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COURT OF APPEALS  
PIERCE COUNTY

NO. 33950-1

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TONY RAY PIERCE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Katherine M. Stolz

No. 05-1-00610-4

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**BRIEF OF RESPONDENT**

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

1. Did the court properly exercise its discretion in excluding reference to the victim and defendant's prior drug use when the court made a finding that such testimony would be prejudicial to the defendant?
2. Did the court properly exercise its discretion in excluding reference to the victim allegedly giving the defendant the jewelry in exchange for drugs when the court found that testimony regarding drug use would be prejudicial to the defendant and the defendant was still permitted to testify that the jewelry belonged to him?
3. Did the trial court comment on the evidence and, in the alternative, if the trial court did comment on the evidence was the comment harmless?
4. Has the defendant failed to demonstrate cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure and Pretrial Motions

On February 3, 2005, TONY RAY PIERCE, hereinafter "defendant," was charged with two counts of trafficking in stolen property in the first degree and one count of possessing stolen property in the second degree. CP 1-3. On August 10, 2005, both parties appeared before

the Honorable Judge Katherine M. Stolz. RP<sup>1</sup> 2. Defense counsel then indicated that he needed time to do additional investigation. RP 5. The defense motion for a continuance was sent back to the criminal presiding court.<sup>2</sup>

Both parties returned for a CrR 3.5 hearing. RP 12. At the hearing, Pierce County Sheriff Deputy Trent Stephens testified that on February 2, 2005, he contacted the defendant. RP 12-14. Deputy Stephens had contacted the defendant as part of a follow-up investigation regarding a burglary that occurred on 12015 116<sup>th</sup> Street South in Tacoma. RP 14-15. The defendant was reported as a possible suspect. RP 14. The victim of the burglary was Rowena Rincon. RP 15. Upon contact, the defendant immediately told the deputies that he had not stolen anything. RP 15. The defendant made the statement before the deputies could even say anything to him. RP 15-16. The defendant was advised of his rights, which he indicated he understood and waived. RP 16-17. The defendant did not ask for an attorney. RP 17. The court found that the statements made by the defendant were spontaneous voluntary admissions or were made after the defendant was advised of his Miranda warnings.<sup>3</sup>

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<sup>1</sup> RP refers to the verbatim report of proceedings.

<sup>2</sup> Verbatim report of proceedings from the motion for a continuance that was held in the criminal presiding court on August 10, 2005, has not been provided by the defendant.

<sup>3</sup> The trial attorney for the State is attempting to enter Findings of Fact and Conclusions of Law for the CrR 3.5 hearing. The State respectfully requests permission to file a supplemental designation of clerk's papers designating Findings of Fact and Conclusions of Law once they are entered by the trial court. The defendant is not alleging any error with respect to the CrR 3.5 hearing.

The defendant made several motions in limine. RP 26. The defendant moved to exclude testimony regarding a statement made by Mark Kosan that he thought the property was stolen because they came from the defendant. RP 26. The State did not object to the defendant's motion. Id.

The defendant moved to exclude testimony from Deputy Stephens that he was investigating stolen jewelry. RP 26-27. The court reserved ruling, but stated that Deputy Stephens could testify that he was investigating a burglary. RP 27. The defendant then made a motion in limine to prohibit Deputy Stephens from testifying that he was investigating a burglary. Id. The court denied the motion. RP 28-29. The court also found that the victim, Rincon, could testify that she believed a burglary had occurred. Id.

The State made a motion to exclude testimony regarding the victim's prior drug addiction. RP 30. The court made the following ruling:

Well, I don't think that at this point her past use of drugs five years ago is relevant. Certainly it would not be relevant if Mr. Pierce has alleged, you know, similarly would commit and say he used drugs five years ago, and therefore, he's a bad guy now, it would not be relevant. Under those circumstances it's not going to be relevant at this point regarding the alleged victim in this matter.

RP 32.

