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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICKIE R. RILEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 04-1-03219-1

BRIEF OF RESPONDENT

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

1. Did the trial court properly exercise its discretion in making evidentiary rulings?
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3. Has defendant failed to show that the prosecutor's argument was improper or that this claim of error wasn't waived by his failure to request a curative instruction?
4. Has defendant failed to show error, much less an accumulation of prejudicial error, so as to entitle him to application of the cumulative error doctrine?

B. STATEMENT OF THE CASE.

1. Procedure

On June 30, 2004, the Pierce County Prosecutor's office charged RICKIE R. RILEY, defendant, with one count of vehicular assault stemming from an incident that occurred on March 1, 2004. CP 1-3.

The matter proceeded to trial before the Honorable John A. McCarthy on April 22, 2005. RP 1. After hearing the evidence, the jury convicted defendant as charged. CP 108. Defendant made a post trial motion for arrest of judgment or, in the alternative, a new trial. Defendant

asserted insufficient evidence and prosecutorial misconduct as the grounds for his requested relief. CP 137-138, 139-144, 145-148. The court denied the motions. 5/27/05 RP 11-15. At the sentencing on August 26, 2005, the court imposed a low end sentence of three months based upon an offender score of "0," and imposed various legal fines and costs. 8/26/05 RP 15; CP 178-197. From entry of this judgment defendant filed a timely appeal. CP 178-197.

2. Facts

On March 1, 2004, Marcus Hayett and Michael Tillman were surveying at a construction site at near 68th Avenue and 152 Street East in the South Hill area of Puyallup, staking out the location of a storm pond. RP 101-104, 132, 224-227. The men had parked their work van on the gravel shoulder of the road. RP 104-106. Mr. Hayett described that there was a two lane road with a gravel shoulder on each side; on the side where they were parked, there was also a sidewalk on the other side of the gravel shoulder. RP 106. There was a considerable elevation difference, about a foot, between the level where the van was parked and the level of the sidewalk. RP 117, 134-135. The shoulder was quite wide and sloped. RP 142. The sidewalk was level on top but the thickness of the sidewalk varied between three to six inches. RP 142-143. The van was completely off the roadway with two to three feet between the edge of the paved road and the side of the van. RP 106. The van was facing west, and the nearest lane of traffic was heading east. RP 106-107, 228-229.

Mr. Hayett was sitting in the front passenger seat. RP 108-109. Mr. Tillman was standing right next to the driver's door in the gravel between the van and the sidewalk. RP 108-109. Mr. Hayett noticed a Ford Ranger truck heading toward the van; initially he thought the truck was going to park in front of his van. RP 109. The truck was approximately 200 feet away when he first noticed it, traveling at approximately 35 miles per hour. RP 109-110. As the truck started to veer toward the van, Mr. Hayett became concerned that it was not slowing down. RP 110. When the car was about 150 feet away, Mr. Hayett noticed that the driver of the truck was "slumped over all the way toward the middle of the vehicle." RP 110. Expecting the truck to hit the van head on, Mr. Hayett yelled at Mr. Tillman to run, then jumped out of the van and ran toward the middle of the road. RP 111. Mr. Tillman looked up and saw that the truck was not slowing. RP 232-233. Mr. Tillman saw that the driver was passed out or asleep; he could see no hands on the wheel. RP 233, 236. When it became clear that he wasn't going to stop, Mr. Tillman began running toward the back of the van. RP 111, 233. The truck continued to veer toward the sidewalk so that instead of a head-on collision, the truck hit the front corner and side of the van before it hit Mr. Tillman. RP 111, 234-235. Mr. Hayett testified that the collision made a loud noise. RP 111. From the center of the road, Mr. Hayett could see the truck still traveling at 25-30 miles per hour, dragging Mr. Tillman underneath. RP 112. The truck never slowed as it was dragging Mr.

Tillman. RP 235. Mr. Tillman was dragged about thirty feet past the van. RP 112. The truck initially accelerated, kicking up gravel, then about fifty feet past the van, Mr. Hayett saw brake lights on the truck which then slowed and came to a stop. RP 112-113. The truck came to a stop about 200 feet beyond the van. RP 117. Mr. Hayett called 911 on his cell phone. RP 113. The defendant was driving the truck. RP 114. Defendant walked past Mr. Tillman on the ground; Mr. Tillman described defendant as cussing and doing something with his hands. RP 237. Defendant came over to Mr. Hayett and asked what happened. RP 114. Mr. Hayett thought he detected the smell of marijuana smoke on the defendant and relayed this information to the responding deputy. RP 114-115, 123-124. Defendant then went back to Mr. Tillman and told him "You can get up," then grabbed him by the arm to pick him up. RP 238, 240.

