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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

JAMAL PAYTON, APPELLANT

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

No. 04-1-05687-0

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 when it admitted defendant's custodial statements when he received proper Miranda warnings and the statements were relevant?
2. Did the trial court properly exercise its discretion when it admitted Mr. Olsen's call to 911 as an excited utterance when Mr. Olsen was still under the stress of the beating he received moments before?
3. Did the trial court properly exercise its discretion when it denied defendant's motion for a new trial where the jury did not consider any extrinsic evidence and defendant was not prejudiced?
4. Did defendant fail to show that he is entitled to relief under the doctrine of cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

On December 17, 2004, the State charged JAMAL RASHON PAYTON, hereinafter "defendant," with one count of assault in the second degree while armed with a deadly weapon other than a firearm, in violation of RCW 9A.36.021(1)(c). CP 1-2. Defendant was accused of

striking Patrick Olsen in the face with a baseball bat, fracturing Mr. Olsen's cheekbone. CP¹ 1-2.

On June 2, 2005, the court held a CrR 3.5 hearing to determine if defendant's custodial statement regarding methamphetamine use could be admitted. RP 4-11. Defendant did not argue that he had not received proper Miranda² warnings, but rather that the statement was not relevant to the proceeding. RP 11. Defendant presented a motion in limine to exclude the statement because it would confuse the jury, would be unfairly prejudicial, and had no probative value in the case. RP 13-14. The State responded that the statement was not being offered as proof of character or a prior bad act, but as defendant's reaction to the interview. RP 17-18. In denying the motion, the court found that defendant had received proper Miranda warnings and that the statement was relevant to defendant's state of mind because a jury could conclude that defendant was attempting to minimize or justify the assault. RP 18-19.

Defendant also brought a motion in limine to exclude the details of the police investigation regarding defendant's girlfriend's theft of the victim's car. RP 14. The State argued that the investigation could not be excluded, because it was the motivation for defendant's assault on the

¹ Citations to Clerk's Papers will be to "CP." Citations to the verbatim report of proceedings for trial will be to "RP." The verbatim report of proceedings for post trial motions were not numbered consecutively, therefore citations will be to "RP" followed by the date of the hearing.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

victim. RP 16. The court denied defendant's motion because the investigation was part of the res gestae of the circumstances that culminated in the assault. RP 19.

Finally, the State requested the court to admit the contents of Mr. Olsen's 911 tape as an excited utterance. RP 20. Defendant objected, stating that this could not be an excited utterance because Mr. Olsen sounded calm, cool, and collected. RP 20-21. The court heard the tape, but withheld a ruling until proper foundation could be laid at trial³. RP 21.

During trial, defendant again argued against admission of the 911 tape because Mr. Olsen was calm, and he had testified that the suspects had already left his home before the officers arrived. RP 106-07. The court agreed that the tape might contradict some of Mr. Olsen's testimony, but ruled that the responding officer testified that Mr. Olsen was very emotional after the 911 call. RP 107. The court held that the tape was admissible as an excited utterance and was not testimonial in nature. RP 107.

On June 6, 2005, the case went to the jury. RP 176. On June 8, 2005, the jury returned a verdict, finding defendant guilty of assault in the second degree with a special verdict finding defendant was armed with a deadly weapon at the time of the commission of the crime. RP 217. During deliberations, the jury sent several questions asking for

³ The 911 tape was not transcribed, but the court heard the tape at RP 23.

clarification of instructions and terms. See CP 4-9. The court did not give any additional instruction. See CP 4-9.

On June 24, 2005, the parties went back to court for a motion brought by defendant to allow his attorney to contact one of the jurors. RP (06/24/05) 1-10. Defense counsel had already contacted one juror, with the court's permission, based on a comment one of the jurors made to counsel after the verdict was entered. RP (06/24/05) 5. According to counsel, the juror had "alleged that a pivotal part of the jury deliberation centered on whether or not there was a baseball bat involved in the assault that took place on the victim in this case. . . He said that in the course of their deliberations, that an interesting point was whether or not there was a baseball bat." RP (06/24/05) 8-9.

During voir dire, a prospective juror had informed the court that she was "an officer of the Pierce County property room and all of the evidence in this case that comes through here and I may be familiar with it." RP (06/24/05) 9. That prospective juror was ultimately excused for cause, based on her friendship with the prosecutor assigned to the case. RP (06/24/05) 9. Based on this exchange, another juror, Kathryn Gustafson, believed the dismissed juror had seen the baseball bat. RP (06/24/05) 9. The court granted defendant's motion to contact Ms. Gustafson. CP 31, RP (06/24/05) 11.

