NO. 45764-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOB M. EDWARDS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John McCarty

No. 12-1-04068-2

BRIEF OF RESPONDENT

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2. Should this court uphold the jury's nine special verdicts that defendant was armed with multiple firearms when he committed his crimes when these special verdicts are supported by sufficient evidence?

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B. STATEMENT OF THE CASE.

1. Procedure

Job Mitchell Edwards ("defendant") was charged with one count of kidnapping in the first degree and one count of felony harassment on October 29, 2012. CP 1-2. Both counts alleged multiple firearm sentencing enhancements. CP 1-2. An amended information was filed on March 15, 2013 adding one count of unlawful possession of a controlled substance with intent to deliver, one count of conspiracy to possess a controlled substance with intent to deliver, and one count of unlawful use of building for drug purposes. CP 11-14. All counts alleged multiple firearm sentencing enhancements. CP 11-14. The count of conspiracy to posses a controlled substance with intent to deliver was severed. 2 RP 54.

The jury convicted defendant of unlawful possession of a controlled substance with intent to deliver, unlawful use of building for drug purposes, felony harassment and unlawful imprisonment, the lesser included of kidnapping. CP 714-719. The jury also found nine firearm enhancements. CP 720-728.

Defendant was sentenced to 234 months in prison based on the multiple, consecutive firearm enhancements. CP 790.

2. Facts

Defendant[1], his brother Michael Edwards, and his brother's girlfriend, Krystal Freitas, lived together in a house in Bonney Lake, Washington. 4 RP 144. Defendant, Krystal and Michael sold prescription pills out of the home. 4 RP 156. All three of them had prescriptions for pills. 4 RP 157. They would fill the prescriptions and put the pills into a combined group pile where they would each be allotted pills for personal use or for sale. 4 RP 157. Michael would hold onto the pills and money. 4 RP 157. While all three sold pills, Krystal did the majority of the selling. 4 RP 158. There were several guns in the house to prevent them from getting robbed. 4 RP 167.

On October 25, 2012, Colton Gleeson and a friend of his sister's, a man he knew as DJ (later identified as Donald Thomas), went to defendant's house to conduct a drug buy. 4 RP 90. Colton arranged for DJ to purchase 50 Percocet pills for $1,500.00 from Krystal. 4 RP 94. Colton and DJ went to defendant's house and meet Krystal and Michael. 4 RP 97.

[1] The State will refer to all parties by first name for clarity as there were multiple sets of siblings called as witnesses.

In the entry way of the home, Krystal took out the pills and as DJ was looking at them, DJ pulled out a gun and ordered Michael and Krystal to get down on the ground. 4 RP 97. Krystal and Michael began yelling the defendant's name. 4 RP 98; 177. DJ went down the stairs of the home and Colton heard multiple gunshots. 4 RP 99.

Michael returned to Colton and Michael was now holding a shotgun. 4 RP 99. Colton told Michael that he did not know what DJ was planning to do. 4 RP 99. Michael told Colton, "I got to kill you now. I'm sorry. I got to." 4 RP 99. Colton told him he does not have a weapon. 4 RP 99. Michael went back down the stairs and Colton went out of the house. 4 RP 100. Colton saw a little girl next door and asked her to call the police. 4 RP 100. Michael came out with the shotgun and ordered Colton back into the house. 4 RP 100.

Colton said he will leave and will not tell anyone what happened. 4 RP 102. Defendant told Colton to get into DJ's car, drive it into the garage and load the body. 4 RP 131. Defendant was holding a gun at Colton. 4 RP 132. Michael went out with Colton to get the car and Michael was now armed with a handgun. 4 RP 104. Colton believed Michael picked up the gun from DJ's body. 4 RP 104. Colton pulled the car into the garage and defendant was in the back of the garage still

pointing a gun at Colton. 4 RP 104. Defendant waived Colton into the garage. 4 RP 104.

