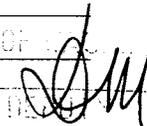


NO. 35019-0

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY: 

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RYNA RA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick Fleming

No. 05-1-04549-5

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 excluding evidence of gang activity, and did the defendant waive any objection to the testimony that was offered by failing to preserve the issue below? (Appellant's Assignment of Error No. 1).
2. Has the defendant failed to meet his burden in establishing prosecutorial misconduct when no misconduct occurred, the proper objections were not raised below, and any error was harmless? (Appellant's Assignment of Error No. 2).
3. Was there sufficient evidence presented for a rational trier of fact to find the defendant guilty of attempted murder in the first degree when the defendant shot at an unarmed victim multiple times before shooting the victim in the chest after a verbal altercation? (Appellant's Assignment of Error No. 3).
4. Is any claim of a violation of the appearance of fairness doctrine waived when the defendant did not properly preserve the issue below? (Appellant's Assignment of Error No. 4).
5. Is the defendant entitled to relief under the doctrine of cumulative error when he has not shown that error occurred? (Appellant's Assignment of Error No. 5).

B. STATEMENT OF THE CASE.

1. Procedure

On May 16, 2006, Ryna Ra, hereinafter “defendant,” was charged by corrected amended information with attempted murder in the first degree, drive-by shooting, and two counts of unlawful possession of a firearm in the second degree. CP 102-104. On May 4, 2006, both parties appeared for trial. RP 1. At the close of evidence, the court dismissed one count of unlawful possession of a firearm in the second degree. CP 194-195; RP 874. On May 19, 2006, the defendant was convicted of attempted murder in the first degree, drive-by shooting, and one count of unlawful possession of a firearm in the second degree. CP 189-192. The defendant was sentenced to a total of 351 months of confinement. CP 210-222.

2. Facts

a. Gang Evidence

On May 4, 2006, defendant moved to exclude gang evidence, and the State agreed. RP 6-7. On May 8, 2006, the defendant again stated that he wanted to exclude gang evidence. RP 22. On May 15, 2006, during the State’s case-in-chief, defense counsel requested that the court verify that the State had turned over all documentation or evidence regarding alleged gang activity. RP 483. Defense counsel indicated that his concerns were based on previous representations of the court. RP 483. Previously, outside the presence of the jury, the State had indicated that

the occupants of the SUV were gang members. RP 361-365. In response to the defendant's request for additional evidence that the defendant was involved in gang activity, the State indicated that the only additional evidence it had was historical evidence which was not relevant to the shooting. RP 484. The State again verified that it was not going to be offering gang evidence. RP 484. The court denied the defendant's motion for additional evidence of gang activity, finding that such evidence is not relevant and gang evidence was excluded. RP 486.

On cross-examination of Samnang Bun, defense counsel asked him if he knew anyone who had been shot at. RP 755. The State objected and indicated there was an issue with a door being opened. RP 755. Outside the presence of the jury, the State questioned Bun regarding gang affiliation. RP 756. Bun acknowledged that he has an "A" and a "B" on each of his hands, and that it stood for "Asian Baller." RP 756-757. He stated that he has "a few" ties to the Asian Baller gang. RP 757. He also stated that the Loc'd-Out Crips wear blue and that he carried a blue bandana in the past. RP 757-758.

The State argued that defense counsel opened the door to the admission of gang evidence by asking Bun if he had ever seen another person shot or shot at, and if he had viewed news accounts of high school shootings. RP 761. The court ruled that the gang evidence was not going to be admitted. RP 763. The court made the following ruling:

Let me tell you both something, Mr. Underwood and Mr. Greer, that this is a highly prejudicial issue about gangs. The Court has already ordered that the issue of gangs not be part of this trial. This trial is against Mr. Ra that he allegedly shot somebody. And to the best of our ability, we're going to referee this thing so that it's fair to both sides. And you're treading, Mr. Underwood, in my opinion, on very, very thin ice. I think you are potentially opening the door for something that is terribly prejudicial and unfair to the defendant, Mr. Ra, so we're going to stay away from that.

RP 764.

Again outside the presence of the jury, defense counsel stated that he did not want to open the door to gang evidence. RP 795. Defense counsel asked for clarification as to whether questioning the defendant regarding as to why he had a firearm would open the door to the admission of gang evidence. RP 796. The court made the following ruling:

Let me tell you something, Mr. Underwood, and you have made your record, I think. Anybody sitting here like I have and listened to the testimony here, in particular the testimony of the last witness, it's not a stretch at all to conclude that when he talks about protection, he's not talking about protection from some abstract problem like Columbine or something else. When he says protection, he's talking about his relationships with other people who have cliques or gangs or whatever; and when he goes out, he goes out for his protection, quote, unquote, relating to activities involving people in cliques or gangs that are adversaries of his. It's just that simple. It's a fiction to think and lead the trier of fact in another direction. It's not fair. So, if that happens, I'm going to allow the State to bring in what their position is with reference to it's not just protection, quote, unquote, that they're carrying these

things, it is because their relationship with others in the community where there's a lot of fear and violence occurring.

And that's all I can do. It's a stretch to do anything else, as you're suggesting, it seems to me.

RP 800.