On August 11, 2005, defendant filed a motion for a new trial based on an interview with Ms. Gustafson. CP 33-39. The State responded in

opposition to a new trial on October 24, 2005. CP 40-72. On February 10, 2006, the court heard defendant's motion for a new trial. RP (02/10/06) 2. Ms. Gustafson testified at the hearing. RP (02/10/06) 6. Ms. Gustafson testified that she recalled the property room officer state that she had seen the weapon in the evidence room. RP (02/10/06) 8. Ms. Gustafson did not think anyone on the jury discussed the property officer's statements during deliberation, and it was not until she was speaking with defense counsel after the trial that she brought it up. RP (02/10/06) 10.

Defendant argued that the jurors considered extrinsic evidence when they returned the guilty verdict and this resulted in prejudice. RP (02/10/06) 14-16, 19-20. The court denied the motion, holding that, "based on this one juror's testimony, I don't find that any extrinsic evidence was brought into the jury room which should result in the Court disregarding the deliberations and ultimate conclusions of the jury." RP (02/10/06) 22.

Defendant was sentenced to a mid-range sentence of 72 months, together with a deadly weapon enhancement of 12 months. CP 93-105, RP (02/10/06) 39. At the same time, defendant was sentenced to two unrelated crimes to be served concurrently with his sentence for the assault charge. RP (02/10/06) 39.

Defendant has filed this timely notice of appeal. CP 73-90.

2. Facts

On October 21, 2004, between 6:00 and 7:00 p.m., Patrick Olsen and an acquaintance named Joe, were having some beers when defendant and another man, Youngster, arrived at Patrick Olsen's residence⁴. RP 82, 114. Defendant confronted Mr. Olsen about a police report Mr. Olsen had filed about defendant's girlfriend. RP 84, 89-90. Defendant had a baseball bat, and Youngster had a knife. RP 81.

Mr. Olsen spoke with defendant for approximately ten minutes. RP 84. Defendant told Mr. Olsen that he should not have spoken to law enforcement when defendant's girlfriend stole Mr. Olsen's car and that Mr. Olsen's testifying against her was, "messed up." RP 90. Mr. Olsen testified that he was rude and "lippy" in response, and told defendant and Youngster to get out of his house. RP 90.

Defendant started swinging at Mr. Olsen with the bat and Youngster lunged in with the knife. RP 91. The attack lasted for five to ten minutes, with defendant and Youngster striking Mr. Olsen on his head and body with bat, knife and fists. RP 84, 92-93. Mr. Olsen received several blows to the head, at least one of which fractured his cheekbone. RP 81. Mr. Olsen, his hands raised in a defensive position, had closed his eyes and did not see which blows were caused by which weapon. RP 122.

⁴ Mr. Olsen testified that defendant arrived sometime between 6:00 and 8:00 p.m., but Lakewood Police Officer Shawn Noble testified that he arrived on the scene at approximately 7:10 p.m. in response to Mr. Olsen's 911 call. RP 64.

He did know, however, that defendant was the one who caused the injury to his cheek because defendant said he, “had a hard head and [he] should have went [sic] down.” RP 102-03. Joe did not join in the attack, nor did he try to stop it. RP 119, 126.

After the attack, Mr. Olsen was on the ground. RP 93. Defendant told him that if he got up, he would take the bat to him again. RP 93. Then defendant told Mr. Olsen that he and Youngster were going to take the television and whatever else they wanted. RP 93. Youngster left to get a truck to load up Mr. Olsen’s television. RP 98-99.

Mr. Olsen found an opportunity to run out the side door of the house while defendant was distracted. RP 95. Mr. Olsen’s uncle lived nearby and Mr. Olsen was able to run to his house. RP 95. He used his uncle’s phone to call 911 and reported a robbery in progress. RP 95. As he was on the phone, Mr. Olsen saw defendant and Joe exit his house and leave the area, heading in different directions. RP 96-98.

Officer Noble arrived within a few minutes of Mr. Olsen’s call. RP 99. By the time he contacted Mr. Olsen, defendant and Joe had already left. RP 65. Mr. Olsen was very upset and emotional, as if he had gone through a traumatic experience. RP 67. Officer Noble saw bruising around Mr. Olsen’s left eye and a cut on the left side of his face. RP 68-69. He called the fire department to check Mr. Olsen’s injuries. RP 70.

