

NO. 36039-0

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

STATE OF WASHINGTON, RESPONDENT

v.

LIONEL GEORGE, APPELLANT
BRIAN WAHSISE, APPELLANT

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STATE OF WASHINGTON
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Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 06-1-01123-8

No. 06-1-01125-4

BRIEF OF RESPONDENT

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

1. Did the court properly deny defendant George's request for a jury instruction on reckless driving as a lesser included of eluding when reckless driving is not a lesser included offense?
Did the court properly instruct the jury on accomplice liability where the instruction was a correct statement of Washington law?
2. Did the State adduce sufficient evidence to convict defendant Wahsise of first degree unlawful possession of a firearm when defendant Wahsise had dominion and control over the area in which the firearm was located?
3. Should this court decline to review defendant George's claim of prosecutorial misconduct when he has failed to make any reference to the record in support of his argument?
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7. Did the court properly admit Detective Rackley's testimony identifying defendants George and Wahsise on the surveillance video when Detective Rackley's identification was based upon his observations and interactions with the defendants at the time they were arrested and in subsequent interviews?

8. Are the defendants entitled to relief under the doctrine of cumulative error when no error has occurred?

B. STATEMENT OF THE CASE.

1. Procedure

On March 9, 2006, the State charged Brian Wahsise, hereinafter "defendant Wahsise", with first degree unlawful possession of a firearm and first degree robbery with a firearm enhancement. WCP 3-4¹. Also on March 9, 2006, Lionel Demetri George, hereinafter "defendant George" was charged with first degree robbery, first degree unlawful possession of a firearm; intimidating a public servant; third degree assault; and

¹ The clerk's papers for defendant Wahsise shall be referred to as "WCP". The clerk's papers for defendant George shall be referred to as "GCP".

attempting to elude a pursuing police vehicle. GCP 210-12. Defendants George and Wahsise were charged as co-defendants in the robbery and their two cases were joined for trial. WCP 3-4; GCP 210-12. On May 2, 2006, the court ordered defendant George to be examined for competency. GCP 5-8. On July 7, 2006, the court found defendant George competent to stand trial. 7/14/06 RP 2-5; GCP 19-20.

On November 6, 2007, the parties appeared for trial before the Honorable Frank Cuthbertson. RP 4-6.² The court heard pretrial motions. RP 8-31. The court granted defendant George's motion to exclude (1) reference to defendant George's other two robbery cases; (2) reference to a stolen wallet recovered in defendant George's pocket; and (3) any reference to evidence by non-testifying codefendants. GCP 75-76; RP 6-17. Defendant Wahsise joined in defendant George's motion to exclude evidence by non-testifying co-defendants. RP 16.

The court also made a tentative ruling denying defendant George's motion to admit three written statements allegedly authored by co-defendant Wahsise as statements against penal interest under ER 804(b)(3)

² The verbatim record of proceedings shall be referred to as follows:
Defendant George's July 14, 2006, competency hearing shall be referred to as "7/14/06 RP"
The August 1, 2006, motion for continuance shall be referred to as "8/1/06 RP"
The September 20, 2006, status conference shall be referred to as "9/20/06 RP"
The eight consecutively paginated volumes shall be referred to as "RP"
Defendant Wahsise's March 2, 2007, sentencing hearing shall be referred to as "WSRP"
Defendant George's March 6, 2007, sentencing hearing shall be referred to as "GSRP"

or for impeachment purposes under ER 607. GCP 75-76; RP 25-26. The court found there was insufficient indicia of trustworthiness to admit the statements under 804(b)(3). The court denied the State's motion to admit the statements as admissions by a party opponent. RP 31-32. The court advised the parties that it would revisit the statements' admissibility should there be evidence of the statements' trustworthiness. GCP 75-76; RP 31-32. On November 14, 2006, defendant George asked the court outside the presence of the jury to allow him to call defendant Wahsise to the stand to ask him whether the statements and signatures on the three documents were his. RP 181. Through trial counsel, defendant Wahsise refused to answer questions about the documents and "would plead his right to remain silent for obvious reasons." RP 181. The court denied defendant George's request. RP 181. Defendant George responded "Okay. Thank you. I'm just making a record, Your Honor, that he's refusing. Even if I were to call [defendant Wahsise] to the stand, that he's refusing to answer any questions." RP 181.

During defendant Wahsise's cross examination of Detective Rackley, Detective Rackley testified that Mr. George's son said that Mr. Wahsise was in the Days Inn. RP 301-05. Both defendants objected. RP 301. The court sustained their objections and ordered the jury to disregard Detective Rackley's statement. RP 301. Defendant George moved for a mistrial, which the court denied. RP 316, 325.

After the State rested, defendant Wahsise made a motion for a directed verdict on the first degree robbery count, which was denied. RP 415-19, 421. He later made a motion to dismiss the first degree unlawful possession of a firearm count and the enhancement on the first degree robbery count. RP 429, 433. The court denied both of these motions as well. RP 429, 430, 433.

Defendant George made a motion to dismiss the eluding count with its firearm enhancement and the third degree assault count. RP 425-26. The court granted defendant George's motion to dismiss as to the third degree assault count and the firearm enhancement on the eluding count, but denied his motion to dismiss the eluding count. RP 426-28. Defendant George renewed his motion for a mistrial, which was again denied. RP 424, 428.

On November 16, 2006, the court reviewed jury instructions with the parties. RP 462-76. Neither defendant objected to the proposed accomplice liability instruction (jury instruction no. 9). GCP 115; WCP 18; RP 466. State objected to defendant George's proposed eluding instructions, which were based upon WPIC 94.01 used the willful and wanton language of former RCW 46.61.024. GCP 85-59; RP 470-71. Citing *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005), the court gave the State's proposed eluding instructions which included the reckless manner language of current RCW 46.61.024. GCP 131-32 (instruction nos. 25 and 26); RP 472-73. Reckless manner was defined in

instruction no 27. GCP 133; RP 473. The court denied defendant George's request for an instruction on reckless driving as a lesser included offense of eluding. RP 474, 475. Defendant George took exception to the court's refusal to give a lesser included instruction on reckless driving. RP 483.

On November 17, 2006, the jury returned verdicts of guilty on all remaining counts for both defendants Wahsise and George. WCP 44-46; GCP 141-45; RP 553-54. Defendant Wahsise filed a motion for arrest of judgment on December 29, 2006, which the court denied. WCP 54-55; RP 558; WSRP 2, 11-13.

On March 2, 2007, the court sentenced defendant Wahsise to a low end standard range sentence of 108 months on the first degree robbery conviction, 120 months flat time on the firearm enhancement, and 18 to 36 months community custody. WCP 92-101; WSRP 16-17. Additionally, the court sentenced defendant Wahsise to a low end standard range sentence of 41 months on the first degree unlawful possession of a firearm conviction for a total of 228 months. WCP 92-101; WSRP 17.

On March 6, 2007, the court sentenced defendant George to a high end standard range sentence of 177 months on the first degree robbery conviction with 18 to 36 months community custody plus an additional 60 months flat time. GCP 163-76; GSRP 11-12. The court sentenced defendant George to the middle of the standard range on his convictions for first degree unlawful possession of a firearm, intimidating a public

servant, and attempting to elude a pursuing police vehicle, plus 9-18 months community custody on the intimidating a public servant count. GCP 163-76; GSRP 11-12. Defendant George's total incarceration, including flat time, is 231 months, which runs concurrently with his sentence on Pierce County Cause number 06-1-01393-1. GCP 163-76, GSRP 12.

