NO. 43870-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KISHA LASHAWN FISHER
COREY TROSCLAIR, APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 11-1-01011-4; 11-1-01002-5

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Was Trosclair's right to confront witnesses against him satisfied where his non-testifying co-defendant's statements were sufficiently redacted and there was no improper evidence presented from an unavailable witness? 1

2. Did the trial court properly deny Trosclair's motion for mistrial where there was no evidence presented that he either took a polygraph test or refused to take one? 1

3. Has Trosclair failed to prove that the prosecutor committed misconduct or conduct that was so flagrant and ill-intentioned that any potential prejudice could not have been cured by instruction? 1

4. Has Trosclair failed to show that his counsel's performance was deficient or that he was prejudiced by such performance? 1

5. Has Trosclair failed to show that his trial contained any prejudicial error, let alone that his trial was so rife with error that it warranted reversal under the doctrine of cumulative error? 1

6. Taken in the light most favorable to the State, was sufficient evidence presented at trial to convince a rational fact finder that Fisher was guilty of murder? 1

7. Did the trial court properly decline to instruct the jury regarding Fisher's affirmative defense where she failed to prove the elements of the defense by a preponderance of the evidence? 1

B. STATEMENT OF THE CASE. 2

1. Procedure 2

2. Facts 4

C. ARGUMENT 14

1. TROSCLAIR'S RIGHT TO CONFRONT WITNESSES WERE NOT VIOLATED AS FISHER'S STATEMENTS TO POLICE WERE PROPERLY REDACTED AND THERE WAS NO IMPROPER EVIDENCE FROM MICHELLE DAVIS PRESENTED. 14

2. THE TRIAL COURT PROPERLY DENIED TROSCLAIR'S MOTION FOR MISTRIAL. 20

3. TROSCLAIR HAS FAILED TO PROVE THAT THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS SO FLAGRANT AND ILL-INTENTIONED THAT ANY POTENTIAL PREJUDICE COULD NOT HAVE BEEN CURED BY INSTRUCTION. 22

4. TROSCLAIR HAS FAILED TO SHOW THAT HIS COUNSEL'S PERFORMANCE WAS EITHER DEFICIENT OR THAT HE WAS PREJUDICED BY DEFICIENT PERFORMANCE. 28

5. TROSCLAIR HAS FAILED TO SHOW THAT HIS TRIAL WAS RIFE WITH ERROR WARRANTING REVERSAL UNDER THE DOCTRINE OF CUMULATIVE ERROR. 34

6. THERE WAS SUFFICIENT EVIDENCE PRESENTED AT TRIAL TO CONVINCE A REASONABLE FACT FINDER THAT FISHER ACTED AS AN ACCOMPLICE TO MURDER. 38

7. AS FISHER WAS NOT ENTITLED TO AN AFFIRMATIVE DEFENSE INSTRUCTION, THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING TO GIVE ONE. 43

D. CONCLUSION. 47

Table of Authorities

State Cases

In re Davis, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) 32

In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994) 35

In re Wilson, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979) 40

Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989) 38

State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) 37

State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) 26

State v. B.J.S., 140 Wn. App. 91, 98, 169 P.3d 34 (2007) 40

State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963) 36-37

State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005) 44

State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) 38

State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993) 30

State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996) 22, 23

State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996) 29

State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) 23

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) 39

State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988) 30

State v. Carter, 154 Wn.2d 71, 78, 109 P.3d 823 (2005) 39

State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987) 39

State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988) 30, 33

State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) 35, 37

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) 39

State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....39

State v. Dhaliwal, 150 Wn.2d 559, 578-79, 79 P .3d 432 (2003) 23

State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).....26, 27, 28

State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006).....23

State v. Harvill, 169 Wn.2d 254, 258, 234 P.3d 1166 (2010).....44

State v. Hoffman, 116 Wn.2d 51, 75, 804 P.2d 577 (1991) 14

State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965).....38

State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) 35, 36

State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....38

State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979).....36

State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).....35

State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).....20

State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995) 20

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).....22

State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....38

State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....22

State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007) 14

State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....38

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).....29, 30

State v. Riker, 123 Wn.2d 351, 368, 869 P.2d 43 (1994) 44

State v. Rupe, 101 Wn.2d 664, 690, 683 P.2d 571 (1984).....20

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).....35

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) 39

State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) 23

State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990).....36, 37

State v. Sutherland, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980).....21

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).....29, 31

State v. Thomas, 150 Wn.2d 821, 863, 83 P.3d 970 (2004) 18

State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976).....37

State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....38

State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).....43, 44

State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988).....36

State v. Warren, 165 Wn.2d 17, 26 at FN 3, 195 P.3d 940 (2008).....23, 27

State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952).....22

State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970).....36

State v. Williams, 132 Wn.2d 248, 258–60, 937 P.2d 1052 (1997).....44

Federal and Other Jurisdiction

Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).....22

Brown v. United States, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973).....34

Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) 14

Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990) 31

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995) 30

Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986) 29, 31

Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002) 31

Neder v. United States, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) 34

Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987) 15

Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) 34

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 29, 30, 31, 33

U.S. v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993) 32

United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984) 28

Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003) 31, 33

United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991) 31

Constitutional Provisions

Sixth Amendment, United States Constitution 14, 28, 33

Statutes

RCW 9A.08.020(3)(a) 40

RCW 9A.32.030(1)(c) 40, 44, 45

RCW 9A.32.050(1)(b) 42

RCW 9A.36.021(1)(a) 42

RCW 9A.36.021(1)(c) 42

RCW 9A.36.021(1)(e) 42

RCW 9A56.190 41

Rules and Regulations

CrR 3.5 2

CrR 4.4(c) 15

Other Authorities

WPIC 19.01 45

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B. STATEMENT OF THE CASE.

