NO. 38244-0

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EUGENE RANCIPHER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 07-1-01749-8

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KAREN WATSON
Deputy Prosecuting Attorney
WSB # 24259

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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

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B. STATEMENT OF THE CASE.

1. Procedure

On April 2, 2007, the State charged Eugene Michael Rancipher, hereinafter "defendant," with 14 counts of first degree theft. CP 1-6. On December 3, 2007, defendant filed a motion to dismiss 13 counts of first degree theft based upon double jeopardy. CP 9-19.[1] An amended information was filed on June 4, 2008, adding exceptional sentence language to each of the 14 counts. CP 30-37. Defendant's motion to dismiss 13 counts was argued on June 23, 2008, before the Honorable Judge Bryan Chuschoff. 6/23/08 RP 4[2]. The court denied the motion. 6/23/08 RP 35-36; CP 48-49. The court ordered the State to charge each first and second degree theft separately, but could choose to aggregate the third degree thefts into one count, or charge all third degree thefts

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[1] This motion was filed by defendant's first attorney, Kerry Glascoe-Grant, and argued by his second attorney, Linda King. CP 9-19, 6/23/08 RP 4-36.

[2] There are 17 consecutively paginated volumes of trial transcripts, which are referred to as RP and one volume referred to as 7/21/08 RP. The two sentencing VRPs are referred to as SRP; all other volumes are referred to by DATE RP.

separately. 6/23/08 RP 35-36. The State filed a second amended information on June 24, 2008, charging defendant with 45 counts of second degree theft, each with a sentencing enhancement under the multiple offense policy. CP 50-69. Defense counsel objected to the June 24, 2008, second amended information, arguing that it aggregated two separate thefts into one theft per day. CP 70-75. The court ruled that the State must consider the two transactions as separate thefts. RP 10-11. On July 9, 2008, another second amended information was filed charging defendant with 90 counts of second and third degree thefts, with sentencing enhancements for multiple offense policy and unscored misdemeanors. CP 90-131.

The parties appeared for trial before the Honorable Katherine M. Stoltz on June 26, 2008. RP 2. Defense counsel's motion for a bill of particulars was denied. RP 12. On July 2, 2008, defense counsel filed a motion to withdraw based upon ineffective assistance of counsel, and in the alternative to exclude expert testimony, which the court denied. CP 77-86; RP 51-62, 1088, 1096. On July 24, 2008, defendant filed a motion to dismiss or in the alternative grant a mistrial. CP 134-35. On July 28, 2008, defendant filed a supplemental motion to dismiss or in the alternative grant a mistrial. CP 136-150. The court denied the motions. 1755-57. To cure any potential prejudice, the court gave two curative instructions. RP 1757-60.

The jury convicted defendant on 57 counts of second degree theft, and 27 counts of third degree theft. CP 303-92. The jury found the defendant not guilty on four counts of third degree theft, and could not reach a verdict on two counts of second degree theft. CP 303-392. The court sentenced defendant to a high end standard range sentence on each of the 57 second degree theft convictions, and imposed 365 days in jail, with none of those days suspended, on three of defendant's 27 theft third convictions, and imposed 365 days in jail, but suspended all the days on the remaining 24 counts of theft third. CP 393-410, 430-36; SRP 1934-37. The jail time for each of the three theft third convictions that was not suspended, was to run consecutive to the felony sentence and to each other. CP 393-410, 430-36; SRP 1934-37.

2. Facts

Defendant was the loss prevention manager for the University Place Fred Meyer's store. RP 187. As the loss prevention manager, defendant was responsible for administering two employee incentive programs, the Buck-a-beep program and the Recoveries program. RP 168-72, 320. On 45 different days over the course of seven months, defendant presented fraudulent refund slips for the two incentive programs he ran, which resulted in loss of over $50,000 for Fred Meyers. RP 221, 223. The thefts were not discovered until after defendant was terminated.

RP 300-01. After defendant was terminated, the large cash outlays from these two programs ceased. RP 239, 749.

Christopher Voelker testified that after defendant was terminated, Voelker was asked to investigate the very high losses from incentive programs at the University Place Fred Meyer's store. RP 186-87. Voelker had worked in loss prevention from 1999 to 2007. RP 158-62. While working as a loss prevention specialist for Fred Meyers, Voelker worked for defendant. RP 163.

Voelker testified that the Buck-a-Beep program and the Recoveries program were designed to limit store losses, and they are administered by the loss prevention manager. RP 168, 169,172. The Buck-a-Beep program rewards employees for assisting customers when the EAS pedestal alarms activate as a customer exits the store with merchandise that still has an EAS tag on it. RP 168, 169. When the employee responds to assist the customer, the employee writes his name on a log to document his actions. RP 168-69, 170. Under the Buck-a-Beep program, employees receive $1 for every time the employee assists a customer whose purchases have activated the EAS pedestal alarm. RP 170.

The Employee Recovery Incentive Award Program (Recoveries) rewards employees for preventing shoplifting. RP 171. When an employee either stops a shoplifter themselves or notifies loss prevention so they can prevent the theft, the employee earns ten percent, up to one hundred dollars, of recovered merchandise's value. RP 171. The loss

prevention manager or specialist is responsible for logging the recovery into the computer to document the employee's actions. RP 171. At the end of the 28 day fiscal period, the employee is paid ten percent of the recovered merchandises value up to a maximum of $100.[3] RP 171.

