

63367-8

63367-8

NO. 63367-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RONALD WAYNE MILLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZALEZ

BRIEF OF RESPONDENT

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**A. ISSUES PRESENTED**

1. Whether the defendant has failed to establish that a detective's testimony that one other suspect had been eliminated from the investigation was manifest constitutional error.

2. Whether the defendant has failed to establish that a detective's testimony that one other suspect had been eliminated from the investigation, along with the basis for that elimination, was an impermissible opinion as to the defendant's guilt.

a. Whether the defendant has established that defense counsel's failure object to the testimony was deficient performance that caused actual prejudice.

b. Whether any error in the testimony was harmless beyond a reasonable doubt.

2. Whether the defendant has failed to establish that remarks of the prosecutor in closing argument, to which there was no objection, were flagrant and ill-intentioned and could not have been cured by prompt curative instruction.

4. Whether the defendant has failed to establish that the trial court abused its discretion in declining a cautionary instruction regarding accomplice testimony, when the witness identified was

not an accomplice and his testimony was substantially corroborated.

5. Whether the cumulative error doctrine is irrelevant to this case.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Ronald Wayne Miller was charged by amended information with one count of attempted murder in the first degree, with a firearm enhancement, occurring on October 3, 2007, and one count of tampering with a witness. 2RP 2-4.<sup>1</sup> The Honorable Steven Gonzalez presided over Miller's jury trial, and Miller was found guilty as charged. 2RP 1; CP 49, 51-52. The court imposed a standard range sentence of 300 months of confinement, including the firearm enhancement. CP 94-102.

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<sup>1</sup> The Verbatim Record of Proceedings is cited as in the appellant's brief: 1RP – 1/28/09; 2RP – 2/2/09; 3RP – 2/5/09; 4RP – 2/9/09; 5RP – 2/10/09; 6RP – 2/11/09; 7RP – 2/12/09; 8RP – 2/17/09; 9RP – 2/19/09; 10RP – 2/23/09; 11RP – 2/24/09 (morning); 12RP – 2/24/09 (afternoon); 13RP – 2/25/09; 14RP – 4/10/09.

## 2. SUBSTANTIVE FACTS

On October 3, 2007, defendant Ronald Wayne Miller repeatedly shot Arthur ("JR") Shaw, as Shaw finished washing his car at the National Pride Car Wash in Seattle. 8RP 132-33. Shaw was shot multiple times in the midsection. 11RP 77-78. Eight .380 caliber shell casings and a spent bullet were recovered at the scene. 7RP 74-82. Despite his injuries, Shaw was able to get up, get into his car and drive himself away. 8RP 136-38. He saw an ambulance at a stoplight and got inside—he was given oxygen and quickly taken to Harborview, where doctors saved his life. 7RP 30-40; 8RP 139-40. Another spent bullet was recovered from the seat of the ambulance where Shaw had been sitting. 7RP 42-45; 8RP 34-36.

A security camera on the roof of the car wash captured video images of a Chrysler 300 driving into the car wash and minutes later, a man shooting Shaw as Shaw stood by his car. Ex. 21; 7RP 88-89; 8RP 38-41. Although it was about 5:30 p.m. and still daylight at the time of the shooting, the images did not have the digital information necessary to enlarge them and the quality was not adequate to identify the shooter. 7RP 73, 88-89; 8RP 107.

Shaw had life-threatening injuries to his liver, both kidneys, and his intestines; he spent 19 days in intensive care at the hospital. 11RP 78-80. The injuries required nine surgeries while he was in the hospital. 8RP 155; 11RP 81. At the time of Shaw's discharge from the hospital on November 13, 2007, he was taking 16 medications. 11RP 84-86.

Police were first able to speak with Shaw at the hospital on November 13, 2007. 8RP 44. Shaw identified Marcus Watkins as the person who drove the Chrysler 300—he had seen Watkins driving that car previously. 8RP 46-50, 147-49; 9RP 70. Shaw told police that the shooter was Jamell Webb. 8RP 50, 145-46.

The next contact that police had with Shaw was on February 7, 2008, when Shaw told Seattle Police Detective Mooney that the shooter was not Webb but was a man he knew as "Little Wayne," who he later identified in a photo montage as the defendant, Ronald Wayne Miller. 8RP 56-58, 159-61. The defendant was commonly referred to as "Wayne," "Little Wayne," or "Wheezy." 7RP 127; 12RP 16, 30-31, 55-57.

The day after the shooting, October 4, 2007, police responded to a report of a man with a gun near a grocery store in Seattle and arrested Louis Barrow with a .380 caliber semi-

automatic pistol. 8RP 9-13, 21-31, 81-92, 99. A forensic comparison of the pistol with the shell casings recovered at the shooting scene at the National Pride Car Wash established that all of the shell casings had been fired through that pistol. 11RP 32-35. The spent bullets recovered at the scene and in the ambulance also were matched to that pistol. 11RP 35-39.

Police questioned Barrow about the gun, explaining that it had been used in a shooting and telling him that he had been identified as the shooter (this was a ruse). 8RP 61-64; 11RP 9, 50-51. Barrow said that the night before he was arrested with the gun (October 3), the defendant, who he knew as "Wayne" or "Wheezy," had left the gun with him. Ex. 55; 8RP 64-65; 9RP 130-34; 11RP 10-12. The defendant told him that the gun had been used in a shooting. 8RP 64-65; 9RP 130-34, 154, 165; 11RP 10-12. Louis Barrow was in jail on October 3<sup>rd</sup> at the time of this shooting. 8RP 105-06; 10RP 46. He was released from jail at 6:01 p.m., about 30 minutes after the shooting. 10RP 46.

At the request of the defendant, the defendant's wife posted Barrow's name and picture on the defendant's MySpace web page, with the certification for determination of probable cause in this case and the word "snitch." Ex. 57; Ex. 70 p. 7-8; 9RP 31-35, 66-

67, 176-79; 12RP 52-53; 13RP 23-27. The defendant told another man to make sure that Barrow did not testify. Ex. 57; Ex. 70 p. 13.

