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DIVISION II

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

STATE OF WASHINGTON, RESPONDENT

v.

ARDEN CURTIS GIBSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Sergio Armijo

No. 06-1-03171-9

BRIEF OF RESPONDENT

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

1. Did the trial court properly exercise its discretion in admitting letters written by the defendant to Younker, and did the letter contain reference to an abortion Younker obtained at the request of the defendant? (Appellant's Assignment of Error No. 2).
2. Did the defendant receive effective assistance of counsel when defense counsel had a legitimate trial strategy for his decisions, and were any error was harmless? (Appellant's Assignment of Error No. 3).
3. Is the defendant entitled to relief when he cannot establish that the prosecutor's comments in closing argument were improper, or that they were so flagrant and ill-intentioned as to create an enduring prejudice? (Appellant's Assignment of Error No. 1).
4. Is the defendant entitled to relief under the cumulative error doctrine? (Appellant's Assignment of Error No. 3).

B. STATEMENT OF THE CASE.

1. Procedure

On January 30, 2007, Arden Curtis Gibson, hereinafter "defendant," was charged by third amended information with assault in

the second degree against Howard Ohelo, assault in the fourth degree against Suzanne Younker, burglary in the first degree, residential burglary, intimidating a witness, Suzanne Younker, and intimidating a witness Suzanne Younker. CP 12-15. The defendant proceeded to trial by jury. RP 63.

On February 1, 2007, the defendant was convicted of assault in the fourth degree, tampering with a witness, and intimidation of a witness. CP 51, 53, 54. The defendant was sentenced on March 16, 2007, and given standard range sentences. He was sentenced to a total of 77 months of incarceration. CP 59-71. This appeal timely follows. CP 77.

2. Facts

In June of 2006, the defendant was living in a home located at 3610 67th Avenue West in University Place with Suzanne Younker. RP 103. Younker and the defendant were dating at the time they moved into the house. RP 102-103. Eventually, the defendant moved out of the house and contacted the landlord to request to be taken off of the lease. RP 104-105. The defendant moved out of the house right after the first of July. RP 103-104. Approximately 24 hours after the defendant had moved out of the residence, the defendant returned to the house and rang the doorbell. RP 106.

At the time the defendant arrived at the home, Younker was inside with a friend, Howard Ohelo. RP 106. Younker opened the door and the defendant burst inside, pushing Younker into a fireplace screen. RP 110.

The defendant began making statements such as "What are you doing, what are you doing in my house?" and "Get out." RP 110. The defendant took off his glasses and grabbed a fireplace poker. RP 113-114. The defendant swung the poker at Ohelo. RP 114. The poker was later recovered from inside the fireplace. RP 115. Younker could see that Ohelo was bruised. RP 116.

Younker's dog was barking, so she left to put the dog in its kennel. RP 110. While she was doing that, she heard Ohelo yelling at the defendant to come outside and "knuckle up." RP 110.

As soon as Younker was done putting the dog in its kennel, she stood up to exit the bedroom and got struck in the head by the defendant. RP 113. The defendant struck Younker with a closed fist. Id. The defendant stated, "Stupid Bitch. I hate you," and "I'm going to hurt you for doing this." RP 117. Younker grabbed the telephone and ran into the bathroom, but the defendant broke through the bathroom door, saw what Younker was doing, and pulled the phone out of the wall. RP 117. The defendant then said "I hate you. Why are you doing this?" RP 118. Younker told him that the relationship was over. Id. The defendant then told Younker, "I'm going to fucking shoot you." Id.

On July 10, 2006, Deputy Allen McArthur was requested to meet Younker at the residence. RP 213. When he arrived at the house he went into the residence and found a telephone that appeared to have been pulled

out of the wall. RP 214-215. Deputy McArthur also found some broken sunglasses on the dining room table. RP 215.

After the incident, the defendant wrote Younker ten letters. RP 129. The defendant and Younker also talked on the telephone. RP 130. The defendant informed Younker that his attorney had told him that if Younker and Ohelo did not appear that he would not get in trouble. RP 131.

The defendant also told Younker that if she showed up that he was “going to tell them” what she had done. RP 131. Younker perceived the defendant’s statements as a threat, and believed that he would tell the police or someone else with authority that she had been involved in activity with fraudulent checks. RP 131-132. The letters included the following statements made by the defendant to Younker:

Exhibit 5A: “My freedom and our future is in your hands. Don’t fuck around, fucker.” RP 143.