After the defendant's direct testimony, the State presented argument to the court that the defendant had opened the door to gang evidence. RP 814. The State asserted that on direct examination, the defendant portrayed himself as essentially law abiding. RP 815. The court declined to admit gang evidence. RP 846-847. There were no objections made by the defendant that the State had violated the court's ruling.

b. Trial

On September 14, 2005, James Huff, the victim, went to the waterfront at the Les Davies Pier with his girlfriend, Vianna Cornatzer, and his friends Ashley Suhovernik and Nicholas Serdar. RP 236-230, 281, 300. The four had planned to take a walk. RP 300. To get to the waterfront, the victim and Cornatzer drove in one vehicle, Suhovernik and Serdar in another vehicle. RP 302. Both couples pulled into a parking lot in the waterfront area. Id. It was approximately 10:30 p.m., and there were three to four cars in the parking lot. RP 301, 303. The victim was putting batteries in his flashlight while Cornatzer exited the car. RP 303.

When the victim got out of the car, he heard someone making “cat calls” like “nice ass.” RP 304. As the victim approached Suhovernik and Serdar, he realized that the comments were directed at Cornatzer, who told him to ignore it. Id. The victim then heard a voice say “Hey bitch, nice ass,” or a similar statement. Id. The victim could tell that the comments were coming from a silver SUV in the parking lot. RP 305. The victim looked over to the SUV, and the occupants began making comments to him like “Hey, bitch, what are you—what the fuck are you going to do? I’m going to take that ass from you.” Id. The victim went to look in the water with the group, but the occupants of the SUV continued to aggravate him. RP 307.

The victim walked toward the SUV. RP 308. When he was approximately five to ten feet away, the front passenger of the SUV, later identified as the defendant, pulled out a gun and fired. RP 308, 310, 813. Serdar heard the first shot whiz past him. RP 457. As the victim got closer to the SUV, the defendant fired again. RP 308. During the second shot the gun was aimed at the victim’s head. RP 313. The victim could feel the flash go by the side of his head. RP 313-314. The victim ducked to the side, and his reaction was to kick the gun, or kick in the direction of the gun. RP 308. When he kicked, he made contact with the door of the vehicle. RP 311. The defendant then pointed the gun down and shot the victim in the chest. RP 308.

The victim stated that it felt like someone had hit him in the chest with a bat and that someone was tearing his insides. RP 315. He walked back toward Cornatzer's car, and attempted to keep pressure on the wound. Id. The victim had received military training as a combat life saver and was trying to prevent himself from dying. RP 316. He had become "woozy" from too much blood loss. Id. The bullet exited out of the back of the victim's body. RP 317. The victim had been shot in the stomach and required surgery. RP 318. The injury also resulted in the victim's spleen be removed and having a chest tube inserted. Id. The victim suffers from a weakened immune system, difficulty breathing, and an inability to gain weight. RP 319.

Cornatzer testified that she observed an SUV in the parking lot. RP 229. Once Cornatzer got out of her vehicle, she heard people in the SUV making a comment that she had a "nice ass." RP 231-232. Suhoversnik and Serdar heard the cat calls. RP 384, 442. Cornatzer heard several voices coming from the SUV. RP 232. Suhoversnik could tell the voices were coming from the SUV. RP 389.

Cornatzer asked them to leave them alone. RP 232. The victim also told the occupants of the SUV to leave them alone. RP 448. In response, Serdar heard someone in the SUV say "I'm going to kick your fucking ass." RP 448. The victim said something similar back to the SUV. Id. The victim started to walk toward the SUV and Cornatzer told him not to go over to it. RP 233. At first the victim was not angry, but the

people in the SUV continued to make comments to Cornatzer. RP 234. Serdar heard someone in the SUV say, “You’re a fucking bitch.” RP 449. They appeared to be provoking the victim by telling him they were going to take his girlfriend from him. RP 269. The victim walked over to the SUV. RP 271. Almost as soon as the victim reached the SUV, the shooting began. Id.

Cornatzer heard the first shot. RP 238. She heard the second shot shatter Suhovernik’s car window. Id. After the second shot, Cornatzer heard the victim make a statement to the effect of “Oh, you’re going to F’en shoot at me now?” RP 239. Then Cornatzer heard a third shot and the victim walked away from the SUV holding himself. RP 239-240. She observed that the victim had been shot in his chest. RP 244. She never saw the victim touch the SUV. RP 280.

On September 14, 2005, Tacoma Police Officer Eric Scripps and his partner were flagged down on Ruston Way. RP 74-75. As they were driving past a parking lot, a man waived them down, stating that his friend has been shot by people in an SUV, which the man pointed at. RP 76. Officers Scripps managed to get behind the SUV and conduct a stop. Id. Inside the SUV, officers recovered a firearm. RP 87. A second firearm was recovered by Officer Grant. RP 118-120.

Officer Daniel Grant and his partner, Officer Brian Kim, responded to a call regarding a shooting near Les Davies Pier on Ruston Way. RP 106. Officer Grant provided cover for the other officers who

conducted the stop of the SUV. RP 107. Officer Grant contacted the defendant, who was the front seat passenger. RP 109. Officer Grant asked the defendant if he had been involved in a shooting, and the defendant indicated that he had not. RP 114. Officer Grant was given information that a gun had been thrown out, so he attempted to look for it on Ruston Way. RP 117-118. Officer Grant observed an empty lot and some low bushes across the street on Ruston Way. RP 118-120. He searched the low bushes and located a Smith and Wesson semiautomatic pistol on the ground. Id.