Colton saw Michael dragging DJ down the stairs and into the garage. 4 RP 105. Colton got out of the car and defendant was still pointing a gun at him. 4 RP 106. Before defendant could close the garage door, Colton ran out of the garage to a house across the street. 4 RP 108. Police arrived and took Colton, defendant, Michael and Krystal into custody as they began their investigation. 4 RP 109.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. ***State v. Lopez***, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" ***State v. Brockob***, 159 Wn.2d 311, 336, P.3d 59 (2006) (*quoting* ***State v.***

Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, sufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt. ***State v. Cannon***, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (*quoting* ***State v. Myers***, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Finally, determinations of credibility are for the fact finder and are not reviewable on appeal. ***Brockob***, 159 Wn.2d at 336; ***State v. Locke***, 175 Wn. App. 779, 788-89, 307 P.3d 771, 776 (2013). In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99, 101 (1980). In addition, a jury can infer the specific criminal intent of a criminal defendant where it is a matter of logical probability. *Id.*

With specific regard to a case involving an accomplice, criminal liability applies equally to a principal and an accomplice because they share equal responsibility for the substantive offense. ***State v. Trout***, 125

Wn. App. 403, 409, 105 P.3d 69, 73 (2005). A person is legally accountable for the conduct of another when he is an accomplice to that person. RCW 9A.08.020(2)(c). A person is liable as an accomplice if: (a) with knowledge that it will promote or facilitate the commission of the crime, he, ... (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020(3). To aid and abet another person's criminal act, one must associate oneself with the undertaking, participate in it with the desire to bring it about, and seek to make it succeed by one's actions. ***In re Welfare of Wilson***, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). It is sufficient for defendant to have done "something in association with the principal to accomplish the crime." ***State v. Sweet***, 138 Wn.2d 466, 479, 980 P.2d 1223, 1230 (1999) (*quoting* ***State v. Boast***, 87 Wn.2d 447, 456, 553 P.2d 1322 (1976). It is sufficient for an accomplice to have general knowledge of a crime. *Id.* It is not necessary for an accomplice to have specific knowledge of every element of the principal's crime. *Id.*

a. Felony Harassment

To convict the defendant of felony harassment, the State proved that the defendant or an accomplice, without legal authority, unlawfully,

knowingly threatened to kill a person and that the threat placed the person in reasonable fear that the threat would be carried out. RCW 9A.46.020(1)(a)(i), (2)(b).

The felony harassment occurs when Michael, who is armed with a shotgun, tells Colton, "I got to kill you now. I'm sorry. I got to." 4 RP 99. Colton begged and pleaded for Michael not to kill him. 4 RP 99; 5 RP 328. In conjunction with Michael armed with his shotgun, defendant is also present armed with his gun when the threat is made. 5 RP 324. He is on the landing near the living room. 5 RP 324. After Michael makes the threat to Colton, Michael instructed defendant to hold Colton at gunpoint while Michel dragged DJ's body downstairs. 5 RP 324. Once the body was moved, Michael instructed Colton to drive the car into the garage. Defendant was pointing his gun at Colton and told him he couldn't leave. 5 RP 324.

Taken in the light most favorable to the State, this evidence shows that defendant acted as an accomplice to Michael's threat by aiding in the threat and threatening behavior. Defendant is present, but is doing more than just standing there. He is armed when the threat is made and immediately after the threat, defendant points his own gun at Colton to hold him in place while Michael moves DJ's body. Based on these

actions, the defendant is more than just present - he is actively aiding Michael. There is sufficient evidence to uphold defendant's conviction.

At the time the threat was made, Colton was not attempting to continue the robbery. The threat was unlawful as there is a difference between telling Colton to flee the home or they will kill him and that he will be killed for being part of an attempted robbery or a witness to DJ's shooting. Colton begged and pleaded not to be killed and promised to take DJ's body and leave. He was not attempting to remain in the home, but was actively trying to leave it before being ordered back in at gunpoint by Michael. This is distinguishable from ***State v. Bland***, 128 Wn. App. 511, 116 P.3d 428 (2005), where the defendant was using force to expel a trespasser who refused to leave his property. The jury correctly rejected defendant's argument that defendant was acting lawfully.

