

NO. 35359-8

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

STATE OF WASHINGTON, RESPONDENT

v.

RUSSELL PEARSON, APPELLANT



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

No. 00-1-00372-4

BRIEF OF RESPONDENT

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

1. Did the trial court properly apply the “ends of justice” exception to the mandatory joinder rule in allowing the State to proceed on related charges after the defendant’s original conviction was vacated pursuant to State v. Address?

(Appellant’s Assignment of Error No. 1).

2. Did the trial court properly exercise its discretion when it excluded inadmissible evidence and did such ruling preclude the defendant from presenting a defense; and, assuming arguendo, that error was committed, was any error harmless?

(Appellant’s Assignment of Error No. 2 and 3).

3. Did the defendant receive effective assistance of counsel when (1) defense counsel had a legitimate trial strategy for not calling the defendant as a witness and when the defendant cannot establish prejudice, (2) when any error in not requesting that the jury be instructed on manslaughter harmless, (3) when, if any error was not harmless, counsel had a legitimate trial strategy in not requesting instructions on manslaughter, and (4) when any request for instructions on manslaughter would have been denied?

(Appellant’s Assignment of Error No. 4, Appellant’s Supplemental Assignment of Error No 1).

4. Can the defendant establish cumulative error?

(Appellant's Assignment of Error No. 5).

5. Did the trial court properly act within its statutory authority when it ordered that the sentence imposed on the murder be served consecutively with the sentence previously imposed on a custodial assault conviction?

(Appellant's Assignment of Error No. 6).

B. STATEMENT OF THE CASE.

1. Procedure

In 2000, RUSSELL EUGENE PEARSON, hereinafter "defendant" went to trial on charges of murder in the first degree and, in the alternative, murder in the second degree (with assault as the predicate offense, in the alternative murder in the first degree with robbery in the first degree as the predicate offense, unlawful possession of a firearm in the first degree, unlawful possession of a firearm in the first degree, and assault in the second degree). CP 5-8. On May 19, 2000, the defendant was convicted of murder in the second degree and unlawful possession of a firearm. CP 10, 12. The defendant was acquitted of count one, murder in the first degree. CP 9. The defendant appealed, and his conviction was affirmed in 2002. CP 27-39.

In 2005, the court vacated the defendant's convictions pursuant to In re Address, 147 Wn.2d 602, 56 P.3d 982 (2002). CP 49-50. On

December 2, 2005, both parties appeared for a second trial. 12/2/05¹ RP

1. At the second trial the State proceeded on charges of murder in the second degree (intentional murder), and murder in the second degree (felony murder) with residential burglary or burglary in the second degree as the predicate offense. CP 135-136. The additional charge of first degree assault was dismissed on double jeopardy grounds. CP 119-120; 12/3/05 RP 5. The court found that the murder charges could proceed based on the “interests of justice” exception to the mandatory joinder rule.² CP 119-120; 12/3/05 RP 10. On August 16, 2006, the defendant was found guilty of murder in the second degree (felony murder) and a firearm sentencing enhancement. CP 247. The defendant was found not guilty of murder in the second degree (intentional murder). CP 245. The defendant was sentenced on September 15, 2006, to a sentence of 275 months incarceration. CP 270-282.

2. Facts

At the time of the shooting, the victim, Rodney Klum, was residing in an apartment in Lakewood with his girlfriend, Tami Hotchkiss. RP

¹ Two volumes of the verbatim report of proceedings are not paginated. They are from December 2, 2005 and December 3, 2005. Both are numbered independently. The respondent shall refer to these volumes by date, and all other paginated volumes by page number.

² Additional facts regarding the pretrial motions are contained below.

122, 268. Also residing in the apartment were Hotchkiss's two young children. RP 123, 269.

On January 8, 2000, the victim and Hotchkiss were on their way home from a friends' house when they noticed that another house belonging to a friend of theirs named Tim Knight, had its garage door open. RP 268, 270-271. Hotchkiss believed that it was unusual because Knight had things in the garage that were expensive. RP 271. Hotchkiss told the victim that she did not want to be there, and the victim drove her home. RP 271. After the victim dropped Hotchkiss and her son off at the apartment, the victim told her that he would be right back and was going to go see what was going on over there. RP 271-272. At that time, Jerry Kohl was in the apartment that Hotchkiss and the victim shared. RP 268, 272.

On January 8, 2000, Tammy Whitman was at Tim Knight's home. RP 351-352. When Whitman woke up at Knight's house, she called the defendant who indicated he was going to pick her up. RP 353. The defendant had been working on a car in Knight's garage. RP 353-354. While Whitman waited for the defendant, a man later identified as the victim arrived at Knight's house asking for Knight. RP 358. The victim kept walking through the house and going to the garage. RP 359.

Later the victim returned to Knight's house. RP 359-360. It appeared to Whitman that the defendant and the victim knew each other.

RP 360. The victim was asking the defendant what he was doing, and telling him that Knight did not want him in his garage. RP 360. The defendant told the victim that it was his car in the garage. RP 360. Whitman did not see the victim hit the defendant, but did observe that the defendant had been hit and was bleeding from his lip. RP 361, 365. Whitman heard someone say something about a gun. RP 362. She and the defendant got into the defendant's car and went around the corner. RP 363. The defendant had a gun and he shot it into the air. RP 363. The defendant appeared upset. RP 366. Whitman and the defendant drove to James Davis' parent's home. RP 369, 374. Davis and the defendant were best friends. RP 372. The defendant and Davis left his parent's home. RP 369, 374.

Timothy Knight's testimony from a previous proceeding was read to the jury. RP 491. Knight testified that he is acquainted with both the defendant and the victim. RP 494, 501. Knight had given the defendant permission to work on cars in his garage. RP 535-536. On January 8, 2000, the defendant was at Knight's house working on a car. RP 494. Later that evening, Knight received a knock at the door, and a man later identified as Davis, whom he had never met, stepped inside. RP 498, 501. The man was looking for the victim. RP 498. Davis was agitated and there appeared to be some urgency in his request. RP 502. Knight acted as though he did not know the victim. RP 502. Davis pulled a shotgun out of his sweatpants and chambered a round. RP 503. Davis told Knight

that he was not messing around and wanted to know where the victim lived immediately. RP 503. Knight then told Davis where the victim lived. RP 503. Davis told Knight that he better not be lying or he would be back, and fired a round towards Knight's feet. RP 503. Shotgun pellets and a spent casing were later recovered from Knight's residence. RP 324, 492. Knight described the shotgun as pump-action, with a very short barrel and a pistol grip. RP 504.

The same day, the victim and Matthew Carr drove to the victim's apartment. RP 403. During the drive, the victim told Carr that he caught a person stealing out of Knight's garage, that he beat the person up and took night vision goggles from him. RP 403-404. The victim still had possession of the night vision goggles. RP 404. The victim arrived at the apartment and went into the bedroom. RP 274. He told Hotchkiss that something was going to happen to him, that he beat someone up and they threatened his life. RP 274. The victim gave Hotchkiss Knight's cellular telephone and told her to call Knight's girlfriend because Knight was sleeping. RP 274. The cellular phone was later recovered lying on a mattress in the bedroom. RP 319. Hotchkiss then heard the front door open and the victim stepped into the hallway. RP 274. Hotchkiss was standing next to the victim when she heard a "boom" and saw the wall splatter with blood. RP 275.

On the day of the murder, Jerry Kohl was working on a car at the apartment of the victim and Hotchkiss. RP 122. When he finished

working on the car, he went to the victim's apartment. RP 126-127. The victim arrived later. RP 129. Kohl learned from Matthew Carr, who was also present, that the victim had gotten into a "spat" and had struck someone in the mouth. RP 129, 131.

Kohl heard a knock on the apartment door, which was answered by Carr. RP 132. As Carr was opening the door, Kohl called for the victim. RP 139. Carr observed the defendant at the door, bleeding from his mouth and nose. RP 136, 406. Another individual, later identified as James Davis, was with the defendant. RP 406. Two individuals entered the apartment. RP 135-137. The defendant had a fat lip. RP 214.