1. Procedure

In March, 2011, the State charged KISHA LASHAWN FISHER (Fisher) and COREY TROSCLAIR (Trosclair) each with one count of murder in the first degree, committed in furtherance of robbery. CPF[1] 1; CPT 1. On February 23, 2012, the State amended each information to include one count of murder in the second degree, predicated upon an attempt to commit assault in the second degree. CPF 25-26; CPT 11-12. The case was called for trial on May 10, 2012, before the Honorable Vicki L. Hogan. RP 4. On May 22, 2012, the parties held a CrR 3.5 hearing to determine whether statements made by the defendants to police were admissible. RP 44-143. The court determined the statements were admissible. RP 156-58.

[1] Fisher and Trosclair were tried together and their cases have been consolidated on direct appeal. However, as both defendants filed their designations of clerk's papers separately, they are not sequentially numbered. The State will cite to clerk's papers for Fisher as "CPF" and for Trosclair as "CPT." The entirety of the trial transcript is sequentially numbered; therefore citations to the verbatim report of proceedings for the trial will be to "RP." Citations to any proceedings which were not part of the sequentially-numbered trial transcript will be to "RP" followed by the date of the hearing.

On July 12, 2012, the parties were still engaged in pretrial matters. *See* RP 206. On that date, Trosclair filed a motion to sever his case from Fisher, arguing that Fisher's statements to officers could not be sufficiently redacted to remove references to him. RP 208-19. The court denied the motion, but made additional redactions to Fisher's statement. RP 218-19, 220-21, 237-46. The court also considered whether statements made by Michelle Davis, made the day of the crime and the day following, were admissible as excited utterances. RP 283-94. The court admitted the statements made shortly after the crime, but excluded statements made the following day. RP 293-94.

Testimony began July 23, 2012 before a jury. RP 378. On July 30, 2012, during the State's case-in-chief, Trosclair moved for mistrial alleging that the State improperly elicited testimony regarding a polygraph test that Trosclair's cellular phone was within a specific distance of the victim, that Michelle Davis identified Trosclair from a photomontage, and that Fisher's statement to the police identified Trosclair as her brother. RP 867-68. The court denied the motion for mistrial. RP 872-73, 880.

On August 15, 2012, the jury found both defendants guilty as charged, and that the defendants, or an accomplice was armed with a firearm during the commission of the crime. CPF 198, 199, 200; CPT 237, 238, 239. The State dismissed the second degree murder charge, as

the defendants had been convicted of the more serious crime of murder in the first degree. CPF 213-15; CPT 240-42.

On August 24, 2012, the court sentenced Fisher to standard-range[2] sentence of 290 months, with a 60-month firearm sentence enhancement, for a total sentence of 350 months in custody. CPF 218-31. On September 21, 2012, the court sentenced Trosclair to a high-end, standard-range[3] sentence of 493 months, together with a 60-month firearm sentence enhancement, for a total sentence of 553 months in custody. CPT 409-24.

Each defendant filed a timely notice of appeal. CPF 242; CPT 425.

2. Facts

On January 16, 2011, at approximately 8:30 p.m. in Lakewood, Washington, Lenard Masten received a telephone call, informed his girlfriend, Michelle Davis[4], that he was going to the store and asked if she wanted anything. RP 519-20. Shortly after Mr. Masten left the apartment,

[2] Fisher had an offender score of one, giving her a standard range of 250-333 months for murder in the first degree. CPF 218-31.
[3] Trosclair had an offender score of eight, giving him a standard range of 370-493 months for murder in the first degree. CPT 218-31.
[4] Michelle Davis died prior to trial for reasons unrelated to this case. RP 259. Her statements to Denise were admitted as excited utterances. RP 293-94. Also, as evidence was presented from sisters Michelle Davis, Denise Davis, and Nadise Davis, and their mother, Marlene Davis, the State refers to each woman by her first name only to avoid undue confusion. The State does not intend any disrespect by the familiarity.

Michelle heard a loud noise and looked out the apartment window. RP 519-20. She saw a black male standing over Mr. Masten. RP 519-20.

Michelle's sisters Nadise and Denise, lived at the same apartment complex, along with their mother Marlene, who worked as the manager for the apartments. RP 474-75, 559. Nadise was visiting Denise when she heard a gunshot. RP 479. When she looked outside, she saw Mr. Masten trying to fight someone. RP 479. She immediately went out to assist because she thought he looked like he was hurt. RP 479. She saw a black man digging through Mr. Masten's pockets before looking up at her. RP 480-81. She also saw a second black man, this one with a 9 mm handgun in his left hand, come running down the stairs from the direction of Mr. Masten's apartment. RP 480-81. Both men ran past her and she saw what looked like a truck drive quickly away. RP 480, 485. She went to Mr. Masten and saw that he had been shot in the stomach. RP 486. Nadise called 911. RP 489. Michelle, who had been screaming through the window of the apartment she shared with Mr. Masten, came down and took Mr. Masten's cellular telephone. RP 488, 494.

Denise also heard the gunshot. RP 510. She looked out her window and saw a black male leaning over someone lying on the ground and heard the male cursing loudly. RP 510. She thought people were fighting, so she ran outside and drove her van toward the altercation. RP

510-11. She saw a dark Ford Expedition with its lights off and a black male driving pull out of the parking lot just as she arrived. RP 511.

When she reached Mr. Masten, Michelle and Nadise were already with him. RP 512, 515. She heard Mr. Masten tell Michelle to call his mother. RP 512. As other residents and police started to arrive, Michelle handed her a wad of bills and asked her to keep it for her. RP 516. Michelle then took two backpacks from her apartment and put them in Denise's apartment. RP 517.

A neighbor drove Michelle and Denise to the Hilltop so they could go to St. Joseph's Hospital, where Mr. Masten had been taken. RP 517. Hospital staff would not allow Michelle to see Mr. Masten, so the women walked to their brother's house, which was nearby. RP 520. Michelle called Mr. Masten's nephew[5], Joseph Adams, to inform him of the situation. RP 520.

Joseph Adams picked up the women from their brother's house. RP 521. Michelle informed him that she had left Mr. Masten's drugs, gun, and money at Denise's apartment. RP 522. The trio went to Denise's apartment to retrieve the backpacks, which had the listed items inside. RP 523-24. Michelle informed Denise that she had taken the backpacks because she thought that Mr. Masten would survive his injuries and did

not want the police finding the unlawful items and filing drug or gun charges against him. RP 524.