The defendant himself placed Colton in fear that the threat would be carried out. The defendant was standing on the landing armed with a Glock .40 caliber handgun when Michael makes the threat that they have to kill Colton. 5 RP 324. Michael next instructed defendant to hold Colton at gunpoint while Michel dragged DJ's body downstairs. 5 RP 324. The evidence is sufficient that Colton, who defendant is holding at gunpoint, is reasonably in fear that he will be killed at any moment having

just seen DJ shot multiple times. There is sufficient evidence to uphold defendant's conviction.

b. Unlawful Imprisonment

To convict the defendant of unlawful imprisonment, the State proved that the defendant or an accomplice unlawfully, feloniously, and knowingly restrained another person. RCW 9A.40.040.

Defendant admitted to police that he held Colton at gunpoint and told him that he could not leave. 5 RP 325. When asked why he was holding Colton at gunpoint, the defendant said it was because Michael instructed him to do so. 5 RP 325. Defendant continued to point his gun at Colton in the garage until Colton escaped. 4 RP 106. Defendant never told police that he was using reasonable force to detain Colton until the police arrived. 5 RP 326.

The evidence shows that defendant was restraining Colton at the scene in hopes of using him to get rid of DJ's body. While defendant argued that he was merely detaining Colton for the police, the jury rejected defendant's theory and found him guilty of unlawful imprisonment. There is sufficient evidence to uphold defendant's conviction.

c. Unlawful Possession of a Controlled Substance With Intent to Deliver

To convict the defendant of unlawful possession of a controlled substance with intent to deliver, the State proved that the defendant or an accomplice, unlawfully, feloniously, and knowingly possess, with intent to deliver to another, a controlled substance, Oxycodone, a narcotic, classified under Schedule II of the Uniform Controlled Substances Act. RCW 69.50.401(a)(2)(a).

Krystal testified that she, defendant, and Michael sold prescription pills out of the home. 4 RP 156. All three of them had prescriptions for pills. 4 RP 157. They would fill the prescriptions and put the pills into a combined group pile where they would each be allotted pills for personal use or for sale. 4 RP 157. Michael would hold onto the pills and money. 4 RP 157. While all three sold pills, Krystal did the majority of the selling. 4 RP 158.

Defendant's prescription history during the preceding months and year's corroborates Krystal's testimony. Defendant used cash to purchase oxycodone pills from a pharmacy in Snohomish, Washington, on a monthly basis. 6 RP 365-371. Defendant used cash to purchase oxycodone pills from an Arlington pharmacy on a monthly basis. 6 RP

375. Defendant used cash to purchase oxycodone pills from Peckenpaugh Drug in Auburn, Washington, on a monthly basis. 6 RP 382.

Among the hundreds of pill bottles found at the scene, a prescription bottle in defendant's name was recovered with thirty pills still in it. Exh. 18L. Krystal testified that this was the current bottle they were using, and she put the pills from the interrupted sale in this bottle as she tried to get rid of evidence. 4 RP 183. There is sufficient evidence to uphold defendant's conviction.

d. Unlawful Use of a Building for Drug Purposes

To convict the defendant for unlawful use of building for drug purposes, the State proved that the defendant did unlawfully and feloniously have under his control, a room, space or enclosure as owner, lessee, agent, employee, or mortgagee and to knowingly rent, lease or make it available for use with or without compensation, the building, room or enclosure for the purpose of unlawfully manufacturing, delivering, selling, storing, or giving away any controlled substances. RCW 69.53.010.