These timely appeals followed. WCP 106; GCP 190-204.

2. Facts

Karen Phillips worked as the desk manager at the Days Inn in Fife for four years. RP 119. On March 8, 2006, she was working in the back office when she heard someone say "lay down. Shut up. Lay down" and something that sounded like a chain rattling. RP 122-23. Before Ms. Phillips could go out to the front lobby area, an employee, Christine Huynh, came into the back office and said "Karen, Karen, I've been robbed." RP 123.

Ms. Phillips testified that there had been \$476.00 stolen from the till during the robbery. RP 124, 136. Some of the money consisted of rolled coins. RP 125. No money was recovered from the robbery. RP 137. Ms. Huynh testified that, in addition to the money stolen from the till, a large, flat screen television was stolen during the robbery. RP 145.

Ms. Huynh was working as a receptionist at the Days Inn in Fife on March 8, 2006. RP 140. She saw “a red Ford Bronco kind of thing drive up to our driveway near the entranceway.” RP 141. A heavysset man, later identified as defendant George, approached her while two other individuals went to where the flat screen TV was hung on the wall. RP 141, 157. Ms. Huynh described defendant George as really heavysset, wearing a leather jacket and a beanie hat. RP 141. One of the other two men was about the same height, but more slender than defendant George, whereas, the third man was shorter. RP 141-42; Defense Exhibits 2 and 3.

Defendant George approached the counter and pointed a gun at Ms. Huynh. RP 141,143; Plaintiff’s Exhibit 3³, 15⁴. She couldn’t see the whole gun, just the barrel, which was black. RP 143, 147. He told her not to look at him and demanded money from the cash register. RP 141, 143, 144. Defendant George said if she looked at him, he would shoot her head off. RP 141, 143. He told her to put all the money into a plastic bag, which she did. RP 144. After she gave him the bag of money, defendant George told her to lie flat on the floor and to not get up or he would shoot her. RP 145.

³ Plaintiff Exhibit 3 is a series of still photographs taken from the Days Inn surveillance video footage of the robbery.

⁴ Plaintiff’s Exhibits 9-21 are photographs of the Days Inn taken shortly after the robbery.

Meanwhile, the two men who walked to the flat screen TV, unscrewed it, and carried it out of the hotel. RP 145, 157, Plaintiff's Exhibit 3, 13. It took both men to carry the television from the hotel. RP 145. The two men removed the television from the hotel before defendant George exited the building. RP 146.

When Ms. Huynh heard them leave, she stood up and noted the suspects' vehicle driving toward the freeway. She believed the vehicle was a Ford Bronco because "it wasn't a small car. It wasn't a truck either. It was just big." RP 146. Ms. Huynh called 911 and reported the incident. RP 161.

On March 8, 2006, Fife Police Officer Thomas Gow responded to an armed robbery that had just occurred at the Days Inn in Fife. RP 73, 74. The initial incident information was that three men and a handgun were involved in the robbery, and the suspects had just fled in a dark-colored Bronco or Blazer heading westbound on Pacific Highway. RP 75, 106-07.

Officer Gow and Detective Jeff Rackley were five blocks away at the Fife Police Station when they were advised of the robbery. RP 75, 231. They got into their respective police vehicles and immediately attempted to overtake the suspect vehicle on Pacific Highway. RP 75. Officer Gow and Detective Rackley hoped the suspects would get stuck in

traffic on Pacific Highway. RP 75, 232. Officer Gow did not see a Bronco or Blazer, however, within minutes after the initial call, he observed a dark red van with an obscured license plate driving westbound in the eastbound lane as it crossed the Puyallup River Bridge. RP 80, 107, 108, 109.

Detective Rackley and Officer Gow attempted to initiate a traffic stop on the dark red van, but it refused to yield to their lights and siren. RP 81. The van continued to drive in the oncoming lanes causing vehicles traveling in those lanes to move to get out the van's way. RP 81, 232. After crossing over the bridge, but before the intersection of Pacific Highway and Portland Ave., Detective Rackley, who was driving an unmarked Ford Explorer, had Officer Gow, who was driving a fully marked patrol car, take the lead in the pursuit. RP 75, 76, 83, 232. The driver of the van continued westbound on Puyallup Ave. without yielding and turned left onto 'M' Street. RP 84, 85. After it turned, the vehicle came to a stop in the middle of the block. RP 85, 111. Detective Rackley and Officer Gow began the process for a high risk stop and ordered the occupants out of the van. RP 85, 111, 232. After a brief moment, the van started driving again. RP 86. The van drove down 'M' Street and turned left onto 25th Street and drove three blocks before coming to another stop. RP 86.

Officer Gow and Detective Rackley again initiated the process for a high risk stop. RP 86. The officers ordered the occupants of the van to show their hands and to exit the vehicle. RP 86-87. The occupants did not respond immediately, but after a while two subjects exited the passenger slider door of the van. RP 87, 88, 112, 260, 262. Despite being ordered to the ground, neither subject complied. RP 88. The driver exited the van and looked at Detective Rackley. RP 88, 237. He walked to the front of the van and looked at Detective Rackley a second time before running away. RP 88, 112, 237. Neither officer pursued, but Detective Rackley radioed dispatch to advise them that the driver had fled and the direction he had taken. RP 89, 237, 238. Officer Gow identified on suspect, "Maas," from the van. RP 89. Officer Gow observed a large, flat panel television inside the vehicle and a bandana secured to the rear license plate that obscured the license plat number. RP 90, 102.

There were nine men and women inside the van, including the suspect who fled. RP 102. Two of the people in the van were so intoxicated they had to be assisted out of the van. RP 294-95, 299. Officer Gow was not aware of any large sums of money being recovered from any of the people in the van, however, a roll of dimes similar to the rolled coins stolen in the robbery was recovered from the floor inside the van. RP 114-15, 117, 131, 274.

During the pursuit, Officer Gow was driving a fully marked patrol vehicle. RP 75, 76. Officer Gow's patrol vehicle was marked with a large Fife Police Department logo on both doors, it had overhead lights and strobe lights in the headlights, and an audible siren. RP 73-76. Officer Gow was wearing his police uniform. RP 76. Officer Gow's patrol vehicle was equipped with a video recorder that was automatically activated when he activated his emergency lights. RP 90, 91, Plaintiff's Exhibit 7. Detective Rackley was driving an unmarked black Ford Explorer. RP 76, 233.

After the people in the van were taken into custody, Detective Rackley went to the Days Inn to interview Christine Huynh. RP 238, 240, 241. While there, Detective Rackley was advised that officers had taken a person into custody that they suspected was the driver who fled from the van. RP 241. This individual was later identified as defendant George. RP 245. Detective Rackley took Ms. Huynh to where defendant George was detained for a show up. RP 148, 241, 242, 243. At the show up, Ms. Huynh positively identified defendant George as the person who pointed a gun at her and demanded the money from her till. RP 149-50, 243. Detective Rackley recognized defendant George as the person who fled when he and Officer Gow stopped the van. RP 244.

At trial, Ms. Huynh again identified defendant George as the man who pointed a gun at her, demanded money, and threatened to shoot her if

she looked at him during the Days Inn robbery. RP 150. Detective Rackley also identified defendant George at trial as the man he saw get out of the van and flee on foot as well as a the same man that Ms. Huynh identified as one of the robbers during the show up. RP 244, 259.