At trial, Barrow acknowledged his statements to the police, but claimed that he had been talking about another Wayne, not the defendant. 9RP 123-25, 130-31, 134. He said that he went to Roman's Casino with the man who left the gun in Barrow's car – the defendant's wife and his former housemate agreed that Miller went to Roman's most evenings. 9RP 148-59; 12RP 34, 43-44. Barrow had no explanation for his pick of Miller's picture in the montage that he had been shown. 9RP 137-41. Barrow knew that his name and picture had been posted on the internet with the "snitch" label, and was concerned about his safety. 9RP 176-79.

A joint trial of the defendant and Marcus Watkins began on February 2, 2009. 2RP 1-4. The charge against Watkins was rendering criminal assistance. 2RP 2-4. On February 6<sup>th</sup>, after the trial began, Watkins asked his attorney to contact the State to offer to cooperate in exchange for a reduction in the charge. 7RP 155-58, 163. After an agreement was reached, Watkins pled guilty to attempted rendering criminal assistance and agreed to testify at the trial of Miller. 4RP 2-9. The jury panel had not yet been sworn – it was dismissed and the trial restarted. 4RP 10-16.

Watkins testified that the Chrysler 300 was his car. 7RP 122. Watkins and a friend, Chris Wilson, stopped at a store on the way to the car wash on October 3, 2007, and ran into the defendant. 7RP 128-34. They agreed to give the defendant a ride to the car wash, which was a social gathering place. 7RP 135-36, 175; 8RP 108. Wilson was driving because Watkins did not have a driver's license (as a habitual traffic offender). 7RP 130. Watkins did not see any gun and there was no discussion of a confrontation to come. 7RP 136, 142-43, 182.

Watkins testified that when they arrived at the car wash, all three men got out of the car. 7RP 140. As Watkins talked to one of the transients who washes cars at that location, he heard shooting behind him, turned, and saw the defendant shooting Shaw. 7RP 140-44. Watkins leapt into the back seat of his car, Wilson jumped into the driver's seat, and the defendant got into the front passenger seat. 7RP 144-46. The defendant took the empty ammunition clip out of the gun and put a fresh, loaded clip in, saying, "Drive, drive." 7RP 146-50. At the defendant's request, he was dropped off some two miles away. 7RP 146, 151. Watkins did not see the defendant again until they both were in jail. 7RP 153.

Watkins admitted his multiple prior convictions and described the cooperation plea agreement that he made with the State. 7RP 153-159, 161-68.

The defendant presented an alibi defense. The defendant's wife, Shauna Miller, testified that between October 2007 and January 2008 her husband drove her to work and picked her up at work every day about 5 p.m., and they went home to dinner. 12RP 43-48; 13RP 8-9. She said that she and the defendant lived with Rita Curry from September 2007 until the defendant's arrest in February 2008. 12RP 41. Shauna Miller agreed that she had discussed wiping fingerprints off of shell casings in a jail phone call with the defendant, and that she had seen him wipe a gun off before. Ex. 69; 12RP 59. No fingerprints were found on the magazine or bullets that were in the .380 pistol used in this shooting when the gun was recovered. 10RP 32-34.

Rita Curry testified repeatedly that while Shauna Miller lived with her for some time, the defendant lived in her home only in September of 2007, and not in October. 12RP 15-18, 25, 37. Finally, on redirect by defense counsel, she agreed that the defendant could have moved out in October. 12RP 37. Curry said

that the defendant drove his then-girlfriend to and from work every day, then went to Roman's Casino every night. 12RP 19-22, 34.

Shauna Miller's supervisor confirmed that she worked on October 3, 2007. 12RP 69. He sometimes noticed that her boyfriend picked her up from work, but sometimes Shauna drove herself, got a ride from her father, or carpooled with her mother. 12RP 70.

While the defendant was in custody pending trial, his outgoing phone calls were recorded, as is true for all inmates. 10RP 65-67. In a call on April 9, 2008, the defendant complained, "the boy is talkin'," referring to "some shit that happened at the...carwash," and that "the boy talkin' bout ah...he's 100% sure that ...I shot him." Ex. 57; Ex. 70 at pp. 2-3 (emphasis added). On April 8, 2008, Detective Mooney showed the defendant still photos from the video of the shooting and played excerpts of the recording of Barrow's interview. 8RP 69. The defendant told Shauna Miller that he recognized Barrow's voice, referred to him as a "snitch-ass" and asked her to put Barrow's picture on the defendant's MySpace page. Ex. 57; Ex. 70 at pp. 5-8. The defendant told another man to tell Barrow not to testify. Ex. 57; Ex. 70 at pp. 13.

C. **ARGUMENT**

1. **THE DETECTIVE DID NOT OFFER AN IMPERMISSIBLE OPINION AS TO GUILT.**

The defendant claims that Detective Mooney's testimony that he eliminated Jamell Webb as a suspect was manifest constitutional error, an impermissible opinion as to Miller's guilt. That claim should be rejected. The testimony was not an opinion as to guilt, but was a proper response to a question raised during cross-examination. Further, defense counsel emphasized on recross-examination that the reason Webb was eliminated was the victim's retraction of his earlier identification of Webb as the shooter, all of which was evidence presented to the jury. Miller did not object to the testimony in the trial court and has waived any error. Even if the testimony was objectionable, defense counsel's decision not to object was a reasonable tactical decision. In the context of all of the evidence and the jury instructions, if it was improper opinion evidence, it was not reversible error.

a. **Relevant Facts**

Seattle Police Detective Mooney responded to the scene of this shooting and investigated the case. 7RP 67-71, 84. He testified about his investigation at the scene and in the months

following. 7RP 71-103; 8RP 34-81. Detective Mooney said that when he first spoke to Shaw at the hospital on November 13, 2007, Shaw identified another man as the shooter, then in February of 2008, Shaw's identification of the shooter changed to the defendant. 8RP 50-52, 57-58.