The defendant clarified that he was not planning on admitting evidence of all of the victim's prior drug use, but only her drug use with the defendant. RP 32. The court again found that such evidence would not be relevant. RP 33.

On August 29, 2005, both parties again appeared before the court. RP 49. The court again addressed the admission of prior drug use by the victim and defendant. RP 54. The court found that the mention of drug use either by Rincon or the defendant would be prejudicial to the defendant. RP 54.

During the defendant's testimony at trial, the defendant indicated three times that Rincon gave him different pieces of jewelry in exchange for drugs. RP 164, 168. After the defendant mentioned an exchange of jewelry for drugs for a third time, the court requested a sidebar. Id. After a sidebar, the court made the following statement:

At this time the Court will give a verbal instruction to the jury. There is no evidence of any use of drugs by anyone in this case.

RP 168.

Outside the presence of the jury the court instructed the defendant as follows:

Mr. Pierce, you have violated my instructions three times, sir. If you violate them again, this court is going to entertain sanctions of contempt against you, and may declare a mistrial.

A recess was taken, and before the jury returned, the court made the following statement:

I'll tell the jury we're going to strike any testimony regarding dope use. It's not admitted, and it's stricken by me. But we'll do that at the close of his testimony.

RP 171.

The jury was never instructed that any of the defendant's testimony was stricken or to disregard any of the defendant's statements. On August 31, 2005, the defendant was found guilty of two counts of trafficking in stolen property in the first degree and not guilty of possessing stolen property in the second degree. CP 33-35. The defendant was sentenced to a standard range sentence of 20 months. CP 56-67. A notice of appeal was timely filed on October 14, 2005. CP 55.

## 2. Facts Adduced at Trial

On January 28, 2005, and January 29, 2005, the defendant went to Topkick Jewelry and Loan, in Tacoma, and pawned some items. RP 63-64. He contacted the manager, Mark Kosan. RP 63. On January 28, 2005, the defendant pawned four rings, bracelets, and an earring. CP 70-71 (exhibit #2). The defendant received \$65.00. Id. On January 29, 2005, the defendant sold earrings, a watch, and necklaces. CP 70-71 (exhibit #1). He received \$70.00. The defendant had been a customer of Topkick Jewelry and Loan for approximately ten years. RP 69.

Pierce County Sheriff Deputy Trent Stephens received a report regarding theft of jewelry from Rowena Rincon. RP 79. All pawn shops within Pierce County have to report all items that are pawned to the Pierce County Sheriff's Department. RP 81. On or about February 2, 2005, the victim viewed the suspected stolen jewelry that had been pawned at Topkick Pawn, and identified those items. RP 81-82.

On February 2, 2005, Deputy Stephens contacted the defendant. RP 82. The defendant immediately stated, "You looking for me? I didn't steal anything."<sup>4</sup> Id. Deputy Stephens asked the defendant if he had pawned any items, and he denied pawning anything recently. RP 83. The defendant was placed under arrest, and then admitted that he had pawned some items a couple of days previously. Id. A search of the defendant revealed a pair of silver earrings in the defendant's front left pants pocket. Id.

Rowena Rincon knew the defendant, who lived in her neighborhood. RP 90. On or about January 26, 2005, the defendant came to Rincon's front door. RP 91. Rincon did not answer and the defendant left. Id. Later that day the defendant returned but again Rincon did not answer. RP 91-92. Kevin Johnson, another resident of the home,

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<sup>4</sup> The defendant asserts that Deputy Stephens contacted the defendant based on Rincon's claim that the defendant had taken the jewelry. Brief of Appellant at 4. The record does not support such a claim. Deputy Stephens attempted to clarify how the defendant was developed as a suspect, but defendant objected to such testimony and the objection was sustained. RP 80.

indicated that the defendant had come to the home the day before the theft and had been looking for his gloves. RP 128. The next day Rincon returned to her home and found that her door was kicked in. RP 92. She discovered that her jewelry was missing. Id.