Shannon Henderson lived at the apartments and was home the night of the shooting. RP 429, 433. She heard a man say, "what's up nigga," then she heard one gunshot. RP 433. She peeked out her window and saw a man standing over Mr. Masten and going through his pockets. RP 434-35. She also saw another man go up the stairs toward Mr. Masten's apartment and come back down quickly. RP 434. When the second man came back down the stairs, both men left the area immediately. RP 435. She saw a black SUV leave the parking lot. RP 436. Later, she did not identify any person presented in a photomontage containing Joseph Adams. RP 439, 673-75, 1565.

Aaron Howell also lived in the apartments in Lakewood on the night of the shooting. RP 1044. He was in his living room when he heard what he immediately recognized as a gunshot. RP 1045. He went outside and saw a man standing in the parking lot. RP 1047. He and the man looked at each other for a couple of minutes before the man turned around and left. RP 1047-48. He was able to see three-quarters of the man's face very well, as it was lit from the side by overhead lights. RP 1057. He saw

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[5] Joseph Adams is not related to Mr. Masten, but several people testified that they referred to each other as "nephew" and "uncle." *See* RP 1314, 1324.

the man get into a dark-colored SUV, which had been backed into a parking stall. RP 1048-49. Then Mr. Howell heard a woman start to scream that someone had shot her boyfriend. RP 1049-50.

Mr. Howell went to render aid, and saw a man lying on the ground. RP 1050-51. Mr. Masten was lying approximately three feet from where Mr. Howell had seen the unknown man standing. RP 1051. Mr. Howell stopped giving aid when the police and medical personnel arrived. RP 1052.

Lakewood Police Detective Jeffrey Martin contacted Mr. Howell a day or two after the shooting. RP 1053. Mr. Howell was unable to identify the man he saw from a photomontage containing a picture of Joseph Adams. RP 103-54; Exhibit 136. On March 18, 2011, Mr. Howell again met with Detective Martin and this time he immediately identified Trosclair as the man he saw from a photomontage. RP 1058, 1060-61. He also identified Trosclair in the courtroom. RP 1061.

Mr. Masten died at the hospital as a result of a gunshot to his torso, which passed through the left iliac artery in his pelvis. RP 1008; 1024, 1028-30.

Detective Martin and Lakewood Police Investigator Sean Conlon were in charge of the investigation on the case. RP 656, 1552-53. They interviewed some people at the scene, but did not have a lot of

information. RP 664-65. They were unable to locate Michelle that night, but one witness was able to give them a partial license plate number. RP 682, 1560. The partial plate did not match the format of a Washington license plate, but was consistent with a California-issued plate. RP 682-83, 898-99.

The following day, Michelle contacted the police. RP 1562-63. Michelle gave the detectives Mr. Masten's cellular phone. RP 670. The detectives also acquired search warrants for a second telephone for Mr. Masten as well as telephones for Michelle and Mr. Adams due to a call pattern between them. RP 684-687. Records showed that, at 8:19 p.m., Mr. Adams' phone was located in Seattle. RP 881-82. Based on information contained within Mr. Masten's recent call log, the detectives acquired additional warrants for Mario[6] Steele's home telephone and cellular telephone. RP 777, 784-85. The detectives discovered that Steele's landline had made calls to both[7] of Mr. Masten's telephones at approximately 8:00 p.m. the night of the shooting. RP 784. A few minutes before the 911 call from Nadise came, Steele's landline was involved in a three-way call with a cellular telephone owned by Trosclair and one of Mr. Masten's telephones. RP 790-91, 807, 829-30. Records of

[6] Mario Steele was originally a co-defendant in this case. *See generally*, CPT 2-4.
[7] Mr. Masten had a cellular telephone for his drug deals and a separate one for personal calls. RP 380-81. This is a common situation for drug dealers. RP 678-79.

cellular towers showed that Trosclair's telephone was located in the same area as Mr. Masten's apartment. RP 829-30, 887. Prior to the day of the shooting, Trosclair's telephone had never been in Mr. Masten's neighborhood. RP 831. Also, on the day of the shooting, Mr. Trosclair had called the Steele landline 30 times, which was atypical of the normal calling pattern. RP 832, 889-90, 895.

Trosclair was interviewed by the detectives. RP 833. During his interview, he admitted that Fisher is his sibling and that she had informed him that the police had his telephone number. RP 834, 836. When he was shown evidence of the three-way call, in which his phone called the Steele residence and the Steele residence called Mr. Masten, he denied having been in Lakewood at all. RP 837-46. Trosclair also admitted that no one else had his phone. RP 854. When the detectives asked Trosclair if a lie detector test would clear him, Trosclair responded, "[n]o, it won't." RP 855.

Officers executed a warrant for Steele's residence where he lived with Fisher. RP 794. The detectives interviewed Fisher regarding her involvement in the shooting. RP 795. Fisher admitted that she knew Mr. Masten, as she had dated him for a time. RP 794. She informed the detectives that she had called Mr. Masten at approximately 3:00 that afternoon to set up a drug deal for Steele to buy drugs. RP 795. She

stated that Steele had gone to buy the drugs after dinner and that he was gone for 30-40 minutes. RP 797. She told them that she did not find out about Mr. Masten's death until after midnight that night. RP 799. She also told them that she did not recognize the other phone number (Trosclair's) involved in the three-way call. RP 823-24.

As part of their continuing investigation, the detectives again interviewed Fisher. RP 1605. This time, she eventually admitted that Mario had told her they had shot Mr. Masten. RP 1619. She also reluctantly admitted that she was aware that "they" were planning to rob Mr. Masten. RP 1637-38, 1643. "They," being Steele, "the first guy," and a "tall dude" who was from California. RP 1641, 1648. She also admitted that, despite knowing of this plan, she tracked down Mr. Masten's phone number. RP 1639. Fisher denied being angry at Masten for any reason, even when detectives confronted her about her knowledge of rumors Mr. Masten had been spreading that he had prostituted her while they were dating. RP 1633-35. She had initially denied knowledge of the rumors, but then admitted that Steele had told them to her. RP 1633-34.