On cross-examination, defense counsel questioned the effort put into this investigation. 8RP 84-85, 99-101. Defense counsel questioned the detective at length about Shaw's initial identification of Jamell Webb as the man who shot him. 8RP 86-94, 97-99. The following exchange occurred during defense counsel's questioning about Shaw's later identification of defendant Miller as the shooter:

Q. Okay. And only after he got out of the hospital did he talk to you or did he, per your indications, come back to you and change his identification of the shooter, correct?

A. He did so advise me on the 7<sup>th</sup> of February, 2008.

Q. And no doubt that was concerning to you, Detective?

A. I had some concerns about that, yes.

Q. Because of the potential for intimidation out there on the streets?

A. My job is to –

Q. Excuse me, did you have concerns for intimidation out there on the streets?

A. That was one of my concerns.

8RP 97-98.

During redirect examination, the following exchange occurred:

Q. Counsel asked you a question then limited your answer to your concerns regarding intimidation on the streets. And you said that was one of your concerns, intimidation on the street. What were other concerns that you had when this identification changed?

A. No matter what the circumstances, my job as a detective is to identify the correct suspect. And that's what I do, that's what I work for. So when I learned that there [ ] was a misidentification of the shooting suspect, it became my highest priority to identify the correct suspect.

Q. Were you able, in your work, to eliminate Jamell Webb as a suspect in this case?

A. Yes.

8RP 103. There was no objection to this testimony. 8RP 103. The final question and answer in that exchange are those that Miller claims deprived him of a fair trial.

Defense counsel recross-examined the detective, briefly.

This exchange constituted almost the entire examination:

Q. And it's fair to say you interviewed Mr. Webb in 08 because he remained a person of interest in this case? Possible suspect, correct, yes or no?

A. Um, no.

Q. And that's because of what Mr. Shaw had told you, correct?

A. Based on his identification, yes.

Q. Right. Or change of identification?

A. True.

8RP 110.

b. The Defendant Waived His Right  
To Object To The Testimony, Which Was Not  
An Opinion As To The Defendant's Guilt.

The defendant did not object to the testimony that he now claims was admitted in violation of his right to a fair trial. RAP 2.5(a) bars consideration of this issue. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Not every constitutional error falls within this exception; the defendant must show that the error occurred and caused actual prejudice to his rights. Id. It is the showing of actual prejudice that makes the error manifest, allowing appellate review. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

Even if objectionable, the testimony at issue was not constitutional error. It was not an opinion as to Miller's guilt but a response to defense counsel's question on cross-examination as to Detective Mooney's state of mind and the effect on his investigation of Shaw's retraction of this original identification. The State did not present any testimony concerning the detective's state of mind after Shaw's change of identification until after defense counsel cross-

examined the detective about his concerns. 8RP 97-98, 103. The detective did not state any opinion as to Miller's guilt.

Generally, testimony will not be deemed an opinion as to the defendant's guilt unless it relates directly to the defendant. State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992). However, testimony regarding the veracity of a victim may be improper depending on the circumstances of the case. Kirkman, 159 Wn.2d at 928. The court will consider the type of witness, the challenged testimony, the charges, the type of defense, and the other evidence. Id. (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). The jury is presumed to follow the court's instruction that it is the sole judge of the victim's credibility. Kirkman, 159 Wn.2d at 928. The Supreme Court has noted that "the assertion that the province of the jury has been invaded may often be simple rhetoric." Id.

An analysis of the five factors identified by the Supreme Court establishes that the testimony at issue here was not an improper opinion as to guilt. Although the witness was a detective, he did not suggest that he had information not known to the jury. 8RP 103, 110. The challenged testimony was that the detective eliminated one suspect in the shooting. The only evidence that the

jury heard to implicate that suspect was the victim's initial identification of him, which the victim later retracted. The jury heard that the reason the detective eliminated the suspect was the victim's retraction of his prior identification. The challenged testimony did not refer to the defendant.

This constitutional challenge relates only to the attempted murder charge. The defense to that charge was identity, via an alibi and attacks on the credibility of the State's identification witnesses. The testimony at issue explained that after Shaw retracted his original identification of Webb as the shooter, the detective turned to identifying the shooter. Notably, the detective did not say that he accepted as true Shaw's identification of the shooter as Miller. While the testimony certainly was relevant to the defense, it did not convey an opinion as to the defendant's guilt.

This challenge is very similar to the claim rejected by this Court in State v. Wilber, 55 Wn. App. 294, 299, 777 P.2d 36 (1989). In that case, an accomplice initially said that the defendant participated in a burglary but at trial testified that it was another man who participated. Wilber, 55 Wn. App. at 286-97. Two police officers testified to their expertise in determining whether a person is telling the truth, based on body and eye movements. Id. at 297-

99. Both officers testified that, in their opinion, the witness was telling the truth when he gave his original statement. Id. at 297. This Court concluded that the expert opinion was improperly admitted but it was not an opinion as to the defendant's guilt, so the error was not constitutional error and was harmless. Id. at 299-300. The testimony in that case was a direct opinion as to witness veracity concerning identification but nevertheless was not considered an opinion as to guilt. It is even more clear that the alleged implied opinion as to the witness' veracity in this case was not an opinion as to the defendant's guilt.<sup>2</sup>

Even if the testimony was an improper opinion as to guilt, Miller has not established that it caused actual prejudice. Admission of testimony as to a defendant's guilt, without objection, is not necessarily manifest constitutional error. Kirkman, 159 Wn.2d at 936. "[W]hen a witness does not expressly state his or her belief of the victim's account, the testimony does not constitute manifest constitutional error." State v. Warren, 134 Wn. App. 44,

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<sup>2</sup> The Massachusetts case cited by appellant (App. Br. at p. 10) does not support his claim of reversible error. It affirmed a trial court's decision to exclude a defendant's questioning an officer about his opinion as to whether a person identified was the "prime suspect." Commonwealth v. Hesketh, 386 Mass. 153, 161-62, 434 N.E.2d 1238 (1982).