As stated in the preceding section, there was sufficient evidence that defendant, along with Krystal and Michael, was using the house as a

base of operations for selling oxycodone.[2] Defendant admitted to police that he knew Krystal was selling pills out of the house. 5 RP 327. Robert Kanany rented the home to defendant and Michael. 4 RP 223. Therefore, the house was under defendant's control as he was a lessee and he was allowing Krystal to sell oxycodone out of the home.

The fact that defendant's bedroom was downstairs and the drug transaction at issue was upstairs does not negate defendant's conviction. There was no testimony that he did not have access to or control over the upstairs of the house. In fact, the testimony was that the home only had one kitchen that was in the upstairs portion of the house, and defendant had use of this space. 4 RP 144. These facts are distinguishable from ***State v. Davis***, 176 Wn. App.385, 308 P.3d 807 (2013), where the defendant in that case lived in a single room in a motel and was only selling drugs out of her own room. There is sufficient evidence to uphold defendant's conviction.

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[2] The culpability of an owner or manager, or in this case a lessee, for the unlawful use of a building for drug purposes is a distinct issue apart from the manufacture, or in this case the sale, of the controlled substance. ***State v. Bryant***, 78 Wn. App. 805, 810-811, 901 P.2d 1046 (1995) (defendant, who is found not guilty of manufacturing marijuana can still be convicted of making a building available for the manufacture of a controlled substance at a subsequent trial.)

2. THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT DEFENDANT OR AN ACCOMPLICE WAS ARMED WITH A FIREARM AT THE TIME OF THE COMMISSION OF THE CRIMES.[3]

A defendant or an accomplice is armed with a deadly weapon/firearm at the time of the commission of the crime if he, she, or another participant in the crime causes a deadly weapon/firearm to be "readily available for use," either offensively or defensively, during the commission of the crime. ***State v. Simonson***, 91 Wn. App. 874, 882, 960 P.2d 955, 960 (1998). A nexus between the defendant, the weapon and the crime must be established. ***State v. Schelin***, 147 Wn.2d 562, 575-76, 55 P.3d 632 (2002). The State need not establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible, so long as it was at the time of the crime. ***State v. O'Neal***, 159 Wn.2d 500, 504-505, 150 P.3d 1121 (2007). Knowledge of a firearm is not an element of the firearm enhancement statute. ***State v. Barnes*** 153 Wn.2d 378, 386-387, 103 P.3d 1219 (2005) (*citing* ***State v. Woolfolk***, 95 Wn. App. 541, 977 P.2d 1 (1999). The State does not need to prove that the defendant had actual knowledge that an accomplice was armed, only that the defendant or an accomplice was armed. ***State v. Bilal***, 54 Wn. App. 778, 781-782, 776 P.2d 153 (1989).

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[3] This was defendant's ninth argument; however, the State chooses to group this with the other arguments regarding sufficiency of the evidence.

Four firearms were collected at the scene: a Glock 23 .40 caliber handgun, a Benelli Super 90 shotgun, a .45 caliber Taurus handgun and an SKS assault riffle. 4 RP 240. All four were tested and found functional. 4 RP 240.

With regard to Count I, unlawful possession of a controlled substance with intent to deliver, the jury found that the defendant or an accomplice were armed with a .40 caliber Glock, a SKS assault rifle and a Benelli shotgun. The Glock 23 was found on defendant's bed. 4 RP 245. It was loaded. 4 RP 246. The SKS assault riffle was found in defendant's bedroom. 4 RP 251. Approximately 250 rounds of 7.62 ammunition for the SKS were also found in defendant's bedroom. 4 RP 256. The shotgun was located in the living room. 4 RP 268. It was loaded. 4 RP 270. Krystal testified that there were several guns in the house to prevent them from getting robbed. 4 RP 167. There was sufficient evidence that these three guns were readily available for use as the defendant and his accomplices possessed pills with the plan to sell them. These facts are similar to ***State v. O'Neal***, 159 Wn.2d 500, 506 150 P.3d 1121 (2007) (guns readily available and easily accessible to one or more of the accomplices to protect the drug manufacturing operation.) and ***State v. Simonson***, 91 Wn. App. 874, 883, 960 P.2d 955 (1998) (guns at the site of an active methamphetamine manufacturing site were there to protect drug production) where the Courts upheld the verdicts. There is sufficient evidence to uphold these special verdict's.