In addition to the call logs, the detectives discovered that Steele was having rent problems. RP

Joseph Adams was also interviewed as part of this case. RP 1362. Mr. Adams also testified on behalf of the State pursuant to a plea

agreement involving unrelated crimes. RP 1313, 1365-66. Mr. Adams testified that he was in Seattle when he received news of the shooting. RP 1320. He described his trip to Tacoma and his activities with Michelle and Denise the night of the shooting, which was consistent with the testimony given by Denise. *See* RP 1321-30. Mr. Adams admitting that Michelle had given him Mr. Masten's drug phone and he threw it away the following day because he realized people were thinking that he had been involved in the murder. RP 1325-26.

Mr. Adams was ultimately arrested on unrelated charges. RP 1331. While he was in the Pierce County jail, he was housed with Trosclair. RP 1332. Mr. Adams had discovered Trosclair's suspected involvement with the murder from reading the paper and confronted Trosclair. RP 1334-35. After some initial tense relations, the two men began to talk about their respective charges. RP 1336-37. Trosclair told Mr. Adams that the murder was an accident, that he and Steele had intended to rob Mr. Masten because the drugs he had bought earlier in the day were unacceptable. RP 1338. Trosclair stated that someone called Mr. Masten to lure him out of his apartment while he and Steele waited in the parking lot. RP 1339. As Mr. Masten was about to enter his car, the two men ran up on him. RP 1339. According to Trosclair, Mr. Masten started getting "loud," and reached for his own gun, so Trosclair shot him.

RP 1339. Trosclair then tried to get into Mr. Masten's apartment, but it was locked so he ran away. RP 1339. When Mr. Adams and Trosclair found out Michelle had died, Trosclair stated, "God is good," as without her as a witness, the State's case was not as strong against him. RP 1357.

Mr. Adams did not initially tell anyone about Trosclair's statements. RP 1344. He told Detective Martin about the statements only after he was unable to make any other deal for leniency on his sentence and he found out that Trosclair's defense theory involved blaming him for Mr. Masten's murder. *See*, RP 1348-61.

Patrick Pitt, a private investigator with the Department of Assigned Counsel, testified on behalf of Trosclair and was the only defense witness in the case. RP 1832-33. According to Mr. Pitt, Mr. Adams told him that he did not believe Trosclair was involved in Mr. Masten's murder and that Trosclair would "walk." RP 1834.

Neither Trosclair nor Fisher testified on their own behalf. RP 1843.

C. ARGUMENT.

1. TROSCLAIR'S RIGHT TO CONFRONT WITNESSES WERE NOT VIOLATED AS FISHER'S STATEMENTS TO POLICE WERE PROPERLY REDACTED AND THERE WAS NO IMPROPER EVIDENCE FROM MICHELLE DAVIS PRESENTED.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The primary right of the confrontation clause is the right to effect cross-examination of the adverse witness. The standard of review on a confrontation clause challenge is de novo. ***State v. Mason***, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

a. Admission of Fisher's interview with police did not violate Trosclair's right to confrontation where the statement was redacted to omit references to Trosclair and the jury was instructed that it could only use the statement against Fisher.

A defendant's right to confront witnesses is violated if he is incriminated by a pretrial statement of a non-testifying codefendant. ***State v. Hoffman***, 116 Wn.2d 51, 75, 804 P.2d 577 (1991) (*citing* ***Bruton v. United States***, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)). But admitting a non-testifying codefendant's confession that is redacted to omit all references to the defendant, coupled with an instruction that the

jury can use the confession against only the codefendant, does not violate the confrontation clause. ***Richardson v. Marsh***, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). This is true even where the codefendant's confession, although not facially incriminating, becomes incriminating when linked with other evidence introduced at trial. ***Richardson***, 481 U.S. at 208-09. The ***Richardson*** Court noted that "[o]rdinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." ***Richardson***, 481 U.S. at 206. Redaction of a codefendant's references to the defendant, coupled with an instruction, creates the same situation with respect to a non-testifying codefendant's confession. ***Richardson***, 481 U .S. at 211. Consistently, Criminal Rule 4.4(c) states:

> (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:
>
> ....
>
> (ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

Here, all references to Trosclair were deleted from Fisher's statement. They were not replaced with a blank or other obvious omission, but with "the first guy" as a neutral statement. *See* RP 1605-46.

Fisher implicated not two, but *three* men as having gone to buy drugs from Mr. Masten; Steele, the "first guy," and a "tall dude" she did not know from California. RP 1610, 1641, 1648. Moreover, Fisher stated that "they" returned to Mr. Masten to get more drugs, and clarified that Steele was the only one she knew of that actually went back. *See* RP 1616-17. There was nothing in the statement that identified "the first guy" by name or as Fisher's brother. That only two suspects were seen at the scene does not render the statement incriminating where three men were implicated.

The fact that other evidence linked Trosclair to the crime does not render the statement a violation of Trosclair's confrontation rights. Fisher's statement was that "the first guy" stayed in Kent, not that her brother stayed in Kent. RP 1612. Evidence that Trosclair stayed in Kent came from his own interview with Detective Martin, RP 837, 838. The fact that Fisher would know "the first guy" well enough to know that he stayed in Kent, did not visit often, did not have a car, and did not ask her to get drugs does not imply that "the first guy" is her brother. None of these facts about "the first guy" are unusual, unique, or private to the point where only a sister would know them.

Even Fisher's statement that the man from California was not related to her or any member of her family did not implicate Trosclair.

During Investigator Conlon's interview with Fisher, the following exchange took place:

Q. And if dude was your cousin, would you tell me his name if he was your real cousin?
A. Oh, yeah, at this point, yeah.
Q. What?
A. He's not. He's not my cousin. He is no relationship to me.
Q. No relation to the first guy that you know of?
A. No relation to my family.
Q. Okay.
A. I would know who he was then.

RP 1615. Based on Fisher's responses to the officer, the answer that the man was no relation to her family appears to be a continuation of explaining that he was not her relative, otherwise, she would know his name. She did not state that the first guy was her brother. In fact, the question itself implies that "the first guy" is not a relative of Fisher, as anyone who is related to Fisher is likely related to her brother.