55, 138 P.2d 1081 (2006), aff'd on other grounds, 165 Wn.2d 17 (2008), cert. denied, 129 S. Ct. 2007 (2009).

Shaw, Detective Mooney and Seattle Police Officer Santiago testified to Shaw's original identification. 8RP 50-52, 145; 12RP 11-12. No other evidence implicated Webb. Detective Mooney testified that he eliminated Webb as a suspect because Shaw retracted that identification. 8RP 103, 110. There was no suggestion that the detective had any additional information not known to the jury.

Because the Detective testified that he eliminated Webb as a suspect because Shaw changed his identification, a point repeatedly emphasized by defense counsel, the statement that he eliminated Webb as a suspect was not prejudicial.

Juries embody "the commonsense judgment of the community." Taylor v. Louisiana, 419 U.S. 522, 530, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). Only with the greatest reluctance and with clearest cause should judges—particularly those on appellate courts—consider second-guessing jury determinations or jury competence. As Judge Learned Hand wrote, "Juries are not leaves swayed by every breath." United States v. Garsson, 291 F. 646, 649 (D.N.Y.1923).

Kirkman, 159 Wn.2d. at 938. The jury was instructed that it was the sole trier of fact and the sole judge of the credibility of the witnesses. CP 55. In considering the possible prejudicial effect of

opinion testimony, the jury is presumed to follow instructions when there is no evidence that they were confused or unfairly influenced.

State v. Montgomery, 163 Wn.2d 577, 595-96, 183 P.3d 267

(2008). The defendant has cited no such evidence in this case.

Because the defendant has not established manifest constitutional error, he has waived this claim.

c. Any Error Was Harmless.

A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Any constitutional error in the testimony at issue was harmless beyond a reasonable doubt.

The challenged testimony established only that when Shaw retracted his initial identification, the detective eliminated that person as a suspect. 8RP 103, 110. The jury heard nothing else that corroborated that initial identification. To the extent that the detective's answer was a comment on credibility, the inference was either that Shaw's initial identification was not credible, or that his later statement that Webb was not the shooter was credible. The detective did not state that he believed Shaw when Shaw identified

Miller as the shooter, and that would not be the natural inference drawn from his testimony.<sup>3</sup>

Miller's reliance on State v. Dolan<sup>4</sup> is misplaced. Dolan was charged with assault of a child. Only two people (Dolan and the child's mother) could have been responsible – the pool of suspects was limited by access to the child. Dolan, 118 Wn. App. at 329. Two State's witnesses testified that they did not believe the child's mother was responsible for the injury. Id. at 328-29. In contrast, in the case at bar, the pool of people who could be the shooter was not limited and the detective did not opine that no one else could be the shooter.

The elimination of one suspect was not equivalent to a conclusion that the defendant was guilty. See State v. Link, 25 S.W.3d 136, 145 (Mo.), cert. denied, 531 U.S. 1040 (2000) (officer's testimony that other suspects were eliminated was proper and did not invade the province of the jury); State v. Baker, 338 N.C. 536, 555, 451 S.E.2d 574, 591 (1994) (officer's explanation of the basis

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<sup>3</sup> The State did not claim that Shaw's identification of Miller as the shooter was credible—in closing argument, the prosecutor stated, "[I]t would be reasonable for you to conclude that JR [Shaw] doesn't really know who shot him." 13RP 48. The prosecutor also said, "You cannot rely on JR's identification like you can rely on the identification by Marcus Watkins." 13RP 51.

<sup>4</sup> 118 Wn. App. 323, 73 P.3d 1011 (2003).

for his elimination of another suspect was proper opinion testimony); Taylor v. State, 689 N.E.2d 699, 706 (Ind. 1997) (officer's opinion as to the probable guilt of another suspect was harmless because the reasons for that decision were disclosed).

The evidence supporting the defendant's guilt was compelling. He was identified as the shooter by both the victim (Shaw) and one of the men (Watkins) who drove with the defendant to the scene and saw him shoot the victim. The man (Barrow) caught with the gun the day after the shooting said that the defendant left the gun with him within hours of the shooting and said it was dirty (had been used in a shooting).

In a taped phone call from the jail on April 9, 2008, the defendant complained, "the boy is talkin'," referring to "some shit that happened at the...carwash," and that "the boy talkin' bout ah...he's 100% sure that ...I shot him." Ex. 57; Ex. 70 p. 2-3 (emphasis added). The defendant said "Louie" was telling the police that "I got in the car and left ... the gun in his car," and that Barrow said the defendant told him that the gun was used in the shooting. Ex. 57; Ex. 70 p. 4. The defendant referred to the tape recording of Barrow's statement. Id.

In another taped phone call from the same day, the defendant told his girlfriend that he recognized the recorded voice of the person who was caught with the gun (Barrow). Ex. 57; Ex. 70 p. 5-6. In a taped call on April 12<sup>th</sup>, he asked her to put the man's picture on the defendant's MySpace page, referring to Barrow as a "snitch-ass." Ex. 57; Ex. 70 p. 7-8. He said, "I guess that's what happens when...they really want to scare you...you get to singin' like a mockingbird." Ex. 57; Ex. 70 p. 9. When Shauna Miller responded with, "it's cool he'll get his," the defendant answered, "Oh, yeah I know that, I know that's for sure." Ex. 57; Ex. 70 p. 10. Later the defendant added, "Can't trust nobody." Id.

On April 16<sup>th</sup>, the defendant talked to a man named Marcus and said, "I need you to um...talk to 'Q' nigga in the shit. Tell that bitch-ass nigga.. I mean tell ah...tell him to tell Boy nigga ah not to come, you feel me?" Ex. 57; Ex. 70 p. 13. After Marcus said he did not think that "he" would come, the defendant said, "I don't think he's gonna come either. I'm just ... I'm just trying ... trying to make sure that bitch-ass nigga don't come." Id. Miller continued, "Cause, if they don't got him, they ain't got nothin'." Id.