Once inside the apartment, the defendant made the comment that "somebody was gonna get shot." RP 138. The defendant told Kohl or Carr that somebody in the house was going to get shot in the house, in the leg or in the foot. RP 144. Kohl told the defendant and Davis to take it elsewhere because there were children in the house. RP 144. Davis asked Matthew Carr if he was RJ, a name used by the victim. RP 138, 400, 501. Davis then asked Kohl if he was RJ. RP 138. Both times the defendant indicated that Kohl and Carr were not the person they were looking for. RP 141.

At the same time the victim was coming out of the bedroom, the defendant stated "that's him." RP 140. At that time the defendant and Davis both produced weapons. RP 140, 142. Davis was armed with a shotgun, and the defendant was armed with a revolver. RP 142, 144, 410.

Kohl knew the gun the defendant had was real and loaded because he had seen the gun before. RP 143. The defendant pointed his gun at Carr. RP 415, 429-430. The defendant appeared nervous. RP 429.

Davis' gun was what Kohl described as a short shotgun with a pistol grip. RP 145. Davis pointed the shotgun at the victim's head. RP 147-148. Davis asked the victim why he beat up his friend and why he took the night vision goggles. RP 411. The victim was armed with a paintball gun. RP 148-149. Davis told the victim to drop his gun or he was going to shoot him in the leg. RP 446. The defendant encouraged Davis to shoot the victim. RP 212. Davis chambered a round into the shotgun. RP 151-152. Davis then told the victim to drop his gun, and the victim told Davis to drop his. RP 149, 414. Davis shoved the gun into the victim's neck. RP 150. On the third time Davis told the victim that he was not kidding, and put the shotgun up to the victim's neck and pulled the trigger. RP 150, 202. The blast picked the victim up off of his feet and threw him. RP 151. The victim was dead before he hit the ground. RP 203. After the victim fell to the ground Davis bent over the body and either picked something up or put something down. RP 152.

Kohl angled himself so that, if necessary, he could push Davis out of the second story window before Davis could chamber another round in the shotgun. RP 151. After the shooting, Davis and the defendant both ran. RP 153. Hotchkiss saw a car screeching out of the parking lot. RP 276.

Kohl did not hear either Davis or the defendant ask for the location of a cell phone or night vision goggles. RP 161-162.

Knight indicated that the night vision goggles and the cellular telephone belonged to him. RP 404-405, 537, 547. Knight never gave the night vision goggles or his cellular telephone to anybody else. RP 513, 515. He only discovered that the phone was missing after Davis fired the shotgun at his feet and left. RP 514. Knight's night vision goggles were found on the victim's body. RP 317.

When the defendant and Davis returned to Davis's parent's home, there was a lot of screaming and someone said, "What the fuck did you do?" RP 377. When they returned, Davis was not dressed the same. RP 379. Whitman also believed that the defendant repainted his car to a different color. RP 382.

Matthew Nodel, a former analyst for the Washington State Patrol, testified that he reviewed evidence collected from the police investigation. RP 215-217, 237. Based on his examination of the evidence, Nodel was able to determine that the projectile was a shotgun shell from a 12-gauge shotgun. RP 237. Nodel also examined photographs of the victim taken by the medical examiner. RP 243. He was able to determine that the victim was shot relatively close to the barrel of the gun. RP 245. Nodel characterized the wound as being very, very close, if not a contact wound. RP 262.

Dr. John Dale Howard, the chief medical examiner for Pierce County, performed the autopsy on the victim. RP 584, 587. He found that that the cause of death was a shotgun wound to the head. RP 608. Dr. Howard found that the weapon used was in direct contact with the victim's temple. RP 610. The position of the victim's body was consistent with the victim walking down the hallway at the time of the shooting. RP 616.

The defendant's mother's boyfriend, Marvin Berto, testified that the defendant had previously received money in the course of a lawsuit. RP 579-580. In January of 2000, Berto was holding the money for the defendant. RP 580. Berto indicated that the defendant had a debit card with Berto's permission. RP 581-582.

Washington State Patrol Sergeant Jason Armstrong testified that he contacted the defendant on January 10, 2000, in Whatcom County. RP 630-632, 727. Sergeant Armstrong stopped the defendant on a routine traffic stop for having no visible front license plate and for driving a vehicle that was missing a driver's side mirror. RP 632, 727. At the time of the stop, the defendant appeared nervous and anxious. RP 728. The defendant provided four different false names. RP 729-731. At the time of his arrest, the defendant was in possession of \$4,700.00 in cash. RP 733. The defendant was also in possession of a credit card belonging to

Marvin Berto. RP 733. Finally, two expended 12-gauge shotgun shells were recovered from the defendant's car. RP 733.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY APPLIED THE "ENDS OF JUSTICE" EXCEPTION TO THE MANDATORY JOINDER RULE IN THIS CASE.

A prosecutor has broad discretion in determining the content of the initial information. CrR 2.1(a); State v. Haner, 95 Wn.2d 858, 631 P.2d 381 (1981). Amendments are liberally allowed unless the court finds that the substantial rights of the defendant are prejudiced or when the amendment is part of a plea agreement which the court finds is not in the interests of justice. CrR 2.1(d); Haner, 95 Wn.2d at 864-865. The right to add a charge is not unlimited, however, and a criminal defendant always has the opportunity to seek severance of multiple offenses. See, CrR 4.3(a); CrR 4.4.

Generally, the criminal rules require the prosecution to file any and all "related offenses" in a single charging document. CrR 4.3(a), CrR 4.3.1. Under the mandatory joinder rule, two or more offenses must be joined if they are related. CrR 4.3.1(b)(3). Offenses are related if they are within the jurisdiction and venue of the same court and are based on the same conduct. CrR 4.3.1(b)(1). "Same conduct" is conduct involving a

single criminal incident or episode. State v. Lee, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997). The possible consequences for failing to join related offenses are set forth in CrR 4.3.1(b), which provides in the relevant part:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense. . . . The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

CrR 4.3.1(b)(3).

The “mandatory joinder” rule has been applied to prevent the prosecution from adding an alternative means of committing a crime after the defendant has been to trial on one means. State v. Anderson, 96 Wn.2d 739, 638 P.2d 1205, (“Anderson II”) cert. denied, 459 U.S. 842, 103 S. Ct. 93, 74 L. Ed. 2d 85 (1982). Anderson was originally charged and found guilty of first degree murder by the alternative means of extreme indifference to human life. State v. Anderson, 94 Wn.2d 176, 616 P.2d 612 (1980) (“Anderson I”). On appeal the Supreme Court found that the “extreme indifference” alternative could not apply on the facts of the case, and dismissed without prejudice to refile. Anderson I, 94 Wn.2d at 192. On remand the prosecution did not file a lesser included charge, but opted to again charge first degree murder but under a different alternative

means- premeditated murder. Anderson II, 96 Wn.2d at 743. The Supreme Court dismissed the second, or re-filed, first degree murder charge because it violated the mandatory joinder rule. Anderson II, 96 Wn.2d at 740-41. See also, State v. Russell, 101 Wn.2d 349, 678 P.2d 332 (1984). (Russell was charged with first degree (premeditated) murder; the jury acquitted on that charge but hung on the lesser degree crime of second degree (intentional) murder. After the mistrial, the State tried to file an alternative crime of second degree (felony) murder. The court held that the mandatory joinder rule prohibited the prosecution from adding that crime prior to the second trial.) After Russell and Anderson, the general rule is that once a case has gone to trial, the prosecution is precluded from adding any charges for a second trial, and the second trial can proceed only on the original charges and/or any lesser included offenses of those original charges.

But neither of these cases address the “interests of justice” exception to the mandatory joinder rule. The express language of the rule allows the prosecution to proceed to a second trial on a related offense that was not filed before the first trial when “the interests of justice would be defeated” by granting a defendant’s motion to dismiss the related offense.