Around noon on March 1, 2005, Deputy Fleig of the Pierce County Sheriff's department responded to a dispatch of an injury accident near 68th Avenue and 152 Street East in Pierce County. RP 132. When he arrived, firefighters were putting Mr. Tillman onto a backboard. RP 150. After brief contact with Mr. Tillman, Deputy Fleig contacted the defendant who had been pointed out to him as the driver of the truck. RP 150-151. Deputy Fleig asked him what happened; defendant responded, "I don't know what happened. I was on 152nd one minute and the next thing I know I am here." RP 151. Deputy Fleig went back to speak more

with Mr. Tillman and to get a statement from Mr. Hayett. RP 151-152. After speaking with them, Deputy Fleig went back to speak with defendant, again asking him what happened. RP 153. Defendant told the deputy, "I don't know. I said I must have fallen asleep." RP 153. The deputy testified that defendant appeared dazed and that his speech was a little slow. RP 153. The deputy asked him whether he had had anything to drink or whether he had taken any medications; defendant indicated that he had not had anything to drink, but that he had consumed 300 milligrams of Vicodin and 400 milligrams of a muscle relaxant between 7:00 and 7:30 that morning. RP 153-154. Defendant indicated that he had gotten these medications from some friends and had taken them for a sore back. RP 158. Defendant indicated that he had only had a couple of sticks of licorice to eat that day. RP 158. Deputy Fleig noticed that defendant's eyes were dilated. RP 159.

Deputy Fleig asked defendant to perform some field sobriety tests. RP 159. Defendant refused to do the one leg stand because of his sore back. RP 159. Defendant did agree to do the heel-toe test which is a walk-and-turn test used to assess coordination, balance, and the ability to follow instructions. RP 159-160. Defendant completed the first nine steps as directed, swaying just a little bit, but he failed to turn as instructed and did not complete the return nine steps as directed. RP 160-161. In the return step, defendant had to put his arm out to maintain his balance. RP 161. Another deputy then performed the gaze nystagmus test on

defendant; during this testing Deputy Fleig had to remind defendant three times to keep his head looking forward as he had been instructed to do. RP 162. Because Deputy Fleig thought defendant's eyes looked dilated for being such a sunny day, he shielded defendant's eyes with a card to see if he could get a change in the pupil size; there was no change. RP 163. Deputy Fleig then transported defendant to Good Samaritan Hospital for a blood draw. RP 163, 245-246. Defendant's blood was drawn at 1:50 p.m. RP 246. Deputy Fleig then sent defendant's blood sample to the State toxicology lab in Seattle for analysis. RP 165-166.

Asa Louis, a toxicologist employed at the Seattle toxicology lab analyzed defendant's blood sample. RP 175-194. The initial screening revealed no alcohol in the blood but did indicate the presence of the active ingredient in marijuana. RP 195. Further testing revealed two nanograms of THC per milliliter, and 12 nanograms of carboxy THC per milliliter, as well as the presence of caffeine. RP 196. Mr. Louis testified that THC is the active ingredient in marijuana; carboxy THC is inactive but indicates that the body has metabolized THC. RP 195-201. THC is at its peak level in the system within ten to thirty minutes after ingestion or inhalation and that then there will be a decrease in the levels such that most THC is metabolized within three hours of consumption. RP 199-200. The presence of active THC in defendant's blood sample indicates that he had direct exposure to THC within the three hours preceding the blood draw. RP 199-200. Mr. Louis testified that if there had been a sample of

defendant's blood drawn two hours earlier, that he would expect to see higher levels of THC in such a sample. RP 200. Mr. Louis found no evidence of Vicodin or muscle relaxants in defendant's blood sample. RP 201-204. Mr. Louis testified that marijuana is a unique drug with its own classification and testified to the effects of THC on the human body which are generally accepted in the scientific community. RP 204-205. THC in the blood system can cause hallucinations, slowed reactions and inhibit a person's ability to divide their attention or multi-task. RP 205. Under its influence a person can only focus on a single task at a time. RP 205. It is known to have a sedative effect on people and cause sleepiness and fatigue. RP 205-206, 208. THC can cause increased heart rate, decreased blood pressure and impairment of motor skills. RP 205-206. He indicated the scientific community has not been able to correlate a particular level of THC in the blood stream with a corresponding level of impairment . RP 212.