At the end of a fiscal period, the loss prevention manager is responsible for using the logs for the two recovery incentive programs, and tallying up the money owed to each employee under each program. RP 172. For the Buck a Beep program, the loss prevention manager makes a list of the amount of money owed to each employee from the hand written log. RP 173. For the Recoveries program, once the data is entered into the computer, the computer program will itemize the amount of money owed to each employee. RP 173. Once the amount owed to each employee has been determined, the loss prevention manager completes two refund slips, one for each program. RP 175. The loss prevention manager then takes all the paperwork to the store director for his or her signature before presenting the refund slips to the customer service desk where the loss prevention manager gets cash in appropriate denominations to pay employees who earned money through the program. RP 175-76, 179, 335-36, 342.

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[3] Fred Meyers works off a 13 month fiscal year – each fiscal month consists of 28 days. RP 172.

During Voelker's investigation, he discovered that numerous months had multiple transactions for the two incentive programs, and that the documentation to support the transactions was not present. RP 221, 238. Many of the refund slips had defendant's name on them, but were not co-signed by the store director as required by company policy. RP 380. The amounts on the refund slips were abnormally high compared to other, similarly situated, stores. RP 182. Over a seven month period there had been 45 days where refund slips were processed for both the Buck-a-Beep program and the Recoveries program. Ex. 5, 6-88, 100-114, 132, 133.

Defendant testified at trial. He admitted the refund fund slips at issue appeared fraudulent. RP 1496-96. Defendant denied that he had written the fraudulent slips, however. RP 1411-22. Defendant testified that he was on vacation on July 9th when one set of refund slips was processed, and that other store employees had the opportunity to commit the thefts. RP 1449. Defendant's work schedule showed that he was back from vacation on July 9th. RP 1711. Additionally, the customer service employees testified that defendant was the person who consistently presented the refunds slips to get cash for the incentive programs. RP 866, 1042. They recalled giving him cash for the programs. RP 866, 1042.

Handwriting expert Robert Floberg testified that he could conclusively determine that six of the fraudulent receipts were written by defendant. 7/21/09 RP 51. His evaluation of the other refund receipts was inconclusive as to whether defendant had written them.

The jury convicted defendant of 84 of the 90 counts of theft. CP 303-92.

C. ARGUMENT.

1. THE PROSECUTOR'S COMMENTS WERE NOT IMPROPER; ALTERNATIVELY, DEFENDANT CANNOT SHOW PREJUDICE.

Claims of prosecutorial misconduct are reviewed under an abuse of discretion standard. ***State v. Allen***, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). The prosecutor is afforded wide latitude in closing argument in drawing and expressing reasonable inferences from the evidence. ***State v. Millante***, 80 Wn. App. 237, 250, 908 P.2d 374 (1995).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. ***State v. Russell***, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). The challenged remarks are viewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. ***State v. Russell***, 125 Wn.2d 24, 85-86. 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.*

a. Defendant's constitutional right to counsel was not implicated by the prosecutor's whispered requests for copies made to defense counsel nor during her cross examination of defendant; alternatively, defendant has failed to show there was a substantial likelihood the jury verdict was affected.

In the present case, defendant claims that the prosecuting attorney "interrupted [defendant's] testimony four times with negative comments on his right to counsel." Brief of Appellant (BOA) at 12. The record does not support defendant's argument that the prosecutor's statements were comments on defendant's right to counsel. In fact, the record shows that the prosecutor made no comment on defendant's right to counsel at all.

i. The prosecutor's request to view an exhibit prior to its admission was not misconduct.

On direct examination of Robin Wieland, defendant's former girlfriend, defense counsel showed Ms. Wieland a series of receipts for purchases made during a camping trip she and defendant and had taken to Cle Elum in July 2005, when some of the thefts occurred. RP 1196 -1211, 1372. The receipts were three years old and defense counsel had previously asked the court to allow her to merely show the receipts to the prosecutor rather than provide copies in discovery. RP 33-34. The court ordered defense counsel to provide copies, which were to be used as part of defendant's alibi defense, to the State. RP 35. During Ms. Wieland's direct examination, defense counsel showed her a Bobcat and log splitting rental receipt. RP 1202. When defense counsel offered the exhibit into evidence, the prosecutor asked to look at the receipt because she wasn't sure she had been provided a copy of that exhibit. RP 1203. No objection was made to the State's request. RP 1203. The prosecutor reviewed the receipt and offered no objection to its admission into evidence. RP 1203.

Defendant alleges for the first time on appeal that the prosecutor's request to review the exhibit prior to its admission was error because the prosecutor stated she wasn't sure she was provided a copy of the exhibit. BOA at 13. However, because no objection was made at trial and this

issue is not properly before the court. 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 court has "steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal." ***Bellevue Sch. Dist. 405 v. Lee***, 70 Wn.2d 947, 950, 425 P.2d 902 (1967). A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). The prosecutor's request to review an exhibit, and her statement that she may not have been provided a copy of that exhibit, does not present an issue of constitutional magnitude that may be raised for the first time on appeal under RAP 2.5. Only claims that were preserved for review by a specific objection in the trial court are properly before the appellate court.

In the present case, defendant has attempted to frame this issue as a right to counsel issue. However, as argued below, defendant has cited no authority to support his argument that the right to counsel has been implicated. Instead, in this instance the State merely requested to review an exhibit to ensure the State has received a copy of it. The court should decline to review defendant's claimed error because no objection was made at trial and the error, if any, was not preserved for appeal.

ii. The prosecutor's whispered comments were not misconduct.

Defendant asserts that the prosecutor committed misconduct during defendant's direct when the following exchange took place.