In State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004), Division I of the Court of Appeals ruled that the extraordinary circumstances of felony murder convictions vacated under In re Address,

147 Wn.2d 602, 56 P.2d 981 (2002), implicate the interests of justice exception to the mandatory joinder rule. Ramos, 124 Wn. App. at 336. Ramos and his co-defendant were charged with premeditated murder and convicted of second degree felony murder as a lesser included offense.³ The Court of Appeals reversed the convictions under Andress and engaged in a lengthy analysis of the application of the mandatory joinder rule when it was deciding on an appropriate remedy on remand. Ultimately, the court rejected the defendant's request for dismissal under the mandatory joinder rule and remanded to the trial court with instructions to consider the interests of justice exception to that rule when it determined what charges could proceed to trial. Ramos, 124 Wn. App. at 343.

In Andress the Supreme Court ruled that under former RCW 9A.32.050 (enacted in 1975; Laws of 1975, 1st Ex. Sess., ch. 260 § 9), assault cannot serve as the predicate felony for second degree felony murder and that felony murder convictions predicated on assault. Andress, 147 Wn.2d at 604. It was well established under numerous decisions that the felony murder statute in effect until 1976 allowed prosecution of second degree murder predicated on assault. State v. Crane, 116 Wn.2d 315, 333, 804 P.2d 10 (1991); State v. Leech, 114 Wn.2d 700, 712, 790

³ There is no authority that concludes second degree felony murder is a lesser included offense of premeditated murder. In fact, all the law is to the contrary.

P.2d 160 (1990); State v. Wanrow, 91 Wn.2d 301, 306-10, 588 P.2d 1320 (1978); State v. Thompson, 88 Wn.2d 13, 23, 558 P.2d 202 (1977); State v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966); State v. Safford, 24 Wn. App. 783, 787-90, 604 P.2d 980 (1979); State v. Theroff, 25 Wn. App. 590, 593-95, 608 P.2d 1254, rev'd on other grounds, 95 Wn.2d 385, 622 P.2d 1240 (1980); State v. Heggins, 55 Wn. App. 591, 601, 779 P.2d 285 (1989); State v. Creekmore, 55 Wn. App. 852, 858-59, 783 P.2d 1068 (1989); State v. Goodrich, 72 Wn. App. 71, 77-79, 863 P.2d 599 (1993); State v. Bartlett, 74 Wn. App. 580, 588, 875 P.2d 651 (1994), aff'd on other grounds, 128 Wn.2d 383, 907 P.2d 1196 (1995); State v. Duke, 77 Wn. App. 532, 534, 892 P.2d 120 (1995)).

In short, the Washington Supreme Court construed a statute in 2002 that had been in effect since 1976 in a manner that was wholly inconsistent with how the previous version of the second degree felony murder statute had been construed. The court in Andress seemed to recognize its decision was a complete departure from what had been presumed to be the law and that it might have dramatic repercussions. When the opinion was first written, the court vacated the defendant's sentence and remanded "for resentencing in accord with this decision." Andress, 147 Wn.2d at 616. Upon reconsidering, the court added this statement in a footnote:

We do not intend that the State be more restricted on remand than our rules, statutes, and constitutional principles demand. Accordingly, we clarify our instructions for remand, and direct that the State is not foreclosed from any further, lawful proceedings consistent with our decision.

Id. at 617. The legislature immediately reacted to the Andress decision and reenacted the felony murder statute making it clear that a person commits second degree felony murder when a death results during the commission of “any felony, including assault.” RCW 9A.32.050(1)(b) (created by Laws of 2003, ch. 3, § 2).

Almost two years after the legislature passed a legislative fix to the Andress decision, the Washington Supreme Court issued the decision in In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), holding that any defendant convicted since 1976 of a felony murder predicated on assault could have his conviction vacated. The court in Hinton implicitly recognized the huge impact of its decision by citing to the footnote in Andress that is quoted above when it remanded the cases of the consolidated defendants “for further lawful proceedings consistent with Andress.” Hinton, 152 Wn.2d at 861.

In addition to Ramos, referenced above, one other decision issued by the Court of Appeals provides some guidance on whether a conviction affected by Andress presents a situation where the “interests of justice”

exception to the mandatory joinder rule should be applied rather than the general rule.

In State v. Gamble, 137 Wn. App. 892, 155 P.3d 962 (2007), this court held that Andress created an extraordinary circumstance that triggered the ends of justice exception to the mandatory joinder rule, and, citing Ramos, *supra*, followed the analysis of Division One. Id. at 903-904. In Gamble, the defendant's conviction for felony murder with assault as the predicate was reversed and vacated pursuant to Andress. Id. at 895. The defendant was then tried and convicted of first degree manslaughter. Id. This court held that the trial court properly relied on Ramos, and found that there were extraordinary circumstances that allowed the State to try the defendant on related charges. Id. at 904-905.

In State v. DeRosia, 124 Wn. App. 138, 100 P.3d 331 (2004) (Division II), the defendant was convicted of second degree felony murder predicated on a second degree child assault after he entered a Newton plea to that charge. The court vacated the defendant's conviction pursuant to Andress and considered several options for what relief it could grant, including remanding for entry of a conviction on a "lesser included offense." DeRosia, 124 Wn. App. at 150-51. In the end, the court entered an order that "vacate[d] DeRosia's conviction and remand[ed] without prejudice to the State's refiling any lawful charge, *including first degree*

manslaughter.” DeRosia, 124 Wn. App. at 153 (emphasis added).

Although the DeRosia decision never discussed the mandatory joinder rule, its conclusion that the prosecution could file first degree manslaughter charges on remand was significant because it is well settled that first degree manslaughter is not a lesser included offense of felony murder. See, State v. Tamalini, 134 Wn.2d 725, 953 P.2d 450 (1998) (neither degree of manslaughter is a lesser included offense of felony murder in the second degree); State v. McJimpson, 79 Wn. App. 164, 901 P.2d 354 (1995), review denied, 129 Wn.2d 1013, 917 P.2d 576 (1996) (there are no lesser included offenses to second degree felony murder). Given that the general rule under mandatory joinder is that the prosecution is prohibited from proceeding in a second trial on anything other than the original charges and lesser included offenses, the only way that this remedy would be available was by application of the interests of justice exception to the mandatory joinder rule.

The Ramos decision does not mandate that a trial court allow the prosecution to file additional or different charges under the interests of justice exception to the mandatory joinder rule after a conviction has been vacated under Andress. It does, however, contain a thorough analysis of that issue and suggests a test for its application: “to invoke the ends of justice exception to the mandatory joinder rule, ‘the State must show there are ‘extraordinary circumstances’ warranting its application.’” Ramos, 124 Wn. App. at 339 (quoting State v. Carter, 56 Wn. App. 217, 223, 783

P.2d 589 (1989)). This language in Carter has been quoted with approval by the Washington Supreme Court. State v. Dallas, 126 Wn.2d 324, 333, 892 P.2d 1082 (1995). The Supreme Court further explained that the necessary “extraordinary circumstances” “must involve reasons which are extraneous to the action of the court or go to the regularity of its proceedings.” State v. Dallas, 126 Wn.2d at 333. The court in Ramos also listed as a factor to be considered the lack of other available charges, and resulting outright dismissal, if the interests of justice exception is not applied in Andress cases. Ramos, at 342-43.

Without going so far as to hold that the interests of justice exception applies to all Andress defendants, the court in Ramos did articulate just how surprised prosecutors were by the Andress decision:

For the [Washington Supreme] Court to abandon an unbroken line of precedent on a question of statutory construction after more than 25 years is highly unusual, and the decision to do so was certainly extraneous to the prosecutions of Ramos and Medina. This is not a case in which the State negligently failed to charge a related crime, or engaged in harassment tactics. Rather, the State filed charges and sought instructions in accordance with long-standing interpretations of state criminal statutes. The fact that the convictions thus obtained must now be vacated is the result of extraordinary circumstances outside the State’s control.