Mr. Tillman's back was broken in eight places. RP 240. He had to undergo surgery and was in the hospital for a couple of weeks. RP 240-241. Mr. Tillman still has problems with numbness in his arm and hand. RP 241. He also has loss of bladder and bowel control, as well as loss of sexual function. RP 242. Mr. Tillman testified that due to the injuries he sustained he is unable to work as a surveyor and is hoping to be retrained for another job. RP 226, 241.

The defense presented the testimony of a single witness, David Predmore, a retired toxicologist from the Washington State Toxicology lab. RP 247-248. He concurred that the scientific toxicology community has not been able to establish any correlative impairment with a specific level of THC in the bloodstream. RP 250-251. He agreed that THC can cause pupil dilation. RP 251. He agreed that marijuana is a mood altering drug that causes relaxation and sedation. RP 254-255. He agreed that it can cause altered time and space perception, drowsiness, impairment in retention, impaired balance, and loss of coordination in divided attention tasks. RP 255, 260-261. In his opinion, the peak effect of marijuana shows up 30 to 45 minutes after exposure, then drops off over the next three hours until the person no longer feels under its effect. RP 256. He testified that THC is metabolized very quickly. RP 257. He agreed that most studies show that THC is metabolized into carboxy THC within three to five hours, but there are some studies that show a longer period of metabolization. RP 257. Mr. Predmore had never spoken to defendant and had no specific information about defendant's health or marijuana consumption on the day of the accident. RP 259-260. He could not testify that defendant was not impaired at the time of the accident. RP 262.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MAKING EVIDENTIARY RULINGS.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. Rehak, 67 Wn. App. at 162.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); State v. Hettich, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

In the case now before the court, defendant claims that the trial court made several errors in the admission of evidence. As will be argued below, defendant has failed to demonstrate any abuse of discretion in the evidentiary rulings.

- a. The Trial Court Properly Found That Defendant's Statements To The Investigating Officer About Whether He Had Consumed Any Drugs That Day Were Relevant To Whether Defendant Was Driving Under the Influence of Drugs.

Defendant asserts that statements he made to Deputy Fleig regarding his consumption of Vicodin and muscle relaxant the morning of the accident should have been excluded as irrelevant.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

Defendant was charged with vehicular assault. In order to convict him of this crime, the State had to convince the jury that defendant operated or drove a vehicle while he was under the influence of drugs and thereby caused substantial bodily injury to another person. See RCW 46.61.522(b); CP 117-129, Instruction No. 8. The jury was further

instructed that a “person is under the influence of or affected by the use of drugs if the person’s ability to drive a motor vehicle is lessened in any appreciable degree.” CP 117-129, Instruction No. 6.

The jury heard evidence that, at the scene of the accident, Deputy Fleig asked defendant if he had had any thing to drink that day or if he had taken any medications. RP 153. Defendant told him that he had not had anything to drink but that he had taken 300 milligrams of Vicodin and 400 milligrams of some muscle relaxant between 7:00 and 7:30 am that morning. RP 153-158. The jury also heard testimony from a toxicologist who tested defendant’s blood sample; he found no indication of any Vicodin, which is an opiate, or muscle relaxants in his system. RP 201-205. The blood analysis did reveal the presence of THC, the active ingredient in marijuana, and carboxy THC, the deactivated form of THC showing that the body had metabolized THC. RP 195-201.

Because the jury had to determine whether defendant’s driving was affected by his consumption of drugs, defendant’s affirmative statements that he had consumed medications earlier that day was relevant to this issue in the case. The jury might believe his statements and find that his consumption of these medications had an affect on his ability to drive safely, or it might believe his statement and conclude that such medications would have no effect. Alternatively, the jury might find that defendant’s statements that he had consumed medications early in the morning for a sore back were not credible when the blood screen showed

no presence of these drugs in his system, but only evidence that he had ingested marijuana. Under this view of the evidence, the jury might conclude that defendant was trying to hide the fact that he had consumed marijuana by offering a more palatable explanation for why he was unconscious at the wheel. Offering a false explanation is consistent with consciousness of guilt. Under any of these scenarios, the defendant statements were relevant to an issue before the jury, and the court did not abuse its discretion in admitting the evidence.