Vuthy Chau testified that he went to high school with the defendant. RP 144. On September 14, 2005, Chau and the defendant were in Chau's parent's SUV with two other individuals. RP 145-146. Earlier in the day, Chau had observed the defendant with a gun. RP 147. The defendant had shown Chau the gun. RP 155. One of the other individuals present, Samnang Bun, also had a gun. RP 158-159.

The defendant was seated in the front passenger seat of the SUV. RP 146. At the time of the shooting, the SUV was parked in a parking lot near the waterfront. RP 151. On direct examination, Chau stated that he was in the SUV at the time of the shooting. RP 162. On cross-examination, Chau stated that he was walking toward the SUV. RP 184.

Chau observed the defendant shoot his gun three times. RP 161. He stated that after the first shot, the victim kicked the car. RP 174. He testified that he was afraid of the victim because the victim was trying to

attack him. RP 162-163. It did not appear to Chau that the victim was trying to do damage to the vehicle. RP 193. He was aware that the victim did not have a weapon. RP 168-169. Chau asserted that the defendant fired the first shot into the air. RP 169. The defendant then fired two additional shots. RP 172-174. The second shot struck the victim. RP 169. As the defendant was firing, Chau was trying to leave the scene because he did not want trouble. RP 161. He stated that the victim was still kicking the car as he tried to flee the scene. RP 197. On re-cross examination, Chau stated that the victim did not do anything else after initially kicking the car. RP 203. Chau told the police that the defendant had thrown his gun out of the window. RP 165. Chau denied that anyone inside the SUV said anything to any of the women near the parking lot. RP 186.

Dy Son testified that he was sitting in the rear driver's side seat of the SUV. RP 577. He stated that the defendant was the front seat passenger. RP 578. He stated that Chau, Bun, the defendant, and himself went to Ruston Way trying to find something to do. RP 587, 628. He observed two couples walking past the SUV. RP 589. Bun began making cat calls to the girls, hollering at them and calling them "sweet cheeks." RP 590. He stated that one of the males, the victim, who was with the women shined his flashlight towards the SUV. RP 595. Son stated that the defendant told the victim to stop shining the flashlight, and then fired a warning shot to scare him. RP 597-599. Son indicated that the victim

tried to open the door to the SUV and tried to attack the defendant. RP 599-600. After that, the defendant fired two to three more shots. RP 602. He saw the victim holding his stomach. RP 603.

Samnang Bun stated that he was seated in the rear passenger seat of the SUV. RP 742. He stated that he carried a gun for protection so that he and his friends would be prepared for anything that might happen. RP 746-747. Bun stated that the victim had made the mistake of responding to what he and his friends were doing. RP 749. He stated that he told the girls in the parking lot “Hey, baby, nice ass” and “Hey, sweet cheeks.” RP 768.

The defendant stipulated to having been convicted previously as a juvenile of a felony offense. CP 243-245 (exhibit # 15), RP 297. The defendant testified on his own behalf. RP 801. The defendant denied saying anything to the girls on Ruston Way. RP 808. He stated that Bun was harassing the girls. RP 809. He denied intending to kill the victim. RP 813. The defendant claimed that he fired two “warning shots” to scare the victim. Id. The defendant testified that the victim then tried to open the door and grab him, and he shot the victim. Id.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING GANG EVIDENCE AND NO SUCH EVIDENCE WAS OFFERED.

- a. The evidence the defendant now asserts was admitted as gang evidence was not objected to below, and any objection was waived.

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.

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.

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 erred in admitting gang testimony. Specifically, he alleges that the trial court erred in allowing Detective Bair to testify that he was assigned to the gang unit and in allowing Bun to testify that he carries guns. Br. of Appellant at p. 34. The defendant also asserts that questioning Bun regarding loyalty implied gang activity. Id. However, there were no objections raised during those specific portions of testimony. The defendant has failed to preserve this issue for review. If the defendant believed that the State had somehow violated the court's ruling, he could have raised an objection. The defendant failed to do so and has failed to preserve this issue.

- b. Assuming, arguendo, that this court were to reach the merits of the defendant's claim, the testimony that the defendant now asserts was admitted as gang evidence was not, in fact, gang evidence.

Even though in this case, the court specifically ruled that it was not going to allow admission of any evidence of gang activity, evidence of gang activity is not per se inadmissible. When evidence of gang membership or affiliation is offered for a legitimate purpose and not just to portray the defendant as a bad person, it is admissible. Evidence of a defendant's membership in a gang is relevant to show motive where the trial court finds there is a sufficient nexus between gang affiliation and motive for committing the crime. No evidence of gang affiliation or activity was offered into evidence. The State did not violate the court's ruling. RP 6-7, 486, 846-947.

The defendant asserts that the State introduced gang evidence through Detective Bair, who testified that he is in the gang unit and that cases are assigned to his division based on whether they are crimes against a person or crimes against property. RP 715. Detective Bair did not indicate that the defendant's case was a gang related case, nor did Detective Bair state that the defendant was in a gang.

The defendant states that "the prosecutor eagerly elicited detective Bair's 'gang unit' expertise and his hearsay testimony that various gang

unit professionals determined that Mr. Ra's was a gang case." Br. of Appellant at p. 34. Nowhere in Detective Bair's testimony does he even suggest that the defendant's case was gang related. The defendant does not specify which statements in Detective Bair's testimony are hearsay. There is nothing in Detective Bair's testimony that implicates that the defendant is in a gang or that the crime was gang related. While Detective Bair did state that he was assigned to the gang unit, he did not state that he only handled gang related crimes or that the current case was gang related.