Ramos, 124 Wn. App. at 342. The court concludes that, based on the facts before it, a strict application of the mandatory joinder rule “presents a scenario where through no fault on its part the granting of a motion to dismiss under the [mandatory joinder] rule would preclude the State from

retrying a defendant or severely hamper it in further prosecution.” Ramos, 124 Wn. App. at 343.

The interests of justice exception to the mandatory joinder rule was intended to be a remedy that is available only in limited circumstances. In this particular case, there is no dispute that intentional murder and felony murder with residential burglary or burglary in the second degree are related offense of felony murder. The sole issue for this court to determine is whether the interests of justice exception to the mandatory joinder rule should be applied to uphold the trial court’s decision to permit the State to file intentional murder in the second degree charges and felony murder with residential burglary or burglary in the second degree against the defendant after he succeeded in getting his former murder in the second degree conviction vacated. The State submits that there cannot be a more appropriate application of that exception than the situation presented here.

In this case, the defendant was originally charged with premeditated first-degree murder and, in the alternative, second-degree felony murder. CP 5. He was convicted of second degree murder based solely on the felony murder alternative. CP 10. His conviction was obtained under a statute that had been valid for about 24 years at the time. That conviction was affirmed by the Court of Appeals in 2002 in the direct appeal. CP 27-39. Prior to his personal restraint petition, the defendant

never made a claim that his conviction could not stand because it was predicated on assault. Id. The trial court found that CrR 4.3.1 did not preclude the State from proceeding on murder in the second degree (intentional murder) or murder in the second degree (felony murder). CP (3/7/06 order). The State made legal decisions, including the crimes to charge, based upon long-established legal principles. It would be unjust to now use an unprecedented decision by the Supreme Court to prohibit the State from charging crimes it could have charged at the time of the crime, but chose not to, based upon the law at the time. As the court in Ramos held, the circumstances in which the defendant's felony murder conviction was vacated were outside of the State's control. Ramos, 124 Wn. App. 344 at 342.

Were the court to apply mandatory joinder rule strictly, there are no charges available to the State on which to retry defendant. Under the general rule of Russell and Anderson, the second trial can proceed only on the original charges and/or any lesser included offenses of those original charges. Here, because the original charge is void, the State is left to pursue the offense of felony murder in the second degree under a different theory. Under Tamalini and McJimpson there are no lesser included offenses of felony murder in the second degree. Strict application of the mandatory joinder rule would bar further prosecution. Nothing in the Andress and Hinton decisions indicate that the Supreme Court wanted

Andress defendants to go without any consequence for causing the death of another person.

At the time of defendant's original trial, there was no way for the State to foresee the change in the law created by the Andress decision. As such, there was no reason for the State to allege the alternative means of intentional second degree murder back in 2000. Clearly the interests of justice exception should allow the State to seek redress for the homicide of Rodney Klum. It is difficult to see when the interests of justice exception would apply if it does not apply to the situation presented here. This court has, as argued above, cited Ramos with approval and has found that the interests of justice exception is applicable. See, State v. Gamble, 137 Wn. App. 892, 155 P.3d 962 (2007).

While the defendant in the case at bar asserts that Andress did not create an extraordinary circumstance, such contention is without merit. As discussed in Ramos, supra, the Andress decision overruled three decades of cases interpreting statutes defining murder when death occurs in the course of a felony. Ramos, 124 Wn. App. 334 at 342. The Ramos court also cited numerous cases which are cited above, that continually rejected the merger doctrine where assault was the predicate crime for felony murder. Id. Under the defendant's analysis, the interests of justice exception to the mandatory joinder rule would never be applicable. It is clear that there is an extraordinary circumstance created by Andress which, under the interests of justice exception, allowed the State to

proceed on related charges. The trial court properly held that the interests of justice exception applied and properly allowed the State to proceed on the charges of murder in the second degree (intentional murder) and murder in the second degree (felony murder) the residential burglary or burglary in the second degree as the predicate offense.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT EXCLUDED INADMISSIBLE EVIDENCE AND THEREFORE THE DEFENDANT WAS NOT PREVENTED FROM PRESENTING A DEFENSE, AND EVEN IF THIS COURT WERE TO FIND ERROR, ANY ERROR WAS HARMLESS.

a. The trial court properly exercised its discretion when it excluded inadmissible evidence and therefore the defendant was not prevented from presenting a defense.

The Sixth Amendment, applied to the states through the Fourteenth Amendment, guarantees criminal defendants a fair opportunity to present exculpatory evidence free of arbitrary state evidentiary rules. Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987), Washington v. Texas, 388 U.S. 14, 18, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L.

Ed. 2d 297 (1973); State v. Baird, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997).

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), cert. denied, 508 U.S. 953 (1993); In re Twining, 77 Wn. App. 882, 893, 894 P.2d 1331 (1995), review denied, 127 Wn.2d 1018 (1995). Limitations on the right to introduce evidence are not constitutional unless they affect fundamental principles of justice. Montana v. Engelhoff, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996) (stating that the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988))). Similarly, the Supreme Court has stated that the defendant's right to present relevant evidence may be limited by compelling government purposes. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

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), cert. denied, 498 U.S. 1046 (1991); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), cert. denied, 508 U.S. 953 (1993). 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), cert. denied, 475 U.S. 1020 (1986).

Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); Rehak, 67 Wn. App. at 162.

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

In the present case, the defendant sought to admit evidence that Carr had indicated that his friend and the victim were probably using methamphetamine. RP 419. Defendant further sought to introduce evidence that people would come and go from the victim's residence because it was a "drug house" and the entry requirements were not as strict. RP 420. The State asserted that any evidence that the residence was a "drug house" was irrelevant because such information, even if true,

was not known to the defendant or Davis, and therefore the defendant would not know if the entry requirements into the apartment were relaxed. RP 420. The defendant made a further offer of proof that there was meth oil, mason jars, rock salt, muriatic acid and tubing recovered, and that such evidence would tend to establish that the entry into the residence was lawful. RP 421-422. The court found that such evidence was not admissible because none of it was known to the defendant or Davis at the time of the incident. RP 422.

The trial court in this case properly exercised its discretion in excluding such evidence. The trial court correctly found that such evidence was irrelevant because, even if the victim lived in a “drug house” in which there were frequent visitors, such information was not known to the defendant and therefore he could not have been implicitly invited inside. Moreover, Carr, who answered the door of the apartment, specifically testified that he did not invite the defendant or Davis inside. RP 409.

While evidence is relevant if it has a tendency to make the existence of a fact of consequence more or less probable, the evidence the defendant sought to admit did not meet this standard. The State alleged that the murder was predicated on residential burglary or burglary in the second degree, both of which require unlawful entry into a building. CP

135-136; RCW 9A.52.025, RCW 9A.520.30. The defendant asserts that Carr implicitly invited the defendant and Davis inside by opening the door. Brief of Appellant at page 24. Carr testified that he did not invite the defendant or Davis inside, but that they stepped inside anyway. RP 409. Under the defendant's analysis, the mere act of answering a knock on the door is an invitation for whomever is knocking to enter the building lawfully. Under the defendant's argument, for example, if a person opened their front door to speak to a solicitor, the solicitor would be permitted to lawfully enter the home.

Carr testified that he had, in the past, opened the door for a stranger and let that person inside the apartment. RP 427. What is different about the present case, however, is that Carr did not open the door and invite the defendant and Davis inside. The mere fact that Carr had invited other strangers inside on occasion does not give the defendant an implicit invitation to enter. The defendant argues that "[s]ince people, including strangers, were routinely admitted to the apartment to purchase drugs, it was more likely Carr responded to Davis and Pearson with an implied invitation to enter the apartment in this instance." Brief of Appellant at page 25. Such assertion is without merit. As argued above, Carr testified that he did not invite the defendant or Davis inside. It does not stand to reason that because Carr allowed other strangers to enter on

separate occasions that he allowed the defendant to enter before the incident.