The paramedics did not transport Mr. Olsen to the hospital, but did inform him that he should seek medical attention if he had further pain.

RP 74. The next day, Mr. Olsen went to the hospital on his own where he found out that his cheekbone had been broken. RP 81, 101. Mr. Olsen had to have a plate put into his cheek. RP 101-02.

After the paramedics tended to Mr. Olsen, Officer Noble took his statement. RP 71-72. Mr. Olsen told him he knew his assailants, but only knew their street names or aliases. RP 71. Mr. Olsen knew defendant as "JP." RP 72. Officer Noble went back to the station to begin his investigation. RP 73. He spoke to other officers who knew "JP" to be defendant. RP 73.

Detective Jeff Paynter was assigned to the case in November, 2004. RP 29. By December of that year, Detective Paynter determined that defendant was the suspect who had swung the bat at Mr. Olsen. RP 30. Mr. Olsen identified defendant from a photo montage. RP 33.

On December 14, 2004, Detective Paynter contacted defendant at the Pierce County jail. RP 36. Because defendant was in custody, Detective Paynter read his Miranda warnings before conducting the interview. RP 37. Defendant waived his rights and agreed to speak to Detective Paynter about the incident. RP 37. Defendant repeatedly denied that he had swung a bat at Mr. Olsen. RP 38. He admitted that he confronted Mr. Olsen about his girlfriend, but said that the conversation was not threatening. RP 40. Toward the end of the interview, defendant volunteered the statement that his life was out of control because of methamphetamine use. RP 38, 42. Detective Paynter stated that

defendant was upset and had cried several times throughout the interview.

RP 38.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED DEFENDANT'S CUSTODIAL STATEMENTS WHEN HE RECEIVED PROPER MIRANDA WARNINGS AND THE STATEMENTS WERE RELEVANT.

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; see also State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (threshold "very low," and "[e]ven minimally relevant evidence is admissible"). Relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. ER 403. "Unfair prejudice" generally means an undue tendency to suggest a decision on an improper basis, commonly an emotional one. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

Admission of evidence is within the trial court's sound discretion, which will not disturb on review absent a showing of abuse. State v. Sanford, 128 Wn. App. 280, 284, 115 P.3d 368 (2005); see also State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on

untenable grounds, or for untenable reasons.” Neal, at 609. The appellant bears the burden of proving abuse of discretion. Sanford, 128 Wn. App. at 284. The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. State v. Bourgeois, 133 Wn.2d, 389, 403, 945 P.2d 1120 (1997). Erroneous admission of evidence is not grounds for reversal “unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Sanford, 128 Wn. App. at 285 (citing State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

A defendant's conduct is a circumstance for the jury to consider when it is not “likely to be the conduct of one who was conscious of his innocence” or “tend[s] to show an indirect admission of guilt.” State v. McGhee, 57 Wn. App. 457, 461, 788 P.2d 603 (quoting State v. Kosanke, 23 Wn.2d 211, 215, 160 P.2d 541 (1945)), review denied, 115 Wn.2d 1013, 797 P.2d 513 (1990); see, e.g., State v. Freeburg, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001) (resistance to arrest, concealment, and assumption of a false name admissible to show consciousness of guilt); State v. Cotten, 75 Wn. App. 669, 689-90, 879 P.2d 971 (1994), (defendant's silence when accomplice described drive-by shooting to friend constituted an adoptive admission; “reasonable to conclude” that the defendant would have responded if the description was false), review denied, 126 Wn.2d 1004 (1995).

Here, the trial court admitted defendant's custodial statement to Detective Paynter that his life was out of control due to methamphetamine use. The State did not offer the statement as proof of character or a prior bad act, but as defendant's reaction to the interview. RP 17-18. The court read the officer's statement prior to hearing argument. RP 12. The court decided to allow the statement because defendant had received proper Miranda warnings and found that it was relevant to defendant's state of mind where the jury could conclude that defendant was attempting to minimize or justify the assault. RP 18-19.