In addition to redacting references to Trosclair from Fisher's statement, the trial court instructed the jury not to consider her admission or incriminating statement against Trosclair. RP 794; CPF 158-97; CPT 197-236 (Jury Instruction 8).

Because the trial court properly redacted Fisher's statement to remove all references to Trosclair and instructed the jury not to consider the statements as evidence against Trosclair, Fisher was not a "witness

against" him, and the confrontation clause was not at issue. The trial court did not violate Trosclair's right to confront the witnesses against him by admitting the redacted co-defendant statement and did not commit error in denying the motion to sever.

b. Michelle Davis's identification of Trosclair in a photomontage was not admitted at trial.

Washington courts have specifically held that police officers may testify about actions taken during the course of their investigation, such as contacting witnesses to confirm alibis and facts, without implicating the hearsay rules, as long as the officers do not testify about any actual "statements made by [the witnesses]." ***State v. Thomas***, 150 Wn.2d 821, 863, 83 P.3d 970 (2004) (officer's testimony that he contacted witnesses to verify defendant's alibi defense and other facts was not hearsay where the officer did not testify about any witness statements).

Here, Trosclair claims that his confrontation rights were violated because testimonial evidence by Michelle Davis was admitted at trial, specifically that Detective Martin and Officer Conlon showed Michelle a photomontage containing Trosclair's picture before arresting him. Trosclair's argument is entirely without merit. Both officers testified extensively as to their investigation leading to the arrest of Trosclair. *See* RP 824, 887-90, 895; 1568, 1579-80. Investigator Conlon testified that he

showed a photomontage containing Trosclair's photo to Michelle, Mr. Howell, and Denise. RP 1581. Mr. Howell testified that he identified Trosclair from the photomontage. RP 1060-61. There was no testimony that Michelle had identified Trosclair. RP 1582. That officers showed Michelle a photomontage before acquiring the arrest warrant merely shows the steps they took in their investigation and is not an admission of any evidence that Michelle actually identified him.

Trosclair's second contention, that the prosecutor used evidence of Michelle's identification of Trosclair during closing, is equally without merit. The prosecutor stated:

> What's a coincidence? I tell you what's not a coincidence. Minutes after two black males arrange to buy cocaine from Lenard Masten via three-way call, Lenard Masten is robbed and shot by two black males. It's not a coincidence that Michelle Davis picked these two out of a photomontage, or that Michelle picked Mario Steele out of a photomontage. It's not a coincidence that Aaron Howell picked Corey Trosclair out of the photomontage. It's not a coincidence that Nadise Davis saw a man leaving the scene with a gun in his left hand and Corey Trosclair is left handed.

RP 1885. Clearly the prosecutor misspoke when he first said Michelle had identified both men, then immediately corrected himself and stated that Michelle had identified only Steele, and that it was Mr. Howell who identified Trosclair. The trial court, who heard the argument, also

considered this statement a mistake which was immediately corrected. RP 1907, 1909.

As nothing in this record supports a finding that the jury was left with the impression that Michelle Davis identified Trosclair from a photomontage, his claim that his confrontation rights were violated by the admission of such evidence is without merit.

2. THE TRIAL COURT PROPERLY DENIED TROSCLAIR'S MOTION FOR MISTRIAL.

A trial court's denial of a motion for a mistrial is reviewed under an abuse of discretion standard and should only be granted where a "defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." ***State v. Lewis***, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Because the trial court is in the best position to most effectively determine whether a defendant's right to a fair trial has been prejudiced, the trial court's ruling is given deference on appeal. ***State v. Luvene***, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

In Washington, evidence of polygraph tests is generally inadmissible absent the parties' stipulation. ***State v. Rupe***, 101 Wn.2d 664, 690, 683 P.2d 571 (1984). Nevertheless, "[t]he mere fact [that] a jury is apprised of a lie detector test is not necessarily prejudicial if no inference as to the result is raised or if an inference raised as to the result

is not prejudicial." ***State v. Sutherland***, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980). Thus, a witness's passing reference to polygraph test, or to the mere possibility that a person could have taken a polygraph test, is not necessarily reversible error unless the testimony raises an inference about the test's result.

Here, no trial irregularity occurred. No polygraph test was given, nor was there any inference that Trosclair was offered one or refused to take one. During Detective Martin's interview with Trosclair, Detective Martin confronted Trosclair with the fact that Trosclair's cellular phone had been in Mr. Masten's neighborhood, despite Trosclair's repeated assertions that he had not been there. RP 837-42. Detective Martin asked Trosclair if taking a lie detector test would clear him, and Trosclair responded "[n]o, it won't." RP 855. The trial court considered Trosclair's motion for mistrial, noting that counsel had a valid reason for not objecting at the time the statements were made and reviewed whether the question violated Trosclair's rights. RP 880. The court denied the motion, "given the way the question was asked." RP 880.

The question was asked so as not to improperly suggest that Trosclair refused a polygraph test. Rather, it was obviously an admission by Trosclair that he was not being truthful during the interview. It did not imply that Trosclair had taken a polygraph test, that a test had been

offered, that there were any test results, or that he had refused to take one. As there was no evidence of any polygraph test admitted, the trial court properly denied Trosclair's motion for mistrial.

3. TROSCLAIR HAS FAILED TO PROVE THAT THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS SO FLAGRANT AND ILL-INTENTIONED THAT ANY POTENTIAL PREJUDICE COULD NOT HAVE BEEN CURED BY INSTRUCTION.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they 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). To prove that a prosecutor's actions constitute misconduct, 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) (citing ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of 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). A new trial will be ordered only if there is a substantial likelihood the

misconduct affected the jury's verdict. ***State v. Dhaliwal***, 150 Wn.2d 559, 578-79, 79 P .3d 432 (2003).