The present case is not an example of a situation in which there was an implied invitation for anyone to enter the residence. There were no facts whatsoever known to the defendant that would have lead him to believe that he was invited to enter the residence. Assuming, arguendo, that other individuals were implicitly invited into the residence to purchase drugs, none of those facts or circumstances were known to the defendant, and the trial court properly precluded him from introducing evidence of possible drug sales or manufacture.

The court's ruling, however, did not preclude the defendant from arguing that, by his conduct, Carr implicitly invited the defendant and Davis inside. The defendant specifically argued to the jury in closing argument that the defendant and Davis were implicitly invited into the apartment by Carr. RP 827-833. Therefore, the court's ruling did not preclude the defendant from arguing his theory of the case—that the apartment had a lot of people coming in and out, that Carr had previously allowed strangers to enter, and that the admission of strangers into the apartment was not unusual. *Id.* The jury clearly rejected this theory. Because evidence of possible drug sales was irrelevant, and the defendant

was unaware of possible drug sales, the trial court properly exercised its discretion in excluding such evidence.

- b. The trial court properly exercised its discretion in excluding evidence that someone in the victim's residence was possibly manufacturing methamphetamine because such evidence was irrelevant to showing bias of the witness.⁴

The confrontation clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, cross-examination is limited to the subject matter of direct examination and matters affecting the credibility of the witness. ER 611(b). A court may, in its discretion, allow inquiry into additional matters as if on direct examination. ER 611(b); State v. Robideau, 70 Wn.2d 994, 997, 425 P.2d 880 (1967) (scope of cross-examination is within the trial court's discretion), State v. Coe, 101 Wn.2d 772, 780, 684 P.2d 668 (1984); State v. Young, 89 Wn.2d 613, 4 P.2d 1171, cert. denied, 439 U.S. 870 (1978).

⁴ This court previously addressed the issue of whether evidence of a methamphetamine lab in the victim's apartment was admissible in the first trial. This court held that the trial court did not err in prohibiting the defendant from cross-examining Kohl on the presence of the methamphetamine lab in the victim's apartment. CP 27-39. It is unclear from this court's prior opinion if evidence regarding the methamphetamine lab in the victim's apartment was admitted in the first trial, and if it was, to what extent. As the record is unclear as to what evidence was admitted previously, the State addresses the merits of the defendant's claims now. If, however, this court were to find that the issue has already been litigated, it should not revisit the issue. See, State v. Bailey, 35 Wn. App. 592, 594, 668 P.2d 1285 (1983) (quoting Davis v. Davis, 16 Wn.2d 607, 609, 134 P.2d 467 (1943)).

A defendant is allowed great latitude in cross-examination to expose a witness's bias, prejudice, or interest. State v. Knapp, 14 Wn. App. 101, 107-08, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975). Nevertheless, the trial court still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); State v. Kilgore, 107 Wn. App. 160, 184-185, 26 P.3d 308, (2001), affirmed by State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002).

Under ER 103(a)(2), error may not be asserted based upon a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by offer or was apparent from the context of the record. "An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). The party offering the evidence has the duty to make clear to the trial court: 1) what it is that he offers in proof; and, 2) the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. Ray, 116 Wn.2d at 539, citing Mad River Orchard Co. v. Krack Corp., 89 Wn.2d

535, 537, 573 P.2d 796 (1978). Finally if the ruling was a tentative ruling on a motion in limine, a defendant who does not seek a final ruling waives any objection to the exclusion of the evidence. State v. Riker, 123 Wn.2d 351, 369, 869 P.2d 43 (1994), citing State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991), review denied, 120 Wn.2d 1022 (1993).

In this case the State moved in limine to exclude evidence that a dismantled methamphetamine lab was recovered in the victim's apartment and belonged to Kohl. RP 38. The State asserted that there was no relevance, and that it would be considered a bad act of Kohl's under ER 404(b). Id. The defendant asserted that the State had enough evidence to charge Kohl with unlawful manufacturing of methamphetamine, and did not do so because he was cooperating as a witness. RP 38-39. The court initially reserved ruling, and addressed the issue again during trial. RP 163. The trial court did not allow the admission of such evidence to be admitted, but invited the defendant to address the issue again once the defendant testified. RP 165. Defense counsel even asked if Kohl could be permitted to stay, presumably to provide testimony during the defense case. RP 165.

The State submits that defendant has failed to properly preserve this claim for review. The trial court did not issue a final ruling but invited the defendant to address the issue at a later time. Based on the record below, the trial court issued a tentative ruling excluding the evidence unless defendant could show how such evidence was relevant to

show the bias of Kohl. Defendant made no effort to overcome this tentative ruling of exclusion. At one point defense counsel asserts that evidence of a methamphetamine lab was recovered from the apartment, but he does not provide any details as to whether the case could have been charged and, but for Kohl cooperating with the state, was not. There is no evidence that there was any kind of agreement between Kohl and the State, or that the evidence of the dismantled methamphetamine lab was even a case that could have been prosecuted. This issue was not properly preserved for review. Moreover, the defendant could have requested to question Kohl about any possible benefit he received in exchange for his testimony outside the presence of the jury to make a record, but the defendant never made such a request.

Should this court find the issue sufficiently preserved, the record indicates that the trial court properly exercised its discretion in excluding the evidence. The State asserted that the methamphetamine lab recovered was dismantled and inactive. RP 38. Such evidence would suggest that the State would likely have been unable to proceed with such a charge. Moreover, there was no evidence presented by the defendant to show when the alleged manufacturing took place, as the lab was inactive and dismantled. The State moved to exclude such reference to the dismantled lab, and the court agreed. CP 141-143; RP 38. The defendant never made an offer of proof as to what the alleged evidence against Kohl was, and

therefore cannot establish that the trial court abused its discretion in excluding it.

The defendant cites to State v. Kimbriel, 8 Wn. App. 859, 510 P.2d 255 (1973), in support of his argument. Brief of the Appellant at page 30. Kimbriel, however, is distinguishable from the case at bar. In Kimbriel, a key state rebuttal witness was originally charged with robbery and auto theft arising out of the same incident as the defendant. Id. at 866-867. The witness was then permitted to enter a plea to the charge of auto theft and was given a deferred sentence. Id. The court held the deferred sentence that the witness received could have influenced his testimony and that “[a] light sentence given to an accomplice may on one hand be fully justified by his background. . . . On the other hand, subtle pressures are present at the time the plea agreement is made, even though no promises have been made to the state.” Id., citing State v. Tate, 2 Wn. App. 241, 469 P.2d 999 (1970). The court found that the defendant should have been permitted to explore the issue on cross-examination. Id. at 866-867.

The present case differs substantially from Kimbriel. In the present case, Kohl was not an accomplice to the defendant’s crimes. Moreover, Kohl was not given a plea bargain which could create “subtle pressures” because he was not charged with any crime. The record is also void of any evidence that Kohl was being given a benefit by the State.

- c. Assuming, arguendo, that any error was committed, such error was constitutional harmless error.

Finally, assuming arguendo, that any error was committed, any error was harmless. The test to determine whether an error is harmless is “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Stated another way:

An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred . . . A reasonable probability exists when confidence in the outcome of the trial is undermined.

State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). In the present case, testimony was presented that the defendant and the victim got into an altercation during which the defendant threatened the victim’s life. RP 272. The victim gave the defendant a bloody lip and took a pair of night vision goggles and a cell phone belonging to Tim Knight. RP 361, 365, 403-404. The defendant enlisted the assistance of his best friend, Davis, who went to Knight’s residence in order to get the address of the victim. RP 372, 498, 501-503. While at Knight’s residence, Davis fired a shotgun at Knight’s feet. RP 503. Davis and the defendant then went to the victim’s residence, and entered the apartment uninvited. RP 409. Davis questioned Kohl and Carr to see if they were the victim. RP 138, 141, 501. Davis produced a shotgun, the

defendant produced a revolver and Davis points his shotgun directly at the victim's head. RP 142, 144, 147-148, 410. The victim was armed with a paintball gun. RP 148-149. Davis asked the victim why he beat up his friend and why he took the night vision goggles. RP 411. Davis untimely fired his shotgun at close range at the victim's head, causing immediate death. RP 150, 202, 619. Davis bent over the victim's body and either put something on or took something from the victim. RP 152. Davis and the defendant fled the apartment. RP 153. The defendant paints his car a different color and is stopped near the Canadian boarder with a large amount of cash. RP 382, 630-632, 724.