Defendant's claim that he could not have been minimizing or justifying his action since he denied performing the assault through the interview is without merit. Denial and minimization are not mutually exclusive concepts. A person can deny specific conduct, but still attempt to minimize or justify their behavior when confronted. Here, defendant denied assaulting Mr. Olsen, but he was crying throughout the interview and admitted that his life was out of control due to methamphetamine use. RP 4-11. While he never admitted hitting Mr. Olsen, his reaction to the interview and the statement that his life was out of control, coupled with the excuse of his drug use, were relevant to the proceedings and cast doubt on defendant's denials.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED MR. OLSEN'S CALL TO 911 AS AN EXCITED UTTERANCE WHEN MR. OLSEN WAS STILL UNDER THE STRESS OF THE BEATING HE RECEIVED MOMENTS BEFORE.

An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2). Three closely connected requirements must be satisfied for a hearsay statement to qualify as an excited utterance. First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Third, the statement must relate to the startling event or condition. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

The key determination is “ ‘whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.’ ” State v. Strauss, 119 Wn.2d 401, 416-417, 832 P.2d 78 (1992) (quoting Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

The passage of time between the startling event and the declarant's statement is a factor to be considered in determining whether the statement is an excited utterance. State v. Woodward, 32 Wn. App. 204, 206-07, 646 P.2d 135, review denied, 97 Wn.2d 1034 (1982). The passage of time

alone, however, is not dispositive. State v. Thomas, 46 Wn. App. 280, 284, 730 P.2d 117 (1986) (trial court did not err in determining that statements made after a six to seven hour time span qualified as excited utterances), aff'd, 110 Wn.2d 859, 757 P.2d 512 (1988); State v. Flett, 40 Wn. App. 277, 699 P.2d 774 (1985) (a statement made seven hours after a rape was properly admitted as an excited utterance because of the declarant's "continuing stress" during that time period).

Moreover, an excited utterance may also be given in response to a general question, such as asking what happened. State v. Owens, 128 Wn.2d 908, 913, 913 P.2d 366 (1996). For instance, in Strauss, 119 Wn.2d at 405-406, the defendant picked up a 17 year-old girl, took her back to his apartment where he repeatedly raped her at knifepoint. When the officer took the victim's statement, she was very distraught, very red in the face, crying, and appeared to be in a state of shock three and half-hours after the incident. Id. at 416. The court found that the victim was still under the influence of the incident when she made her statement to the police. Id.

A trial court's determination that a statement falls within the excited utterance exception will not be disturbed absent an abuse of discretion. State v. Thomas, 150 Wn.2d 821, 854, 83 P.3d 970 (2004). The trial court's ruling, therefore, will not be disturbed unless this court believes that no reasonable judge would have made the same ruling. Id.

In this case, the prosecution sought to introduce, as excited utterances, the statements Mr. Olsen made to the 911 operator. RP 20. Defense counsel objected arguing the statements were not an excited utterance because Mr. Olsen was “calm, cool, collected.” RP 20-21. The court heard the tape, pretrial, without ruling on its admissibility until such time that the State could lay proper foundation. RP 21-23. The State offered the tape at the end of Mr. Olsen’s direct examination. RP 110. At trial, defendant again objected to the tape because “it’s calm; it’s collected,” and because the suspects had left the house while Mr. Olsen was on the phone to 911, there was no threat to him. RP 106-07. The court held that the tape was admissible as an excited utterance based on the responding officer’s testimony that Mr. Olsen was “very emotional, very upset when he, the officer, arrived, which was after the 911 call. RP 107. Specifically, the Officer Noble testified:

He was upset. I don’t specifically recall if he was crying, but he was very emotional to me. Definitely struck me as if he had gone through a traumatic incident by the way he was saying, you know, “Come on. Come on.” And for me, I didn’t immediately rush into the apartment because I wasn’t sure exactly what was going on or who was in the area, and so I was trying to get some more information from him from a slight distance until we could determine what was going on, and so - - but he was very emotional about what had occurred.

RP 67. Officer Noble also testified that he immediately noticed that Mr. Olsen had some bruising and a cut on the left side of his face. RP 68.