If an instruction could have cured the error and the defense failed to request one, then reversal is not required. ***Binkin***, 79 Wn. App. 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." ***State v. Stenson***, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

During closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. ***State v. Gregory***, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). A prosecutor's remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Here, defendant claims that the prosecutor committed "serious, prejudicial, and constitutionally offensive" misconduct[8] during closing

[8] Defendant's argument encourages the court to adopt a constitutional harmless error analysis rather than the well-established standard of review for prosecutorial misconduct. The Washington Supreme Court has declined to adopt a constitutional harmless error standard for claims of prosecutorial misconduct. *See* ***State v. Warren***, 165 Wn.2d 17, 26 at FN 3, 195 P.3d 940 (2008).

argument by minimizing the State's burden, misstating the jury's duties, and use of the "declare the truth" in rendering a verdict argument. Appellant's Brief (Trosclair) at 43, 47. As Trosclair failed to object to any of these arguments below, he must show that they were so flagrant and ill-intentioned that any prejudice could not have been cured by instruction.

a. The prosecutor did not commit minimize the burden of proof when he discussed an abiding belief.

Trosclair first argues that the prosecutor's argument telling jurors they were "convinced beyond a reasonable doubt if they simply 'know' someone is guilty despite wishing they had more evidence." Appellant's Brief (Trosclair) at 43. Trosclair's assertion is incorrect, as it reviews the prosecutor's statements in isolation and misstates the argument.

In closing, the prosecutor discussed the standard of proof beyond a reasonable doubt. RP 1902. The prosecutor informed the jury to forget everything they knew of the burden from what they might have heard on television and to consider only the instruction given by the court. RP 1902. The prosecutor then quoted, verbatim, the court's instruction on reasonable doubt. RP 1902-03. Then the prosecutor stated:

> Satisfied, if you have an abiding belief that the defendants committed the robbery, you have a duty to convict them. That's exactly what the instructions tell you. So once you are satisfied -- this is -- put this to you slightly different. At

> some point you are going to be sitting back in the jury room and somebody is going to say, I know he did it, but I would like to see more. Well, of course you would like to see more. I know he did it but -- and I want you to stop to think and say, I know he did it, I know he did it. At that point you have an abiding belief in the truth of the charge. You know he did it.
>
> There is no such thing as a perfect trial. There is [sic] always things that you could want. You would like to have heard -- here's a perfect example in this trial. Would you like it if that video of black night was as clear as the video during the day? As clear as that picture of that video, would that be -- sure, we would all like that. That would have been great. It's a doubt that rises from the evidence or lack of evidence. In other words, when you are looking at the truth of the charge, you say it wasn't him. You say, they didn't try to rob Lenard Masten. The gunshot didn't kill him. That's a doubt that arises from the evidence, or the lack of evidence.
>
> Do you have enough? It's not do you wish you had more. Do you have enough? There will always be something else that you would like to see. If you have an abiding belief it just means abiding, long lasting. Are you satisfied -- when you reach your verdict today, are you satisfied tomorrow, are you satisfied two years from now? When you wake up three years from now, I did the right thing. It's not I'm 1,000 percent certain. It's, I know he did it. Are you going to be satisfied two years from now? I know he did it.

RP 1903-05.

Nothing in this statement minimizes or trivializes the State's burden of proof. The argument discusses points out the fact that there are gaps in evidence in every trial, but that doesn't preclude the jurors from finding the defendant guilty if the evidence they did have convinced them

beyond a reasonable doubt. The prosecutor even correctly pointed out that a reasonable doubt can arise from the lack of evidence and it was for the jury to decide if any lack of evidence in this case affected whether they had an abiding belief in the truth of the charge. The prosecutor did not encourage the jury to convict on anything less than the burden of proof as stated in the court's instructions.

Moreover, the trial court correctly instructed the jury on the reasonable doubt standard. The prosecutor read this instruction before making this statement and concluded by directing the jury to follow the instructions. He did not tell the jurors to rely on the decision-making process they use in their daily lives, nor did he attempt to lower the State's burden of proof.

Trosclair has not shown that this argument was improper, let alone so flagrant and ill-intentioned that any prejudice could not have been cured by instruction.

b. The prosecutor's argument that the jury return a verdict that "speaks the truth" is not so flagrant and ill-intentioned any prejudice could not have cured any prejudice.

Washington courts have held that a prosecutor's "truth" statements are improper. *See* ***State v. Emery***, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); ***State v. Anderson***, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

A jury's job is not to determine the truth of what happened; a jury therefore does not "speak the truth" or "declare the truth." ***Emery***, 174 Wn.2d at 760. However, in absence of an objection, such statements are not reversible error unless they are "flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." ***Emery***, 174 Wn.2d at 760-61. Misconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom. ***Emery***, 174 Wn.2d at 762. Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. ***Emery***, 174 Wn.2d at 762.

In ***Emery***, the Court held that similar statements as to the present case would have been curable by instruction because 1) they were not the type of statements the Court has held to be inflammatory, and 2) similar misstatements had been held curable by instruction in ***State v. Warren***, 162 Wn.2d 17, 195 P.3d 940 (2008), where the prosecutor misstated the burden of proof. 174 Wn.2d at 763-64.

In the present case, the prosecutor argued that both parties were entitled to a fair trial and that the State has to prove all the elements of the crime charged. RP 1905. The prosecutor then defined "voir dire" as French, for speak the truth and "verdict" as Latin for the same statement.

RP 1905; *see also* Exhibit 164. The prosecutor then stated "[w]e all get a fair trial." RP 1905. The prosecutor asked the jury to keep the principles of a fair trial to both the State and the defendants in mind and to return a "verdict that speaks the truth." RP 1905. Neither defendant objected to the statements. RP 1905.

Here, as in ***Emery***, had Trosclair objected to the statement, the court could have properly explained the jury's role and reiterated that the State bears the burden of proof and the defendant bears no burden. Such an instruction would have eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor's improper remarks.