She subsequently met law enforcement at a pawn shop where she identified the recovered jewelry as being her property. RP 93. She indicated that the jewelry had been present in her home until it was taken on January 27, 2005. RP 94. She identified earrings that were recovered from the defendant as being her property, valued at \$400.00. RP 83-84, 100. Rincon produced a receipt for a watch that was taken which indicated that the watch cost \$800.00. RP 98-99. Rincon indicated that earrings which were taken had a value of \$400.00. RP 100. She produced an earring which she had at home which matched an earring that was recovered from the pawn shop. RP 94-95.

Rincon's son, Sean Gumm, stated that he was home the day his mother showed him the broken front door. RP 115. He was in his room sleeping. RP 115. Gumm stated that he heard the door open, and it sounded like it hit the wall. RP 115-116.

Ron Moores, an employee at CJ Bail Bonds, testified that on January 27, 2005, he drove the defendant from Roy into Tacoma so the defendant could go to court. RP 154. At the time Moores contacted the defendant it was between 9:00 and 9:05 a.m. Id. The defendant testified

that he knew Rincon, and that they had a prior sexual relationship. RP 162. The defendant stated that Rincon gave him jewelry in exchange for drugs<sup>5</sup>. RP 164. He stated that one of the rings he sold or pawned was a ring that he had purchased from Fred Meyer Jewelers. RP 165. The defendant indicated that Rincon gave him a gold chain in exchange for drugs. RP 168. He also indicated that Rincon gave him a gold watch in exchange for drugs. Id.

The court instructed the jury that there was no evidence of drug use by anyone in the case. RP 168. Outside the presence of the jury the court indicated that it was striking the testimony regarding drug use, but the jury was never instructed that the testimony was stricken or to disregard it. RP 171. The defendant denied going to Rincon's home on January 26, 2005, or January 27, 2005. RP 173.

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<sup>5</sup> The defendant asserts that the alleged exchange of jewelry for drugs occurred during the relationship, but such assertion is not supported by the record. Brief of Appellant at 10. The defendant's testimony was unclear about when the alleged exchanges occurred.

C. ARGUMENT.

1. THE COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING REFERENCE TO THE VICTIM AND THE DEFENDANT'S PRIOR ALLEGED DRUG USE WHEN IT FOUND THAT SUCH TESTIMONY WOULD BE PREJUDICIAL TO THE DEFENDANT.

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 (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. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); Rehak, 67 Wn. App. at 162.

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 than 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.

First, the court must identify the purpose for which the evidence will be admitted. Second, the evidence must be materially relevant. Third, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact finder. Further, to avoid error, the trial court must identify the purpose of the evidence and conduct the balancing test on the record. State v. Wade, 98 Wn. App. 328, 989 P.2d 576, 579 (1999).

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).

Evidence of drug use on prior occasions, or of drug addiction, is generally inadmissible on the ground that it is impermissibly prejudicial. State v. Tigano, 63 Wn. App. 336, 345, 818 P.2d 1369 (1991)(citing State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d (1974)). In State v. Tigano, supra, the defendant contended that he should have been allowed to impeach a witnesses' veracity with evidence of the witnesses' prior drug use. Id. at 344. The court held that for evidence of drug use to be admissible to impeach, there must be a reasonable inference that the

witness was under the influence of drugs either at the time of the events in question, or at the time of testifying at trial. Id.

In the case now before the court, the court found that both Rincon and the defendant's prior drug use was not relevant. RP 32. Rincon freely admitted during her testimony that she knew the defendant. RP 90. The court properly exercised its discretion in excluding testimony of the victim's alleged prior drug use. The court, in conducting a balancing test, made a specific finding that evidence of drug use by either the victim or the defendant would be prejudicial to the defendant. RP 54. The court made the following ruling:

Well, she's going to admit that she knows the defendant. I'm not going to go into the drug use of either side, because I think it is also prejudicial to Mr. Pierce, and the jury could very well decide that he did indeed break in and steal the stuff because he's got a drug problem. And I don't want to go there.

