also be admissible as admissions by a party opponent. The statements were properly admitted under either theory.

2. DEFENDANT'S SPONTANEOUS STATEMENTS TO LAW ENFORCEMENT WERE ADMISSIBLE BECAUSE THEY WERE NOT IN RESPONSE TO CUSTODIAL INTERROGATION.

The State agrees the defendant was in state custody at the time of his statements to both officers.

The State does not assert the defendant waived his rights; rather the State recognizes the defendant was read his constitutional rights which, at a minimum, obviously included the right to remain silent and that he was entitled to an attorney. The defendant conveyed to Deputy Thompson that he wished to avail himself of both rights. RP 12-14. All subsequent statements made by the defendant were volunteered and/or not the product of interrogation.

The trial court conducted a CrR 3.5 hearing and heard testimony from both officers. Following testimony and argument of counsel, the trial court concluded the defendant's statements were not made in violation of his Constitutional rights and were admissible. CP 180, 1 RP 42.

When a trial court concludes that a statement was made voluntarily, the appellate court will affirm that determination if there is "substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence." ***State v. Aten***, 130 Wn.2d 640, 664, 927 P.2d 210 (1996).

Defendant's first statement was to the transporting deputy, Deputy Thompson. At the CrR 3.5 hearing, the deputy testified he transported the

defendant to the collision scene to be transferred to the custody of the State Patrol. 1 RP 15. Furthermore, it is agreed the defendant was handcuffed during transport and in the back seat of the patrol car. *Id.* The defendant was clearly in the custody of the State. However, the "State," i.e. Deputy Thompson, never asked the defendant any questions. As they approached the collision scene, the *defendant asked* the deputy if the defendant's wife, Tiffany, was okay. The deputy specifically testified the defendant's question was not in response to anything he asked the defendant. 1 RP 16. The deputy testified that his sole response to the defendant's questions was that he did not know Tiffany's condition. *Id.* The deputy also testified that the defendant did not ask any follow up questions to the deputy's response. The defendant, however, made one additional comment during the ride. Deputy Thompson testified that the defendant volunteered that he had "found out that she was having an affair with a black man." *Id.* This statement was not in response to any question or statement by the deputy. *Id.* At one point, the defendant asked the deputy if he had any questions for him, meaning the defendant. 1 RP 16-17. The deputy properly responded that the defendant had invoked his right to remain silent and therefore he could not ask the defendant any questions. That concluded the exchanges between the two men. 1 RP 17. The deputy ultimately arrived at the collision scene and relinquished custody of Mr. Recinos to the State Patrol, specifically, Detective Gundermann. *Id.* 1 RP 27.

The defendant reiterated to the detective his desire to speak to an attorney when the detective contacted him. 1 RP 29. However, the defendant had questions for the detective. The defendant asked the detective what he was being arrested for and what was going on. *Id.* The detective properly answered his question and said there had been a collision and a shooting. 1 RP 30. The detective did not elaborate any further. The detective did not ask any questions. The defendant responded he didn't know anything about a collision or a gun. *Id.* There was no additional conversation or statements between the two after that. *Id.*

Miranda[1] refers not only to express questioning, but also to any words or actions on the part of the police...that the police should know are reasonable likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. ***State v Sargent***, 111 Wn.2d 641, 650, 762 P2d 1127 (1988). In the present case, it is essentially inarguable that there was no solicitation whatsoever on the part of Deputy Thompson. The same is true for the detective. It was the defendant who asked a question, which the detective answered. There were no follow up statements or questions that were designed to elicit any response from the defendant.

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[1] ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

The critical facts are undisputed. Therefore, the court need only determine if the statements are voluntary, self-initiated, and/or spontaneous. A finding of any of the three conditions obviates the need to determine the precise nature of the rights read to the defendant and if there was a waiver of any rights.

Voluntary statements made by the defendant, either wholly unsolicited or in response to questions not likely to solicit incriminating information, are admissible in the absence of ***Miranda*** warnings. ***State v. Eldred***, 76 Wn.2d 443, 448, 457 P.2d 540 (1969). Brief, neutral, non-accusatory inquiries do not infringe on the defendant's privilege against self-incrimination. ***State v. Lister***, 2 Wn. App. 737, 741, 469 P.2d 597 (1970).

The unrefuted evidence is clear: there is substantial evidence to demonstrate the defendant's statements were voluntary and not the product of custodial interrogation by a preponderance of the evidence. The statements were properly admitted.

3. THE ADMISSION OF THE PHOTOGRAPHS OF THE DEFENDANT IN HANDCUFFS WAS NOT UNDULY PREJUDICIAL; ALTERNATIVELY, ANY POTENTIAL ERROR WAS HARMLESS.

The State sought to demonstrate several relevant facts with photographs of the defendant from that night. Exhibit photograph 46 was first mentioned in the presence of the jury with Mr. Moreau. 5 RP 619-20. He identified the clothing the defendant was wearing in the picture as

being his and having been taken from his home that night. *Id.* He explained where in his home that evening he had left the sweat pants and shoes the defendant was wearing in the photograph. 5 RP 620. Mrs. Moreau had already testified the defendant's initial pants and shoes were bloody. 5 RP 585. It is apparent the defendant changed out of his bloody clothes and into Mr. Moreau's before leaving the Moreau home. Exhibit 46 illustrates this fact and corroborates the defendant's involvement in the collision.