4. TROSCLAIR HAS FAILED TO SHOW THAT HIS COUNSEL'S PERFORMANCE WAS EITHER DEFICIENT OR THAT HE WAS PREJUDICED BY DEFICIENT PERFORMANCE.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the

adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also* ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also* ***Strickland***, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn. 2d at 226. A defendant carries the burden of

demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable

competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." ***Strickland***, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. ***Mickens v. Taylor***, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

A defendant must demonstrate both prongs of the ***Strickland*** test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. ***Kimmelman***, 477 U.S. at 375; ***United States v. Molina***, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. ***Cuffle v. Goldsmith***, 906 F.2d 385, 388 (9th Cir. 1990). Generally, a defense attorney's failure

to object to a prosecutor's closing argument is not deficient performance because lawyers "do not commonly object during closing statement 'absent egregious misstatements.'" ***In re Davis***, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (*quoting* ***U.S. v. Necoechea***, 986 F.2d 1273, 1281 (9th Cir. 1993)).

Here, Trosclair claims that he received ineffective assistance of counsel for his counsel's failure to move to exclude evidence of a polygraph test prior to trial. *See* Appellant's Brief (Trosclair) at 39. However, as noted above, no evidence of Trosclair either taking or refusing to take a polygraph test was admitted at trial. Moreover, counsel moved for mistrial based on the evidence that was presented. *See* RP 866. Counsel's statement regarding why he did not object during testimony - that he did not want to draw additional attention to the statement - was a legitimate trial tactic.

Moreover, even if counsel had raised the issue pretrial, it is unlikely to have succeeded. Pretrial, counsel stated, "the last page they want him to take a polygraph. That needs to be taken out." RP 193. Yet the statement did not say that the officers wanted Trosclair to take a polygraph, or did it suggest that he refused such a request.

In addition, defendant's focus on counsel's performance during the State's rebuttal closing argument leads the court away from the proper

standard of review under ***Strickland*** and its progeny. The standard of review for effective assistance of counsel is whether, *after examining the whole record*, the court can conclude that defendant received effective representation and a fair trial. ***Ciskie***, 110 Wn.2d at 263. The Sixth Amendment guarantees reasonable competence, not perfection, and counsel can make demonstrable mistakes without being constitutionally ineffective. ***Gentry***, 540 U.S. at 8.

The entirety of the record reveals that Trosclair received his Sixth Amendment right to counsel. He had an attorney who argued for severance from a non-testifying co-defendant, and for redactions in the co-defendant's out-of-court statements. RP 192-94, 208-19, 219-46. Counsel gave an opening statement. RP 377. Throughout the trial, he made relevant objections and cross–examined the State's witnesses. *See e.g.*, RP 389, 390, 393, 404, 424, 440, 458, 471. He also made a coherent closing argument. RP 1910-44. It is clear that defendant had counsel and that his attorney tested the State's case. Looking at the entirety of the record, defendant cannot meet her burden on either prong of the ***Strickland*** test.

5. TROSCLAIR HAS FAILED TO SHOW THAT HIS TRIAL WAS RIFE WITH ERROR WARRANTING REVERSAL UNDER THE DOCTRINE OF CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ***Neder v. United States***, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose***, 478 U.S. at 577. Thus, 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. *Id.* at 578; *see also* ***State v. Kitchen***, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) ("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous 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, 684 P.2d 668 (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.").

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. *Compare*, ***State v. Whalon***, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), *with* ***State v. Wall***, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), *and* ***State v. Kinard***, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g.*, ***State v. Badda***, 63

Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see, e.g.*, ***State v. Coe***, 101 Wn.2d 772, (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g.*, ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See* ***Stevens***, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, Trosclair has failed to establish that his trial was so flawed with prejudicial error as to warrant relief.

6. THERE WAS SUFFICIENT EVIDENCE PRESENTED AT TRIAL TO CONVINCE A REASONABLE FACT FINDER THAT FISHER ACTED AS AN ACCOMPLICE TO MURDER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing* ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). 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).

Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing* ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

> great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

An accomplice and a principal share the same criminal liability. ***State v. Carter***, 154 Wn.2d 71, 78, 109 P.3d 823 (2005). A person is an

accomplice if, "[w]ith knowledge that it will promote or facilitate the commission of the crime, he or she (i)[s]olicits, commands, encourages, or requests such other person to commit it; or (ii)[a]ids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a); *see also* CPF 158-197 (Jury Instruction 10). "Aiding in a crime includes all assistance whether given by words, acts, encouragement, support, or presence." ***State v. B.J.S.***, 140 Wn. App. 91, 98, 169 P.3d 34 (2007). However, presence alone plus knowledge of ongoing activity does not establish the intent requisite to a finding of accomplice liability. ***In re Wilson***, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979).

a. There was sufficient evidence to prove that Fisher acted as an accomplice to felony murder.

A person is guilty of murder in the first degree when that person, or an accomplice, "commits or attempts to commit robbery in the first or second degree, and in the course of or furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants." RCW 9A.32.030(1)(c); CPF 158-197 (Jury Instruction 11). A person commits the crime of robbery in the first degree when that person, or an accomplice, "unlawfully takes personal property the person of another . . . against his or her will by the use or threatened use of immediate force,

violence or fear of injury to that person." RCW 9A56.190; CPF 158-197 (Jury Instruction 14). Hence, to prove Fisher was guilty of murder in the first degree, the State was required to prove:

> 1) That on or about the 16th day of January, 2011 the defendant or a person to whom the defendant was acting as an accomplice, committed or attempted to commit the crime of robbery in the first degree or robbery in the second degree
> 2) That the defendant, or another participant, or a person to whom the defendant was acting as an accomplice, caused the death of Lenard Masten in the course of or in furtherance of such crime or in immediate flight from such crime:
> 3) That Lenard Masten was not a participant in the crime: and
> 4) That any of these acts occurred in the State of Washington.

CPF 158-197 (Jury Instruction 12). Here, the second, third, and fourth elements are not in dispute. *See* Appellant's Brief (Fisher) at 10-11.

There was sufficient evidence to prove that Fisher acted as an accomplice to robbery. In her statements to the detectives, Fisher admitted that she knew that Steele planned on committing a robbery against Mr. Masten. RP 1619, 1629, 1637-38, 1643. Despite knowing this information, she not only went through the steps of tracking down Mr. Masten's phone number, but also called Mr. Masten to set up the original drug deal and initiated the three-way call to Mr. Masten in order to lure him out of his apartment. RP 1639. While Fisher discounts her

participation as merely a "theory," the evidence supports a reasonable inference that she aided in the commission of robbery by setting up Mr. Masten as the victim of the crime.

b. There was sufficient evidence to prove that Fisher acted as an accomplice to murder[9] in the second degree.