Detective Roy Farnworth responded to the scene where Detective Rackley and Officer Gow had stopped the van. RP 185-86. Because there was a potential firearm involved, Detective Farnworth looked in and around the van. RP 186-87. Inside the van, he saw a very large flat screen television behind the front passenger's seat and the handle of the gun protruding from the pouch on the back of the front passenger's seat. RP 187-88, 214. Both the driver and front passenger could easily have reached around the seat and accessed the gun in the pouch. RP 189, 191. The gun was also easily accessible to people in the back passenger area of the van. RP 214. At trial, Detective Farnworth identified Plaintiff's Exhibit No. 1 as the gun he observed in the pouch of the van's front passenger seat. RP 198. The gun has a black barrel and white handle.⁵

Defendant George was transported to the hospital after his arrest where Detective Rackley met with him. RP 259, 262, 263. When Detective Rackley reviewed the surveillance video of the robbery, he

⁵ The gun was admitted into evidence as exhibit 1. The State has not transferred the gun to the court of appeals, however, a visual examination of the gun reveals the gun's barrel is black as described by Ms. Huynh. The gun is available for viewing at the Pierce County Superior Court Clerk's Office.

recognized defendant George as the person standing at the counter and Robert Maas and defendant Wahsise as the two men stealing the television. RP 263, 264, 272, Plaintiff's Exhibit 3. At trial, Detective Rackley identified Robert Maas and defendant Wahsise as one of the two individuals who exited the van from the passenger sliding door when Detective Rackley and Officer Gow conducted the felony stop. RP 259, 260, 262.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT GEORGE'S REQUEST FOR A JURY INSTRUCTION ON RECKLESS DRIVING AND THE JURY INSTRUCTION ON ACCOMPLICE LIABILITY WAS AN ACCURATE STATEMENT OF THE LAW.

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). The standard for review applied to a trial court's failure to give a jury instruction depends on whether the trial court's refusal to grant the instruction was based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give an instruction to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541,

544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed *de novo*.

In the present case, the court ruled as a matter of law that defendant is not entitled to a reckless driving instruction. Therefore, this court reviews the trial court's decision to deny the instruction *de novo*.

- a. The court properly denied defendant George's request for a jury instruction on reckless driving because reckless driving is not a lesser included offense of eluding.

A defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser offense is a necessary element of the charged offense, and (2) the evidence in the case supports an inference that the lesser offense was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). If, however, it is possible to commit the greater offense without having committed the lesser offense, then the latter offense is not an included crime. *State v. Roybal*, 82 Wn.2d 577, 583, 512 P.2d 718 (1973).

To convict defendant of eluding the State has to prove: 1) that the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren; 2) the police officer was in a marked police vehicle; 3) defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop; and 4) that defendant *drove his vehicle in a reckless manner*. See RCW

46.61.024(1)(emphasis added). Driving in a reckless manner is defined as driving “in a rash or heedless manner, indifferent to the consequences.” *State v. Ratliff*, 140 Wn. App 12, 17, 164 P.3d 516 (2007); *State v. Roggenkam*, 153 Wn.2d 614, 622, 106 P.3d 196 (2005); citing *State v. Thompson*, 90 Wn. App. 41, 48, 950 P.2d 977 (1998).

Conversely, to convict a defendant of reckless driving the State would have to prove that the defendant was *driving a vehicle in willful or wanton disregard for the safety of persons or property*. See RCW 46.61.500(emphasis added). The “willful or wanton” standard is a higher standard than “reckless manner.” See *State v. Ridgley*, 141 Wn. App. 771, 781, 174 P.3d 105 (2007).

In *Roggenkam*, the defendant was convicted of both vehicular homicide and vehicular assault when he drove his vehicle in a “reckless manner” and caused serious injuries and death to the driver and passenger of another vehicle. 153 Wn.2d at 618-19. Roggenkam appealed, challenging the jury instruction that defined reckless manner as “driving in a rash or heedless manner, indifferent to the consequences.” *Id.* at 621. Roggenkamp asserted “reckless manner” should be defined using the higher standard of “willful and wanton disregard for the safety of person or property” that appears in the reckless driving statute. *Id.* In rejecting Roggenkam’s argument, the court held that the term “reckless manner” as used in the vehicular homicide and vehicular assault statutes is defined as “driving in a rash or heedless manner, indifferent to the consequences”

and the term “reckless driving” as used in the reckless driving statute is defined as “willful or wanton disregard for the safety of persons or property.” *Id.* at 629-30. The term “reckless manner” in the eluding statute has the same definition as the term “reckless manner” in the vehicular homicide and vehicular assault statutes. *State v. Ratliff*, 140 Wn. App 12, 17, 164 P.3d 516 (2007).

Here, defendant George argues that the trial court erred when it denied his request for a reckless driving instruction as a lesser included offense to eluding. Brief of Appellant (BOA) George at 26. Appellant George’s argument fails because reckless driving has a higher mental element than eluding. As a result of the differing mental elements, under *Workman* reckless driving is not a lesser included offense of eluding because it is possible to commit eluding without having committed reckless driving. The court properly denied defendant George’s request for a reckless driving jury instruction.

Defendant George relies upon *State v. O’Connell*, 137 Wn. App. 81, 96, 152 P.3d 349 (2007) to support his argument that reckless driving is a lesser included offense of eluding. BOA George at 27. However, his reliance on *O’Connell* is misplaced. *O’Connell* interpreted the eluding statute as it existed in 2001, when O’Connell committed his offense. In 2003, the eluding statute was amended and replaced the “willful and wanton” language relied upon in *O’Connell* with driving in a “reckless manner.” Laws of 2003, ch. 101, section 1. Because defendant George

committed his offense after the 2003 amendment, the analysis in *O'Connell* is inapposite.

Defendant George's argument that the court erred when it denied his request for a lesser included reckless driving jury instruction is without merit.

b. The ninth circuit's opinion in *Sarausad v. Porter* is not controlling.

Defendant Wahsise challenges the accomplice liability instruction alleging that the instruction relieved the State of its burden of proof. BOA Wahsise at 3. Defendant Wahsise relies upon the recent decision in *Sarausad v. Porter*, 479 F.3d 671, rehearing, en banc denied 503 F.3d 822 (9th Cir. 2007) cert. granted, *Waddington v. Sarausad*, 128 S. Ct. 1650, 170 L. Ed. 2d 352, 76 U.S.L.W. 3496 (2008), to support his claim. At the outset, it should be noted that there was a strong dissent on the denial of the motion for rehearing in the federal court, with several circuit justices agreeing that the Ninth Circuit was overstepping its bounds by not giving proper deference to the Washington Supreme Court's interpretation of state law. See *Sarausad v. Porter*, 503 F.3d at 823-836.

Defendant Wahsise's reliance on a Ninth Circuit's case is misplaced because the Ninth Circuit's constitutional holdings are not binding on this court or the Washington Supreme Court. *In re Personal*

Restraint of Grisby, 121 Wn.2d 419, 430, 853 P.2d 901 (1993); *In re Personal Restraint of Benn*, 134 Wn.2d 868, 937, 952 P.2d 116 (1998). This court is bound by the decisions of the Washington Supreme Court. *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227, 39 A.L.R. 4th 975 (1984) (the Court of Appeals is bound by decisions of the Washington Supreme Court).