Photograph exhibits 49 and 51, though a bit confusing what the trial court specifically admitted (2 RP 207), the photos depict the injury described by Detective Gundermann. 2 RP 138, CP 302 (The minute entry.) The State argued the injury was consistent with an injury from the slide of a semi-automatic weapon after firing it. 6 RP 749-50. The defendant testified that that is what happened. *Id.* However, there was no way for the State to know in its case in chief if the defendant was going to testify and if so, what, if anything, he might say about his hand injury. The photographs corroborate the defendant being the probable shooter and were clearly relevant.

Furthermore, as the trial court noted, the jury had already been informed the defendant was arrested, handcuffed, and placed in the back seat of a patrol car. 2 RP 136. Neither the testimony nor the photos in any

way convey that the defendant was *currently* incarcerated at time of trial. Rather, the photograph merely shows that he was arrested that night regarding the collision and the shooting. There is no undue prejudice by seeing a photograph of that which has already been discussed in testimony. The probative value of the three photos substantially outweighs any unfair prejudice. ER 403.

Additionally, in view of the 140 exhibits in this case, three is an extremely small percentage when viewed in the totality of the trial and total number of exhibits. CP 290-299. The photographs were only three out of nearly 140 exhibits and twenty witnesses. The trial court specifically set aside a number of photographs of the same subject matter. 2 RP 205-07. The court viewed the photos before limiting the State to the three ultimately admitted. It is clear the trial court took the time to examine the photos in question, hear from counsel, and sort the pictures in a manner that the court felt was the most appropriate. The admission of the photographs corroborated the State's case and was clearly relevant. The trial court did not err in admitting the photographs.

The admission of the photographs is reviewed for an abuse of discretion. That is, the trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did. ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

Alternatively, if this Court were to find any error in the admission of the three photos, the error was harmless. The harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). Given the overwhelming evidence of the defendant's guilt, error, if any, was clearly harmless.

4. TRIAL COUNSEL WAS NOT DEFICIENT IN REFRAINING FROM OBJECTING TO THE PLAYING OF A RECORDED JAIL CALL OF DEFENDANT'S IMPEACHMENT STATEMENTS, THEREFORE HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FAILS.

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's objectively deficient performance prejudiced him. ***State v. McFarland***, 127 Wn.2d 322, 334–35, 899 P .2d 1251 (1995). Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.*, at 334–35. Prejudice results if the outcome of the trial would have been different had defense counsel not rendered deficient performance. *Id.*, at 337.

The reviewing court gives great deference to trial counsel's performance and begins with a strong presumption that counsel was effective. ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S. Ct. 2052,

80 L.Ed.2d 674 (1984); ***McFarland***, 127 Wn.2d at 335. A claim that trial counsel provided ineffective assistance fails if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. ***State v. Hendrickson***, 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996).

The State is entitled to impeach any witness, to include impeachment by prior inconsistent statement. ER 607(3)(c),(e). In this case, the defendant did just that. At trial he admitted he shot at the vehicle carrying his wife and Mr. DeVone. 6 RP 751-52, 759, 768, 784. The defendant implied he has always been honest and forthright about that fact. 6 RP 767. However, the State possessed a recording of a jail call of the defendant talking with a friend where the defendant adamantly denied shooting at the vehicle. *Id.* Ex. 138.

Given the defendant's assertions at trial, it is clear the impeachment evidence was relevant and admissible.

The State laid the foundation for the creation and maintenance of the recorded conversation, eliminating any question as to its origin or whether it was properly handled or collected. 6 RP 688-96. The defendant's testimony was inconsistent with his statements on the recording *before* the State played the taped statements. Neither the defendant's testimony at trial nor his statements on the recording were equivocal or unclear. He clearly said one thing at trial, and something

completely different on the recording. This inconsistency goes both to his credibility as well as previous inconsistent statements on a key subject: Was he the person who shot at the victims? It is unquestionable that such evidence is both admissible and important to the State in demonstrating that the defendant was the person who chased and shot at the victim vehicle and not for the purpose claimed by the defendant, i.e. that he was trying to rescue his wife from a kidnapper. 6 RP 749.

The defendant implies that defense counsel was deficient in failing to object to the playing of a portion of the recording when it was not admitted. However, the defendant provides no authority that admission is required. The CD was properly marked and thereby identifiable in the record. CP 297, Ex. 138. There is no authority that evidence of this nature, i.e. taped statements of impeachment, be formally admitted.

There are several purposes for marking exhibits. One is to give all physical items a number for purpose of clarity when the court and parties refer to an item. Another is for a similar purpose, but also so that the piece of evidence becomes a part of a case record available for appellate review if necessary. The final reason is to have a method by which pieces of evidence given to the jury for consideration during deliberations are tracked. All purposes were satisfied in this case.