After this evidence of the defendant's comments about Barrow and his efforts to ensure that Barrow did not testify,

Barrow's recantation at trial was even more unconvincing. Miller's phone calls added weight to Barrow's original recorded identification of the defendant as the man who gave him the gun and told him that it was "hot." Barrow also had told a defense investigator that it was the defendant who had given him the gun. 9RP 170-71.

Given the clear instructions to the jury as to their role in determining credibility and the strong evidence against the defendant, there is no doubt that the same result would have been reached in the absence of this alleged error.

- d. Not Objecting To The Testimony Was A Strategic Decision To Focus On Shaw's Change Of Identification And Was Not Ineffective Assistance of Counsel.

To establish ineffective assistance of counsel, the defendant must show both that defense counsel's representation was deficient, *i.e.*, that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. The United States Supreme Court has warned that, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. Therefore, every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Id. at 689.

In judging the performance of trial counsel, courts must begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90. The defendant "must show in the

record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." Hutchinson, 147 Wn.2d at 206 (quoting State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). Courts should recognize that, in any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

Because the testimony at issue was not an opinion as to the defendant's guilt, the failure to object on that basis cannot be deficient performance. City of Seattle v. Heatley, 70 Wn. App. 573, 582 n.4, 854 P.2d 658 (1993), rev. denied, 123 Wn.2d 1011 (1994).<sup>5</sup>

Even if the detective's testimony on this point was objectionable, defense counsel had at least two tactical reasons not to object. First, the testimony gave him the chance to point out again on recross-examination that Shaw originally identified Webb as the shooter. Second, the testimony could add weight to the defense theory that the investigation was inadequate, and the theory that its direction was dictated solely by an unreliable witness.

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<sup>5</sup> For the same reason, the prosecutor's act of asking the question was proper rebuttal, fair response to the questions on cross-examination, and was not prosecutorial misconduct.

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. The defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694. Speculation that a different result might have occurred is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006).

No additional out-of-court information was presented or implied by the testimony at issue. Shaw introduced Jamell Webb's name to the investigation and when Shaw retracted his statement that Webb was the shooter, the name was eliminated. The jury was instructed that it was the sole judge of credibility and Shaw testified at trial about both identifications and the reasons he made them. CP 55; 8RP 145-46, 150-55, 159-62, 9RP 24-31, 51-52. The detective did not state that Webb was the only other suspect and did not state or imply that he believed Shaw or that he believed that Miller was the shooter.

The detective did not state or suggest that he had any special expertise or familiarity with Shaw that would make him a better judge of Shaw's credibility than the jury. Miller has not shown how the testimony that the detective eliminated the name introduced by Shaw when Shaw retracted that name prejudiced the defense. Without that showing of prejudice, the defendant's ineffectiveness claim must be rejected, even if the representation was deficient.

**2. NO PROSECUTORIAL ERROR OR MISCONDUCT OCCURRED DURING REBUTTAL CLOSING.**

The defendant argues that he was deprived of a fair trial because the trial prosecutor committed misconduct during her rebuttal argument. More specifically, the defendant claims that the prosecutor improperly expressed a personal opinion as to the defendant's guilt, articulated a false choice, and misstated the burden of proof. This claim should be rejected. The prosecutor's remarks did not express an opinion as to either credibility or guilt, and were a fair reply to the defendant's closing argument. Moreover, there was no objection to any of the remarks now challenged. Even if the remarks were improper, a curative instruction would have been sufficient to ameliorate any resulting prejudice, and there is not a

substantial likelihood that these remarks had any impact on the jury's verdict. Therefore, this court should affirm.

A defendant who claims on appeal that prosecutorial misconduct during closing argument deprived him of a fair trial "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), aff'd on other grounds, Uttecht v. Brown, 551 U.S. 1 (2007). A defendant who did not make a timely objection at trial has waived any claim on appeal unless the argument in question is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Also, arguments that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). The prosecutor's remarks must not be viewed in isolation, but "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." Brown, 132 Wn.2d at 561.

The jury in this case was informed by the court's written instructions that the lawyers' statements and arguments are not evidence and that the jury is the sole judge of the credibility of witnesses. CP 55-56.

The jury also was informed of the burden of proof by written instruction, as follows:

The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

CP 59.

- a. The Challenged Remark At The Start of Rebuttal Did Not Constitute An Improper Personal Opinion.

When a defendant claims that the prosecutor has improperly expressed a personal opinion as to the defendant's guilt, the challenged remarks must be viewed in context. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). As the court explained in McKenzie:

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instruction, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*

McKenzie, 157 Wn.2d at 53-54 (emphasis in original) (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, rev. denied, 100 Wn.2d 1003 (1983)). In short, the law requires a "clear and unmistakable" expression of personal opinion, "divorced from the evidence," before a prosecutor's remarks will be found to be an improper expression of opinion as to the defendant's guilt.

McKenzie, 157 Wn.2d at 57. In light of these standards and the record, the defendant's prosecutorial misconduct claims fail.

The defendant's closing argument was focused on convincing the jury that the defendant was not the shooter and was somewhere else at the time of the shooting. Defense counsel highlighted Shaw's initial identification of Jamell Webb and what he perceived as weaknesses in the State's witnesses against the defendant. See, e.g., 13RP 63-65 (initial identification of Webb); 13RP 64, 68 (possible intimidation by Webb); 13RP 66-69 (Watkins'

attitude and cooperation agreement); 13RP 67, 69 (Barrow's recantation of his original identification of the defendant).

At the beginning of rebuttal closing argument, the prosecutor made the following remark:

What possible incentive could the state have for not charging Jamell Webb with the attempted murder of JR Shaw if the evidence pointed to Jamell Webb as the shooter? The evidence points to Ronald Wayne Miller, not to Jamell Webb.

13RP 72. There was no objection. Then the prosecutor responded to the defense arguments in turn, noting the wealth of incriminating evidence against the defendant and answering the defendant's criticisms of the State's case. 13RP 72-79.