Moreover, the murder was witnessed by two other people, in addition to Kohl. Carr testified that the defendant and Davis entered the apartment uninvited. RP 409. He stated that the defendant was armed with a revolver, and Davis was armed with a shotgun. RP 410. He testified that Davis questioned the victim about why he beat up his friend and took the night vision goggles. RP 411. Carr observed Davis hold the shotgun to the victim. RP 414. Carr pushed the defendant out of his way, stepped out of the apartment door, and Davis "blew [the victim's] head off." RP 414. Hotchkiss testified that she heard a voice outside the bedroom door that said "Why did you..." RP 275. She indicated the victim was armed with a paintball gun. RP 275. She then heard a "boom," saw the wall splatter with blood, and saw the victim fall. RP 275.

Hotchkiss stated that before the date of the murder she did not know the defendant or Davis. RP 277.

Clearly, there was overwhelming evidence that Davis and the defendant committed felony murder with residential burglary or burglary in the second degree as the predicate. Any error the court committed in excluding evidence that the victim resided in a “drug house” or that Kohl had at one time manufactured or attempted to manufacture methamphetamine is harmless.

3. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE (1) COUNSEL HAD A LEGITIMATE TRIAL STRATEGY FOR NOT CALLING THE DEFENDANT AS A WITNESS AND DEFENDANT CANNOT ESTABLISH ANY PREJUDICE, (2) ANY ERROR IN NOT REQUESTING THAT THE JURY BE INSTRUCTED ON MANSLAUGHTER WAS HARMLESS, (3) COUNSEL HAD A LEGITIMATE TRIAL STRATEGY FOR NOT REQUESTING INSTRUCTIONS ON MANSLAUGHTER; AND (4) ANY REQUEST FOR INSTRUCTIONS ON MANSLAUGHTER WOULD HAVE BEEN DENIED.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Washington State Const. Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial

testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgement or tactics, the testing envisioned by the Sixth Amendment has occurred. Id. The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and adopted by the Washington Supreme Court in State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 497 U.S. 922 (1986).

The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to

deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also, State v. Walton, 76 Wn. App. 364, 884 P.2d 1348 (1994), review denied, 126 Wn.2d 1024 (1995); State v. Denison, 78 Wn. App. 566, 897 P.2d 437 (1995); State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995); State v. Foster, 81 Wn. App. 508, 915 P.2d 567 (1996), review denied, 130 Wn.2d 100 (1996).

The Washington Supreme Court, in State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991), cert. denied, 506 U.S. 56 (1992), gave further clarification to the intended application of the Strickland test. The Lord court held the following:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Strickland, at 689-90.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, at 694. Because [the defendant] must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved

upon a finding of lack of prejudice without determining if counsel's performance was deficient.

Strickland, at 697. Lord, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. McFarland, 127 Wn.2d at 335 (citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), cert. denied, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. State v. Hayes, 81 Wn. App. 425, 442, 914 P.2d 788 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689.

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective

assistance of counsel. Lord, 117 Wn.2d at 883. Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. McFarland, 127 Wn.2d at 336. Defendant may not supplement the record on direct appeal. Id. Finally, in determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. State v. White, 81 Wn.2d 223, 225, 500 P.2d 964 (1993). In this case, as argued below, defendant has failed to establish that the trial attorney's assistance was deficient and that any deficiency resulted in prejudice to defendant.

- a. The defendant did not receive ineffective assistance of counsel when counsel stated in opening statement that the defendant would testify when trial counsel made an informed change of trial strategy in the midst of trial.

It is not per se ineffective assistance of counsel to fail to call a promised witness, such as the defendant. In re PRP of Benn, 134 Wn.2d 868, 897-898, 952 P.2d 116 (1998). In Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988), the 1st circuit court held that failure to call a promised witness did establish prejudice as a matter of law. Id. at 18-19. However, the 1st circuit had subsequently held that the inquiry is "necessarily fact-based." U.S. v. McGill, 11 F.3d 223, 227 (1st Cir. 1993). More recently in 2000, the 1st circuit again addressed whether it was error for an attorney not to call a promised witness. In Ouber v. Guarino, 293 F.3d 19, 32-33

(1st Cir. 2000), the 1st circuit held that “whether or not Anderson intended to [create an exception to the prejudice requirement] is beside the point, since the weight of recent Supreme Court precedent is to the contrary.”

Id.

The Washington Supreme Court specifically distinguished the holding of Anderson v. Butler, supra. In Benn, the court stated the following:

The defendant also contends that it is ineffective per se to fail to call a promised witness, such as himself. There is language to that effect in Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988). However, the First Circuit subsequently held that, while failure to produce a promised witness may under some circumstances be deemed ineffective assistance, the determination of inefficacy is necessarily fact-based. United States v. McGill, 11 F.3d 223, 227 (1st Cir. 1993) (citing Anderson). The court there held that “assuming counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is “virtually unchallengeable.” Turner, 35 F.3d 904 (quoting Strickland, 466 U.S. at 690).

Benn, 134 Wn.2d 868 at 898.

In the present case, it was clear that the defendant’s counsel did not know that he would not be calling the defendant as a witness when he made his opening statement. On the contrary, trial counsel clearly believed that the defendant would be testifying. It is clear, and acknowledged by trial counsel, that there was a change in trial strategy in the midst of the trial itself—a situation that the court in Strickland held

was “virtually unchallengeable.” Strickland, 466 U.S. 690. Trial counsel articulated in opening statement that the defendant was “freaked out” by Davis’ actions, and that is why the defendant fled the area. RP 119-120. During the course of the State’s case, however, much of that information was introduced through other witnesses. For example, the defendant introduced testimony that witnesses to the murder believed the defendant looked “white as a ghost” and in shock or scared by Davis’ actions. RP 188-189, 203, 207. Defense counsel also elicited testimony that the defendant appeared nervous the entire time of the incident and that he acted like he wanted to leave. RP 447. It clearly could have been the strategy of trial counsel to call the defendant as to how he felt when Davis shot the victim, but felt that such testimony from the defendant would be unnecessary because the same evidence was already before the jury. Trial counsel even acknowledged to the court that he was not calling the defendant because of technical issues in the trial.⁵ Therefore, another trial strategy could have been simply that the State presented a weaker case

⁵ The defendant asserts that:

“Counsel then reneged on that promise, not because of some unforeseen change in the expected testimony, but because counsel had not yet made the decision whether to present the defendant’s testimony at the time he made the promise.”

Brief of Appellant at page 37. The defendant does not provide a citation to the record to support that assertion, and such assertion is unsupported by the record. Trial counsel stated that he did not call the defendant for technical reasons. RP 892. Such assertion does not suggest that he had not made a decision when he gave his opening statement.

than trial counsel originally believed, and therefore he wanted to put the State on its burden and not present a case.

The present case is not a situation in which trial counsel made an error in judgment in making a false promise to the jury. Rather, it is a case in which the trial strategy changed after the State presented its case. In the midst of trial it is reasonable that the circumstances in which the defendant was going to testify would change.

While the defendant relies on Anderson, the same court that issued Anderson later held that the inquiry still must be fact-based. See U.S. v. McGill, supra. Based on the facts in the present case, it is clear that trial counsel was justified in changing his mind about the type of case he wanted to present. Moreover, the defendant still must make a showing of prejudice. See Ouber v. Guarino, 293 F.3d 19, 32-33 (1st Cir. 2002) (“Whether or not Anderson intended to [create an exception to the prejudice requirement] is beside the point, since the weight of recent Supreme Court precedent is to the contrary.”). In this case, the defendant cannot establish prejudice.