> DEFENSE COUNSEL: Now, I'm going to hand you Exhibits – Defendant's Exhibits 142, 143, 144, 145, 145, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159.
>
> (Pause.)
>
> DEFENSE COUNSEL: Your Honor, could I please ask that the jury be excused?
>
> COURT: All right. If you would be so kind as to step into your jury room. Thank you for your patience. Thank you, No. 1, for your services as the door shutter.
>
> > (The following took place without the presence and hearing of the jury:).
>
> DEFENSE COUNSEL: Your Honor, [the prosecutor] just spoke to me across the table within the jury's hearing saying that she's not been provided copies of all of these exhibits. That's not the correct way to raise this issue; and first of all, I did provide copies. Some of them were very hard to read. They're very illegible, even in the originals. The Court instructed me to do that, and I believe that I provided copies of all of them; but more problematic than that is the fact that she spoke to me directly within the jury's hearing, suggesting that I'm not being up front with her; and that's a serious problem.
>
> THE COURT: Ms. [Prosecutor]?
>
> PROSECUTOR: Your Honor, I spoke quietly to [defense counsel]. I'm not sure if the court reporter could hear it. The court reporter is the same distance as the jurors.

> Furthermore, I was speaking in the court reporter's direction, not [defense counsel's] direction. It's not as if I stood up and broadcast this.
>
> In addition, Your Honor, I do not have any objection at this time. I was simply trying to alert [her] that when we were following these exhibits the other day, we did not seem to have all of them; and so I was trying to alert [defense counsel] to the fact that I couldn't find all of the exhibits in the ones that were provided to the State. I did have an opportunity to look at all of them. I believe that all of the ones that she has there are ones that the State has looked at, but I don't believe that we have copies of all of them.
>
> What I whispered to [defense counsel] is that I don't know that we have all of them; and if we get to one that the State does not have, then I may want to excuse the jury.

RP 1372-74. While defense counsel did not object to the prosecutor's whispered statement, the court admonished the prosecutor to raise these issues outside of the presence of the jury in the future and stated "if there's an objection by [defense counsel] at this time, then I will sustain the objection." RP 1375-76. The judge noted that she hadn't heard the prosecutor's whispered comment; neither had the court reporter, who only recorded the incident as a "pause" in the proceeding. RP 1372, 1375. Defense counsel did not request that the jurors be questioned to determine if they had heard the prosecutor's whispered comment. RP 1372-76. Nor did defense counsel ask that the jury be instructed to disregard the whispered comment if they heard it. RP 1372-76.

In response to the court's admonition to bring these types of issues up outside of the presence of the jury, the prosecutor stated "I do not mean to obstruct the trial." Defense counsel responded: "Nobody is suggesting that you're obstructing the trial." RP 1378. And the court concurred. RP 1378. The prosecutor then stated that "[defense counsel] said that I was accusing her of not providing discovery; and I'm not." RP 1378. Defense counsel denied that she had made such an accusation. RP 1379. The jury was called back in and defense counsel continued with her direct examination. RP 1380.

Approximately twenty minutes, later as defense counsel showed the prosecutor an exhibit from a series of exhibits of which copies had not yet been made for the State, the prosecutor asked, in a very low whisper, if defense counsel could make a copy of the exhibit for her.[4] RP 1392, 1393. Again, the prosecutor's whispered request was heard neither by the court nor the court reporter, and is only reflected in the record as a pause. RP 1392, 1393, 1399. There is nothing in the record to indicate that the jury heard the prosecutor's whispered request for a copy of the exhibit. RP 1392-99. Despite the fact that the whispered request was in no way objectionable, and that there was no evidence that the jury heard the

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[4] Defense counsel had just obtained the exhibit that morning. The exhibit had been shown to the State, but no copies had been provided at the time defense used the exhibits in trial. RP 1392.

whispered request, defense counsel moved for a mistrial alleging that the prosecutor's whispered questions in some way implied the defense was hiding things from the State and were putting the defense in a bad light. RP 1393, 1396. The court denied the motion for a mistrial, but warned the prosecutor to be careful in the future. RP 1399.

Defendant's allegations of prosecutorial misconduct regarding the whispered requests for copies of trial exhibits fail because there was nothing improper in the prosecutor's whispered requests. Defendant cites no authority that it is improper for the prosecutor to whisper to defense counsel during trial that the prosecutor may not have copies of exhibits or to request that defense counsel provide copies of certain exhibits to the prosecutor. Instead, defendant relies upon ***State v. Nemitz,*** 105 Wn. App. 205, 19 P.3d 480 (2001), and ***United States v. Friedman***, 909 F.2d 705, 708-09 (2d Cir. 1990), to support his prosecutorial misconduct argument. Defendant's reliance on these cases is misplaced.

Keith Nemitz was convicted of driving under the influence. ***State v. Nemitz***, 105 Wn. App. 205, 208. At trial, Nemitz made a motion *in limine* to exclude any evidence of the card he provided the officer on the night he was arrested. ***Nemitz***, at 208. The card was a business card given to him by his attorney, and included instructions on what to do if stopped by police. *Id.* at 208. The trial court denied the motion, and the prosecutor asked the arresting officer on direct and Nemitz on cross, about

the card. *Id.* at 212-13. On appeal, Nemitz asserted that his Fifth and Sixth Amendment rights were violated because the card was given to him by his attorney, and listed his right to remain silent on it. *Id.* at 214. The Court of Appeals held that defendant's right to remain silent and right to counsel were violated because the only evidentiary value of the card was to create an inference that only a person predisposed to driving under the influence would assert his right to counsel and right to remain silent. *Id.* at 215.

In ***United States v. Friedman***, 909 F.2d 705, Friedman was convicted of drug conspiracy and possession crimes following a jury trial. In closing, the prosecutor argued that "while some people, ladies and gentlemen, go out and investigate drug dealers and prosecute drug dealers and try to see them brought to justice, there are others who defend them, try to get them off, perhaps even for high fees." ***Friedman***, at 708. Later the prosecutor argued that defense counsel would say anything to get his client off. ***Friedman***, at 709. The court found the prosecutor's arguments improper and the court's response insufficient to cure any prejudice. *Id.* at 709-10. The court noted when "a prosecutor's improper remarks have not been deemed prejudicial, the record has disclosed emphatic curative instructions by the trial judge". *Id.* at 710.