- b. The Court Properly Excluded Collison's Hearsay Statement To The Investigating Deputy As Defendant Failed To Show It Qualified As A Recorded Recollection, A Present Sense Impression or That It Was Admissible Under The Rule Of Completeness.

The exception for a past recollection recorded is found in ER 803(a)(5); it states:

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ...

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The Court of Appeals has approved use of this exception even when the declarant is unable to testify at trial about the accuracy of the recorded recollection. State v. Alvarado, 89 Wn. App. 543, 949 P.2d 831 (1998). While the availability of the declarant at trial is not dispositive, the same court held that four factors must be satisfied before the evidence is properly admitted under this exception:

- (1) the record pertains to a matter about which the witness once had knowledge;
- (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony;
- (3) the record was made or adopted by the witness when the matter was fresh in the witness' memory; and
- (4) the record reflects the witness' prior knowledge accurately.

Alvarado, 89 Wn. App. 543, 548, 949 P.2d 831 (1998). In Alvarado, the court was considering whether a tape-recorded witness statement to the police that implicated both defendants in a murder could be admitted as a recorded recollection. At trial, the witness testified that he could neither remember any of the events surrounding the murder nor verify that his statements to the police had been accurate. The court analyzed the situation and stated:

The recordings here are taped statements made within eight days of the murder. Their content establishes that Lopez had knowledge of the events when the recordings were made. At trial, he testified that he could not remember the

events. The recordings are Lopez's own words and thus were made and adopted by him. The first three factors therefore are easily met.

Alvarado, 89 Wn. App. at 549. The court went on to say that a trial court should determine the fourth element on a "case-by-case basis" by examining the "totality of the circumstances," which includes the following factors: "(1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement." Alvarado, 89 Wn. App. at 551-552. Ultimately, the court found that under the facts presented in the case, the statement had been properly admitted under the rule. 89 Wn. App. at 552-553.

Similar issues were addressed in State v. Derouin, 116 Wn. App. 38, 64 P.3d 35 (2003), but this case also focused on the third prong of the four Alvarado factors – whether the record was made or adopted by the declarant when the matter was fresh in the declarant's memory. The court was assessing the admissibility of a statement written by a police officer based upon his interview of a witness that was then shown to the witness for review. The officer told the witness that she could not lie and that he was going to ask her to sign the statement and indicated that signing an untrue statement was the same as lying under oath. 116 Wn. App. at 41. The witness then reviewed the statement and signed it. Id. The court

found that this manner of recording was not as satisfactory as the tape recording in Alvarado:

The recording process was not ideal. Deputy Robinson wrote his own version of Michelle's story. Such a recording process makes it more likely that the statement contained inaccuracies or statements flavored by the officer's perception of the events and not the actual witness's perception. However, the recording process was not so unreliable as to prevent the statement's admission. Any inaccuracies within the statement due to the recording process can be argued at trial and should go to the weight, not the admissibility of the evidence. Other prongs weigh towards the statement's accuracy. Deputy Robinson recorded Michelle's statement as she was giving it, which is arguably more reliable than cases where an officer writes out the statement after discussing its contents with the witness. Deputy Robinson also asked her to read the statement before signing it. The recording process was accurate enough in this case.

Derouin, 116 Wn. App at 46-47. The court noted that there is considerable case law from other jurisdictions excluding any statements in police reports that were not sworn, signed by the witness, or otherwise affirmed by the witness as accurate. See, 116 Wn. App. at 45, n. 1.

In this case defendant sought to introduce statements made to the investigating officer, Deputy Fleig, by William Collison, the defendant's boss. CP 46-56. Collison had died prior to trial and, therefore, was unavailable as a witness. After a pretrial hearing, the court addressed the admissibility of this evidence. RP 25-36, 77-81, 89-91. Defendant adduced that while Fleig was still investigating the accident, but after his

interviews of the witnesses, Collison arrived at the scene. RP 77-78. Deputy Fleig asked Mr. Collison about the defendant's whereabouts earlier in the day, and about whether he had seen defendant consume any alcohol. RP 78. According to the deputy, Collison told him that defendant had been at work the entire morning and that he did not consume any alcohol while at work. RP 78. The court concluded the evidence was hearsay and found no applicable exception. RP 30-35, 90-91.