RP 54.

The trial court properly exercised its discretion in finding that evidence of either Rincon's alleged prior drug use or the defendant's prior drug use would be prejudicial to the defendant.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING REFERENCE TO THE VICTIM GIVING THE DEFENDANT THE PROPERTY IN EXCHANGE FOR DRUGS WHEN THE COURT FOUND THAT TESTIMONY REGARDING DRUG USE WOULD BE PREJUDICIAL TO THE DEFENDANT AND THE DEFENDANT WAS STILL PERMITTED TO TESTIFY THAT THE JEWELRY BELONGED TO HIM.

As argued above, 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 (1992). In the present case, the court made a pretrial ruling excluding testimony regarding drug use because it would be prejudicial to the defendant. RP 54. The court's analysis was that if evidence of drugs was introduced into the case, the jury could speculate that the defendant stole the property at issue in order to support a drug habit. Id. The trial court properly exercised its discretion in excluding testimony regarding any alleged exchange of the jewelry for drugs. The court concluded that the defendant would be prejudiced by reference to drug use.

The defendant relies on State v. R.H.S., 94 Wn. App. 844, 974 P.2d 1253 (1999), for his assertion that the trial court erred in excluding drug evidence. Brief of Appellant at 18. The defendant's reliance on R.H.S. is misplaced. In R.H.S., the defendant was charged with second

degree assault. Id. at 846. The trial court excluded testimony regarding whether the defendant knew that his punch to the victim could cause substantial bodily harm. Id. The court held that the trial court erred in excluding such testimony because it denied the defendant the right to present a defense. Id. at 848. The court reasoned that the defendant should have been permitted to testify as to his subjective intent as it related to reckless conduct. Id. The court stated “While it is possible that RHS’s testimony was ‘so incredible that its exclusion is harmless error,’ we are not the arbiters of credibility.” Id. at 849. The court found that the defendant’s testimony, if believed, would establish a defense to assault in the second degree. Id.

The present case is distinguishable from R.H.S. In the case at bar the defendant was not precluded from testifying that he lawfully possessed the jewelry. In fact, he testified that the jewelry was his property. RP 164. The court’s ruling merely excluded reference to drug use because the court found that such testimony would have been prejudicial to the defendant. RP 54. The defendant was not precluded, unlike R.H.S., from testifying as to subjective belief. The defendant was permitted to testify that the jewelry was his property, and he did so. RP 164. The defendant was permitted to testify that the jewelry given to him by Rincon in a trade, and he did so. RP 170. While the defendant was prohibited from

mentioning drugs, he mentioned an exchange of jewelry for drugs three separate times. RP 164, 168. Unlike the court's ruling in R.H.S., which precluded the defendant from testifying about his subjective intent, in the present case the defendant was permitted to testify about his subjective belief that the jewelry was not stolen.

Alternatively, if the court did abuse its discretion in excluding the testimony, the jury did hear repeated testimony from the defendant that Rincon gave him jewelry in exchange for drugs, and therefore any error committed was harmless. RP 164, 168. The defendant now asserts that the trial court struck the defendant's testimony relating Rincon allegedly giving him the jewelry in exchange for drugs. Brief of Appellant at 10. The trial court, however, never told the jury to disregard any statements relating to drugs that were made by the defendant. Therefore, the jury had before it evidence that the defendant had received the jewelry in exchange for the drugs—testimony which the jury clearly rejected. The defendant now asserts that he was denied his defense that the jewelry was given to him by Rincon. Brief of Appellant at 16. This assertion is without merit, however, because the defendant not only repeatedly testified that he received the jewelry in exchange for drugs, but that the jewelry was his property. RP 164. The jury gave whatever weight they felt appropriate to the defendant's testimony. Therefore, any error in the court excluding evidence of drug use was harmless because on several occasions the

defendant stated that Rincon had given him jewelry in exchange for drugs, and the jury had that testimony before it for its consideration.

3. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE, AND ALTERNATIVELY, IF THIS COURT FINDS THAT THE TRIAL COURT DID COMMENT ON THE EVIDENCE, SUCH COMMENT WAS HARMLESS.

Trial courts are forbidden from commenting upon the evidence presented at trial. Wash. Const. art. VI, sec. 16. "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); see also State v. Deal, 128 Wn.2d 693, 911 P.2d 996 (1996); State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991). The purpose of prohibiting judicial comments is to prevent the judge's opinion from influencing the jury. Lane, at 838.

Once the defendant demonstrates that the trial judge made a comment on the evidence, the reviewing court will presume the comments were prejudicial; the burden is then on the State to show no prejudice could have resulted from the comment or that no prejudice did result to the defendant. Lane, at 838-839. Any error will be harmless "if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt."

State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). In assessing whether a statement constitutes an improper comment, courts have considered whether the comment was directed at counsel, as opposed to the jury, and was said in legal terms or to explain a ruling, State v. Knapp, 14 Wn. App. 101, 113, 540 P.2d 898 (1975); State v. Surry, 23 Wash. 655, 660, 63 P. 557 (1900), and whether the court instructed the jury to disregard its comment, Surry, at 661.

Defendant assigns error to the court's statement during the defendant's testimony which was, "at this time the Court will give a verbal instruction to the jury. There is no evidence of any use of drugs by anyone in this case." RP 168.

Trial counsel did not perceive this to be a comment on the evidence as there was no objection. Id. Nor does the statement reflect the court's opinion on the evidence. The court did not comment on the credibility, but merely made a correct factual statement—there was no evidence of drug *use* by anyone in the case. The defendant suggests that there was evidence of drug use presented because the defendant testified that he and the victim "partied" together. Brief of Appellant at 10, 23. There is no evidence that the defendant was using the term "party" to mean drug use. RP 162. While it certainly is possible, as defendant now suggests, that the defendant meant "partying" to mean the use of drugs, it is also possible that he used the term "partying" in its ordinary meaning—

that they attended parties together. To merely assume that the defendant meant that he and the victim used drugs together would be mere speculation. The court's comment was not a comment about the court's attitude toward the merits of the case—it was merely a statement made in response to the defendant's repeated violation of the court's pretrial ruling excluding reference to drug use. The court's statement is factually correct—the testimony of the defendant was that Rincon gave him jewelry in exchange for drugs, not that she was using drugs herself. The court's statement was not a comment on the evidence, but clearly a statement made to undo any prejudice caused by the defendant's continued violation of the court's order.

Moreover, the jury was instructed to disregard any statement by the court that it perceived as a comment on the evidence. Instruction 1, CP 36-54. The jury was instructed, in part, as follows:

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

Id.

To the extent that the court's remark could be perceived as a comment, this instruction would have cured any prejudice. The jury is presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d

493, 509, 647 P.2d 61 (1982). Therefore, any potential error in the court's comment was cured by the court's instructions to the jury.

4. THE DEFENDANT CANNOT ESTABLISH CUMULATIVE ERROR.

The doctrine of cumulative error 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).

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 sometime 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 errors 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. 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.")(emphasis added).

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 the 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. Coe, 101 Wn.2d 772 (holding that four error 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

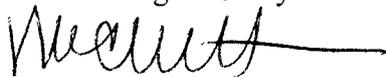
could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See Stevens, 58 Wn. App. at 498. In the instant case, for the reasons set forth in the preceding sections, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. The defendant cannot establish cumulative error.

D. CONCLUSION.

The State respectfully requests that this court affirm the defendant's convictions.

DATED: JULY 27, 2006

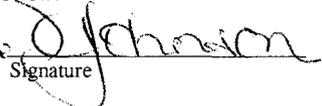
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Certificate of Service:

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.

7/28/06   
Date Signature

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