Exhibit 5D: “Hello, dakine. I hope all is well and you’re in the best of health. As for me, I’m not doing too well. You didn’t have to lie to me about sending me some money. I let you get my money from Walter to help you out so you could of at least sent me 50 bucks of it. Since you have plans on no sending me any more, you are a cold bitch. And if you lie about something small like that, how can I trust you and dude not to show up for court? To make sure you don’t, I have a little information for you. Do you know those things you make on your computer? I was arrested with three of them. One in your

name, one in my name, and one in Brian's name for your lawyer's account." RP 146-147.

"They are mixed up with my paperwork and property. I can get a court order and have them released to my lawyer. I'm not going to do that unless I find out you've been talking to the court people and plan on coming to Court." RP 147-148.

Exhibit 5E: "It's like someone else took over my body. Some of the things I said and did I would have never done in a million years." RP 149.

Exhibit 5F: "I really don't deserve you. I've caused you so much pain and I find it hard to believe that you still are willing to make this relationship work." RP 150.

Exhibit 5H: "I can only apologize so much for what I did and I'm paying dearly for it and you're making it even harder because I'm not sure that you're going to be there for me, like you say." RP 152.

Exhibit 5I: "Say, baby, my lawyer told me to tell you guys not to answer any of the paperwork or talk to anybody and things should work out fine." RP 153.

The defendant testified on his own behalf. RP 255. The defendant testified that Younker would print blank checks with magnetic ink and insert someone else's information on them. RP 260. The defendant stated that it was Ohelo, not he, who had the fireplace poker. RP 262. When questioned about the letters he wrote to Younker, the defendant

acknowledged that he was referring to Ohelo when he told Younker that “If you lie about something small like that, how can I trust you and dude not to show up for court?” RP 284-285. He also acknowledged that he was referring to the checks that Younker had when he told her that he had information on her. RP 286-287.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING LETTERS WRITTEN BY THE DEFENDANT TO YOUNKER, AND THE LETTER ADMITTED DID NOT REFERENCE YOUNKER HAVING OBTAINED AN ABORTION AT THE DEFENDANT’S REQUEST.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (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). 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.

The defendant asserts that a section of one of the letters the defendant wrote to Younker referenced a prior abortion that Younker had received. Brief of Appellant at page 18. Exhibit 5E, however, does not reference Younker having previously obtained an abortion. Rather, exhibit 5E states, in part:

Say baby I'm back, had to take a brake so I can go eat that slop, I've been thinking about us and something you said made me think, you are right we truly don't know each other, I look back on when we first met at that meeting, that was the real me and from then on I don't remember a thing, It's like someone else took over my body, some of the things I said and did I would have never done in a million years. I swear to God I would still have been with you if you had kept that baby, I'm truly sorry I told you to get rid of the baby if you wanted to be with me, I'm not that type of person ad I pray to God that you don't hold it against me. I'm a loving and caring individual who loves to spend time with that special lady in my life. I also like taking care of my woman, and letting her know she's appreciated.

CP 80-81 (Exhibit 5E).

First, the defendant concedes that he did not raise an objection to the specific section of the letter he now asserts was admitted in error. Brief of Appellant at page 17. Rather, the defendant raised a general objection to the letter in its entirety on relevance grounds. RP 129-139; 149. In order to preserve an objection for appeal, it must be specific. State v. Powell, 139 Wn. App. 808, 824, 162 P.3d 1180 (2007). The defendant did not preserve his objection for appeal, and his claim is without merit.

Assuming, arguendo, that this court finds that the defendant's objection below was specific enough to preserve the issue, the evidence was properly admitted. While the letter does reference the defendant forcing Younker to "get rid of the baby," the letter does not specify that Younker had an abortion. It is just as likely that the jury believed that the defendant forced Younker to give a baby up for adoption. There were no specific questions asked about the reference to a baby, and no evidence presented about what Younker did. The testimony at trial is void of any reference to Younker getting an abortion. The defendant relies on Kirk v. Washington State University, 109 Wn.2d 448, 746 P.2d 285 (1987). Brief of Appellant at page 16. Kirk, however, is distinguishable in several ways. First, Kirk is a civil case involving a personal injury action. Id. at 449. Second, the defendant in Kirk sought to introduce testimony

regarding the petitioner's prior abortions. Id. at 462. As argued above, in the present case there was no specific reference to Younker getting an abortion.

2. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL HAD LEGITIMATE TRIAL STRATEGIES FOR HIS DECISIONS AND ANY ERROR WAS HARMLESS.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in 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); State v. Denison, 78 Wn. App. 566, 897 P.2d 437 (1995), review denied, 128 Wn.2d 1006, 907 P.2d 297 (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 1009, 928 P.2d 413 (1996).

The Washington Supreme Court, in State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991), 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, 114 S. Ct. 382, 126 L.Ed.2d 331 (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), review denied, 130 Wn.2d 1013, 928 P.2d 413 (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 (1972).

- a. Defense counsel was not ineffective for failing to object to any purported abortion evidence when no such evidence was admitted, the exhibit was relevant and admissible, defense counsel had a legitimate trial strategy for not objecting to the letter, and any error was harmless.

Defense counsel was not ineffective for failing to object to exhibit 5E for several reasons. First, as argued above, exhibit 5E does not

reference any abortion evidence. Second, exhibit 5E was relevant and probative evidence of the assault charges. The letter includes statements by the defendant that he “brought it on myself” and that “It’s like someone else took over by body, some of the things I said and did I would have never done in a million years.” CP 80-81 (exhibit 5E). Such statements are evidence of the defendant’s own consciousness of guilt as it relates to the assault charges. The entire letter was admitted because to do otherwise would be to take away from its meaning. Because exhibit 5E was relevant and admissible, any defense objection to the admission of the letter would have been overruled.

Moreover, there was a tactical decision for defense counsel not to seek redaction of exhibit 5E. It is possible that defense counsel thought the jury would punish Younker, not the defendant, for “getting rid of” a baby. It could also be, as argued above, that the passage is so vague and innocuous that it cannot be prejudicial.

Finally, any error in defense counsel not seeking redaction of exhibit 5E is harmless as the defendant cannot establish any resulting prejudice. The defendant was acquitted of the most serious charge in this case—assault in the second and third degree. CP 49-50. The defendant was convicted of assault in the fourth degree, tampering with a witness and intimidation of a witness. CP 51, 53-54. There was ample evidence to support those charges—Younker testified that the defendant struck her, and the jury was able to see the letters from the defendant to Younker

asking her and Ohelo not to come to court. Any error that was committed was harmless and the defendant cannot demonstrate ineffective assistance of counsel or resulting prejudice.

- b. Defense counsel was not ineffective for failing to object to evidence of a pretrial no contact order because he had a legitimate trial strategy for doing so and any error was harmless.

Defense counsel did not object to testimony regarding a pretrial no contact order that was in place prohibiting the defendant from having contact with Younker. The defendant now asserts that he received ineffective assistance of counsel because counsel could have no legitimate trial strategy in failing to object to such evidence. Such a claim is without merit. Part of the defense below was that while the defendant attempted to contact Younker unlawfully, Younker also continued to contact the defendant. Because the defendant's strategy below included addressing Younker's repeated contact with him, defense counsel had a legitimate trial tactic in not objecting to the evidence. While the defendant may not now agree with the tactical decision that was made, that cannot serve as the basis for an ineffective assistance of counsel claim.

Finally, any error committed was harmless. As argued above, the defendant was acquitted of the most serious charge. As evidenced by their verdicts, the jury was clearly not attempting to merely punish the defendant for violating a court order. There was overwhelming evidence

for a jury to find the defendant guilty of assault in the fourth degree, tampering with a witness, and intimidation of a witness. Any error committed in introducing that the defendant acted in violation of a pretrial no contact order was harmless.

- c. Defense counsel was not ineffective for introducing Younker's letters to the defendant because defense counsel had a legitimate trial strategy for doing so, and any error was harmless.

Defense counsel also had a clear trial strategy for introducing Younker's letters. While the defendant may now be displeased with the result that the strategy yielded, legitimate trial strategy cannot be the basis for an ineffective assistance of counsel claim. Defense counsel articulated his position as follows:

Both. He is nowhere to be found. But it boils down to an assault against this victim. These letters go on, "I love you, I love you, I love you, I miss you." It's our position that there's a rule that says there's what your state of mind is, under 803. And she's writing these letters after this supposed assault took place. I think I should at least be able to ask her, number one, about the letters written after this assault where she's contacting him saying "I love you," not letters that say "Why did you punch me?"