A person commits the crime of murder in the second degree when that person or an accomplice, "commits or attempts to commit any felony, including assault . . . and in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants." RCW 9A.32.050(1)(b); CPF 158-197 (Jury Instruction 23). A person commits assault in the second degree when the person or an accomplice intentionally assaults another and thereby recklessly inflicts substantial bodily harm, or assaults another with a deadly weapon, or assaults another with intent to commit a felony. RCW 9A.36.021(1)(a), (c), (e); CPF 158-197 (Jury Instruction 26).

To convict Fisher of murder in the second degree, the State was required to prove:

[9] As Fisher was convicted of both murder in the first degree and murder in the second degree based on the same evidence, the State moved to dismiss the count of murder in the second degree after trial. CPF 213-15.

(1) That on or about January 16, 2011, the defendant . . . or an accomplice, committed or attempted to commit the crime of assault in the second degree,
(2) That the defendant, or another participant, or a person to whom the defendant was acting as an accomplice, caused the death of Lenard Masten in the course of or in furtherance of such crime or in immediate flight from such crime:
(3) That Lenard Masten was not a participant in the crime: and
(4) That any of these acts occurred in the State of Washington.

CPF 158-197 (Jury Instruction 24). Again, the second, third, and fourth elements are not in dispute.

Here, taken in the light most favorable to the State, there was sufficient evidence to convince a rational fact finder that Fisher was guilty of murder in the second degree. As noted above, Fisher was aware of the plan to rob Mr. Masten, a man she knew drug dealer, and set up the scenario that made the robbery possible. While she may not have been aware of whether any of her fellow participants was armed with a firearm, it was reasonable to infer that she was aware that they would have taken Mr. Masten's property through use of force.

7. AS FISHER WAS NOT ENTITLED TO AN AFFIRMATIVE DEFENSE INSTRUCTION, THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING TO GIVE ONE.

This court reviews a trial court's refusal to give a requested jury instruction de novo where the refusal is based on a ruling of law. ***State v. Walker***, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). Appellate courts

review a refusal based on factual reasons for an abuse of discretion. ***Walker***, 136 Wn.2d at 771–72.

Jury instructions are adequate if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. ***State v. Barnes***, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). A defendant is entitled to have the jury instructed on his theory of the case if evidence supports that theory. ***State v. Williams***, 132 Wn.2d 248, 258–60, 937 P.2d 1052 (1997). A defendant must establish each element of an affirmative defense[10] by a preponderance of the evidence. ***State v. Harvill***, 169 Wn.2d 254, 258, 234 P.3d 1166 (2010). Reversal is required only when a defendant has proved each element of the affirmative defense and the court refuses to give the instruction. ***Williams***, 132 Wn.2d at 259–60.

RCW 9A.32.030(1)(c) provides:

> It is a defense to a charge of murder in the [first or second] degree based upon committing [robbery in the first degree] that the defendant:
> (1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
> (2) Was not armed with a deadly weapon, or any

[10] An affirmative defense that admits the elements of the crime charged but pleads an excuse for doing so must be proved by a preponderance of the evidence. *See* ***State v. Riker***, 123 Wn.2d 351, 368, 869 P.2d 43 (1994). On the other hand, defendants must prove defenses that deny an element of the crime only to the extent that it creates a reasonable doubt as to guilt. ***Riker***, 123 Wn.2d at 367 (alibi defense makes it impossible for State to prove defendant guilty beyond a reasonable doubt).

> instrument, article or substance readily capable of causing death or serious physical injury; and
> (3) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article or substance; and
> (4) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

See also WPIC 19.01. RCW 9A.32.030(1)(c) is an affirmative defense as it requires that it be proven by the defendant by a preponderance of the evidence.

WPIC 19.01 was proposed[11] by Fisher. RP 1683. The State objected to the giving of the instruction, as Fisher did not intend to testify. RP 1683. The court indicated it had read the comments to the WPIC, the cases cited, and RCW 9A.32.030(1)(c), to determine if Fisher was entitled to the instruction. RP 1687. The court stated that it was not inclined to give the affirmative defense instruction, but that it would do more research before making a final determination. RP 1703-04. The following day, the court stated that it had researched self defense cases as those were most analogous to the present case. RP 1829. The court reaffirmed her earlier ruling declining to give the jury the proposed instruction. RP 1829.

[11] The State was unable to locate Fisher's proposed instructions to the jury in the court file, but the transcript shows that the instruction was requested under the format of WPIC 19.01. RP 1683.

Here, the trial court did not err because Fisher had not proved all of the elements of the defense by a preponderance of the evidence. The State pointed out that the evidence that was presented through Fisher's statements to police - that she did not know they were going to rob Mr. Masten at that particular time - was a "solid" defense to felony murder, but not an affirmative defense. RP 1694. The jury could find her not guilty because the State had not proved that she was an accomplice to the crime charged. RP 1694-65. The State was correct. That Fisher was unaware that Steele and Trosclair intended to rob Mr. Masten at that particular time, if the jury believed her, would negate an element of the crime the State was required to prove. To use proposed instruction, Fisher would have had to testify or present other evidence that she intended the robbery to take place, but she had no reasonable grounds to believe any participant was armed and that no participant intended to engage in dangerous conduct. As Fisher did not admit that she intended the robbery to take place, nor prove by a preponderance of the evidence that she had no reason to believe any participant was armed or intended to engage in conduct likely to cause death or serious physical injury to Mr. Masten, she was not entitled to an affirmative defense and the court did not commit error when it refused to give the proposed instruction.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that the court affirm the defendants' convictions.

DATED: SEPTEMBER 9, 2013

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Pierce County
Prosecuting Attorney

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WSB # 39218

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.

9/9/13
Date Signature

PIERCE COUNTY PROSECUTOR

September 09, 2013 - 3:02 PM

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