Both ***Nemitz*** and ***Friedman*** are clearly distinguishable from the present case. First, unlike ***Nemitz***, here the prosecutor's whispered remarks made no reference to defendant's right to counsel or his right to remain silent. Instead, the prosecutor whispered to defense counsel that

the prosecutor may not have a copy of some trial exhibits counsel was using and, later, that she needed copies of a different exhibit defense counsel was using. In the first instance, the court had ordered defense counsel to provide the copies to the State. In the second instance, defense counsel acknowledged on the record that she had not provided copies of the exhibit she had shown the State, but said the State had looked at them. RP 1392. Contrary to defendant's assertions, neither of these instances implicate defendant's right to counsel.

Assuming, *arguendo*, it was improper for the prosecutor to whisper statements or questions to defense counsel, there is no evidence that the jury heard the whispers. The court did not hear them. RP 1375, 1399. The court reporter did not hear them. RP 1372, 1392. Defense counsel did not ask that the jurors be questioned to determine if they had heard the whispered request for copies. Because the record is devoid of any evidence that the jury even heard the whisper, defendant cannot meet his burden of showing there was a *substantial likelihood* the jury's verdict was affected as a result of the prosecutor's conduct. The prosecutor's efforts to discreetly alert defense counsel that the State needed copies of certain exhibits is in direct contrast to both ***Nemitz*** and ***Friedman*** where the prosecutor's goal in eliciting the testimony or making the argument was for the jury to hear and draw improper inferences. Additionally, unlike ***Friedman***, where the prosecutor denigrated defense counsel, here

the prosecutor made no disparaging remarks – she just politely and discreetly wanted to ensure the State had copies of all exhibits being used at trial.

iii. The prosecutor's cross examination of defendant was proper.

Defendant asserts the prosecutor commented on his right to counsel during the State's cross examination of defendant. RP 1494, 1517. Part of defendant's case theory was that his loss prevention specialists, Tiffany Kissinger and Chris Voelker, had the same access and opportunity to have committed the thefts as he did. RP 1848-49. On direct, defendant testified that he could only have one loss prevention specialist in his store at a time. RP 1303. On cross examination, the prosecutor attempted to elicit testimony from defendant as to the dates when Ms. Kissinger and Mr. Voelker worked at the University Place Fred Meyer's. RP 1494-96.

PROSECUTOR:	Do you recall when the transfer took place?
DEFENDANT:	When the transfer took place?
PROSECUTOR:	Well, you indicated that you had both Chris and Tiffany; is that correct?
DEFENDANT:	No I brought them both over to Fred Meyer
PROSECUTOR:	When was that?
DEFENDANT:	In the beginning of Fred Meyer – or when I started
PROSECUTOR:	And when was that?
DEFENDANT:	I don't know my hire date –
PROSECUTOR:	Okay
DEFENDANT:	-- with Fred Meyer

PROSECUTOR:	You're looking at your defense attorney. She's not giving you the answer, is she?
DEFENSE COUNSEL:	Objection, Your Honor.
COURT:	I'll sustain the objection
PROSECUTOR:	Mr. Rancipher, do you recall the date that you brought Chris and Tiffany over?
DEFENDANT:	I do not.

RP 1494-95. When the court sustained defense counsel's objection to the question, the prejudice, if any, from that question was cured. Later in the trial, defense counsel made a motion for dismissal for government misconduct or, in the alternative, a mistrial based, in part, upon this exchange. RP 1547; CP 134-35. In response to these motions, the prosecutor clarified her statement. She noted that her statement "You're looking at your defense attorney. She's not giving you the answer, is she?" was designed to point out that defendant was hesitating or looking for help before he answered questions. RP 1748-49. This goes to the credibility of defendant and his demeanor while testifying, which are proper areas for the jury to evaluate. *See* CP 197-99 (Ins. No 1). The prosecutor noted that the transcript does not show tone of voice or emphasis on words, but in this case she had lowered her voice at the end, which made her statement a comment on his demeanor and not a question. RP 1748. The court denied the motion for a mistrial. RP 1757.

If the court were to find that the prosecutor's statement was improper, defendant's argument still fails because he cannot show there was a substantial likelihood that the jury's verdict was affected by the

statement. When defense counsel objected, she did not state a basis for her objection; however, the court sustained the objection. RP1495. At most, the prosecutor's statement that defendant wasn't getting any answers from his attorney was argumentative; it cannot, however, be construed to be a comment of defendant's right to counsel. *See* ER 611.[5] Regardless of the basis for the objection, whatever prejudice that could flow from this statement was cured when the court sustained the objection. However, in an abundance of caution, the court issued a curative instruction to ensure the jury's verdict was not affected. RP 1757-58; CP 204 (Ins. No. 6)[6]. In order for defendant to prevail on his claim of prosecutorial misconduct, he has to show that the prosecutor's statement was so egregious that even a curative instruction could not obviate the prejudicial impact of the statement. Defendant cannot meet this burden. Defense counsel's objection was sustained and defendant made no reply to the prosecutor's statement. RP 1494-95. The prosecutor moved on and made no other reference to defendant hesitating before answering questions. A curative

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[5] ER 611(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

[6] Ins. No. 6: You must disregard all questions which were asked regarding the defendant looking at his attorney during cross examination, or which referred to his reviewing evidence with his attorney in preparation for trial. The defendant has a constitutional right to counsel.

instruction was included in the jury instructions that instructed the jury to disregard questions regarding looking at his attorney or preparation for trial. CP 204. Jurors are presumed to follow the jury instructions. ***State v. Swan***, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Defendant's claim of prosecutorial misconduct is without merit.