The trial did not abuse its discretion in finding that the statements were excited utterances. There was evidence that Mr. Olsen called 911 while still under the influence of a startling event. Mr. Olsen was physically assaulted by two armed men. RP 90-93. During the course of the attack, Mr. Olsen received several blows to the head, including at least one blow that fractured his cheekbone. RP 81, 92. Mr. Olsen was able to run out of his apartment only after defendant became distracted and he immediately fled to his uncle's house to call 911. RP 95. The police arrived within a couple of minutes of Mr. Olsen's call. RP 99. That Mr. Olsen sounded calm on the recording does not suggest that he had gotten over the attack. Mr. Olsen testified that he felt numb, as if from adrenaline. RP 124. Feeling numb could also be the result of shock. The responding officer had the best opportunity to observe Mr. Olsen's demeanor and he saw that Mr. Olsen was very emotional, upset, and had clearly been through a traumatic experience. RP 67. The record supports the trial court's determination that Mr. Olsen's statements to the 911 operator were properly characterized as excited utterances.

Defendant argues that Mr. Olsen was not under the stress of the incident because he was improvising rather than accurately reporting during his 911 call. See Appellant's brief at 16. Specifically, defendant contends that Mr. Olsen's report that people were taking his television and his identification of Joe as one of his assailants were both untruthful. See

Appellant's brief at 16-17. In support of this argument, defendant relies on State v. Brown, 127 Wn.2d 749, 903 P.2d 459 (1995). In Brown, the victim fabricated her report of the incident itself. She told police that her attacker had a knife during the rape, but later admitted that she never saw a knife. The Supreme Court reversed Brown's conviction because the trial court admitted the victim's report to police as an excited utterance. Id. at 759. The facts of Brown differ from the case at bar. In Brown, the evidence showed that the victim discussed with her boyfriend what she would tell police before she made the call and had decided on the fabrication at that point. Id. at 753. The Supreme Court reasoned that "she had the opportunity to, and did in fact, decide to fabricate a portion of her story" prior to calling police. Id. at 759.

Defendant's reliance on Brown is misplaced for two reasons. First, there was no evidence that Mr. Olsen fabricated a portion of his story prior to police arrival as the victim did in Brown. Second, when Mr. Olsen told the 911 operator that people were taking his television and that Joe was involved in the attack, it was not an untruth on the merits of the incident itself.

Mr. Olsen told the 911 operator that people were taking his television set. RP 120. Defendant told Mr. Olsen that he was going to take Mr. Olsen's television and whatever else he wanted to grab. RP 93. Youngster left his apartment to get a truck in order to load up his television. RP 93, 99. When Mr. Olsen called 911, defendant was still in

his apartment. RP 94. As far as Mr. Olsen knew at the time, Youngster was still coming back with the truck. Only after the police arrived a few minutes later was it known that defendant was not going to make good on his threat to take Mr. Olsen's property.

Mr. Olsen also told the 911 operator that Joe had been involved in the attack, even though he had not participated. RP 119. Mr. Olsen admitted he was on friendly terms with Joe, but never characterized Joe as a friend. RP 86. In fact, Mr. Olsen never knew Joe's last name. RP 126. Joe had spent the previous night at Mr. Olsen's apartment to help him watch the place. RP 118. However, Mr. Olsen thought Joe might have been involved in the attack because Joe merely watched as Youngster and defendant beat Mr. Olsen. RP 126. Joe made no attempt to stop the assailants or otherwise help Mr. Olsen. RP 126. When Mr. Olsen escaped to his uncle's house, he could have thought that Joe was a part of the attack because of his inaction.

In contrast, the victim in Brown went home, and was well away from her attacker when she discussed with her boyfriend what to make up to tell police. Brown at 753. She was safe at that point. Mr. Olsen ran directly to his uncle's house to call 911. RP 95. Defendant did not leave the apartment until after Mr. Olsen was on the phone. RP 94. Until the officers arrived at the scene, Mr. Olsen had no way of knowing if defendant was going to come back to follow through on his threat to take his television or to continue beating him.

Defendant has failed to show that the trial court abused its discretion when it determined that the 911 call was admissible as an excited utterance.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION FOR A NEW TRIAL WHERE THE JURY DID NOT CONSIDER ANY EXTRINSIC EVIDENCE AND DEFENDANT WAS NOT PREJUDICED.

Pursuant to CrR 7.5(a)(1), a trial court may grant a defendant's motion for a new trial if it "affirmatively appears that a substantial right of the defendant was materially affected" by the jury's receipt of "any evidence, paper, document or book not allowed by the court." State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). A new trial is warranted in such circumstances only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly. Id. (citing State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997)). A trial court's denial of a motion for a new trial will not be reversed on appeal unless there is a clear showing of abuse of discretion. Id. "An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion." Id. (internal citations omitted).