With regard to Count IV, unlawful imprisonment, and Count V, felony harassment, the jury found that the defendant or an accomplice was armed with a 40 caliber Glock, a 45 Taurus and a Benelli shotgun. Colton testified that after DJ was shot, Michael returned upstairs holding the Benelli shotgun. 4 RP 99. Michael told Colton, "I got to kill you now. I'm sorry. I got to." 4 RP 99. Colton told him he does not have a weapon. 4 RP 99. Michael went back down the stairs and Colton went out of the house. 4 RP 100. Colton saw a little girl next door and asked her to call the police. 4 RP 100. Michael came out with the shotgun and ordered Colton back into the house. 4 RP 100. Colton said he will leave and will not tell anyone what happened. 4 RP 102. The defendant told Colton to get into DJ's car, drive it into the garage and load the body. 4 RP 131. The defendant was holding a gun at Colton. 4 RP 132. Michael went out with Colton to get the car and Michael was now armed with a handgun (the Taurus). 4 RP 104. Colton believed Michael picked up the gun from DJ's body. 4 RP 104. Police ultimately recovered the .45 caliber Taurus handgun on a railing at the top of the stairwell in the apartment. 4 RP 271. Colton pulled the car into the garage and the defendant was in the back of the garage still pointing a gun at Colton. 4 RP 104. There was sufficient evidence that these three guns were readily available for use as the defendant and his accomplices committed the crimes of felony harassment and unlawful imprisonment. There is sufficient evidence to uphold these special verdict's.

3. THE TRIAL COURT DID NOT ERR BY REFUSING TO GIVE WPIC 17.02 AS IT DOES NOT APPLY TO THE FACTS OF THIS CASE.

Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly inform the jury of the applicable law. ***State v. Hathaway***, 161 Wn. App. 634, 647, 251 P.3d 253, 261 (2011). Generally, a defendant is entitled to an instruction on self-defense if there is some evidence demonstrating self-defense. ***State v. Werner***, 170 Wn.2d 333, 336-337, 241 P.3d 410 (2010). When a trial court refuses to give a jury instruction based on a factual reason, the Court reviews the decision for an abuse of discretion. ***State v. White***, 137 Wn. App. 227, 230, 152 P.3d 364 (2007). An abuse of discretion occurs when no reasonable judge would have reached the same conclusion. ***State v. Rodriguez***, 146 Wn.2d 260, 269, 45 P.3d 541 (2002).

Defendant argues that the trial judge erred by declining to give WPIC 17.02 (defense of self, others, property). However, the trial court indicated that instruction 17.02 is not applicable. 7 RP 499. The trial court believed that the trial was not about the self-defense on the shooting [DJ], but on the detaining of a person [Colton]. 7 RP 482 -483. The trial court believed that giving WPIC 17.02 would confuse the jury. 7 RP 479-481. The Court instead gave instruction 17.03 (detention of person), plus

some of the instructions that go with 17.02, namely 17.04 (actual danger not necessary) and 17.05 (no duty to retreat). 7 RP 499.

The trial court did not err in declining to give WPIC 17.02 as the facts of the case support this decision. The evidence at trial was that defendant and Michael threatened and then forced Colton to remain in the home at gunpoint after DJ's attempted robbery. These facts fit WPIC 17.03 and the trial court gave this instruction for the jury to consider.

These instructions still allowed defendant to argue his theory of the case, which was that he was not guilty of felony harassment and kidnapping because he was using lawful force to detain Colton as someone who was attempting to rob them. This is similar to ***State v. Thompson***, 47 Wn. App. 1, 5-6, 733 P.2d 584 (1987), where there was no error found when the trial court refused to give an instruction on the duty to retreat but instead gave a definition on necessary force. In ***Thompson***, the Court found that the defendant was able to argue his theory of the case without the instruction. *Id.* Defendant was able to argue that he was using lawful force in the aftermath of DJ's attempted robbery of his home, but the jury rejected defendant's argument.