The prosecutor's remarks fall far short of the "clear and unmistakable" expression of personal opinion, "divorced from the evidence," that the law requires for a finding of prosecutorial misconduct. Indeed, these remarks contain no expression of opinion at all, "clear and unmistakable" or otherwise. Rather, the prosecutor simply asked a rhetorical question as to why the State would charge the defendant with these crimes rather than Webb, and then she answered that rhetorical question by stating the

obvious: because the evidence established the defendant's guilt, not Webb's.<sup>6</sup>

These remarks were a fair reply to the defendant's arguments that Webb was the shooter and that the State's case was weak. The remark certainly would not be understood to convey that the prosecutor was vouching for Shaw's credibility, as the defendant claims on appeal, as the State explicitly did not rely on Shaw's identification of the defendant. 13RP 48-51.

Even if remarks of the prosecutor are improper, they are not reversible if they are a pertinent response to defense counsel's argument. Russell, 125 Wn.2d at 86. The Supreme Court has explained the limits of proper response:

Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.

Id., citing State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). It is proper for the prosecutor to respond to defense arguments with a contention that the defense theories are not

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<sup>6</sup> This case is clearly distinguishable from State v. Susan, 152 Wash. 365, 278 P. 149 (1929). In that case the prosecutor said, in his opening statement, that he had never accused any person until he was satisfied that person had committed the crime. Id. at 378. That statement of necessity referred to matters outside the record.

supported by the evidence. State v. Babiker, 126 Wn. App. 664, 669, 110 P.3d 770 (2005), rev. denied, 161 Wn.2d 1015 (2007).

But even if this Court were to find that this remark was improper, there is still no basis to reverse. The remark clearly does not constitute "flagrant and ill-intentioned" misconduct that could not have been cured by an instruction to the jury if a prompt objection had been made. The prosecutor's statement of the obvious, that the evidence supported the case against Miller and not the defense claim that Webb was the shooter, certainly did not prevent the jurors from fairly considering the evidence.

b. The Prosecutor Did Not Present The Jury With A False Choice.

The defendant argues that the prosecutor undermined the presumption of innocence because she presented a false choice to the jury. The challenged statement of the prosecutor did not refer to conviction or acquittal, guilt or innocence, and so did not misstate the presumption of innocence. Under the circumstances of this case, the challenged statement was accurate and not misleading.

A prosecutor misstates the burden of proof if she argues that in order to acquit, the jury must believe that the State's witnesses are lying. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076

(1996), rev. denied, 131 Wn.2d 1018 (1997). No such argument was made in this case.

The prosecutor argued:

If you believe Shauna and Rita, then you would have to conclude that Mr. Miller was home having a quiet little family dinner at the time of this shooting. That would mean that Marcus Watkins had to just pull him out of [the air] and decide to blame him for the shooting, just decide to make it up about Ronald Wayne Miller.

13RP 72-73. She then explained that Watkins had no motive to falsely identify Miller as the shooter and that Barrow's identification corroborated Watkins' identification. 13RP 73. Later she explained why the defense alibi witnesses were not credible. 13RP 75-76.

Under the circumstances of this case, the challenged argument was entirely accurate. If the defendant's alibi was believed, Watkins' identification of the defendant as the shooter must be disbelieved. While in some cases a witness could be disbelieved because they could be simply mistaken, in this case Watkins could not be simply mistaken. Watkins knew the defendant before the shooting, they drove together to the site of the shooting, Watkins saw the defendant shoot Shaw, and they drove away together, the defendant reloading the gun as they drove

away. 7RP 134-51. There is simply no possibility that Watkins could be mistaken about his identification of Miller as the shooter.

A prosecutor can argue that conflicting versions cannot both be correct, but generally cannot argue that in order to believe one version, the jury must conclude that the opposing witness is lying. State v. Wright, 76 Wn. App. 811, 823-24, 888 P.2d 1214, rev. denied, 127 Wn.2d 1010 (1995). That rule relies on the premise that the jury could simply believe the witness is mistaken. Id. at 826. Where that premise is false, as in this case, the argument is not misleading and is not improper.

While generally it would be misleading to state that if an alibi is believed, the witness who identified the defendant must be lying, it is not in this case. There was no error in stating this conclusion, when the prosecutor did not say that the jury must conclude that the identification witness was lying in order to acquit.

c. The Prosecutor Did Not Misstate  
The Burden Of Proof.

The defendant argues that the prosecutor misstated the burden of proof in her concluding remarks. At the end of rebuttal closing, the prosecutor said:

The word verdict means to speak the truth. And your job as jurors is to search for the truth, not to search for reasonable doubt but to search for the truth, and I ask that you do that.

13RP 79. That statement does not purport to address the State's burden of proof or the reasonable doubt standard. If it can be inferred to minimize the State's burden, the error was not flagrant and ill-intentioned misconduct that warrants reversal when defense trial counsel did not consider it worthy of an objection.

Due process guarantees the defendant the right to cross-examine the State's witnesses and to offer testimony of defense witnesses, to present the defendant's version of the facts to the jury, "so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (holding compulsory process is required by the guarantee of due process). The prosecutor's exhortation to the jury to search for the truth was not misconduct.

The closer question presented in this case is whether the prosecutor's request that the jurors not search for reasonable doubt improperly minimized the State's burden. The prosecutor did not make the improper statement that the defendant "does not get the benefit of the doubt." See State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (that argument is improper). The prosecutor did

not ask the jury to "declare the truth." See State v. Anderson, \_\_\_ Wn. App. \_\_\_, 220 P.3d 1273 (2009) (that argument is improper).

The remark at issue does not misstate the burden of proof or the presumption of innocence, or request a guilty verdict if reasonable doubt exists. Just as repeated exhortations to "declare the truth" in Anderson were not reversible error,<sup>7</sup> the single comment at issue here is not reversible in light of the correct instruction as to the burden of proof. Miller has not shown that the remark was a flagrant and ill-intentioned remark, any improper effect of which could not have been cured by a prompt instruction.