Generally, courts are reluctant to inquire into how a jury arrives at its verdict. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). "There must be a strong, affirmative showing of misconduct in order to

overcome the long-standing policy in favor of stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” Pete, at 552. However, it is misconduct for a jury to consider extrinsic evidence. Id. If a jury were to consider such evidence, that may be a basis for a new trial. Id. “Extrinsic evidence” is information that is outside the evidence admitted at trial, either orally or by document. Id. Extrinsic evidence is improper because it is not subject to objection, cross-examination, explanation, or rebuttal. Id. at 553.

Consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.” State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967). Something more than a possibility of prejudice must be shown. Pete, 152 Wn.2d at 556.

In the present case, the court held a fact finding hearing to determine if the jury had heard extrinsic evidence and if defendant had been prejudiced. Ms. Gustafson, one of the jurors, testified at the hearing. RP (02/10/06) 7. She testified that, during jury selection, she had heard one prospective juror say that she was a property officer and had seen the weapon for the case in the evidence room. RP (02/10/06) 8. Ms. Gustafson said that the prospective juror’s statement never became a topic of discussion among the seated jurors, and that the statement was never raised during deliberation. RP (02/10/06) 8, 10. Ms. Gustafson assumed that the other jurors heard the same statement and believed that the bat

was in the property room, but she admitted that she, “assume[ed] it was an assumption.” RP (02/10/06) 11. In fact, Ms. Gustafson never mentioned the statement herself until after trial when she spoke to defense counsel. RP (02/10/06) 10. Ms. Gustafson stated that she based her assumption that there was a weapon, not on the prospective juror’s statements, but from the 911 tape and other evidence presented at trial. RP (02/10/06) 8-9.

Ms. Gustafson’s testimony is consistent with the taped interview she gave the defense investigator prior to the hearing. See CP 40-72. Ms. Gustafson told the interviewer that she and the other jurors had to determine the existence of the weapon based on circumstantial evidence since the State had not presented it at the trial. CP 43-46.

The parties agreed that the prospective juror had never mentioned a weapon during voir dire, and had only stated that she was familiar with the evidence in the case. RP (02/10/06) 12. Neither party had found the property officer’s statement objectionable at the time it was made, nor did either party request a limiting instruction or a new jury panel. RP (02/10/06) 13, 17.

The court denied the motion for new trial, stating:

Okay. Well, one never knows what goes through someone’s mind, but the juror that was discharged never mentioned a weapon, and I think you both agree on that. I don’t have the transcript of that. I don’t have any specific recollection, other than discharging the juror because that person, I think, would know Mr. Greer more than anything else.

But nonetheless, whatever that person said was not of such prejudicial magnitude that it resulted in a curative instruction by either counsel or a motion to strike anything they may have said or a motion for a new venire or new panel. So what that person said wasn't particularly significant, other than they worked in the property room and there was some reference to seeing evidence. So it didn't result in any motion by anyone. It wasn't particularly significant.

At what point in time Ms. Gustafson misunderstood that statement is entirely unclear. I think she testified to the fact it really wasn't a topic of discussion. Indeed, there was evidence of a 911 call, a statement made, and plus the significant evidence of the nature and extent of the injuries sustained by the victim in this case, as I recall. And there has been no testimony presented that this juror or any other juror brought any extrinsic evidence into the jury room that should result in a new trial.

What the jurors talk about, we generally don't question their motives, intents or beliefs or how evidence affects them, things that adhere in the jury room. But based on this one juror's testimony, I don't find that any extrinsic evidence was brought into the jury room which should result in the Court disregarding the deliberations and ultimate conclusions of the jury.

So based on what has been presented by virtue of the transcript, motion and response and even the testimony of today, I am going to deny the motion for a new trial. I do not find misconduct or the consideration of extrinsic evidence during the deliberation process by the jury panel. So I am going to deny your motion.

RP (02/10/06) 21-22.

It is clear from the record that the court did not abuse its discretion when it denied defendant's motion to dismiss. The court believed Ms.

Gustafson's testimony that the prospective juror's statement was not a topic of discussion among the jurors. "Credibility 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). The court considered the statement and the fact that it was not so offensive as to raise an objection or any request for a curative instruction. The court also considered the fact that Ms. Gustafson testified that the statement was not part of the jury deliberation. The court also considered the evidence which was admitted, and found that there was sufficient direct and circumstantial evidence through the 911 tape, and Mr. Olsen's injuries, that defendant was not prejudiced by Ms. Gustafson's misunderstanding. The record reflects that the trial judge's ruling was not unreasonable under the circumstances of this case.