Defendant also alleges that the prosecutor negatively commented on his right to counsel when she asked if he had gone through some of the refund slips with his attorney before he testified. BOA at 14. Defendant alleges the prosecutor returned to this question immediately after defense counsel objected, and the court sustained that objection. *Id.* The record does not support defendant's argument.

PROSECUTOR:	You went through the [refund] slips with [defense counsel], didn't you?
DEFENDANT:	Did I go through the slips?
PROSECUTOR:	With [defense counsel]
DEFENDANT:	When I testified, yes.
PROSECUTOR:	When you testified. Did you go through the slips with her before you testified in preparation?
DEFENSE COUNSEL:	Objection, Your Honor
COURT:	I'll sustain the objection
PROSECUTOR:	You indicated that you went through the slips with [defense counsel]. At first, she handed you one set of slips; is that correct? And those are slips that were affiliated with the logs; right?
DEFENDANT:	I believe so.

RP 1516-17. There was no objection to the prosecutor's questions regarding defense counsel's direct examination of defendant regarding the refund slips. RP 1516-17. The only objection defense counsel made was to the prosecutor's question regarding reviewing the slips with defense counsel in preparation for trial. RP 1517. The court sustained defense counsel's objection and the prosecutor did not return to that topic. RP 1517. The record shows that the prosecutor did not continue to ask questions regarding reviewing the slips in preparation for trial, but returned to questions regarding refund slips defendant testified to on direct. The prejudice, if any, was cured when the court sustained the objection.

Again, defendant relies on ***Nemitz*** to support his argument that asking a defendant on cross examination if, in preparation for trial, he had reviewed with his attorney certain exhibits that had been admitted into evidence during trial. However, ***Nemitz*** is not on point. In ***Nemitz,*** the defendant invoked his right to remain silent when contacted by police and gave the officer his attorney's card, which had instructions on the back on what to do if contacted by police. During trial, the prosecutor addressed the card with both the police officer and Nemitz. The prosecutor in ***Nemitz*** used the card, which had no probative value as to the crime charged, to show that only a person who had a propensity to drive under

the influence would have taken the precautionary step "to avoid self-incrimination and to assert his right to counsel in the context of a DUI stop." ***Nemitz***, at 215. Here no such argument can be made. The refund slips at issue documented many of the thefts that were the subject of the trial. RP 175-77, 179, 187-240. The slips made no reference to defendant's right to remain silent or his right to counsel.

Even if this court were to find that prosecutor's question improper, defendant cannot show prejudice. Defense counsel's general objection was sustained. RP 1517. Defendant did not answer the question. RP 1517. The prosecutor moved on and asked no further questions regarding whether defendant had reviewed the refund slips with his attorney in preparation for trial. Additionally, the court gave a curative instruction that instructed jurors to disregard any questions regarding reviewing evidence with his attorney. RP 1757-58; CP 204. Jurors are presumed to follow the instructions. ***Swan***, at 661.

As argued above, none of the instances where defendant has alleged the prosecutor commented negatively on defendant's right to counsel have merit. In fact, they are not even a comment on his right to an attorney and this court should so hold.

b. Evidence of defendant's termination was properly admitted as res gestae and to show intent and an absence of mistake; the prosecutor's question as to whether a previous witness was mistaken was proper.

Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to commit crimes, but may be admissible for other purposes:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action purposes, such as proof of motive, opportunity, intent, accident.

The trial court may admit evidence of prior misconduct for other purposes, like demonstrating intent or to complete the story of the crime under *res gestae,* so long as the probative value outweighs its prejudicial effect. *See* ***State v. Tharp***, 96 Wn.2d 591, 637 P.2d 961 (1981); ***State v. Foxhoven***, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Generally, appellate courts defer to the assessment of the trial judge who is best suited to determine the prejudicial effect of a piece of evidence. ***State v. Posey***, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

i. The prosecutor's reference to defendant's termination was proper.

Under *res gestae* exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or provide the immediate context for events close in both time and place to the charged crime. ***State v. Lillard***, 122 Wn. App. 422, 93 P.3d 969 (2004). In the present case, throughout the time the thefts were occurring at Fred Meyer, defendant was under scrutiny by his supervisor for failing to work his scheduled shifts. RP 662-63. Defendant was ultimately terminated, not for the thefts, but for failing to work his scheduled hours. After defendant was terminated, all the thefts stopped. RP 749, 760, 1628. Under the State's case theory, the fluidity in defendant's work hours and the lack of checks and balances, which were exacerbated by defendant's failure to work his scheduled hours, combined to present defendant with the opportunity to commit the numerous thefts that occurred over approximately one year period. RP 1797-99. The court did not admit the evidence as *res gestae*, however, this court can affirm a trial court's decision on a different ground if the record is sufficiently developed. ***State v. Villarreal***, 97 Wn. App. 636, 643, 984 P.2d 1064 (1999).

Evidence of defendant's termination was also proper to show an absence of mistake and intent. In the present case, part of defendant's

case theory was that he was sloppy and didn't understand the paperwork involved in his job. RP 1865. Evidence that he was terminated because he failed to work his scheduled hours shows that his work product was not so flawed that he was unable to maintain his employment.