Defendant's reliance on ***State v. Bland***, 128 Wn. App. 511, 116 P.3d 428 (2005), is misplaced as the facts are distinguishable. In ***Bland***, the defendant was using force to expel a trespasser who refused to leave

his property. In the case at bar, defendant was not using force to expel Colton from the home, but was using force to illegally detain him in the home. It appears this is why the trial court gave WPIC 17.03 instead of 17.02. The trial court did not err, especially in the context of an abuse of discretion.

4. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF DEFENDANT'S PARTICIPATION IN THE DRUG SALE BUSINESS AS PROOF THAT HE WAS AN ACCOMPLICE IN THE PLAN.

"A defendant may be found guilty of a single count of possession with intent to deliver based on substantial evidence of a continuing course of conduct involving an ongoing enterprise with a single objective." ***State v. Love,*** 80 Wn. App. 357, 363, 908 P.2d 395 (1996). A continuing course of conduct requires an ongoing enterprise with a single objective. ***State v. Gooden***, 51 Wn. App. 615, 619029, 754 P.2d 1000(1988).

In this case, defendant was charged with one count of possession of a controlled substance with intent to deliver based on his participation in this illegal drug sale business. What the defendant argues is "previous drug activity," is part of the continuing course of conduct. The prosecutor argued that this was not propensity evidence and was accomplice liability information. RP 71. The trial court agreed that this was evidence

establishing that the defendant was aiding and assisting the drug sale business and that it may or may not prove accomplice liability. 2 RP 74-75.

The evidence adduced at trial was that police found defendant's prescription pill bottle with 30 oxycodone pills in it. Exh. 18A. Krystal testified about how she, defendant, and Michael sold prescription pills out of the home. 4 RP 156. All three of them had prescriptions for pills. 4 RP 157. They would fill the prescriptions and put the pills into a combined group pile where they would be each be allotted pills for personal use or for sale. 4 RP 157. Michael would hold onto the pills and money. 4 RP 157. While all three sold pills, Krystal did the majority of the selling. 4 RP 158. The evidence of previous drug activity is not propensity evidence, but evidence to show defendant's participation in the business and how this pill bottle with his name on it is not a legitimate prescription for his personal, medical use, but evidence of the crime he is charged with, possession of a controlled substance with intent to deliver.

Assuming arguendo that this should have been treated as evidence subject to ER 404(b), it would have been properly admitted for other purposes, such as proof of motive, intent, plan, and knowledge, not propensity evidence. To admit evidence of other crimes or wrongs under Washington law, the trial court must (1) identify the purpose for which the

evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged and (3) weigh the probative value of the evidence against its prejudicial effect. ***State v. Lough***, 125 Wn.2d 847, 853, 889 P.2d 487, 490 (1995). In this case, although the trial court did not believe this was ER 404(b) evidence, the court still determined that the evidence was relevant to whether defendant was an accomplice and weighed the probative value against its prejudicial effect. 2 RP 74-75. This is not propensity evidence. The evidence and subsequent argument was not that defendant sold drugs previously so he was selling it on this occasion, but how defendant fits into the drug selling business and how he aided it by supplying the drugs that were going to be sold on that day.