The accomplice liability instruction given in this case mirrored Washington's accomplice liability statute; consequently, the instruction complies with what the Washington Supreme Court has indicated would be proper wording. *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 511-12, 14 P.3d 713 (2000) (citing *State v. Davis*, 101 Wn.2d 654, 656, 682 P.2d 883 (1984)). The instruction given in this case was consistent with the Washington Pattern Jury Instruction on accomplice liability. WPIC 10.51. This language was specifically approved of in *State v. Moran*, 119 Wn. App. 197, 209-10, 81 P.3d 122 (2003), *review denied*, 151 Wn.2d 1032, 95 P.3d 351 (2004). These decisions should control this issue rather than the Ninth Circuit decision in *Sarausad*.

2. THE STATE ADDUCED SUFFICIENT EVIDENCE TO CONVICT DEFENDANT WAHSISE OF FIRST DEGREE UNLAWFUL POSSESSION OF A FIREARM BECAUSE DEFENDANT WAHSISE HAD DOMINION AND CONTROL OVER THE AREA IN WHICH THE FIREARM WAS FOUND.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In the present case, the jury was instructed that to convict defendant of first degree unlawful possession of a firearm it had to find the following elements beyond a reasonable doubt:

- (1) That on or about the 8th day of March, 2006, the defendant knowingly owned a firearm or had a firearm in his possession and control;

- (2) That the defendant had previously been convicted of a serious offense; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

WCP 29, Instruction No. 20. Defendant Wahsise's sole challenge to the State's proof is a claim that the prosecution produced insufficient evidence to show that he had dominion and control over the firearm found in his vehicle. BOA Wahsise at 22.

The jury was given the following instruction on possession:

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession.

Constructive possession occurs when there is not actual physical possession but there is dominion and control over the item and such dominion and control may be immediately exercised.

WCP 28, Instruction No. 19 (emphasis added).

As the jury was instructed in this case, possession may be actual or constructive. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A defendant actually possesses an item if he has physical custody of it; he constructively possesses the item if he has dominion and control over it or the premises where the item is found. *Jones*, 146 Wn.2d at 333; *State v. Coahran*, 27 Wn. App. 664, 668, 620 P.2d 116 (1980) (citing *State v. Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969)). An automobile is considered to be "premises." *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000); *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942

(1971). Whether a passenger's occupancy of a particular part of an automobile would constitute dominion and control of contraband found in that area depends upon the particular facts of the case. *Mathews*, 4 Wn. App. at 656. Dominion and control need not be exclusive and can be established by circumstantial evidence. *State v. Chavez*, 138 Wn. App. 29, 34, 156 P.3d 246 (2007) citing *State v. Weiss*, 73 Wn.2d 372, 375 438 P.2d 610 (1968). A person has dominion and control of an item if he has immediate access to it. *Jones*, 146 Wn.2d at 333. Mere proximity, however, is not enough to establish possession. *Id.* No single factor is dispositive in determining dominion and control. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995). The totality of the circumstances must be considered. *Collins*, 76 Wn. App. at 501.

When there is sufficient evidence of the defendant's dominion and control over the premises, the defendant may be found guilty of constructive possession of contraband found in those premises even if he denies knowledge of the item. *Callahan*, 77 Wn.2d at 29-30 (citing *State v. Weiss*, 73 Wn.2d 372; *State v. Chakos*, 74 Wn.2d 154, 443 P.2d 815 (1968), *cert. denied*, 393 U.S. 1090, 89 S. Ct. 855, 21 L. Ed. 2d 783 (1969); *State v. Mantell*, 71 Wn.2d 768, 430 P.2d 980 (1967); *State v. Morris*, 70 Wn.2d 27, 422 P.2d 27 (1966)).

In *Mathews*, the defendant was found in constructive possession of heroin because he exercised dominion and control over the area in which

the heroin was found. 4 Wn. App. 653, 658. Mathews, a heroin addict, purchased some heroin at a residence in Oregon where he met up with the Domeiers. Mathews and his brother agreed to go with the Domeiers to Washington. Along the way, they stole money from a grocery store in Longview, Washington. When the police contacted them, Mathews was seated in the back right passenger seat of the Domeiers' car. Police found heroin in the back seat area tucked underneath the carpet near the right front seat. Mathews admitted to purchasing heroin, but testified he had used it all before getting in the Domeiers' car. *Id.* at 655.

In affirming Mathew's conviction, the court looked not only at Mathew's proximity to the heroin, but also at the totality of the circumstances that would make it reasonable for a jury to find he had dominion and control over the area in which the heroin was found. This included the fact that heroin paraphernalia was found in defendant's coat pocket and beneath the right back seat. *Id.* at 657. Domeiers testified they did not know the heroin was there and that Mrs. Domeiers had thrown her heroin out the window on the way to the police station. *Id.* at 657. Defendant denied Mrs. Domeiers had thrown heroin out the window and the police officer following their car did not observe her do it. *Id.* Defendant's brother, who was seated in the left back seat, did not use heroin. *Id.* Based upon the above, the *Mathews* court found Mathews had dominion and control over the area and constructive possession of the heroin.

Similarly, defendant Wahsise had dominion and control over the area where the gun was found. At trial, defendant Wahsise was identified as one of the two individuals who stole a large flat screen television from the Days Inn during the robbery in which defendant George pointed a handgun at the hotel clerk, threatened to shoot her, and demanded money from the cash register. RP 141, 143, 145, 263-264. The defendants fled the Days Inn in a van, which was stopped within minutes after the robbery. RP 230-36. Inside the van were the stolen television, a gun, and nine people including, defendants George and Wahsise, and a third co-defendant Robert Maas. RP 260, 262, 272.

When, like *Mathews*, the totality of the circumstances are viewed in the light most favorable to the State and all reasonable inferences are drawn in favor of the State, there was substantial evidence that defendant Wahsise had dominion and control over the area in which the gun was found. Both the stolen television and the gun were recovered from the back passenger compartment of the vehicle. RP 90, 102, 186-87, 214. The television was on the floor in the back passenger area and the gun was visibly protruding from the pouch attached to the back of the front passenger's seat. RP 90, 102, 186-87, 214. A reasonable jury could find that when defendant Wahsise placed the large, flat screen television he and Robert Maas carried out the Days Inn in the passenger area of the van, he also entered back passenger area of the van before they quickly fled the scene. This is consistent with Detective Rackley's testimony that

defendant Wahsise exited the van from the slider on the passenger side. RP 260. A reasonable jury could infer that defendant Wahsise had dominion and control over back passenger area of the van where he had placed the proceeds from the robbery and where the firearm used in the robbery was located.

Defendant Wahsise relies on *Callahan* to support his argument that there was insufficient evidence of constructive possession to support the jury's verdict of first degree unlawful possession of a firearm. BOA Wahsise at 18. However, *Callahan* is distinguishable because the owner of the drugs testified he had brought them onto the boat, was the sole possessor of the drugs, and that the drugs had not been sold or given to the defendant. *Callahan*, 77 Wn.2d at 31. The *Callahan* court found there was uncontroverted direct evidence that the owner of the drugs had exclusive possession of them, whereas, there was only circumstantial evidence that Callahan had dominion and control over the drugs. *Id.*

Here, unlike *Callahan*, the owner of the gun did not claim exclusive possession of it. Instead, the evidence showed: 1) minutes before the police stopped the van, defendant Wahsise had participated in a robbery in which a gun was used and a television was stolen; 2) the gun and television were both located in the back passenger area of the van; 3) the gun was both visible to and accessible by defendant Wahsise; 4) when police stopped the van, all three robbery suspects were inside the van; and 5) defendant Wahsise exited the slider door on the passenger side of the

van. RP 74, 107, 108, 110-11, 187, 189, 190, 197, 260, 272, 273, 274.