Even if the prosecutor's questions regarding defendant's termination were improper, defendant cannot show there was a substantial likelihood the jury's verdict was affected by its admission. The jurors in this case were very careful and took their responsibilities seriously. Defendant was charged with 90 counts of theft. CP 151-192. There were 103 jury instructions. CP 196-302. The jury received the case on July 30, 2008, and they returned their verdicts on August 4, 2008. RP 1879, 1896-1910; RP 303-92. While deliberating, they sent out three questions. CP 193-95. The first question requested the use of the projector and laser pointer. CP 193; RP 1882. The second question asked for clarification on jury instructions No. 38 and No. 101, because the dollar amount of the theft alleged for the two counts relating to those instructions did not fall within the parameters of the to convict instructions. CP 194; RP 1888. The third question asked what the process was when they could not reach an agreement on four counts. CP 195; RP 1892. The jurors' questions show a thoughtful and methodical approach to evaluating the evidence presented at trial. This is reinforced by the fact that the jury did not

convict defendant of all 90 counts. Instead, they hung on two counts[7] and acquitted on four counts[8]. Defendant has failed to show a substantial likelihood that the rebuttal argument of counsel affected the jury's verdict; in fact, all evidence is to the contrary. The fact that defendant was not convicted of all counts shows that the jury could not have been swayed by any alleged improper propensity or character evidence. They evaluated the evidence, compared it to the jury instructions, convicted defendant on some counts, acquitted on some counts, and could not reach a verdict on other. There is no evidence that the jury's verdict was impacted by evidence that defendant was terminated for failing to work his shift.

Similarly, the prosecutor's statement in closing that defendant was terminated for "time fraud" was not misconduct. The court sustained defense counsel's objection, and the prosecutor rephrased her argument. RP 1818. Any prejudice from the prosecutor's sole reference to time fraud was cured when the court sustained the objection. Defense counsel could not have felt in the context of the argument that it was particularly prejudicial because no curative instruction was requested. Without the request for a curative instruction, defendant must show the prosecutor's comment was so flagarant and ill-intentioned that no curative instruction could have obviated the resulting prejudice. ***Swan***, at 661. The jury's

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[7] The jury did not reach a verdict on counts LXIII and LXIV. RP 1904; CP 365, 366.
[8] The jury found defendant not guilty on counts VI, XVI, XXVIII, XC. RP 1897, 1898, 1900, 1907; CP 308, 318, 330, 392.

verdict convicting on some, acquitting on others, unable to reach a verdict on still more, is consistent with the perception that the argument was not particularly prejudicial.

Defendant's argument is without merit and must fail.

ii. The prosecutor's question regarding the payment of taxes was proper.

Defendant testified that he earned an annual salary of $36,000 for his work at Fred Meyers. RP 1288. Despite this relatively modest salary, there was evidence that defendant lived a lavish lifestyle and always seemed to have cash on hand. RP rounds 227, 235, 283, 1505-06. The State elicited testimony that defendant purchased a new truck, gambled regularly, bought rounds of drinks for people when he went out, purchased meals for other people, etc. RP 227, 235, 244, 283, 1505-06. This evidence went directly to whether defendant had committed the 90 counts of theft for which was charged.

Defendant attempted to explain the apparent inconsistency between his income and his spending by testifying that he supplemented his income with a lucrative second job: security camera installation. RP 624, 1174-75, 1454, 1455. Defendant testified that the cameras he installed generally cost $250-300, and he received 50 percent of the profit from every installation. RP 1455. From January 2005 though August 2005, defendant installed approximately 14 security systems and earned

approximately $450 from each installation. RP 1454-55. The prosecutor asked defendant if he had reported this income to the IRS, and defense counsel objected on ER 404(b) grounds. RP 1455. The court sustained the objection, and defendant did not answer the question.

In response to defense counsel's objection, the State argued the evidence was admissible because, in part, it went to how much cash defendant had available. If defendant was reporting this income to the IRS, then the $450 per job he earned would be reduced by about one third because of the taxes he would have to pay. RP 1456-57. The prosecutor conceded that the question may implicate defendant's overall integrity, but maintained that defendant should be allowed to answer the question to impeach his credibility. RP 1456. As noted above, the court sustained the objection, and defendant did not answer the question.

Again, defense counsel did not ask for a curative instruction. In the context of the trial, defense counsel clearly did not perceive the question to be so prejudicial that a curative instruction was necessary. As a result, the alleged misconduct is not reviewable unless it was so flagrant and ill-intentioned that the resulting prejudice could not be neutralized by a curative instruction. ***State v. Alexander***, 54 Wn. App. 147, 155, 822 P.2d 1250 (1992). As argued above, the prosecutor's question was proper. If this court finds that it was improper, then defendant has waived this issue by failing to request a curative instruction, which would have directed the jury to disregard the question. Defendant's claim is without merit.

iii The prosecutor properly asked if a prior witness was mistaken because there was a discrepancy in the testimony.

Defendant also asserts that the prosecutor committed misconduct when she asked defendant on cross examination whether Ms. Wieland was mistaken when she believed that defendant made payments on a tent trailer they had purchased. RP 1466.

Questions put to one witness as to whether another is lying, or not telling the truth, are improper and constitute misconduct because they are designed to elicit personal opinion testimony, which is irrelevant and may be prejudicial. *See* ***State v. Casteneda-Perez***, 61 Wn. App. 354, 364, 810 P.2d 74 (1990); ***State v. Barrow***, 60 Wn. App. 869, 875-77, 809 P.2d 209, *review denied*, 118 Wn.2d 1007, 822 P.2d 288 (1991). However, where conflicts in the testimony make questions about the discrepancies relevant, questioning a witness about those discrepancies may be proper. ***State v. Wright***, 76 Wn. App. 811, 822, 888 P.2d 1214, *review denied*, 127 Wn.2d 1010, 902 P.2d 163 (1995).

In ***Wright***, the prosecutor asked Wright during cross examination about discrepancies between his testimony and the testimony of officers. ***Wright***, at 819. When pointing out discrepancies, the prosecutor asked Wright if the events differed because the police "got it wrong." *Id.* at 819-20. The court in ***Wright*** held that questions on cross-examination that ask

one witness whether another witness was mistaken are merely objectionable to the extent they are irrelevant. *Id.* at 822.