5. THE EVIDENCE OF A KNIFE, GAS MASK, AND BULLETPROOF VEST WAS RELEVENT TO THE CHARGES.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence." ER 401. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." ***State v. Darden***, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The decision to admit evidence lies within the sound discretion of the trial

court and should not be overturned absent a manifest abuse of discretion. ***State v. Neal***, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

In this case, during motions in limine, defendant objected to evidence regarding a gas mask and filters, a knife and a bulletproof vest. The trial court ruled that a photo (exhibit 3A), which shows a gas mask, gas mask filters and a Gerber knife, was admissible as relevant evidence. The court ruled that defendant's possession of a gas-mask, filters, and a knife are relevant to proving knowledge and intent. 2 RP 69. The trial court also ruled that a photo of a bulletproof vest (exhibit 12A) found in Michael's room was admissible as relevant evidence. Again, the trial court believed that "what is discovered and located in the house appears to the Court to have relevance" given that the trial involves a drug delivery house, possession with intent to deliver and people charged as principals and/or accomplices. 2 RP 70.

Assuming arguendo that the trial court erred in admitting this evidence, any error is harmless. "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. ***State v. Bourgeois***, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). With the presence of four guns, including an SKS assault rifle and hundreds of rounds of ammunition, these photos were of minor significance to the

evidence as a whole. Defendant cannot show any prejudice from the admission of these two photos.

6. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL ERROR.[4]

A defendant claiming prosecutorial error bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. ***State v. Mak***, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); ***State v. Binkin***, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). Before an appellate court should review a claim based on prosecutorial error, it should require "that [the] burden of

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[4] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.*, ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase prosecutorial error." The State urges this Court to use the same phrase in its opinions.

showing essential unfairness be sustained by him who claims such injustice." ***Beck v. Washington***, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834, (1962). Alleged error is reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. ***State v. Russell***, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Improper comments are not deemed prejudicial unless "there is a *substantial likelihood* the misconduct affected the jury's verdict." ***State v. McKenzie***, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (*quoting* ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original]. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***Binkin***, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Id.*

To prove that a prosecutor's actions constitute error, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express

such inferences to the jury. ***State v. Stenson***, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). It is improper for a prosecutor to appeal to the prejudice and passions of the jury or to assume facts not in evidence. ***State v. Claflin***, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985).

In determining whether prosecutorial error warrants the grant of relief, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. ***State v. Russell***, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); ***State v. Weber***, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). Remarks of a prosecuting attorney, including remarks that would otherwise be improper, are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel's statements. ***Russell***, 125 Wn.2d at 85-86; ***State v. Dennison***, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). A new trial in a criminal proceeding is required only when the defendant has been so prejudiced that nothing short of a new trial can insure that he or she will be treated fairly. ***State v. Bourgeois***, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997).

Defendant alleges that the prosecutor committed error during closing arguments on three occasions.

a. Pulp Fiction Argument

Defendant argues that the prosecutor committed error by making a personal opinion comparing this case to the movie Pulp Fiction and calling the case "crazy" and "insane." 7 RP 505. Defendant cites ***State v. Lindsay***, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) for the proposition that personal opinions by a prosecutor are improper. However, the Court in ***Lindsay*** held, "It is impermissible for a prosecutor to express a personal opinion as to the credibility of a witness or the guilt of a defendant." *Id.* (emphasis added). The prosecutor in this case was not offering a personal opinion on the credibility of a witness or the guilt of the defendant; he was merely illustrating for the jury that this case is outside of most people's common frame of reference. The prosecutor's comparison and description was not improper argument.

Assuming arguendo that the comments were improper, there is no substantial likelihood that they affected the outcome of the trial. In ***State v. Rafay***, 168 Wn. App. 734, 831, 285 P.3d 83 (2012), the Court concluded that although a prosecutor's comments comparing the murders to the well publicized terrorist beheadings in the news was improper, there

was no substantial likelihood those comments affected the outcome of the trial.

b. Armed Camp Argument

While defendant was not charged with illegally possessing firearms, ammunition or other items, the State alleged, and the jury found, that his crimes were committed while he was armed with numerous firearms. Four firearms were collected at the scene: a Glock 23 .40 caliber handgun, a Benelli Super 90 shotgun, a .45 caliber Taurus handgun and an SKS assault riffle. 4 RP 240. In addition, Krystal testified that there were several guns in the house to prevent them from getting robbed. 4 RP 167. With this evidence admitted in the trial, the prosecutor described the house as an armed camp. 7 RP 520. The prosecutor's argument was not improper as it was supported by the evidence. There is no likelihood that the prosecutor's comments affected the outcome of the trial.

c. Homicide Argument

Defendant argues that the prosecutor knowingly mislead the jury in arguing that the defendant was not justified in killing DJ. BOA, 41. This is an inaccurate reading of the prosecutor's comments. The prosecutor's comments were rebutting defense attorney's closing arguments.