Samnang Bun's testimony that he carried a gun for protection also does not imply gang activity. RP 743-744. Bun stated that he carried a gun and his friend has a gun so that they are prepared and no one messes with them. RP 745-746. Such statement also does not imply any gang activity. Bun denied that there was loyalty involved in his unwillingness to answer questions, and such question and answer does not suggest any gang activity. The defendant now asserts that Bun's testimony was designed to create an inference that the defendant and the other individuals in the SUV were gang members, but such an inference cannot be drawn from the testimony.

Neither the testimony of Detective Bair nor the testimony of Samnang Bun suggests that the shooting was gang related. The defendant may now assert that their testimony creates such an inference, but can point to nothing in the record on which to base such an inference. The testimony of Detective Bair was merely background information on

Detective Bair's current assignment. The word "gang" was not even used in Bun's testimony. In addition to failing to preserve this issue, as argued above, the defendant cannot establish that any of the testimony elicited was done so in violation of the court's order excluding gang evidence.

2. DEFENDANT HAS FAILED IN MEETING HIS BURDEN OF SHOWING THAT THE PROSECUTOR COMMITTED MISCONDUCT OR THAT EACH ISSUE NOW RAISED WAS PROPERLY PRESERVED BELOW.

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, 93 L.Ed.2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996), overruled in part on other grounds by State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002). 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).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. See, State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The court will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). In closing argument, a prosecutor is permitted reasonable latitude in arguing inferences drawn from the evidence admitted during testimony. State v. Papadopoulos, 34 Wn. App. 397, 401, 662 P.2d 59 (1983).

Except for the comment by the State that incidents like this “happen all the time,” the defendant has failed to object to any statements of which he now seeks review. The defendant is therefore held to a higher standard of showing that each comment is so flagrant and ill-intentioned that it creates an enduring prejudice. When the State’s entire closing and rebuttal arguments are viewed as a whole, it is clear that the defendant cannot meet such a high burden.

Even assuming, without deciding, that the challenged remarks were misconduct, the defendant fails, as argued below, to prove they were so flagrant and ill intentioned that the court could not have cured any prejudice by instructing the jury. The trial court told the jury to disregard any lawyer’s remarks not supported by the evidence or the law. CP 158-188. The trial court also instructed the jurors that they (not the lawyers) were the sole judges of credibility and the facts. *Id.* The trial court told the jury how to apply the concept of reasonable doubt. *Id.* Had defendant properly objected to the comments he now disputes on appeal, it would have given the trial court the opportunity to cure any prejudice by referring to or repeating these instructions. The defendant never requested a curative instruction or moved for a mistrial. Any argument made by the State, if improper, could easily have been remedied by a curative instruction. Defendant has waived any error.

- a. The defendant mischaracterizes the State's closing argument as the State did not state that the defendant is all that is dangerous in society and that the defendant was the baddest of the bad.

The defendant alleges that the prosecutor “personified Mr. Ra as all that is dangerous in society, ‘the baddest of the bad.’” Br. of Appellant at p. 39. Such assertion mischaracterizes the State’s argument.

The State argued in part:

Then you have minimal contact before the shooting. He wasn't just there to be a tough guy and flash his gun around and say, now what are you gonna do, huh, and stand there and point and let the guy look stupid, or whatever, and stand there and talk to a gun. As soon as Mr. Huff came toward them, that's when the gun came out. That's when shots were fired. That reflects on the defendant's state of mind. There were three people with the defendant. That also reflects on his state of mind because he's buttressed. His status is elevated. When he acts as a bad guy in front of these other bad guys—and I say that because two other of those guys are felons, and I'm not talking about their character, I'm talking about the fact that another one has a firearm in the car and the other one knows that the others have firearms. And they don't care. They don't get away. They're convicted and serving eight months in the county jail by sitting in that car with people with firearms. They're bad guys in that sense. They're tough. And if one of those guys shoots and kills somebody or hurts somebody badly, the others don't say, oh, my God, what did you do? No. It evaluates the status of that person. He's the baddest of the bad. Which of these people, when law enforcement contacted them, and said it was a self-defense case? None. Which of them said, how's the victim? It was an accident, I meant to call 911. A guy was shot in the chest while he was walking backwards. That's one of the defense witnesses, that's the person that's in the car; not the defense witness, but the person who was in the defendant's car said

he was going backwards when he got shot. Which one of those persons that was pulled over five minutes later was so concerned about the victim and what had happened? None of them. That's the culture. It's not a big deal somebody got shot. It's all about protecting themselves. It's all about now we're in trouble. Now we've done something. Now I've been with somebody who did something, but I'm not gonna snitch, because that's the culture, too.

RP 912-913.

When seen in context, it is clear that the prosecutor was not calling the defendant the “baddest of the bad,” but was speaking in abstract terms. Further, the State did not argue that the defendant was “all that is dangerous in society” as the defendant alleges. As argued above, the defendant must show that the statements were so flagrant and ill-intentioned that it evinced an enduring prejudice. The defendant cannot make such a showing. The State merely presented argument based on the evidence, which it is permitted to do. The State did not commit misconduct by the statements.

- b. The defendant mischaracterizes the prosecutor's closing argument as the prosecutor never stated that the defendant was a gang member who was violent by nature who was seeking to elevate his gang status.