The court was on solid ground in excluding Collison's statement as hearsay. The statement was made out-of-court, unsworn, and offered to prove the truth of the matter asserted; therefore, it was hearsay under the definition of that term under ER 801. As for showing the four factors set forth in Alvarado, the record does not support a finding that either factor three or four was met.

As for factor number three, there is no evidence in the record that the declarant, Mr. Collison, reviewed Deputy Fleig's police report while the event was still fresh in Collison's mind or that he adopted the deputy's wording¹ as his own. This makes the case distinguishable from Alvarado where the recollection was in the declarant's own words, recorded on tape. It is also distinguishable from Derouin where the declarant had reviewed

¹ The evidence at trial showed that the deputy did not prepare his report until later that day, so it would have been unavailable for Mr. Collison's review at the scene of the accident. CP 152.

the officer's written statement and signed it, adopting it as her own. Defendant presents no authority that a police officer's report which summarizes a declarant's out of court statement, constitutes a recorded recollection of that declarant in the absence of some adoption by the declarant of the content of the report at a point where the events are still fresh in his or her mind. Courts in other jurisdictions have excluded such evidence as falling outside the rule. United States v. Schoenborn, 4 F.3^d 1424, 1427 (7th Cir. 1993); United States v. Almonte, 956 F.2d 27, 29 (2d Cir. 1992)(A third party's characterization of a witness's statement "does not constitute a prior statement of that witness unless the witness has subscribed to that characterization."); see also, United States v. Leonardi, 623 F.2d 746, 757 (2d Cir.), cert. denied, 447 U.S. 928, 100 S. Ct. 3027 and 449 U.S. 884, 101 S. Ct. 236 (1980); People v. Hoffman, 518 N.W.2d 817, 825 (Mich. App. 1994). Defendant fails to satisfy the third Alvarado factor.

Defendant argued that the statement was reliable because the trooper is trained to be accurate in his reports, and because there is "no indication" that Collison ever disavowed his statements. CP 46-56; Br. of Appellant at 20. But that is insufficient to make the required affirmative showing of an accurate recording of the witness's prior knowledge under the totality of the circumstances. There is no information whether Collison disavowed the accuracy of the statement because he was unavailable at the time of trial. As noted above, there was no information

that Collison ever reviewed the officer's report and averred that it was an accurate statement of his knowledge. The process used to "record" the statement in this case is less satisfactory than procedure questioned in Derouin. See State v. Derouin, 116 Wn. App. at 45-47 (court questioned reliability of statement where an officer wrote it "after discussing its contents with the witness," rather than as witness spoke, and officer did not have witness subsequently read and sign statement). There is no other indicia of reliability to establish the trustworthiness of the statement. The court properly excluded this statement as hearsay.

Defendant claims that Collison's statements could be admitted under the present sense impression exception or under the rule of completeness. This court should reject these arguments as without merit. A present sense impression is a hearsay statement made while the declarant is perceiving the event. ER 803(a)(1), State v. Martinez, 105 Wn. App. 775, 20 P.3d 1062 (2001). Collison's statement about what defendant had done while at work that morning were statements about past events. The rule of completeness of ER 106 may be invoked by an adverse party to the proponent of a writing or recording statement. The State could find no authority that the proponent of the recorded statement could use the rule. The court did not err in excluding Collison's statements as hearsay.

- c. The trial court did not abuse its discretion in allowing a toxicologist to testify that his testing of defendant's blood sample revealed evidence of marijuana consumption or as to the short term effects of marijuana consumption on the human body.

The admission of expert testimony is governed by ER 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

An expert's opinion is admissible if the witness is properly qualified, relies on generally accepted theories, and the expert's testimony is helpful to the trier of fact. State v. Cauthron, 120 Wn.2n 879, 890, 846 P.2d 502 (1993); State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). Courts construe "helpfulness" to the trier of fact broadly. Philippides v. Bernard, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). "If the reasons for admitting or excluding the opinion evidence are 'fairly debatable', the trial court's exercise of discretion will not be reversed on appeal." Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979). The opinion of a qualified expert is proper evidence even though it may be an opinion on the "ultimate" issue in the case, as long as it will not mislead the jury to the prejudice of the objecting party. State v. Alden, 73 Wn.2d

360, 361, 438 P.2d 620 (1968). A trial court is given broad discretion to admit evidence under ER 702, and its decision is reviewed under the abuse of discretion standard. State v. Russell, 125 Wn.2d 24, 69, 882 P.2d 747 (1994).