And there's also one letter in particular, which I believe is the July 12 letter, that says—references her not testifying in court. That's prior to Mr. Gibson's letter that the State is going to want to produce that says, we understand you're not coming to court. So I believe that those letters are relevant for those two issues. Her state of mind, something that she writes in regard to specifically the account of intimidation. She writes to him and says, you know,

basically I'm not coming to court. I think that's relevant because the intimidation statute is one of a threat.

Now, it's our theory if she writes first and says I'm not coming and then he writes back to her and says, hey, you're not coming, then that lessens the impact of what the State is going to show, which is a threat on the one count.

One of the counts involved a specific reference to I'm going to cause these criminal charges to be filed against you, and that's separate from, I believe that's Count V. There's two counts. One that basically involves a threat of prosecution or reference of prosecution. The other one, don't show up to court. It's basically a don't appear. And I think that her reference earlier in that letter is relevant to that.

RP 55-56.

Clearly, defense counsel was attempting to mitigate the seriousness of the defendant's actions by producing evidence that Younker was not intending on appearing for court regardless of the defendant's requests. While the defendant now contends that such approach was "tremendously naive¹," that is not the standard by which an ineffective assistance of counsel claim is judged. If the defense attorney's conduct can be characterized as legitimate trial strategy, even if that strategy is ultimately unsuccessful, it cannot be a basis for an ineffective assistance of counsel claim. In this case, the defendant's attorney specifically articulated what his trial strategy was—that the severity of the defendant's conduct is lessened by the fact that Younker was also contacting the defendant. The

defendant cannot establish that he received ineffective assistance of counsel.

- d. Any error committed by defense counsel was harmless as the defendant cannot establish any prejudice and the evidence against him was overwhelming.

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).

The defendant cannot establish any prejudice by any of the errors he is now alleging were committed by his trial counsel, as the evidence of the charges that the defendant was found to have committed was overwhelming. The defendant admitted to pushing Younker. RP 303. Younker testified that the defendant hit her with a closed fist. RP 113. Sergeant Mueller, who contacted Younker after the incident, observed that

¹ Brief of Appellant at page 22.

Yunker's left cheek was slightly swollen. RP 66. There was overwhelming evidence that the defendant committed assault in the fourth degree against Yunker.

There was also overwhelming evidence that the defendant committed tampering with a witness and intimidation of a witness. The defendant was convicted of tampering with a witness, Yunker, during the time period between July 11, 2006, and August 31, 2006. CP 12-15. The defendant, during that time period, specifically told Yunker that his attorney said that she should not answer any of the paperwork. CP (exhibit 5I). The defendant also told Yunker to "stay strong" with him, and told her that his freedom was in her hands and "Don't fuck around fucker!!!". CP (exhibit 5A, 5E). Clearly, there was sufficient evidence presented that the defendant attempted to induce Yunker to absent herself from legal proceedings.

The defendant was also convicted of intimidating a witness, Yunker, during the time period between September 1, 2006, and October 1, 2006. CP 12-15. During that time period, the defendant wrote Yunker a letter calling her a "cold bitch" and telling her that if she appeared in court he was going to report her for making false checks. CP 80-81 (exhibit 5D). Such statements by the defendant are clearly threats against Yunker in an attempt to influence her testimony. There was overwhelming evidence for the jury to find the defendant guilty of intimidating a witness.

3. THE DEFENDANT CANNOT ESTABLISH THAT THE PROSECUTOR'S COMMENTS IN CLOSING ARGUMENT WERE SO FLAGRANT AND ILL-INTENTIONED AS TO CREATE AN ENDURING PREJUDICE.

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)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L.Ed.2d 834 (1962). A defendant claiming prosecutorial misconduct in argument bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), rev. denied, 128 Wn.2d 1015 (1996), overruled on other grounds by State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002). If a curative instruction could have cured the error, and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an

enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id. Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998).

In closing argument, “[t]he largest and most liberal freedom of speech is allowed an attorney in the conduct of his client’s cause.” State v. Claflin, 38 Wn. App. 847, 851, 690 P.2d 1186 (1984) (citations omitted). However, “mere appeals to jury passion and prejudice ... are inappropriate.” State v. Belgarde, 110 Wn.2d 504, 508, 75 P.2d 504 (1998) (citations omitted). Thus, a prosecutor’s argument that a defendant was a member of “a deadly group of madmen” who were “butchers that kill indiscriminately” was improper. Id. Similarly, a prosecutor’s “use of a poem utilizing vivid and highly inflammatory imagery in describing rape’s emotional effect on its victims” was improper. Claflin, 38 Wn. App. at 850-51.