The defendant asserts that the prosecutor's entire closing argument was based on insinuations that the defendant was a gang member. Br. of Appellant at p. 39. Nowhere in the prosecutor's closing does he reference that the defendant may be a gang member. The State argued that the

defendant may have sought to gain an elevated status among the other people in the vehicle at the time of the shooting, but never states that the defendant or any of his associates are associated with a gang. The State also argued that if one of the people in the SUV shot and killed or hurt someone, it would elevate the status of that person, and that the people in the SUV are felons who would not be concerned about the victim. RP 912-913.

Such argument is proper because the State was clearly trying to explain to the jury one possible motive for the shooting—that the defendant wanted to be elevated among his group of friends, and they did not care that someone got hurt. Moreover, there were no objections during the State’s closing argument. During rebuttal argument, there were two objections, neither of which were objections that the State was violating the court’s ruling regarding gang evidence. Any objection on such a basis was waived.

The defendant cites to State v. Powell, 126 Wn.2d 244, 893 P.2d 651 (1995) to support his argument that any objection was not waived. Brief of Appellant at p. 38 n. 6. The analysis in Powell, however, is not applicable to the present case. In Powell, the court stated:

A different situation is presented, however, when, as here, evidentiary rulings are made pursuant to motions in limine. Because the purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial, the losing party is deemed to have a standing objection where a judge has made a final ruling

on the motion, “unless the trial court indicates that further objections at trial are required when making its ruling.”

Powell, 126 Wn.2d 244 at 256, quoting State v. Koloske, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988) (emphasis added). In the present case, however, the defendant was not the “losing party.” In fact, the defendant was the prevailing party because the court excluded any reference to gang activity. The defendant is not deemed to have a standing objection to the State’s closing argument, and neither of the defendant’s objections were specific as to gang activity.

Moreover, Powell addressed a standing objection to the admission of evidence, not closing arguments. Id. at 256. The defendant is required to make timely and specific objections so that the court can, if appropriate, provide a curative instruction. Therefore, the defendant must now show that the comments were flagrant and ill-intentioned to create an enduring prejudice, and the defendant cannot make such a showing. He can point to nothing in the State’s closing argument where he references or implies gang activity. The State merely presented argument that the defendant sought to enhance his image or status among his friends in the car at the time of the shooting. Such argument is entirely permissible, and is not improper, flagrant, or ill-intentioned.

- c. The defendant mischaracterizes prosecutor's rebuttal closing argument as being a call to fight against America's culture of gang and gun violence.

In rebuttal argument, the State argued, in part:

Prosecutor: Who else says there's a warning shot? Defense counsel does. There was a warning shot, wasn't there? Yes. Didn't this happen, right? Yes. Open-ended question, though. Who said anything about a warning shot?

Shot, bumped heads, didn't see anything else. Other witnesses you can't even hear when they're talking. This warning shot is created so that it will lessen the defendant's responsibility and get you to look less stringently upon what he actually did. I mean, people actually do shoot to kill people. Happens all the time. People actually commit very serious, heinous crimes against other people for little or no reason. Happens all the time.

Defense counsel: Objection. Inducing passion for unrelated incidences.

The Court: It is argument. Overruled.

RP 930-931.

The State is permitted to use inferences from the testimony to explain a possible motive for the crime. State v. Dhaliwal, 150 Wn.2d 559, 579, 79 P.3d 432 (2003). Argument by the State in the present case

is exactly such an argument. The undisputed testimony presented that the victim and the defendant did not know each other, and they appeared to be at the Les Davies Pier for unrelated reasons. RP 813. The inference the State was drawing was that this shooting was a random act of violence, which can and does happen. Such inference is entirely permissible and is based on the testimony and evidence.

The defendant cites to U.S. v. Solivan, 937 F.2d 1146 (6th Cir. 1991), for the proposition that it is error for the prosecutor to direct the jurors' desires to end a social problem toward convicting a particular defendant. In Solivan, the prosecutor argued to the jury that because of the defendant's participation in drug trade, such activity would continue in the community if the defendant was not convicted. Id. at 1153. The present case is distinguishable from Solivan. The State in the case at bar did not ask the jury to send a message by convicting the defendant. Rather, the State argued that this act was a senseless act and such acts happen. RP 914, 931. Nothing in such a statement urged the jury to convict the defendant to send a message to the perpetrators of other senseless acts of violence. It is clear that the analysis of Solivan is not applicable to the present case.

The defendant also relies on U.S. v. Johnson, 968 F.2d 768 (8th Cir. 1992), and State v. Perez-Mejia, 134 Wn. App. 907, 143 P.3d 838 (2006). Neither case is analogous to the case at bar. In Johnson, the prosecutor stated:

[The defense attorney] says your decision to uphold the law is very important to his client. Your decision to uphold the law is very important to society. You're the people that stand as a bulwark against the continuation of what Mr. Johnson is doing on the street, putting this poison on the street.

Johnson, 968 F.2d at 769.

The court held the prosecutor, in asking the jury to act as a bulwark against putting poison on the streets, was asking the jurors to be the conscience of the community. Id. at 771. The State merely argued that senseless violence happens all the time. Such argument is permissible to explain a possible motive for the shooting.

In Perez-Mejia, supra, the court found that the State made an impermissible argument by urging the jurors to base a guilty verdict on the goal of sending the message to gangs or base a guilty verdict on the goal of ending violence, not on consideration of the evidence. Perez-Mejia, 134 Wn. App. 907 at 915. Again, in the present case, the State did not ask the jury to send a message to the defendant.