In the instant case, defendant challenges the trial court's admission of the testimony of a state toxicologist, Asa Louis, asserting that it was irrelevant. Appellant's brief at p. 30. Defendant concedes that the witness qualified as an expert. Id. at 29. Defendant fails to identify where he objected to the testimony of the toxicologist on the grounds that it was irrelevant. Defendant did raise a pretrial objection to the toxicologist testifying to the combined effects of Vicodin, muscle relaxants and marijuana. RP 91-92. The State did not adduce any testimony from the toxicologist on this point. Defendant did not raise a general relevancy objection in the pretrial hearing, and did not object when the toxicologist was called to the stand. RP 175. As defendant may only assert evidentiary error on the same basis as asserted in the trial court, he has failed to show that he properly preserved his claim below. The court should refuse to review this issue.

Nor can defendant show an abuse of discretion in allowing the witness to testify. The toxicologist testified regarding the testing he performed on defendant's blood sample, which was taken approximately two hours after the accident. The result of that testing indicated that defendant had recently used marijuana as he had both active THC and

inactive carboxy THC, which indicates the body has metabolized THC, in his system. RP 195-201. Mr. Louis testified that THC had psychotropic effects on the body, such as causing hallucinations. RP 198. Mr. Louis further testified that THC is at its peak level in the system within ten to thirty minutes after ingestion or inhalation, and that then there will be a decrease in the levels such that most THC is metabolized within three hours of consumption. RP 199-200. Thus, he testified that if a blood sample could have been drawn two hours earlier, which would correlate to the time of the accident, he would have expected to see a higher level of THC in such a sample. RP 199-200.

Mr. Louis testified that marijuana is a unique drug with its own classification. RP 204-205. He testified that THC can cause hallucinations and slowed reactions. RP 205. It inhibits a person's ability to divide their attention or multi-task such as is required for driving. RP 205. Under its influence, a person is able to focus on a single task at a time. RP 205. THC is known to have a sedative effect on people and cause sleepiness and fatigue. RP 205-206, 208. THC can cause increased heart rate, decreased blood pressure and impairment of motor skills. RP 205-206.

Unquestionably, this testimony could be helpful to the jury in determining whether defendant was under the influence of drugs at the time he hit Mr. Tillman while operating his vehicle in an unconscious state. The testimony regarding the results of the blood testing went

directly to whether defendant had consumed drugs the day of the accident and whether he was being affected by those drugs at the time of the accident. The testimony regarding the effects of THC, in general, on the human body was relevant to whether the ingestion of marijuana lessened defendant's ability to drive a motor vehicle in any appreciable degree. The court did not abuse its discretion in admitting this testimony.

Defendant contends that because there is no scientific research that can correlate an amount of THC in the blood stream to a specific level of impairment, that this renders all of the toxicologist's testimony irrelevant. Such an argument goes to the weight rather than its admissibility of such evidence. The defendant has failed to show an abuse of discretion in the admission of this testimony.

2. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND DEFENDANT GUILTY OF VEHICULAR ASSAULT.

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.

As discussed earlier, the State had to convince the jury that defendant operated or drove a vehicle while he was under the influence of drugs, and thereby caused substantial bodily injury to another person. See RCW 46.61.522(b); CP 117-129, Instruction No. 8. The jury was further instructed that a “person is under the influence of or affected by the use of drugs if the person’s ability to drive a motor vehicle is lessened in any appreciable degree.” CP 117-129, Instruction No. 6. Defendant contends that the state failed to prove that he was “under the influence of or affected by the use of drugs.” Appellant’s brief at p. 33. He is incorrect.

In this case, the jury was presented with evidence that defendant lost consciousness while driving his truck. The evidence suggests that this loss of consciousness was something more than merely nodding off at the wheel as defendant crashed into a van, ran up over a curb, hit a pedestrian, and dragged the pedestrian for 30 feet under his truck, with no indication that defendant “woke up” at any point in this sequence. A witness coming into contact with defendant shortly after he exited his truck thought defendant smelled as if he had been smoking marijuana. Defendant appeared dazed and confused and had difficulty performing field sobriety tests which is consistent with being under the influence of marijuana. A

blood sample taken two hours after the accident provided evidence that defendant had consumed marijuana within three hours of having his blood drawn. The jury heard about many effects that marijuana can cause on the human body which would impair a person's ability to drive, including sleepiness. Taking all of this evidence in the light most favorable to the State, a rational jury could find that defendant's consumption of marijuana caused him to lose consciousness while driving his truck, thereby causing the collision that seriously injured Mr. Tillman. The verdict should be upheld.