This is sufficient evidence to support the jury's verdict.

The State produced sufficient evidence that a reasonable jury could find that defendant Wahsise had constructive possession of the gun because he had dominion and control over the premises from which the gun was recovered.

3. THIS COURT SHOULD DECLINE TO REVIEW DEFENDANT GEORGE'S CLAIM OF PROSECUTORIAL MISCONDUCT BECAUSE HE MAKES NO CITATION TO THE RECORD IN SUPPORT OF HIS ARGUMENT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remark or conduct was improper and that it prejudiced the defendant. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Improper comments are not deemed prejudicial unless "there is a *substantial likelihood* the misconduct affected the jury's verdict." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original]. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App 284, 293-94, 902 P.2d 673 (1995). Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it

evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Id.*

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952).

In the present case, defendant Wahsise argues the prosecutor committed misconduct by failing to instruct Detective Rackley that statements of non-testifying witnesses had been excluded in pretrial motions. BOA Wahsise at 33. However, this issue is not properly before the court because defendant Wahsise’s brief makes no reference to the record to support his argument. A careful review of the record shows that there is, in fact, no evidence to support defendant Wahsise’s claim. RP 301-25. This issue wasn’t raised with the court, there was no argument or offer of proof on this issue, and the trial court did not have an opportunity to rule on this issue. RP 301-25. This court will not consider arguments that are unsupported by appropriate reference to the record or citation to authority. RAP 10.3(a)(5); *McKee v. American Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989).

Defendant Wahsise’s argument is not properly before the court, is not supported by the record, and this court should decline to rule on it.

4. TRIAL COUNSELS FOR DEFENDANTS
WAHSISE AND GEORGE WERE EFFECTIVE
WHEN DEFENDANTS CANNOT SATISFY THE
STRICKLAND TEST.

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 judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “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 was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L. Ed. 2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel, defendant must meet both prongs of a two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). First, a defendant must establish that defense counsel’s representation fell below an objective standard of reasonableness. Second, a defendant must show that defense counsel’s deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687;

State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To satisfy the first prong, deficient performance, the defendant has the “heavy burden of showing that his attorney ‘made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’” *State v. Howland*, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting *Strickland v. Washington*, 466 U.S. 668, 687). Defendant may meet this burden by establishing that, given all the facts and circumstances, his attorney’s conduct failed to meet an objective standard of reasonableness. *State v. Huddleston*, 80 Wn. App. 916, 912 P.2d 1068 (1996). There is a strong presumption that counsel’s representation was reasonable and, taking into consideration the entire record, that counsel made all significant decisions in the exercise of reasonable professional judgment. *State v. McFarland*, 127 Wn.2d at 335.

Matters that go to trial strategy or tactics do not show deficient performance. *State v. Hendrickson*, 129 Wn.2d at 77-78. The decision of when or whether to object is an example of trial tactics and only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A

defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct.

McFarland, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objection had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

To satisfy the second prong, resulting prejudice, a defendant must show that, but for counsel's deficient performance, the trial's outcome would have been different. *McFarland*, 127 Wn.2d at 337; *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).

- a. Defendant Wahsise's offender score was properly calculated and his attorney was effective when he did not object to the offender score at sentencing.

The trial court calculates an offender score by adding together the current offenses and prior convictions. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

In *State v. Bolar*, 129 Wn.2d 361, 917 P.2d 125 (1996), the Supreme Court held that when a sentencing court was determining how to score prior concurrently served convictions pursuant to former RCW 9.94A.360, it had the authority to count all of the convictions separately or all of the convictions as one; the court could not count some convictions separately and others as one. While RCW 9.94A.360 has since been amended and recodified as RCW 9.94A.525(5)(a)(i), the language that the court construed did not alter. Thus, under the relevant version of RCW 9.94A.525(5)(a)(i), a sentencing court must consider all prior convictions that were served concurrently and determine whether they all constitute the same criminal conduct. If the prior convictions do not all constitute the same criminal conduct, then the convictions are counted separately. RCW 9.94A.525(5)(a)(i).

Under RCW 9.94A.589(1)(a), two crimes shall be considered the "same criminal conduct" only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes

involve the same victim. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The Legislature intended the phrase “same criminal conduct” to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. *State v. Lessley*, *supra*, at 778.

In the present case, defendant Wahsise asserts that his attorney was deficient for failing to object at sentencing to defendant Wahsise’s offender score. BOA Wahsise at 37. Defendant Wahsise alleges that his 1995 convictions for first degree robbery and two counts of second degree assault constitute the same criminal conduct and therefore should be counted as one on his offender score. However, while all three offenses occurred on the same day, the assaults have two different victims and therefore cannot constitute the same criminal conduct. WCP 56-89. Under RCW 9.94A.525(a)(i) the sentencing court properly calculated defendant Wahsise’s offender score because his convictions for first degree robbery and two counts of second degree assault must count as three separate offenses. Defense counsel cannot be deficient for failing to make an objection that would not have been granted.

Assuming *arguendo*, this court were to find defendant Wahsise’s trial counsel deficient, defendant Wahsise cannot show prejudice. In order for defendant Wahsise to prevail, he would have to show that his trial counsel would have prevailed on his objection and defendant Wahsise’s

offender score would have been reduced. This he cannot do. Because defendant Wahsise cannot satisfy either prong of the *Strickland* test, his argument must fail.

b. Defendant Wahsise's counsel was not deficient during cross examination.

Defendant Wahsise claims his attorney was deficient in his cross examination of Detective Rackley. Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel. *State v. Stockman*, 70 Wn.2d 941, 945, 425 P.2d 898 (1967).

Defense counsel's cross examination of Detective Rackley consisted of 28 pages of transcript in which he elicited testimony that defendant Wahsise's fingerprints were not found inside the Days Inn, on the television that was stolen, nor on the gun used in the robbery. RP 280 – 301; 327-334. He vigorously cross-examined Detective Rackley's ability to perceive defendant Wahsise when he exited the van and whether Detective Rackley had sufficient information to identify him as one of the two individuals who stole the television during the robbery. *Id.*

Defendant Wahsise asserts that his attorney was deficient for asking an open ended question during the following exchange:

HESLOP: Okay. Any other type of evidence that [defendant Wahsise] was even in the Days Inn? Any additional evidence plus you –

DETECTIVE RACKLEY: Mr. George's son told me [defendant Wahsise] was.

RP 300-01. However the record shows that defendant Wahsise's counsel had not completed his question when the witness made his response. It is unclear whether defendant Wahsise's counsel would have formed the remainder of his question in such a way that would not have elicited the response Detective Rackley gave. To overcome the presumption of effective representation, it is defendant Wahsise's burden to show counsel was deficient based upon the record established in the proceedings below. *See McFarland*, 127 Wn.2d 322, 336. Because the record is not complete, defendant Wahsise cannot meet this burden. His argument that his trial counsel was deficient, is not supported by the record, and must fail.