While the defendant now asserts that the prosecutor “again and again substituted the juror’s duty to decide Mr. Ra’s case on its own merits with a call to fight against America’s culture of gang and gun violence,” he provides no citation to the record where such a statement exists. Br. of Appellant at p. 41. Rather, the State argued that the evidence in the case was overwhelming that the defendant intended to kill the victim. RP 941. The State did not urge the jury to fight against gang or gun violence, but

properly made argument to the jury based on the evidence presented in the case. The defendant did not make any objections that the State was asking the jury to send a message or to speak on behalf of the community, so such objection is deemed waived. The defendant did object when the State argued that this type of incident “happens all the time,” but such argument was nevertheless proper as a possible explanation for a senseless act. The defendant has not established that the State committed misconduct.

- d. The prosecutor’s comment that the defense attorney’s job is to turn and twist everything was not misconduct.

During rebuttal argument, the prosecutor made the following statement:

And thus you have to understand that this is our system where it’s an adversary system and then defense does everything he can—it’s his job –to minimize the impact of the evidence, to turn everything and twist it completely.

RP 931.

Any error that was committed by such argument should be deemed waived, because such error could have easily been cured by an instruction from the court. Even in U.S. v. Holmes, 413 F.3d 770 (8th Cir. 2005), a case cited by the defendant, there was a timely objection made after the State’s comment. Id. at 775. In the present case, there was no objection to the argument of the State. If this court were to find that such comment was error, such error could have been easily cured by an instruction if such objection had been made.

The State's comment was not improper. The State's comments were made in rebuttal argument, and were clearly made in direct response to defense counsel's closing argument. In his closing argument, the defense counsel made at least seven questionable arguments: 1) that Bun was the only person making comments; 2) that the defendant fired up to three warning shots; 3) that the victim was upset because the defendant was not respecting his "property"; 4) that the victim challenged either Bun or the defendant; 5) that the victim approached the SUV to "kick ass"; 6) that the victim could have been a mean S.O.B. who didn't care about getting shot at; 7) that the victim had a flashlight that could be used as a weapon; and 8) that the victim's injury was not life threatening.

Defense counsel argued that Bun was the person in the SUV who called out to Cornatzer and Suhoversnik, and that the defendant should not be held accountable for Bun's actions. RP 917. The testimony, however, was that Bun was not the only person in the SUV making comments. Chau, another occupant of the SUV, testified that Bun did not say anything. RP 196. Moreover, Cornatzer testified that there was more than one voice making loud comments, and that she could see that it was more than one person talking because the windows on the SUV were rolled down. RP 232, 273. She testified that she was able to hear multiple voices. RP 273. The victim also indicated that there were multiple voices making the comments. RP 333. Finally, Serdar testified that comments were coming from the right side of the SUV, and the defendant was seated

in the front passenger seat. RP 146-147, 444-445. Defense counsel mischaracterized the testimony by arguing that Bun was the only person in the SUV that “stepped over the line.”

Second, defense counsel argued that the defendant actually fired up to three warning shots at the victim. RP 925. Again, such argument is in contradiction to all of the testimony presented. Serdar testified that he felt the first shot “whiz” by him. RP 451. Cornatzer testified that the second shot broke out the window of Suhovernik’s car. RP 238. Chau, who was in the SUV, stated that the second shot was aimed at the victim. RP 170. Finally the victim stated that the second shot was aimed at his head. RP 313. Even the defendant himself testified that he fired two warnings shots, not three. RP 812. There was no testimony whatsoever that the defendant shot up to three warnings shots, as defense counsel argued.

Taking defense counsel’s third, fourth, fifth, and sixth arguments together as they all relate to the victim escalating the argument, the testimony does not support any of these arguments. The testimony was that comments from the SUV were directed specifically at the victim. RP 234. Everything was peaceful until the people in the SUV began making comments. RP 288. The victim never made any threats. RP 289-290, 306-307. The victim testified that he was going over to the SUV to tell them to stop making the comments. RP 343. The victim reacted only after a “taunt” from the SUV. RP 407. The victim never got close enough to touch anyone. RP 175, 452. The testimony was that the victim asked

the occupants of the SUV to leave him alone. RP 447. There was no evidence presented that the victim initiated the confrontation, was challenging the occupants of the SUV or wanted to get shot at.

Defense counsel also argued that the victim walked over to the SUV with a flashlight and that it could be used as a weapon. RP 921. Chau testified that the victim did not have a weapon. RP 168, 175. The victim testified that he did not have a weapon and did not have a flashlight. RP 309. Son testified that the victim did not have a weapon and did not have a flashlight. RP 602. Even the defendant did not testify that the victim was armed with a weapon or a flashlight when he approached the SUV. There was overwhelming testimony that the victim was unarmed at the time of the shooting, yet defense counsel presented argument that the victim may have been armed with a flashlight that could have been used as a weapon.

Finally, defense counsel attempted to minimize the evidence by arguing that the shot the victim received to his abdomen was not life-threatening. RP 923. There was testimony that the victim's stomach had to be repaired surgically, that his spleen had to be removed, and that a chest tube had to be inserted. RP 319. The bullet went through the victim's lungs. RP 318. The victim was hospitalized for approximately ten days. RP 318. There was absolutely no testimony that the injuries sustained by the victim were not serious and life-threatening.