There was no extrinsic evidence presented to the jury in this case. No unadmitted evidence was sent to the jury room. See Pete, 152 Wn.2d at 551 (police report and defendant's written statement were not admitted at trial, but sent to the jury room). A juror did not have improper communication with spectators or witnesses. See State v. Cummings, 31 Wn. App. 427, 428, 642 P.2d 415 (1982) (the defendant's wife overheard a spectator tell a juror he would not be surprised if the defendant was guilty because the defendant was a con and capable of anything). Nor did any juror perform any individual research. See State v. Boling, 131 Wn. App. 329, 331, 127 P.3d 740 (2006) (a juror performed independent

research on the internet). Rather, one juror misheard a statement by a prospective juror, and then she did not discuss the statement with the other jurors, nor did she base her decision to convict on that statement. Clearly the jury did not consider any extrinsic evidence in this case.

Despite defendant's contention to the contrary, the court had no evidence before it that the jurors must have discussed this issue because more than one juror was aware of it. The trial defense attorney first heard of the issue when he stayed behind to speak to the jurors after they returned their verdict. RP (06/24/05) 5. Mr. Koku, a juror on the case, indicated that a pivotal part of the jury deliberation centered on whether or not there was a baseball bat involved in the assault. RP (06/24/05) 8. However, Mr. Koku had some problems communicating in English and it was apparent from the jury questions that only he had a question of whether or not there was a bat. See CP 4-9 (one of the jury questions indicates that the jury stood at 11-1 in favor of conviction, but that one juror did not understand the English definitions of "readily available" and "easily accessible"). The court did not have any kind of affidavit from Mr. Koku, but did have the testimony of Ms. Gustafson⁵. RP (06/24/05) 10. Ms. Gustafson testified that the jury based its determination of the presence of a bat on the 911 tape and from the evidence of the trial. RP

⁵ Mr. Koku was subpoenaed to same post trial hearing as Ms. Gustafson, but Mr. Koku did not appear. RP (02/10/06) 3.

(02/10/06) 9. Ms. Gustafson also testified that she first expressed her curiosity about the lack of the bat at the post verdict discussion with the defendant's attorney. RP (02/10/06) 10. Additionally, she explained in her affidavit that the rest of the jurors informed Mr. Koku that he would have to base his determination on circumstantial evidence. See CP 40-72 (State's Response to Defendant's Motion for New Trial includes the defense investigator's transcript of his interview with Ms. Gustafson). The evidence before the court indicates that Ms. Gustafson mentioned the prospective juror's statements after the verdict was entered when she spoke to the defense attorney, and Mr. Koku was part of the conversation. Ms. Gustafson did not raise the issue during deliberations, nor did she inform Mr. Koku that he had to find defendant guilty because there was a bat in the evidence room. Defendant's contention that this issue must have been a topic of discussion during jury deliberations is without merit.

Defendant was not prejudiced by the juror's actions in this case. As argued above, there was no evidence before the court that the jurors had discussed Ms. Gustafson's misunderstanding during deliberations. Additionally, the State presented sufficient evidence through the 911 call, Mr. Olsen's testimony, and Mr. Olsen's medical injuries for a rational fact finder to believe that defendant hit Mr. Olsen in the face with a baseball bat. Because the prospective juror's statement was not discussed among

the jurors, and there was sufficient circumstantial evidence that defendant hit Mr. Olsen with a bat presented at trial, defendant was not prejudiced by Ms. Gustafson's mere assumption that the jurors assumed there was a bat.

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 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. 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 some 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

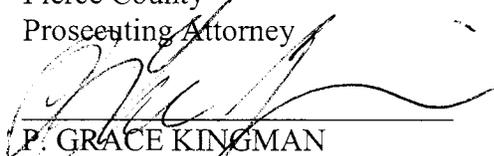
the trial. He has failed to show that there was any prejudicial error, much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court to affirm defendant's conviction for assault in the second degree while armed with a deadly weapon.

DATED: October 24, 2006.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

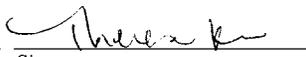


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Kimberley DeMarco
Rule 9 Legal Intern

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.

10-25-06 
Date Signature

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