The Supreme Court recognizes the reality that the absence of an objection by defense counsel "*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial." State v. McKenzie, 157 Wn.2d at 53 n.2 (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991)). That Court has stated, "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the misconduct as a life preserver ...

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<sup>7</sup> Anderson, 220 P.3d 1273 ¶22.

on appeal.” Russell, 125 Wn.2d at 93 (citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

d. Any Impropriety Was Harmless.

While the defendant claims that the State must prove that any misconduct was harmless beyond a reasonable doubt, that standard of review has not been adopted by the Supreme Court on review of prosecutorial arguments that may touch on constitutional rights. Warren, 165 Wn.2d at 26 and n.3; Jackson, 150 Wn. App. at 886 n.2. Instead, the defendant bears the burden of establishing that there is a substantial likelihood that the improper arguments affected the jury's verdict. Brown, 132 Wn.2d at 564.

Miller relies on Fleming, *supra*, as authority for the constitutional error standard, but Fleming does not analyze the proper standard of review and cannot be read as intending to overrule longstanding Supreme Court precedent. Fleming discusses State v. Traweek, 43 Wn. App. 99, 715 P.2d 1148, *rev. denied*, 106 Wn.2d 1007 (1986), and may have imported the standard of review applied there. The court in Traweek stated that “[w]hen a comment also affects a separate constitutional right, such as the privilege against self-incrimination, it is subject to the stricter

standard of constitutional harmless error." 43 Wn. App. at 108. In making this statement, the court cited to footnote 1 of State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984).

However, Davenport did not establish the rule for which it was cited. In Davenport, the Supreme Court stated that trial irregularities do not independently violate a defendant's constitutional rights. Davenport, 100 Wn. 2d at 761-62. In footnote 1, the Court contrasted situations where defendants' constitutional rights are violated. Specifically, the Court cited to State v. Evans, 96 Wn.2d 1, 633 P.2d 83 (1981), followed by the parenthetical "(improper comments on the defendant's right to remain silent)." Davenport, at 761 n. 1. Apparently, the court in Traweek interpreted the language in this parenthetical to mean that improper comments by the prosecutor about a defendant's right to remain silent must be reviewed under a different standard. This is not the case.

Evans was distinguished by the court in Davenport because it involved "trial error," witness testimony that was a comment on silence, as opposed to a "trial irregularity." In Evans, testimony was improperly admitted of Evans' post-arrest silence. Evans, 96

Wn.2d at 3. It is this trial error that was reviewed, appropriately, under a constitutional harmless error standard. Id. at 4.

Prosecutorial misconduct also was alleged in Evans, involving the prosecutor's questions about the defendant's post-arrest silence. Id. at 5. The misconduct was analyzed under a different standard: "whether there was a substantial likelihood that the misconduct affected the jury's verdict, thereby depriving the defendant of his right to a fair trial." Id. Thus, contrary to the assertion in Traweek, neither Davenport nor Evans stands for the proposition that there is more than one standard for reviewing alleged misconduct in closing argument.

The court in Warren noted that the constitutional error standard of review, if it is ever applicable to prosecutorial argument, would be appropriate only if the prosecutor directly commented on the exercise of a constitutional right.<sup>8</sup> Warren, 165 Wn.2d at 26 n.3. The court did not apply a constitutional error standard in that case, where the misconduct was serious but the jury was properly instructed about the correct burdens of proof. Id. The remarks to which Miller objects were not direct comments placing the burden

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<sup>8</sup> This is the standard applied in State v Fleming, 101 Wn. App. 380, 4 P.3d 857 (2000), upon which Miller relies for the constitutional error standard. .

of proof on Miller, so the well-established standard of review for misconduct should be applied in this case. Under that standard, it is the defense burden to establish prejudice. Id. at 26, 28.

In analyzing potential prejudice, improper comments are not viewed in isolation, but in the context of the total argument, the issues, the evidence, and the instructions given to the jury. Id. at 28. The written instructions here properly stated the State's burden of proof and that the defendant has no burden of proving that a reasonable doubt exists. CP 59.

The jury was properly instructed and is presumed to have followed its instructions. Warren, 165 Wn.2d at 28. The jury had been directed not to consider the remarks of the lawyers as evidence. CP 55-56. No reasonable juror would consider the challenged remarks, in context, either a statement of personal belief in the defendant's guilt or an implication that the defense had a burden of disproving the case.

In sum, the defendant has failed to meet his burden of demonstrating either that the prosecutor's remarks in rebuttal were improper, or that prejudice resulted. He has not established a substantial likelihood that any improper remarks affected the verdict. This Court should reject this claim, and affirm.

**3. THE COURT DID NOT ABUSE ITS DISCRETION IN DECLINING AN INSTRUCTION REGARDING ACCOMPLICE TESTIMONY.**

Miller asserts that the trial court erred in rejecting the instruction he proposed, WPIC 6.05,<sup>9</sup> regarding testimony of an accomplice, with respect to Marcus Watkins. That claim is without merit. The court properly declined to include that instruction because there was no evidence that Watkins was an accomplice to the shooting. Even if Watkins was an accomplice, the trial court had the discretion to refuse the instruction because Watkins' testimony was substantially corroborated by the physical evidence, by Shaw's description of the events and identification of Miller as the shooter, by Barrow's identification of Miller as the man who gave him the gun used in the shooting, by the defendant's efforts to tamper with Barrow's testimony, and by the defendant's own statements in jail phone calls.

When the State presents the testimony of an accomplice, it is the better practice to use a cautionary instruction regarding

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<sup>9</sup> WPIC 6.05 states:

Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone, unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

accomplice testimony. State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984). However, that instruction is not mandatory unless the prosecutor relies solely on uncorroborated accomplice testimony. Id. at 150, 155; State v. Sherwood, 71 Wn. App. 481, 485, 860 P.2d 407 (1993), rev. denied, 123 Wn.2d 1022 (1994). The Supreme Court has specifically rejected the conclusion that the instruction is mandatory whenever accomplice testimony is used. Harris, 102 Wn.2d at 155.