Defense counsel's arguments were contrary to much of the testimony that was presented. The State's comment that defense counsel's job is to minimize the evidence and twist and turn everything was in direct response to defense counsel's closing arguments. The comment by the State did not occur in closing argument, but in rebuttal after, as argued above, defense counsel mischaracterized much of the evidence that was presented. Such comment was appropriate given the context in which it was stated.

Even if this court were to find that the comment was misconduct, reversal is not required. In State v. Negrete, 72 Wn. App. 62, 863 P.2d 137, (1993), the prosecutor made the following statement:

I have listened with great interest to the comments of [defense counsel]. Two things come to mind: I have never heard so much speculation in my entire life in going into facts that weren't even presented into evidence. And the second is, he is being paid to twist the words of the witnesses by Mr. Negrete.

Id. at 66 (emphasis added).

In Negrete, there was an objection by defense counsel. Id. In the present case, there was no objection by defense counsel. The court held that the comment by the State, while improper, was not so prejudicial as to warrant a new trial. The court held that defense counsel's failure to move for a curative instruction or a mistrial at the time strongly suggests that the argument did not

appear overly prejudicial. Id. at 67. The court also held that any prejudice was minimized by the court's instructions to the jury that the only evidence the jury was to consider was the testimony of the witnesses and the exhibits admitted into evidence, and that the attorney's remarks, statements and arguments were not evidence and to disregard any statement not supported by the evidence or the law. Id. at 67.

The jury in the case at bar was instructed almost identically to the jury in Negrete. CP 158-188 (Instruction No. 1). The court's analysis in Negrate is applicable. If this court were to find that misconduct occurred, the fact that there was no objection, request for a curative instruction, or motion for a mistrial, suggests that the statement was not overly prejudicial. Therefore, even if this court were to find that the statement was made in error, any error was harmless.

- e. Assuming, arguendo, that any comments made by the State in closing argument or rebuttal argument were improper, any error committed was harmless as the evidence was overwhelming.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991);

see also State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). A prosecutor may draw inferences as to the credibility of witnesses if done properly and if the record supports the inference. State v. Hinkley, 52 Wn.2d 415, 420, 325 P.2d 889 (1958); see State v. Brown, 35 Wn.2d 379, 386, 213 P.2d 305 (1949).

Defendant has failed to show that his claim of prosecutorial misconduct is meritorious or that it was not waived by the failure to object below. Given that the defendant has failed to properly object below, he must establish that any of the comments made by the State were so flagrant and ill-intentioned to create an enduring prejudice. The defendant cannot establish such prejudice.

There was overwhelming evidence of guilt presented here. The evidence showed that the defendant unlawfully possessed a firearm and shot an unarmed victim in the chest at close range. RP 308. The evidence showed that the defendant and his associates had been provoking the victim into a confrontation immediately before the shooting, and the victim had approached the vehicle in order to ask the defendant and his friends to stop. RP 234, 307, 343, 407. The defendant then fired his weapon multiple times, including a shot that went past Serdar, and one that went past the victim's head, before shooting the victim in the chest. RP 308, 313-314, 457. The defendant and his associates then fled the scene, and the firearm used in the shooting was thrown out of the vehicle. RP 162, 868-870. As argued below, not only was there sufficient

evidence to find the defendant guilty, there was overwhelming evidence on which to do so. Therefore, any error that occurred in closing argument was harmless.

3. SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT GUILTY OF ATTEMPTED MURDER IN THE FIRST DEGREE.¹

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). 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); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), and Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). 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)). All reasonable inferences

¹ The defendant was also convicted of drive-by shooting and unlawful possession of a firearm in the second degree, but does not dispute that there was sufficient evidence to support those convictions, so they are not addressed here.

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; the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given, should make these. 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.

In this case, defendant challenges the sufficiency of the evidence regarding his conviction for attempted murder in the first degree. Br. of

Appellant at p. 42. He contends that there is insufficient evidence that he intended to kill the victim. Br. of Appellant at p. 46.

In order to find defendant guilty of attempted murder in the first degree the jury had to find that: 1) on or about the 14th day of September, 2005, the defendant did an act which was a substantial step toward the commission of murder in the first degree; 2) that the act was done with the intent to commit murder in the first degree; and, 3) that the acts occurred in Washington. CP 158-188 (Instruction No. 11). Once a substantial step has been taken, and the crime of attempt is accomplished, the crime cannot be abandoned. State v. Workman, 90 Wn.2d 443, 450, 584 P.2d 382 (1978); State v. McGilvery, 20 Wn. 240, 55 P. 115 (1898).

The jury was also instructed as to the mens rea element of the completed crime of murder, including a standard instruction on the meaning of premeditated. CP 158-188 (Instruction Nos. 8 and 9). The jury was instructed:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take a human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 158-188 (Instruction No 9). Defendant now claims that there was insufficient evidence to supporting a determination that he was acting with a premeditated intent to kill.