If this court were to find deficient performance, defendant Wahsise's argument still fails because he cannot satisfy the second prong of the *Strickland* test, prejudice. The court immediately sustained trial counsel's objection and ordered the jury to disregard Detective Rackley's statement. RP 301. There can be no prejudice because the jury is

presumed to follow the court's instructions. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990).

5. THE COURT PROPERLY DENIED DEFENDANT GEORGE'S MOTION TO SEVER DEFENDANTS WHEN DEFENDANT WAHSISE RETAINED HIS FIFTH AMENDMENT RIGHT NOT TO TESTIFY, DEFENDANT GEORGE MADE NO OFFER OF PROOF AS TO WHAT DEFENDANT WAHSISE WOULD TESTIFY TO *IF* HE WAIVED HIS RIGHT TO REMAIN SILENT, AND DEFENDANT GEORGE CANNOT SHOW HE WAS PREJUDICED AS A RESULT OF THE COURT'S RULING.

A motion to sever joined defendants is governed by CrR 4.4.

Under this rule a motion to sever must be timely brought and preserved.

CrR 4.4(a). Severance of defendants is governed by subsection (c) of the rule, which provides:

(c) Severance of Defendants.

- (1) A defendant's motion for severance on the ground that an out of court statement of a co-defendant referring to him is inadmissible against him shall be granted unless:
 - (i) the prosecuting attorney elects not to off the statement in the case in chief;
 - (ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.
- (2) The court, on application of the prosecuting attorney, or on application of the defendant

other than under subsection (i), should grant a severance of the defendants whenever:

- (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or
- (ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

CrR 4.4(c)(1) is referred to as the mandatory severance provision while CrR4.4(c)(2) is referred to as the permissive severance provision. *State v. Dent*, 123 Wn.2d 467, 483-84, 869 P.2d 392 (1994).

Separate trials have never been favored in Washington. *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982). The granting or denial of a motion for separate trials of jointly charged defendants is entrusted to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Alsup*, 75 Wn. App. 128, 876 P.2d 935 (1994); *State v. Barry*, 25 Wn. App. 751, 611 P.2d 1262 (1980). To support a finding that the trial court abused its discretion, the burden is on the defendant to come forward with facts sufficient to warrant the exercise of discretion in his favor. *State v. Alsup*, 75 Wn. App. 128, 131. Severance is only proper when the defendant carries the difficult burden of demonstrating undue prejudice from a joint trial. *State v.*

Grisby, 97 Wn.2d 493, cert. denied sub nom, *Frazier v. Washington*, 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 446 (1983), overruled on other grounds by *State v. Dent*, 123 Wn.2d 467. Defendants seeking a separate trial must demonstrate manifest prejudice in a joint trial which outweighs the concern for judicial economy. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

The administration of justice would be greatly burdened if required to accommodate separate trials in all cases where multiple parties have participated in a criminal offense and where one or more have confessed to its commission.

State v. Ferguson, 3 Wn. App. 898, 906, 479 P.2d 114 (1970), review denied, 78 Wn.2d 996 (1971), cited in *State v. Samsel*, 39 Wn. App. 564, 694 P.2d 670 (1985).

A defendant can demonstrate specific prejudice by showing: “(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant’s innocence or guilt; (3) a co-defendant’s statement inculpatory of the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.” *State v. Canedo-Astorga*, 79 Wn. App. 518 528, 903 P.2d 500 (1995).

Existence of mutually antagonistic defenses is not alone sufficient to compel separate trials. *State v. Hoffman, supra; State v. Davis*, 73 Wn.2d 271, 438 Pl.2d 185 (1968). The defense must demonstrate that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. Even when the defendants agree on the details leading up to the shooting, but disagree on who killed the victims, the conflict is not sufficient to warrant a severance. *State v. Grisby*, 97 Wn.2d 493. All of the participants in a crime will invariably be in conflict when all are tried for that crime. If such conflicts are regarded as requiring separate trials, then joint trials will be the exception and not the rule. *State v. Grisby, supra*. If defenses are inconsistent, they are not necessarily irreconcilable. To be irreconcilable, and thus mutually antagonistic, they must be “mutually exclusive to the extent that one must be believed if the other is disbelieved.” *State v. McKinzy*, 72 Wn. App. 85, 90, 863 P.2d 594 (1993).

In the present case, defendant George argues the court abused its discretion when it denied his motion to sever his case from defendant Wahsise’s at the end of the State’s case in chief. BOA George at 23. Defendant George wanted the defendants severed so he could compel defendant Wahsise to testify in defendant George’s trial without fear of

incriminating himself and to introduce three documents purportedly written by defendant Wahsise. BOA George at 25. Defendant George's mid-trial motion to sever was based upon CrR 4.4(c)(2)(ii), permissive severance.

Defendant George contends the trial court denied the motion for severance "[d]espite counsel for Mr. Wahsise indicating that Mr. Wahsise did, in fact, wish to have his trial severed in order to allow Mr. Wahsise to testify in defense of Mr. George..." BOA George at 24. The record does not support defendant George's assertion that defendant Wahsise wished to testify in defense of Mr. George. In fact, the contrary is the case.

In pretrial motions, defendant George attempted to admit into evidence three documents, purportedly authored by defendant Wahsise. GCP 38-70, 75-76; RP 18-31. These documents inculpated defendant Wahsise in the robbery and exculpated defendant George. Defendant George offered the documents as statements against defendant Wahsise's penal interest and statements by a party opponent. RP 18-31; ER 801 and 804(b)(3). Defendant Wahsise objected to the admission of these documents and the court declined to admit them because the documents appeared to be authored by three different people and they did not appear to be reliable statements. RP 31.

Later in the trial, counsel for defendant George asked “to do an offer of proof calling Mr. Wahsise to the stand outside the jury’s presence...to ask him if they’re his statements and that’s his signature.” RP 181. Defendant Wahsise exercised his Fifth Amendment right to remain silent and declined take the stand. RP 181.

At the end of the State’s case, defendant George made a motion to sever his case from defendant Wahsise so defendant Wahsise could testify “without fear of consequences in Mr. Georges’s case.” Counsel for defendant Wahsise responded as follows:

Your Honor, it would appear that under the circumstances, severance probably would be the way that Mr. George could quite frankly do what he wants to do. If the Court didn’t sever, then there obviously is problems [*sic*], and so, you know, I think that a severance is reasonable, and we’re willing to proceed to jury verdict, Mr. Wahsise is.

RP 448-49. Counsel for defendant Wahsise did not advise the court that defendant Wahsise would testify if the cases were severed. RP 448-49. Instead, he indicated that he did not object to severance and defendant Wahsise would proceed to jury in this trial. *Id.*

In pretrial motions, the trial court had tentatively ruled that the three documents were not admissible because there was insufficient evidence of reliability. RP 31. At no point during the trial did the court’s ruling change. Therefore, there is no basis for defendant George to assert

that these untrustworthy documents would somehow become admissible if the defendants' cases were severed. Because the court's ruling that the three documents were untrustworthy and inadmissible remained unchanged at the time defendant George made his motion to sever, the trial court properly determined that severance was not necessary to achieve a fair determination of guilt for defendant George.