First, all parties can conclusively identify exhibit 138 as the item which is the subject of defendant's argument. All parties recognize that this exhibit refers to the CD of the recording of the jail call. This purpose has been satisfied.

Second, it is undisputed that exhibit 138 is part of the official record of this case and available to all parties, including any reviewing court. Exhibit 138 still exists as it did when played during trial. This critical purpose has also been satisfied.

Lastly, the CD in question was not available for the jurors to listen to again. Therefore, just as with other forms of impeachment evidence, the jurors heard it only once, when initially played during the defendant's cross-examination. 6 RP 767. It is known that the jury did not play the CD again because the jury was not allowed to play any audio material during deliberations without first requesting the assistance of the court staff. As is clear with the 911 CD, the court clearly arranged with the jury before deliberations to request the help of the judicial assistant if they needed to play the 911 CD. A quick review of the minutes of March 9, 2011, explains the procedure that was outlined for addressing exhibit 138. CP 303. The entry outlines the procedure to be followed if requested, and more importantly it shows that no such request was made by the jury. Therefore, the logical conclusion is that the jury heard the jail

recording that showed the defendant's inconsistent statements only when the defendant testified and no other time. This is completely consistent with proper protocol with inconsistent statements. Though no limiting instruction was requested or given, the jury heard the inconsistent statements played once, and only once, just as they would had the statements been via a live witness. There is no irregularity whatsoever in the manner in which exhibit 138 was used.

If exhibit 138 was properly used, marked, and handled, trial counsel clearly was not deficient in failing to make an unfounded objection. If no reasonable objection could be made, there is no basis upon which defendant can claim he received ineffective assistance of counsel. Defendant's claim of ineffective assistance of counsel must fail.

5. THE DEFENDANT RECEIVED A FAIR TRIAL AS GUARANTEED BY THE CONSTITUTION

The defendant argues if one error is insufficient alone to justify the substantial remedy of reversal, then the cumulative effect of alleged errors does.

The doctrine of cumulative error recognizes the reality that sometimes errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also* ***State v.***

Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995)

There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.*

Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See*, e.g., ***Johnson***, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See*, e.g., ***State v. Stevens***, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.").

In the present case, there was overwhelming evidence of the defendant's guilt. He previously made statements to others of his intent to kill his wife if he ever discovered she was unfaithful. 3 RP 262-64, 5 RP 605, 636. The gun used in the assault was identified by Mr. Moreau as being the same or very similar to one he had seen belonging to the defendant. 5 RP 617-18. The witnesses to the collision all identified a car like the one driven by the defendant being involved in the pursuit of the victim vehicle which lead to the collision. Mrs. Moreau observed the defendant highly stressed and bloody immediately after the collision. 5 RP 584-85. The defendant took Mr. Moreau's clean pants and shoes without asking or otherwise providing a reason. 5 RP 619-20. The defendant's unexplainable behavior in reaction to "discovering" the collision is that he did not summon aid, he did not place any calls, and he did not aid his wife. 6 RP 775-76, 78-79. Instead, he claimed to have gotten into a physical alternation with victim DeVone. 6 RP 771-76. The defendant also repeatedly gives what can only be referred to as a perfect motive for being the person responsible for the events of that night: He learned his wife was being unfaithful, he tracked her down by tracing her use of a bank card, and caught up to the victim's vehicle all while armed with a firearm where a recovered spent round was compared to one test fired from the defendant's gun and found to be consistent. 5 RP 570.

The defendant testified at length to the events described above, but also to his implausible explanation of believing his wife was the victim of

a kidnapping. The defendant was cross-examined by the State and the implausibility of his story exposed. For example, the State demonstrated the impossibility of being able to see his wife struggle with the passenger door due to the heavy tinting he had put on the car's windows. 6 RP 788. The same was equally implausible for his assertion he saw the would-be kidnapper reach across to his wife. *Id.* Lastly, his unbelievable story that he engaged in a physical altercation with victim DeVone despite the evidence indicating such a struggle was virtually impossible. 3 RP 381-82, 384-85.

The events listed above are only a few examples of evidence that demonstrate the defendant's overwhelming guilt. He admits to virtually all the physical acts alleged by the State, but gives an implausible story of a kidnapping that the jury rejected.

Under either test, the claimed error was not unduly prejudicial such that it could be said any one alone could be responsible for the verdict. Additionally, there is overwhelming evidence of the defendant's guilt based up the unchallenged and untainted evidence.

The defendant received a fair trial and his argument for a new trial based upon cumulative error fails.

D. CONCLUSION.

The trial court did not abuse its discretion in admitting evidence against the defendant. Police did not interrogate him.

The defendant received a fair trial where overwhelming evidence was adduced. He admitted the alleged behavior, but gave an implausible explanation. The State's evidence included testimony from the two victims and several independent eyewitnesses. For the foregoing reasons, the State respectfully requests that the convictions be affirmed.

DATED: December 12, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

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Deputy Prosecuting Attorney
WSB # 19614

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ e mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-13-12 Shereen Ka
Date Signature

PIERCE COUNTY PROSECUTOR

December 13, 2012 - 4:05 PM

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