Like ***Wright***, the prosecutor's question in this case was objectionable based upon relevancy, but was not misconduct. It was, perhaps, irrelevant whether Ms. Wieland was mistaken on who made the tent trailer payments, but it did not rise to the level of misconduct. However, if this court were to find that it was misconduct, any prejudice cause by the question was cured by the curative instruction given by the court. RP 1760; CP (Ins. No. 5).[9] Jurors are presumed to have followed the court's instructions. ***State v. Swan***, 114 Wn.2d 613.

Defendant relies upon ***State v. Jerrels***, 83 Wn. App. 503, 507, 925 P.2d 209 (1996), to support his argument that the prosecutor committed misconduct when she asked if Ms. Wieland was mistaken when she thought that defendant had made payments on the tent trailer. BOA at 18. However, ***Jerrels*** is distinguishable from the present case.

Harvey Jerrels was convicted of child rape, child molestation, and assault for acts committed against his daughter and two step-children. ***State v. Jerrels***, 83 Wn. App. 503, 506. On three different occasions during trial, the prosecutor asked Mrs. Jerrels, two of the children's mother, if she had decided whether she believed her children. ***Jerrels***, at

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[9] Instruction No. 5. You must disregard any question which was asked which invited the defendant to comment on the credibility or truthfulness of another witness.

506. Mrs. Jerrels testified that she believed they were telling the truth. *Id.* at 507-08. Defense counsel did not object. The court found that there was error because the prosecutor asked the children's mother whether she believed the children were telling the truth. *Id.* at 508. The Court of Appeals held that the questions were so flagrant and ill-intentioned that a curative instruction could not obviate the resulting prejudice because (1) there was little evidence beyond the children's testimony, so the issue in the trial was credibility; and (2) the improper questions were asked three different times. *Id.* at 508.

The present case is distinguishable from ***Jerrels*** on its facts. In ***Jerrels,*** the prosecutor elicited testimony that the mother believed her children's allegations of sexual abuse, which went directly to the victim's credibility and to the heart of the crimes for which Jerrels was charged. Additionally, the prosecutor asked the mother on three separate occasions whether or not she believed her children. In each instance, the mother replied that she believed them. In contrast, Ms. Wieland had testified about a collateral matter – whether defendant had made payments on a tent trailer purchased during their relationship. RP 1241. On cross examination, the prosecutor asked defendant if Ms. Wieland was mistaken when she thought he had made payments on the tent trailer. RP 1466. This testimony did not go to the heart of the crimes with which defendant was charged. Unlike ***Jerrels***, here the question did not bolster the credibility of the complaining witness. Unlike ***Jerrels***, defendant did not

answer the question because defense counsel objected, and the court sustained the objection. Finally, unlike ***Jerrels***, here the court issued a curative instruction that cured any prejudice that could have resulted from this unanswered question. Jurors are presumed to follow the court's instructions. ***Swan***, at 661

c. The prosecutor's rebuttal was a proper response to defendant's closing argument; alternatively, defendant cannot show there was a *substantial likelihood* the jury's verdict was affected by the argument.

Defendant alleges that the prosecutor committed misconduct when she made the following argument in rebuttal.

PROSECUTOR: ...the comments of the attorneys are not evidence; and let me remind you, as well, that when [defense counsel] stood up here and talked about the fact that his liberty is at stake, that's a comment which has no support testimony behind it. Did anyone come up here and say that he's going to go to jail? No one came up and said that. [Defense counsel] is the only person who said that.

DEFENSE COUNSEL: Objection to this argument, Your Honor.

COURT: I'll sustain the objection. Rephrase it Counsel.

PROSECUTOR: That is not testimony. No witness has testified to that, and so you are to consider that only as argument by Counsel. There is no support for that in any of the evidence in this case. There's, also, no support for [defense counsel's] statements from the

> evidence of the case that I'm just up here trying to dish dirt.

RP 1862-63. Defense counsel made no further objections. RP 1862.

Defendant relies upon ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976), to support his argument that the State's rebuttal was misconduct. However, ***Torres*** is distinguishable from the present case. Alexander Torres, Ralph Castillo, and Ramon Garza were convicted of rape, and Torres and Garza were also convicted of first degree burglary after a jury trial. ***Torres***, at 255. On appeal, Torres, Castillo, and Garza alleged numerous instances of prosecutorial misconduct, including two instances in closing arguments. In closing, the prosecutor first commented on defendant's exercise of the marital privilege, and then in rebuttal repeatedly argued to the jury factors associated with sentencing. ***Torres***, at 261-262. The prosecutor argued that the judge will make a sentencing decision based upon input from probation and others. Even after defense counsel objected, and the court advised the prosecutor to move on from the argument, the prosecutor continued with this theme by arguing the judge has discretion as to what happens to the defendant, and has many alternatives. *Id.* at 261. After yet another objection, the prosecutor continued and began enumerating the alternatives available to the judge including a deferred sentence. *Id.* at 262. Defense counsel objected a total of three times to the prosecutor's improper rebuttal argument.

In the present case, defense counsel argued in closing that this case was

about the loss of liberty and the fact that the jurors could take away defendant's liberty. RP 1840. In rebuttal, the prosecutor reminded the jury that defense counsel's statements were not testimony and that no witness testified that defendant would go to jail. RP 1862-63. Unlike ***Torres*** where, despite repeated objections, the prosecutor continued to focus his rebuttal argument on the judge's sentencing alternatives, here the prosecutor merely reminded the jurors that the argument of counsel was not testimony, and that there was no testimony to support counsel's argument that this case was about defendant's liberty. RP 1863.