The evidence in this case shows that on September 14, 2005, the defendant and his associates were at the Les Davies Pier. RP 151, 587, 628, 768. The defendant was unlawfully armed with a firearm. RP 806, 856. The victim, his girlfriend, and another couple arrived at the Les Davies Pier in order to take a walk. RP 226-230, 281, 300. Once the women were outside of their vehicles, they began to hear “catcalls” coming from the SUV in which the defendant and his friends were sitting. RP 242, 384, 389, 442. The women and the victim asked the people in the SUV to stop, but they refused. RP 232, 448. The comments then began to be directed at the victim personally. RP 234. The victim, after trying to ignore the comments, attempted to approach the SUV to tell them to stop. RP 343. In return, the defendant fired multiple shots at the victim. RP 308, 310, 313-314, 457, 813. The first shot whizzed by Serdar. RP 457. The second shot went past the victim’s head and shattered a window on Ashley Suhovernik’s car. RP 170, 230, 313. Finally, a shot hit the victim in the chest, causing injuries to his stomach and lungs. RP 308, 317-319. The defendant, who acknowledged that he was the shooter, fled the scene with his friends, and the gun was thrown out of the car window. RP 813, 868. There was testimony by multiple witnesses, and the victim, that he was unarmed at the time of the shooting. RP 168, 175, 309, 454, 602.

While the defendant now asserts that the victim was not permanently maimed by the injuries he sustained, such bald assertion is wholly without merit. On the contrary, the victim stated that he now suffers from a weakened immune system, has difficulty breathing, and an inability to gain weight. RP 319. It is clear that the injuries sustained by the victim were not superficial in nature.

Moreover, when viewed in the light most favorable to the State, there was clear evidence of intent to kill. The defendant intentionally brought his firearm with him to the pier and intentionally sought to provoke an incident with the victim. When the victim reacted, the defendant intentionally fired two shots, the first whizzing by Serdar, the second whizzing by the victim's head. The shooting culminated in the defendant shooting the victim in the chest. There was testimony from at least one witness inside the SUV, Chau, that the victim never got close enough to the SUV to touch anyone inside. RP 175. This was an intentional act on an unarmed victim.

The defendant asserts that there was no clear motivation for the shooting. Br. of Appellant at p. 46. The State is not required to produce a motive as an element of the crime. The State established that the defendant, armed with a firearm, shot several times at the victim in an attempt to accomplish his goal of killing the victim. It is clear from the evidence that the defendant did not fire four shots into the air. He pointed

the gun at the victim's chest and pulled the trigger, and he did so with the intent to kill. The fact that the defendant was ultimately unsuccessful in his attempt to kill the victim does not preclude the finding that the defendant had formed the intent and taken a substantial step. Looking at this evidence in the light most favorable to the State, and taking all reasonable inferences, there was sufficient evidence that defendant formulated a premeditated intent to kill the victim.

4. ANY CLAIM OF A VIOLATION OF THE
APPEARANCE OF FAIRNESS DOCTRINE WAS
WAIVED IN THE TRIAL COURT.

The appearance of fairness doctrine, which is based in due process, and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) require a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned. In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L.Ed.942 (1955); State v. Madry, 8 Wn. App. 61, 68-70, 504 P.2d 1156 (1972). A party claiming bias or prejudice must support the claim as prejudice is not presumed. State v. Dominguez, 81 Wn. App. 325, 328-330, 914 P.2d 141 (1996). There must be evidence of a judge's actual or potential bias before the appearance of fairness doctrine will be applied. State v. Post, 118 Wn.2d 596, 618-19 & n.9, 826 P.2d 172, modified, 837 P.2d 599 (1992); State v. Carter, 77 Wn. App. 8, 11-12, 888 P.2d 1230, review denied, 126 Wn. 2d 1026, 896 P.2d 64 (1995); State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674, review denied, 127 Wn. 2d 1013, 902

P.2d 163 (1995). Disqualification is required when a judge has participated as a lawyer in the case being adjudicated, but is not disqualified “merely because he or she worked as a lawyer for or against a party in a previous, unrelated case.” Dominguez, at 329. An objection regarding the appearance of fairness has been deemed waived on appeal when not raised at the trial court level. State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998).

The defendant does not cite to any place in the record where an objection was raised to the court violating the appearance of fairness doctrine. A review of the record reveals that no such objection was made. This claim was not preserved for review.

Moreover, the defendant mischaracterizes the trial court’s comments that the defendant was a “distorted character who breeds and lives violence.” Br. of Appellant at p. 47. While the defendant asserts that the court was talking about him with reference to the comment, the court specifically indicated that he was not talking about the defendant. RP 430. Additionally, the defendant asserts that the court appeared to communicate some bias during sentencing. If the defendant had raised such issue below, a record regarding such issue could have been made, and sentencing could have been conducted by a different court if appropriate. The defendant, however, did not raise such issue below, and is not alleging ineffective assistance of counsel on appeal. The defendant’s claims that the trial court violated the appearance of fairness doctrine was

not preserved below, and the defendant is precluded from raising such issue on appeal.

5. 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, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” Brown v. United States, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L.Ed.2d 208 (1973) (internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. Rose, 478 U.S. at 577. Thus, the harmless error doctrine allows the court

to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. Id. at 578; see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that 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, 684 P.2d 668 (1984); see also State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 574 U.S. 1129, 115 S. Ct. 2004, 131 L.Ed.2d 1005 (1995).

There are two dichotomies of harmless 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), review denied, 78 Wn.2d 992 (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), review denied, 112 Wn.2d 1008 (1989) (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), review denied, 92 Wn.2d 1002 (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 above stated reasons, the State respectfully requests that this court affirm the defendant's convictions below.

DATED: April 30, 2007.

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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.

4/30/07 
Date Signature


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BY
07 APR 30 PM 2:25
COURT OF APPEALS
DIVISION II