Similarly, severing the defendants and allowing defendant Wahsise's case to go to the jury would not ensure he would be available to testify in a severed trial for defendant George. If, for example, the jury was unable to reach a verdict on the charges against defendant Wahsise, then he would retain his right to refuse to testify in a trial for defendant George, a right he had already exercised in the current trial. There is nothing in defendant Wahsise's trial counsel's statement that indicated defendant Wahsise would waive his right to remain silent, regardless of the outcome of this trial, at a severed trial for defendant George. Any argument to the contrary is based upon pure speculation.

Even if this court were to find that defendant Wahsise had agreed to testify at a severed trial for defendant George, there is no offer of proof in the record as to what defendant Wahsise would testify to at that trial. Without an offer of proof, defendant George cannot satisfy his burden to

show that severance was necessary for a fair determination of guilt or innocence.

For the above stated reasons, the trial court did not abuse its discretion when it denied defendant George's motion for severance.

Similarly, the court did not deny defendant George's right to present a defense when the court denied his motion to sever. Under the state and federal constitutions, an accused has a right to compulsory process to compel the attendance of witnesses. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). The right to compulsory process is synonymous with the right to present a defense. As explained in *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Maupin*, 128 Wn.2d at 924. This right, however, is not unlimited.

The defendant must first establish the admissibility of the proposed testimony. *State v. Roberts*, 80 Wn. App. 342, 351, 908 P.2d 892 (1996).

Here, defendant George could not compel defendant Wahsise to testify in a severed trial unless the jury in the present case acquitted defendant Wahsise on all charges. Because this case had not gone to the jury at the time defendant George made his mid-trial motion to sever, his motion was based upon speculation that defendant Wahsise would be available to testify. Because, as argued above, (1) defendant Wahsise had already exercised his right to remain silent at trial; (2) he did not unconditionally agree to waive this right to remain silent if the defendant George's case was severed from defendant Wahsise's; and (3) defendant George made no offer of proof as to what defendant Wahsise would testify to if he did waive his right to remain silent, the court did not deny defendant George's right to present a defense, it denied defendant George's motion to sever.

Defendant George's claim that the court abused its discretion when it denied his motion to sever is without merit.

6. THE COURT PROPERLY DENIED DEFENDANT GEORGE'S MOTION FOR A MISTRIAL BECAUSE DETECTIVE RACKLEY'S TESTIMONY DID NOT IMPLICATE DEFENDANT GEORGE, THE COURT SUSTAINED TRIAL COUNSEL'S OBJECTIONS, AND THE COURT ORDERED THE JURY TO DISREGARD THE TESTIMONY.

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion and will only be overturned when there is a "substantial likelihood" that the error prompting the motion affected the jury's verdict. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); *State v. Crane*, 116 Wn.2d 315, 332-33, 804 P.2d 10, *cert denied* 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991). Trial courts "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407, *cert denied*, 479 U.S. 995 (1986). The trial court is best suited to assess the prejudice of a statement. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

Courts look at (1) the seriousness of the irregularity; (2) whether the statement in question was cumulative of other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction to disregard the remark. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

In the present case, the court granted defendant George's motion in limine to exclude all statements made by non-testifying co-defendants. RP 15-17; GCP 75-76. Defendant Wahsise's trial counsel asked Detective Rackley a series of questions designed to elicit the extent of the evidence the police had linking defendant Wahsise to the robbery. RP 280-301. He asked if the police had discovered defendant Wahsise's fingerprints on the stolen television, on the recovered gun, or on the counter of the Days Inn. RP 300. Defendant Wahsise's trial counsel then asked:

HESLOP: Okay. Any other type of evidence that my client was even in the Days Inn? Any additional evidence plus you –

RACKLEY: Mr. George's son told me he was.

RP 300-01. Both defendant Wahsise's and George's trial counsel objected. RP 301. The court immediately sustained their objections and ordered the jury to disregard Detective Rackley's response. RP 301. Jurors are presumed to follow the court's instruction to disregard improper evidence. See *State v. Swan*, 114 Wn.2d 613, 661-62. Defendant George then asked the court for a mistrial, which was denied. RP 302-25. Defendant George claims the trial court abused its discretion when it denied his motion for a mistrial. BOA George at 22.

First, the irregularity was not serious. Defendant George relies on *State v. Escalona*, 49 Wn. App, 251, to argue that Detective Rackley's

statement was a serious irregularity that required a mistrial. BOA George at 18. However, *Escalona* is distinguishable on its facts.

Escalona was charged with second degree assault for stabbing a former roommate, Vela. *Escalona* at 252. The only witness to the crime was Vela and his testimony was inconsistent and contradictory. *Id.* at 256. On cross examination, Vela testified that he was afraid of Escalona because Escalona “already has a record and had stabbed someone.” *Id.* at 253. Defense counsel’s objection was sustained and the jury was ordered to disregard the testimony. *Id.* at 253. Defense counsel moved for a mistrial, which was denied. *Id.*

On appeal, the court held under these facts it was an abuse of discretion to deny Escalona’s motion for a mistrial. *Id.* at 256. The statement that Escalona had a criminal history involving a similar crime was inherently prejudicial. *Id.* at 256-57. It would likely remain in the jurors’ minds because while not legally relevant, it was logically relevant. *Id.* at 257. Additionally, given the weakness of the State’s case, the jury would most likely “use it for its most improper purpose...to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *Id.* at 256.

Unlike *Escalona*, Detective Rackley’s statement was not inherently prejudicial to defendant George. In fact, the statement did not

implicate defendant George at all. Rather, Detective Rackley's statement that defendant George's son said that defendant Wahsise was in the Days Inn implicated defendant Wahsise, not defendant George. Additionally, the court sustained defense counsels' objections and ordered the jury to disregard Detective Rackley's statement. Jurors are presumed to follow the court's instructions. See *State v. Swan*, 114 Wn.2d 613, 661-62.

Detective Rackley's statement that Mr. Wahsise was in the Days Inn was unlikely to have the same prejudicial effect as Vila's statement in *Escolona*. Vila's statement went to Escolona's propensity to commit the same crime, whereas Detective Rackley's statement had no propensity implications. Instead, it placed defendant Wahsise (not defendant George) at the scene of this crime.

Second, unlike *Escolona*, the State's case against defendant George was very strong. There was substantial evidence the defendant George committed the Days Inn robbery. Ms. Huynh identified defendant George at the show up and at trial as the man who robbed her on March 8, 2006. Defendant George was driving the get away vehicle immediately after the robbery and attempted to avoid capture by attempting to elude police in the van and then, when he stopped the van, he fled on foot.

Third, the error, if any, was cured when the court sustained defense counsel's objection and ordered the jury to disregard Detective Rackley's statement. RP 301.

The court properly denied defendant George's motion for a mistrial because defendant George was not implicated by Detective Rackley's statement, there was substantial evidence of defendant George's guilt, defense counsels' objections to Detective Rackley's statement were immediately sustained, and the jury was told to disregard the statement.

7. THE COURT PROPERLY ADMITTED
DETECTIVE RACKLEY'S TESTIMONY
IDENTIFYING DEFENDANTS GEORGE AND
WAHSISE IN THE SURVEILLANCE VIDEO
BASED UPON HIS OBSERVATIONS OF THE
DEFENDANTS DURING THEIR INITIAL
CONTACT WITH POLICE AND DURING
SUBSEQUENT WITNESS INTERVIEWS.