The instruction was inappropriate in this case because Watkins was not an accomplice to the charged crime. The defendant proposed a definition of accomplice based on WPIC 10.51, as follows:

1. A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:
  - (1) solicits, commands, encourages, or requests another person to commit the crime; or
  - (2) aids another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 48. That definition is consistent with the statutory definition in RCW 9A.08.020(3).

There was no evidence that Watkins aided in the commission of the attempted murder or witness tampering. Watkins testified that Wilson was driving Watkins' car when they agreed to drive the defendant from a store to the National Pride Car Wash, where the shooting occurred. 7RP 134-36. Watkins did not see a gun and there was no mention of any possible confrontation, let alone a shooting. 7RP 150, 142-43, 182. All three occupants of the car got out at the car wash and Watkins arranged to have his car washed. 7RP 140-41. As he was doing so, the defendant started shooting Arthur Shaw. 7RP 141. Watkins got into the back seat of his car, Wilson got back into the driver's seat, and the defendant jumped into the passenger seat. 7RP 144. The defendant reloaded the gun and told Wilson to "drive, drive." 7RP 146. Wilson dropped Miller off about two miles away and Watkins did not see him again until they were both in jail. 7RP 146, 151-53.

As Watkins pointed out, the shooting took place at a location where Watkins goes every day and everyone knew Watkins and his car. 7RP 149. The victim testified that Watkins was the driver of the Chrysler on the day of the shooting, but it is unclear what point

in time he referred to—he agreed that there were three men in the car. 8RP 129-31, 148-49. The victim, who also was a regular visitor to the car wash, did know Watkins because he had seen him at the car wash before with the Chrysler. 8RP 149. There is no reasonable inference that Watkins had knowledge that the shooting would occur or intended to assist in that crime, and there was no evidence presented that he did. The victim's testimony was that the shooting came out of nowhere. 8RP 133.

The defendant asserts that the instruction should have been given because Watkins had some culpability (rendering criminal assistance) and had a motivation to lie. App. Br. at 34. The instruction proposed, however, related only to the testimony of an accomplice, so it would be irrelevant unless Watkins was actually an accomplice.

The defendant claims that Watkins was charged with assault and then allowed to plead guilty to rendering criminal assistance in exchange for his testimony. App. Br. at 36. This is inaccurate. The charge against Watkins was amended to rendering criminal assistance at the beginning of the joint trial of Watkins and this defendant. 2RP 2-4. After pretrial motions and jury selection,

Watkins contacted the State and arranged to cooperate and plead guilty to attempted rendering criminal assistance. 4RP 2-10.

Even if Watkins had been an accomplice to this shooting, the trial court's decision not to give the instruction is not reversible error because substantial evidence corroborated Watkins' testimony.

Harris, 102 Wn.2d at 150, 155; Sherwood, 71 Wn. App. at 485.

Corroborating evidence is sufficient if it fairly tends to connect the defendant with the commission of the crime. State v. Gross, 31 Wn. 2d 202, 216-17, 196 P.2d 297 (1948). The independent evidence need not corroborate every part of the witness' testimony.

Id.

The corroborating evidence in this case includes the video showing the details of the shooting as Watkins described them and Shaw's testimony at trial to the same details of the shooting, as well as Shaw's identification of Miller as the shooter. Ex. 21; 8RP 38-41, 126-36, 159-62. Louis Barrow, caught the next day with the gun used in the shooting, identified the defendant as the man who gave him the gun hours after the shooting and later told him that the gun was "hot." 9RP 130-34, 140-41, 147-60, 165; 11RP 50-52. Barrow's recantation of that identification at trial was unconvincing, as it occurred after his picture was posted on the defendant's

MySpace page with the word "snitch" attached, and Barrow had picked the defendant's picture from a photo montage. 9RP 34, 66-67, 130, 176-77; 10RP 51-52.

**4. THERE WAS NOT CUMULATIVE ERROR THAT DEPRIVED MILLER OF A FAIR TRIAL.**

Cumulative trial errors may deprive a defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cases in which courts have found that cumulative error justifies reversal include multiple significant errors. E.g. Coe, supra (discovery violations, three types of bad acts evidence improperly admitted, impermissible use of hypnotized witnesses, improper cross-examination of the defendant); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (improper hearsay as to details of child sex abuse and identity of abuser, court challenged defense attorney's integrity in front of jury, counselor vouched for credibility of victim, prosecutor misconduct).

There is only one possible error among the claims made by the defendant: the prosecutor's final remark, not to search for reasonable doubt. Therefore, the cumulative error doctrine is inapplicable.

**D. CONCLUSION**

For the foregoing reasons, all of the defendant's claims of error should be rejected.

The claims of error relating to the detective's testimony, the alleged vouching, the choice between the claimed alibi and Watkins' identification, and the cautionary accomplice instruction have no relevance to the conviction of witness tampering, which was essentially conceded by the defendant.<sup>10</sup> Thus, any finding of error as to those issues should not affect that conviction.

The State respectfully asks this Court to affirm both of Miller's convictions and the sentences imposed.

DATED this 28<sup>th</sup> day of January, 2010.

Respectfully submitted,

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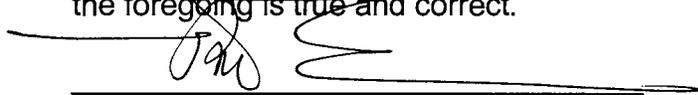
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<sup>10</sup> 13RP 71.

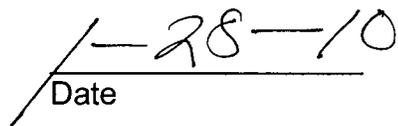
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RONALD MILLER, Cause No. 63367-8-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington



Date

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STATE OF WASHINGTON  
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