3. DEFENDANT HAS FAILED TO SHOW THAT THE PROSECUTOR ENGAGED IN IMPROPER ARGUMENT OR THAT IT WAS SO FLAGRANT THAT THIS CLAIM SURVIVES HIS FAILURE TO REQUEST A CURATIVE INSTRUCTION.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 3 L. Ed. 2d 599, (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the

remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Id.

To prove that a prosecutor's actions constitute 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). Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87.

A comment on a defendant's right to remain silent occurs when the State uses the defendant's exercise of his Fifth Amendment rights as either substantive evidence of guilt or to suggest that the silence was an admission of guilt. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Not every reference to silence constitutes a "comment on

silence.” Id., 130 Wn.2d 706-707; State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999).

Defendant asserts that the prosecutor engaged in improper argument during rebuttal with the following argument:

PROSECUTOR: [Defense Counsel] told you that the jury instructions tell you that the defendant does not have to put on any evidence whatsoever, and that’s true. He is presumed innocent until all the evidence is brought forth.

But in this case, this defendant – the defendant decided to put on a case, so not only do you look at the testimony, but you also look at what the evidence is that they presented, evidence and lack of evidence.

And what is the lack of evidence that they presented [sic] to you? Any specific information about the defendant. Here, we have got an expert who has done analysis and research and read literature and knows all about the effects of marijuana on human beings and he said even on animals. And do they present any evidence to you about the effects of the one person we are interested in in this case? Did he tell you anything about Mr. Riley?

DEFENSE COUNSEL: Your Honor, I am sorry. But I do need to object that is not the standard in this case or in any criminal case.

RP 321.² After the jury was sent to deliberate, defense counsel asked to make an additional record of his objection. RP 328. Counsel argued that the argument improperly shifted the burden. RP 328. When the court

² The prosecutor made a similar argument in her initial closing statement but defense counsel purposely did not object. RP 293-294, 329.

inquired as to defense counsel's suggested remedy, defense counsel indicated that he just wanted to make his record. RP 328-329. Prior to sentencing, defense counsel moved for a new trial on the basis of prosecutorial misconduct. CP 137-138, 139-144, 145-148; 5/27/05. RP 6-7. The court denied the motion ruling that it did not believe that the prosecutor had crossed the line into improper argument. 5/27/05. RP 15.

Defendant has failed to show that the challenged argument was improper. In the cross examination of the defense expert witness, the State established that the rate a person metabolizes THC can be affected by many factors, including how much marijuana is consumed, how often, and the quality of the substance used. RP 258-259. The prosecutor then established that the defense expert had no specific information about the defendant's consumption of marijuana on the day of the accident, or other factors that might assist in determining whether he was affected by his drug use at the time of the accident. RP 259-.260. Thus, the argument did flow from the evidence presented in the case. Nor did the State's argument attempt to shift the burden of proof, but rather acknowledged that defendant did not have to present any evidence. Rather the State asked the jury to critically assess the evidence that was presented on his behalf. That is not improper argument. Furthermore, the jury was instructed as to the burden of proof, and told to disregard any argument by counsel that was not supported by the law as stated by the court. CP 117-129, Instructions No 1 and 2. The jury is presumed to follow these

instructions. Finally, any possible confusion created by the prosecutor's argument could have easily been eliminated by a curative instruction. Defendant chose not to request a curative instruction. RP 328-329. 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." Binkin, supra. Defendant cannot make this showing. The court should reject the claim of prosecutorial misconduct.

4. DEFENDANT IS NOT ENTITLED TO RELIEF 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 (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, 681 P.2d 1281 (1984); see also, State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First,

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

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, 684 P.2d 668 (1984)(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, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in the trial. He has failed to show that there was any prejudicial error, much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction below.

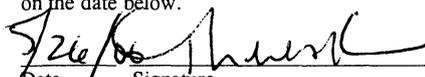
DATED: May 26, 2006.

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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.


Date Signature

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