The admission of relevant evidence is within the sound discretion of the trial court and will not be reversed absent a manifest abuse of discretion. *State v. Hardy*, 76 Wn. App. 188, 884 P.2d 8 (1994) citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

A lay witness may give an opinion, so long as it is rationally based upon his perceptions, helpful to the jury, and not based upon scientific, technical, or other specialized knowledge. ER 701. ER 701 is identical to the Federal Rule of Evidence 701, and federal cases are illustrative.

Hardy, 76 Wn. App. at 190. ER 704 further provides that testimony in the form of an opinion or interferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

“A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.” *Hardy*, at 190-91, *citations omitted*. Admission of such testimony does not invade the province of the jury and the jury is still free to reach its own conclusion regarding the identity in the photograph. *Id.* Courts have upheld the admission of lay opinions on speed of a vehicle, the value of property, and identification of a person from a video tape. *State v. Farr-Lenzini*, 93 Wn. App. 453, 462, 970 P.2d 313 (1999) citing *State v. Kinard*, 39 Wn. App. 871, 874, 696 P.2d 603 (1985), *State v. Lewellyn*, 78 Wn. App. 788, 794-5, 895 P.2d 481 (1995), *State v. Hardy*, 76 Wn. App. 188, 190.

In the present case, the court properly exercised its discretion in admitting Detective Rackley’s testimony. Detective Rackley had several opportunities to observe defendants Wahsise and George. He initially observed them when he and Officer Gow stopped defendants’ van immediately after the Days Inn robbery. RP 237, 244, 261, 262, 286-89.

Detective Rackley looked directly at defendant George's face when he exited the van and then watched him running across a field. RP 237, 286. Detective Rackley saw defendant George a second time when took Ms. Huynh to the show up at La Quinta Inn and again later that evening at the hospital. RP 343, 259, 262.

Detective Rackley initially observed defendant Wahsise when he exited the passenger side the van. RP 261, 262, 286. It took approximately five minutes for Detective Rackely and Officer Gow to remove all the individuals from the van and secure them in handcuffs. RP 288. He later met with defendant Wahsise in an interview room at the Fife police department. RP 261.

When Detective Rackley reviewed the surveillance video from the Days Inn robbery, he recognized defendant George as the person standing at the counter during the robbery. RP 271-72, Plaintiff's Exhibit 3. He also recognized defendant Wahsise and Robert Maas as the two individuals who were carrying the television out of the motel. RP 264, 272,333. Detective Rackley testified he recognized defendants George and Wahsise and Robert Maas by their build, the way they carry themselves, the way they move, what they were wearing, how they compared to each other, how they compared to the rest of the people in the van, and then from talking to them later as well. RP 289, 290, 293. Some

of the occupants of the van were eliminated as potential suspects because of gender and two individuals were so intoxicated they needed help out of the van.⁶ RP 299.

Detective Rackley's testimony was helpful to the jury because only someone familiar with the defendants and the other suspects would be able to evaluate these grainy, poor quality surveillance photos that depicted only a portion of defendant's face. RP 222, 223, 226. Like the witness in *Hardy* the testimony aided the trier of fact, but the jury was still free to disregard this testimony considering the potential for bias of these codefendant witnesses.

Federal law under ER 701 has followed a similar approach for determining when lay opinion testimony regarding photo identification is admissible. *See United States v. Pierce*, 136 F.3d 770, 774 (11th Cir. 1998) (listing a number of factors for admissibility including witness' general familiarity with defendant's appearance and familiarity at the time the photograph was taken, and whether defendant had disguised his appearance at the time of the offense, and whether the defendant had

⁶ It is unclear from the record whether three or four people were eliminated as suspects by this information. Detective Rackley identified one of the highly intoxicated individuals as Mr. Yellow Owl, Officer Gow testified there were both men and women in the van and there were more men than women, and Detective noted that two of the van's occupants were brother and sister. RP 293.

altered his appearance prior to trial); *United States v. Jackman*, 48 F.3d 1, 4-5 (1st Cir. 1995) (upholding the admission of lay opinion identification where all the surveillance photographs of the robber are somewhat blurred and showed only a portion of the robber's face); *United States v. Allen*, 787 F.2d 933, 936 (4th Cir. 1986), *vacated on other grounds by* 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 132 (1987) (upholding admission of lay opinion testimony where surveillance photographs depicted individuals with hoods or hats over head and blurred profiles); *United States v. Beck*, 418 F.3d 1008 (9th Cir. 2004) (holding that a court should consider a variety of factors, including familiarity with defendant's appearance at the time the crime was committed, whether defendant has disguised his appearance during or since the offense, and whether the witness knew the defendant over time and in a variety of circumstances, but that absence of a single factors does not render the testimony inadmissible).

Defendant Wahsise relies upon *United States v. LaPierre*, 998 F.2d 1460 (9th Cir. 1993) in support of his argument that the 9th Circuit has been very critical of police identifications from surveillance videos. BOA Wahsise at 25. However, *LaPierre* is factually distinguishable from the present case.

In *LaPierre*, a police officer testified at trial that he identified LaPierre entirely on his review of still photographs from a surveillance video and witness descriptions. *LaPierre* at 1465. The officer did not know LaPierre nor had he ever seen him in person. *Id.* This testimony offered nothing to the jury that they themselves could not deduce from listening to witnesses testify at trial and looking at the same still photographs.

This present case is distinguishable from *LaPierre*. Here, Detective Rackely had personal knowledge of both defendants George and Wahsise. RP 237, 238, 244, 259, 260, 261, 262, 263, 286, 288, 294, 295. He observed the defendants immediately after the robbery and then later in at the hospital or in a witness interviews. RP 259, 261, 262, 263. His identification was based upon his knowledge of how they moved, the way they dressed, and their physical stature. RP 289, 290, 293, 299. Additionally, he was able observe the other individuals in the van and exclude them as suspects based upon his observations, which included noting their gender, level of intoxication, demeanor, stature, mannerisms, and dress. RP 263, 293, 294, 295. Detective Rackley's statements were properly admitted pursuant to ER 701.

Should this court find there was error, this error was harmless. *See State v. Jamison*, 93 Wn.2d 794, 799-800, 613 P.2d 776 (1980). Where

the error is nonconstitutional, the error is “not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Here the admission of Detective Rackley’s identification of Defendant George was cumulative of Ms. Huynh’s identity testimony, which came in without objection. Detective Rackley’s identification of defendant Wahsise was cumulative of his elimination of the other van occupants as potential suspects. Given this additional evidence any error in the admission of Detective Rackley’s testimony was harmless.

8. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE DOCTRINE OF CUMULATIVE
ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v.*

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

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 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 (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.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *Id.*

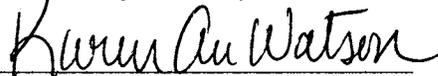
In the present case, as argued above, there was no error. Thus there can be no cumulative error. Defendants Wahsise's and George's arguments of cumulative error are without merit and must fail.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant Wahsise's and defendant George's convictions.

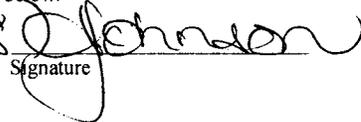
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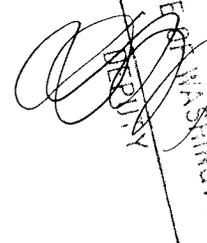
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/5/08 
Date Signature


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DIVISION II