After defendant's trial counsel told the jury that the jury could infer defendant's shooting of DJ was justified (7 RP 535), the prosecutor correctly pointed out that was not the evidence presented to them in the case, "DJ's shooting, killing has been found to be justified. You didn't hear that from anybody in this case. Nobody ever once said that except Mr. Kawamura." 7 RP 549. The prosecutor then reminded the jury, "We are not here to decide a murder case. That issue is off the table." 7 RP 549.

The prosecutor then rebuts defense counsel's next point, which was that defendant did not do anything to assist, so he is not an accomplice. 7 RP 540. The prosecutor says:

> Job didn't do anything to assist. Well, if you call killing somebody not doing anything, okay. But what was he doing when he killed DJ? What was he protecting? Yes, he might have been protecting his brother, but at the same time, he is protecting his drug-dealing partner, both of his drug-dealing partners, and he is protecting the access of his drug organization. So don't say he did nothing. He did something.

7 RP 549-550. The prosecutor then goes on to point out that defense counsel neglected to talk about how defendant was holding a gun on Colten in the garage. 7 RP 550. These statements were proper rebuttal arguments based on defense counsel's closing argument. The prosecutor did not focus on the killing of DJ or "invite the jury to convict [defendant]

on an uncharged act." BOA, 42. It is not error for a prosecutor to argue that the evidence does not support the defense theory. ***Russell***, 125 Wn.2d at 87. In addition, improper arguments rebutting defense counsel's remarks are not grounds for reversal unless so prejudicial that a curative instruction would be ineffective. *Id.* at 85-86. Even assuming the prosecutor's arguments were improper, they do not rise to the level of flagrant and ill-intentioned misconduct.

d. Cumulative Effect of Arguments

Even if the Court concludes that some of the above arguments were improper, these errors had little or no effect on the outcome of the trial. *See, e.g.* ***State v. Grieff***, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); ***State v. Asaeli***, 150 Wn. App. 543, 598, 208 P.3d 1136 (2009). The jury heard from Colton that defendant pointed a gun at him numerous times as defendant and Michael ordered him about the house. In his statement to police, defendant also admitted holding Colton at gunpoint on Michael's orders and in the garage. The jury heard from Krystal about defendant supplying pills to this drug sale business and a prescription bottle with defendant's name on it, full of 30 pills, was located by officers. Multiple pharmacists testified about the defendant's numerous prescriptions from various cities around the area. The prosecutor's arguments were based on

the evidence. The arguments were not so flagrant and ill-intentioned that the there was a substantial likelihood that the error affected the verdicts in this case or could not have been cured by an instruction. The Court should uphold the verdicts in this case.

D. CONCLUSION.

The Court should uphold the convictions and special verdicts as sufficient evidence was introduced to support all four counts and all nine special verdicts. Defendant has not shown that the trial court abused its discretion in declining to give a self-defense instruction not support by the facts. Defendant has also not shown that the trial court abused its discretion by admitting relevant evidence related to defendant being an accomplice it the charged crimes. The prosecutor's arguments were based on the evidence adduced at trial and were not improper or erroneous. The Court should affirm defendant's convictions in this case.

DATED: January 9, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

BRENT J. HYER
Deputy Prosecuting Attorney
WSB # 33338

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. 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.

1/9/15 [signature]
Date Signature

PIERCE COUNTY PROSECUTOR

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