- b. The defendant did not receive ineffective assistance of counsel when counsel did not request instructions on manslaughter in the first or second degree when such charges were unsupported by any evidence and it was legitimate trial strategy not to request instructions on the two lesser crimes.
- i. **Trial counsel was not ineffective for failing to request instructions on manslaughter in the first or second degree, but if this court finds that any error was committed, such error was harmless.**

The defendant proceeded to trial on murder in the second degree (intentional murder) and murder in the second degree (felony murder). As argued above, manslaughter is not a lesser included offense of felony murder in the second degree. See State v. Tamalini, 134 Wn.2d 725, 953 P.2d 450 (1998); State v. McJimpson, 79 Wn. App. 164, 901 P.2d 354 (1995), review denied, 129 Wn.2d 1013 (1996). Therefore, lesser included instructions for the two degrees of manslaughter would have only been available to the defendant on the intentional murder count.

The jury in the present case was instructed on *both* intentional murder and felony murder. They were not instructed that felony murder was an alternative charge to intentional murder. Rather, the jury was told that they must consider each count separately, and that their verdict on one

count should not control the verdict on any other count. CP 219-244.

(Instruction #16). The jury is presumed to follow the court's instructions.

State v. Swan, 114 Wn.2d 613, 662, 790 P.2d 610 (1990).

Assuming, arguendo, that the defendant did request a manslaughter instruction on the intentional murder count, the jury would still have had to consider the charge of felony murder in the second degree. The jury found the defendant not guilty of intentional murder in the second degree. If, however, the jury had been instructed on manslaughter in the first or second degree, and had convicted the defendant of one of those crimes, that conviction would have merged with the felony murder conviction. Because both crimes would have merged, the defendant would have received the same sentence, and any error was harmless. See State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997). Assuming, arguendo, that his attorney requested that the jury be instructed on manslaughter, that the jury was instructed on manslaughter, and that the jury found the defendant guilty of manslaughter, they would still have found the defendant guilty of felony murder, which they had to consider separately. The defendant would not have received any benefit to the jury being instructed on manslaughter, and therefore any error in failing to so instruct was harmless. Also, as argued below, it could have been a trial strategy for

defense counsel not to have requested such instructions because it would not have given the defendant any benefit.

The defendant asserts that he would have faced significantly lower penalties if his counsel had requested instructions on manslaughter. Supplemental Brief of Appellant at page 5. Such argument is without merit. Because the jury was required to consider the crime of intentional murder separately from felony murder, the defendant was found guilty of felony murder. Any instruction on manslaughter as it relates to the intentional murder charge would not have subjected the defendant to a lesser penalty because he was found guilty of the separate crime of murder in the second degree (felony murder).

ii. If this court were to reach the merits of defendant's claim, trial counsel exercised legitimate trial strategy in not requesting that the jury be instructed on manslaughter in the first or second degree on the charge of intentional murder in the second degree.

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 488 U.S. 948 (1988). If defense counsel's trial

conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. Lord, 117 Wn.2d at 883. Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. McFarland, 127 Wn.2d at 336.

Defendant may not supplement the record on direct appeal. Id. Finally, in determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. State v. White, 81 Wn.2d 223, 225, 500 P.2d 964 (1972).

Washington courts have also recognized that defense counsel's decision to pursue an "all or nothing" strategy--seeking acquittal on a greater offense rather than requesting a lesser included offense instruction--does not necessarily constitute deficient performance. For instance, in State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979), the defendant was charged with second degree assault and defense counsel did not request a lesser included offense instruction of simple assault. On appeal, the defendant argued ineffective assistance based on a number of reasons including the failure to request the lesser included instruction. King, 24 Wn. App. at 499-501. The court, however, rejected the defense claim, stating,

Defendant complains because counsel failed to offer an instruction on the lesser included offense of simple assault. Such an instruction would almost have insured a conviction for at least a misdemeanor. Counsel's tactic, as demonstrated by his argument to the jury, was to attempt to persuade the jurors that the affray was not as violent as some witnesses suggested and that the injuries sustained did not produce pain and suffering of a sufficient magnitude to qualify as grievous bodily harm. It was an all-or-nothing tactic that well could have resulted in an outright acquittal.

King, 24 Wn. App. at 501.

Similarly, in State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991), a prosecution for first degree murder, our Supreme Court rejected the suggestion that the trial court had erred by acquiescing in the defense's decision not to request lesser included offense instructions:

Had the jury decided (as the defendants strenuously argued) that the evidence did not prove the charges of murder in the first degree and assault in the first degree beyond a reasonable doubt, then under the instructions given, the defendants would have been acquitted. The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot on appeal now change their course and complain that their gamble did not pay off. Defendants' decision to not have included offense instructions given was clearly a calculated defense trial tactic and, as we have held in analogous situations, it was not error for the trial court to not give instructions that the defendant objected to.

Hoffman, 116 Wn.2d at 112-13.

Thus both the Washington Supreme Court's language in Hoffman and the Court of Appeals decision in King state that a defense decision to

not have lesser included offense instructions is a tactical decision. As a tactical decision can not serve as a basis for a claim of ineffective assistance, the Defendant's claim of ineffective assistance must fail.

The defendant relies on State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004), and State v. Pittman, 134 Wn. App. 376, __ P.3d __ (2006), both cases are distinguishable on their facts. In Ward, the defendant was charged with second degree assault and possession of methamphetamine after he allegedly pointed a gun at two men who were repossessing his car. Ward, 125 Wn. App. 243 at 246-247. On appeal, the court held that defense counsel's "all or nothing" strategy to not request a lesser included instruction for unlawful display of a weapon was deficient. Id. at 249-251. In making this determination, the court considered the significant difference in penalties between the greater and lesser offenses, the fact that the defendant's theory of the case applied to both offenses, and the particularly risky nature of the defendant's claim of self-defense. Id.

Ward is distinguishable. In Ward, two repossession agents were confronted by Ward as they tried to repossess his car. The agents claimed Ward pointed a gun at them. Ward, 125 Wn. App. at 246. The State charged Ward with two counts of second degree assault, both with firearm enhancements. Ward, 125 Wn. App. at 247. At trial, Ward claimed that

he believed the agents were car thieves and that he was trying to defend his property. He and his girlfriend also testified that Ward only displayed the gun by opening his coat. Ward, 125 Wn. App. at 248. Defense counsel did not offer an instruction for the lesser included offense of unlawful display of a weapon, and, on appeal, Ward argued that this was ineffective assistance. Division One agreed, concluding that it was objectively unreasonable to use the “all-or-nothing” strategy in Ward’s case because (1) the lesser included offense was a misdemeanor which carried considerably less jeopardy than the two second degree assault felonies; (2) the defenses would have been the same for both charges, thus the additional of a lesser included offense created little risk; and (3) the all or nothing approach was risky because it relied on Ward’s credibility regarding his claim of self-defense and Ward had been seriously impeached. Ward, 125 Wn. App. at 249-50.

First, unlike in Ward, the defendant would not have been subject to any lesser penalty if he had requested manslaughter instructions. As argued above, the defendant would have been found guilty of felony murder, regardless of whether the jury was given lesser included offenses on the intentional murder. The defendant in the present case was not risking a bigger penalty by not requesting manslaughter instructions on the

intentional manslaughter count. In fact, the defendant in the case at bar would have been facing the exact same penalty.

Second, in Ward, the defendant was severely impeached and the defense was self-defense. Ward told police when they first arrived that he knew the agents were coming to repossess the car, but at trial stated that he thought the agents were thieves. Ward, 125 Wn. App. at 250. Nothing like that happened in the present case.

Moreover, the analysis in Pittman does not apply because the evidence of the defendant and Davis's intent when Davis pulled the trigger of the shotgun at the victim's head was clear. In the present case, the outcome of the case would not have been different. The State's case was not a "weak" case. On the contrary, the State presented extensive evidence that the defendant and Davis entered the victim's apartment with the intent to commit a residential burglary or burglary in the second degree—the defendant and Davis asked the victim about the night vision goggles and they went to Knight's home specifically to find out where the victim was.