In this case, the defendant did not object during the State’s closing argument. Therefore, the defendant must show that the comments by the State were so flagrant and ill-intentioned as to create an enduring prejudice. The defendant cannot meet that burden. The State argued, in part:

What I do want to say is something—it’s a little different about these two charges as compared to the first two. The first two charges are assaults. Mr. Ohelo is a victim. Now,

on first impression, Ms. Younker is the victim on Counts V and VI. But that's really not what we're talking about here, is it? You were brought in here last week, you're brought in here as jurors. The first thing the Court tells you is the whole system upon which we base our criminal justice system is put in the hands of jurors because it is the safest place for it to be.

What he tried to do was hijack that. It is an attack on the entire court system. It is an attack, not just on the judge or the prosecutor or anything like that. It is an attack directly on how we live as a society. We've also lived with the idea of you have to be able to count on witnesses coming in here and telling people what happened because the alternative is simple. The alternative is there is no justice system and it's all taken care of on the street. And that's why this crime is important. That's why these letters are important and the phone calls are important. And why there's a no-contact order to prevent him from doing these things.

RP 322-323.

The defendant relies on State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988). In Belgarde, the prosecutor argued in closing that the defendant was "strong in" the American Indian Movement and that the group was a "deadly group of madmen" and "butchers that kill indiscriminately." Id. at 508. The court held that the prosecutor testified to facts outside the record and gave the jury inflammatory information about the American Indian movement. Id. at 508-510.

In the present case, the defendant concedes that the State did *not* introduce facts outside of the evidence and the State did *not* accuse the defendant of belonging to a terrorist group. Brief of Appellant at page 12. Moreover, unlike the present one, the cases finding improper argument

involve egregious and inexcusable attempts to inflame the jury and obtain a verdict based on prejudice. *See, e.g., Belgarde*, 110 Wn.2d 504 at 507-08 (prosecutor told jurors the defendant was involved in the American Indian Movement, which he characterized as “a deadly group of madmen” and “butchers that kill indiscriminately,” and invited the jury to consider the events at Wounded Knee); *State v. Reed*, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (prosecutor repeatedly called the defendant a liar, stated that defendant did not have a case, and argued that the defense witnesses lacked credibility “because they were from out of town and drove fancy cars”); *State v. Claflin*, 38 Wn. App. 847, 849-51, 690 P.2d 1186 (1984) (prosecutor read poem that used vivid and inflammatory imagery to describe the emotional effect of rape on its victims).

In the case at bar, the State did not engage in such inflammatory or prejudicial conduct. The defendant asserts that the argument by the State conjured “. . . images of terrorism and street violence,” but it is unclear how the argument did so. Brief of Appellant at pages 13-14. The State used the word “hijack” but not in reference to terrorists. As can be seen when read in context, the State was attempting to assert that the defendant was hijacking, or commandeering, the justice system by his conduct of trying to intimidate the witnesses against him. The State never asked the jury to send a message, never argued that the defendant was a liar, and never invoked images of violence. The State’s argument was entirely proper and based on the evidence that was presented. The State, by the

mere use of the word "hijack" did not implicate that the defendant was a terrorist.

Moreover, even if the argument by the State was improper, such error could have easily been cured if an objection had been made. The argument was not so flagrant or ill-intentioned that an enduring prejudice resulted. In the cases cited above, the State engaged in arguments that were either personal attacks of the defendant or blatant attempts to enflame the jury. In the present case the defendant was charged with intimidating the two witnesses against him. The State was merely presenting argument in support of those allegations. If, however, the argument was in error, the statements were not so prejudicial that a curative instruction would not have been sufficient. The defendant cannot show that the argument by the State was improper, cannot show that the statements were flagrant and ill-intentioned, and cannot establish that a prejudice resulted.

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

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional

error was harmless beyond a reasonable doubt.” Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. Id. “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” Neder v. United States, 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, 684 P.2d 668 (1984) (holding that four errors relating to defendant’s credibility combined with two errors relating to

credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, see, e.g., State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See Stevens, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in the trial. He has failed to show that there was any prejudicial error, much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court affirm the defendant's convictions.

DATED: January 7, 2008.

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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.

1.7.08 
Date Signature

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