Moreover, in the present case, the jury in the first trial was instructed on the lesser crimes of manslaughter in the first and second degree. There were, however, significant differences between the first trial and the second that would have caused defense counsel to

strategically decide not to request such lesser crimes. Most significantly, in the first trial the defendant was charged with murder in the first degree. CP 5-8. Unlike the second trial, where the defendant was charged with two variations on murder in the second degree, the defendant was facing a much higher penalty in the first trial. Additionally, in the first trial, Jeremy Davis, the shooter, testified on behalf of the defendant. CP 297-298. Such testimony would have been critical in establishing what intent Davis or the defendant had when then entered the victim's residence. On retrial, the defendant did not call Davis as a witness, and does not allege that his counsel was ineffective for failing to do so.

As the decision to not seek lesser included offense instructions is a tactical decision, and because tactical decisions cannot serve as a basis for a claim of ineffective assistance of counsel, the defendant's claim must fail. Specifically in the context of this case, defense counsel was involved in a case that was quite different from the case presented in the first trial. It is clear that the defendant did not believe the State was able to prove its case, and that the State did not establish that the defendant entered or remained in the victim's apartment to commit a burglary.

Finally, even if counsel's performance were deemed deficient, the defendant cannot show prejudice. To prevail on a claim of ineffective assistance of counsel, he must show that he was prejudiced by counsel's

error. A defendant is prejudiced where there is a reasonable probability that but for the deficient performance, the outcome of the case would have differed. Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

- iii. **The defendant cannot establish prejudice in trial counsel's failure to request that the jury be instructed on manslaughter in the first or second degree on the intentional murder count because such request would have been properly denied.**

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, reversed on other grounds, 141 Wn.2d 448, 6 P.3d 1150 (2000), citing Herring v. Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that

accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

A defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser crime is a necessary element of the charged crime, and (2) the evidence supports an inference that the lesser crime--and only the lesser crime--was committed. State v. Hurchalla, 75 Wn. App. 417, 421-23, 877 P.2d 1293 (1994), overruled on other grounds by State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000) (citing State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978)). As to this second prong, there must be some affirmative evidence from which the jury could conclude that the defendant committed the lesser included crime. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), disapproved on other grounds, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). Manslaughter is a lesser included crime of second degree intentional murder. State v. Berlin, 133 Wn.2d 541, 550-551, 947 P.3d 700 (1997).

In general, a defendant is entitled to an instruction on a lesser included offense when two requirements are met. The first requirement is known as the legal prong. State v. Workman, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978). Under the legal prong, each element of the lesser offense must be a necessary element of the greater offense. The second prong is the factual prong. Id.

Here, it is undisputed that the legal prong of the Workman test is met for both proposed lesser-included offenses. Supplemental Brief of Appellant at page 2. However, the defendant did not receive ineffective assistance of counsel when counsel elected not to request the lesser included instructions on intentional murder because the factual prong was not met.

At trial, evidence was presented that the defendant was in an altercation with the victim at Knight's house. During the altercation the victim struck the defendant in the mouth. The defendant then left, firing out the window of his car as he did so. The defendant met Davis, and together then went to Knight's house to get an address for the victim. Davis fired his shotgun into Knight's floor, in an effort to get the victim's address from him. The defendant and Davis then went to the victim's apartment, and drew their weapons once the victim was visible. The defendant made a comment that somebody was going to get shot. Davis jabbed his shotgun at the victim several times, ultimately pulling the trigger at close range.

The defendant asserts that the jury could have found that defendant acted recklessly or negligently in going to the victim's apartment with Davis. The defendant asserts "[t]he jury could have found, based on the evidence that that while Pearson was lawfully in the apartment by way of an implied invitation, he acted negligently or recklessly in going there with Davis, who was armed with a shotgun." Supplemental brief of

Appellant at page 4. Such analysis, however, is not applicable in determining whether a manslaughter instruction should have been given.

The State presented evidence, and the jury ultimately found, that the defendant was acting either as a principal or as an accomplice to Davis. Under an accomplice theory, the defendant would be responsible for Davis's actions. Therefore, the defendant would have to show that Davis acted recklessly or negligently in firing at the victim's head at close range, not that the defendant acted recklessly or negligently in going with Davis to the apartment. It is the act of Davis shooting the victim that would have to be reckless or negligent in order for a lesser included instruction to be applicable, and the facts in this case do not support such instructions.

In State v. Pastrana, 94 Wn. App. 463, 972 P.2d 557 (1999), review denied, 138 Wn.2d 1007 (1999), the defendant fired one shot at another car on the freeway, killing one of the three occupants. 94 Wn. App. at 468. The jury convicted Pastrana of first degree murder by extreme indifference. Id. Pastrana argued that he was unaware that anyone else was in the line of fire and that he aimed at the tire. Id. at 561-62. This Court held that indiscriminately shooting a gun from a moving vehicle was precisely the type of conduct proscribed by the statute and that Pastrana acted with much more than mere recklessness. Id. Therefore, the trial court in Pastrana did not err in refusing to give a manslaughter instruction. Id. at 562. See also, State v. Pettus, 89 Wn. App. 688, 688, 95

P.2d 284 (1998) (no error for failure to instruct the jury on manslaughter as a lesser offense of first degree murder by extreme indifference where defendant fired 4+ shots from a moving vehicle in a residential area near a school play ground).

The defendant cannot establish that he received ineffective assistance of counsel when counsel did not request jury instructions on manslaughter in the first degree or manslaughter in the second degree when the court would have declined to give those instructions. The factual prong of the Workman test is not satisfied. The defendant cannot establish prejudice.

4. THE DEFENDANT CANNOT ESTABLISH 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.” Delaware v. VanArsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (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).

A criminal defendant is entitled to a fair trial, not a perfect one. Delaware v. VanArsdall, 475 U.S. 673 at 681. 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.

5. THE TRIAL COURT ACTED WITHIN ITS STATUTORY AUTHORITY WHEN IT ORDERED THAT THE SENTENCE IMPOSED ON THE MURDER BE SERVED CONSECUTIVELY WITH THE SENTENCE PREVIOUSLY IMPOSED ON THE CUSTODIAL ASSAULT.

RCW 9.94A.400(3) states:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence of a felony, the sentence shall run concurrently with any felony sentence when has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime be sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(emphasis added).

In State v. Linderman, 54 Wn. App. 137, 722 P.2d 1025 (1989), review denied, 113 Wn.2d 1004 (1989), the court found that under RCW 9.94A.400(3), the trial court is granted total discretion to elect to impose a consecutive sentence. Id. at 139. The court stated that the statute requires only that the judge expressly order that the sentence be served consecutively. Id., citing State v. Huntley, 45 Wn. App. 658, 726 P.2d 1254 (1986). The court further found that “neither the statute nor the official comments thereto require that the trial judge specify any reason whatsoever behind such a decision, let alone that the reasoning conform to any particular policy.” Id.

In the present case, the court ordered that the sentence imposed on the murder be served consecutively to a 2000 custodial assault conviction. CP 270-282; RP 906. The court had the discretion, under RCW 9.94A.400(3) to do so, and need not have stated any reason for its decision.

The defendant asserts that the court violated the defendant’s double jeopardy rights “[b]y ordering that the custodial assault sentence run consecutive to the felony murder sentence. . .” Brief of Appellant at page 44. Such assertion, however, is factually incorrect. The trial court did not alter the sentence on defendant’s custodial assault conviction. The trial court only addressed the defendant’s sentence on the felony murder

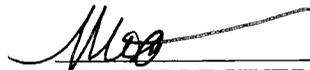
conviction. As argued above, the trial court acted within its statutory authority in sentencing the defendant on the present case.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that the defendant's conviction be affirmed.

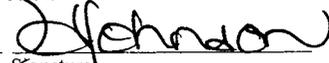
DATED: September 11, 2007.

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Deputy Prosecuting Attorney
WSB # 32724

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.

9/11/07 
Date Signature