Additionally, remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel, and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. ***State v. Dennison***, 72 Wn.2d 842, 849, 435 P.2d 526 (1967); ***State v. Graham***, 59 Wn. App. 418, 428-29, 798 P.2d 314 (1990). In this case, the prosecutor was responding to the remarks made in defense counsel's closing argument in which she argued that the entire case is about defendant's liberty interest. The prosecutor's rebuttal was an appropriate argument in light of defense counsel's argument.

In the unlikely event this court finds the prosecutor's argument to be improper, defendant's argument still fails because he has not shown a substantial likelihood the prosecutor's argument affected the verdict. As

argued above, the jury was thoughtful and methodical in their deliberations. Defendant was not convicted on all counts. The jury acquitted on several counts, and could not reach a verdict on an additional two counts. All evidence indicates that this jury was not swayed by any alleged improper arguments.

d. The prosecutor's use of leading questions did not rise to the level of misconduct.

A leading question is a question that suggests the desired answer. ***State v. Swan***, 114 Wn.2d 613. Generally, leading questions should not be used on the direct examination of a witness, except as may be necessary to develop the witness' testimony. ER 611(c). Leading questions on direct examination may be objectionable, but they are rarely considered misconduct. ***Torres***, 16 Wn. App. 254, 258-59.

In the present case, defense counsel objected to leading questions on numerous occasions, and in each instance the objection was sustained. Like the prosecutor, defense counsel asked many leading questions in direct examination of her witnesses.[10] When defense counsel objected to the prosecutor's leading questions, the court asked the prosecutor to rephrase and the examination continued. Defendant now claims he was prejudiced by the prosecutor's use of leading questions, but his claim is

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[10] The prosecutor examined 13 witnesses during her case in chief, and defense counsel made 19 objections to leading questions. Conversely, defense counsel examined only three witnesses in her case in chief, and the prosecutor objected 10 times, 8 of which were sustained.

without merit. If anything, the prosecutor's case suffered because her questions were poorly phrased and defense counsel's objections were sustained. Defendant cannot meet his burden to show the prosecutor's use of leading questions had a substantial likelihood of affecting the verdict. As argued above, this jury was thoughtful and methodical in its evaluation of evidence, and defendant was not convicted on all counts.

Defendant relies upon ***Torres*** to support his argument that the State's use of leading questions was misconduct. However, in ***Torres***, the prosecutor asked so many leading questions he was held in contempt. *Id.* at 254. Even still, the ***Torres*** court did not reverse solely based upon the prosecutor's use of leading questions, but for cumulative error. *Id.* at 263. In the present case, the prosecutor's use of leading questions was in no way comparable to that of ***Torres***. Defendant's claim is without merit and must fail.

2. DEFENSE COUNSEL WAS EFFECTIVE WHERE DEFENDANT CANNOT SATISFY EITHER PRONG OF 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. Cronic***, 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's first attorney was effective.

Defendant alleges that his first defense attorney, Kerry Glascoe-Grant, was deficient when she included handwriting expert Robert Floberg's name on a witness list knowing that his report contained inclupatory information in it and triggering an obligation to provide the report in discovery. BOA at 30. However, Ms. Glascoe-Grant's decision to use Floberg was a tactical one for which she cannot be considered deficient.

Defendant relies upon ***State v. Grogan***, 142 N.M. 107, 163, P.3d 494 (2007), a New Mexico case to support his argument that Ms. Glascoe-Grant's performance was deficient. BOA at 31. However, ***Grogan*** is distinguishable on its facts. Stanley Grogan was charged with vehicular homicide and two counts of great bodily harm by vehicle stemming from a collision that resulted in the death of his girlfriend and her two children. ***Grogan***, 142 N.M. 107, 109. The toxicology report from blood and urine tests conducted immediately after the collision showed the presence of cocaine, amphetamine, and opiates, but did not quantify amounts. *Id.* at 109. Re-testing confirmed these results, but identified the amphetamines as methamphetamine. *Id.* Defendant hired his own expert to analyze the blood and urine, but listed this expert as a witness before learning the results of the test. *Id.* Defendant's expert quantified the results and later testified for the State that defendant had such a large quantity of methamphetamine in his system that defendant would have been under the effects of the drug at the time of the accident. *Id.*

In the present case, Floberg's report conclusively determined that out of the approximately 200 refund slips he analyzed, defendant had written only six of them. RP 1123. Because Floberg's analysis resulted in numerous inconclusive results, Ms. Glascoe-Grant could have felt his

testimony would be helpful in eliminating many of the counts of theft.[11] This is a legitimate trial tactic, especially when the defendant called him as a witness, which would lend credibility to the expert's testimony. Ms. Glascoe-Grant could easily argue that the inconclusive refund slips were written by someone else. Ms. Glascoe-Grant's decision to use Floberg as a witness was clearly a tactical one. Unlike ***Grogan,*** where the defendant's toxicology report quantified the amount of drugs in defendant's system at the time of the collision, undermined his defense to all of the charges, and strengthened the State's case; here, Floberg's report cast doubt on 84 out of 90 refund receipts on which the State's case rested, and buttressed defendant's argument that other people were involved in the thefts.

Additionally, it is difficult to determine the impact of Ms. Glascoe-Grant's decision to use Floberg as an expert because she withdrew, and defense counsel substituted in as attorney of record. RP 31. When attorneys change, case theories change as well. Defendant's second attorney argued a motion to dismiss 13 of the 14 counts of first degree theft. CP. 9-19; RP 6/23/08 RP 4-36. That motion was denied; but based upon the court's ruling, the State filed an amended information breaking

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[11] When Ms. Glascoe-Grant had the case, defendant was charged with 14 counts of first degree theft. After his second attorney argued a motion to dismiss 13 counts, the court held the State could not aggregate thefts that would, when taken in isolation, constitute a theft 1 or theft 2. As a result, the State amended the information charging defendant with 90 counts of second and third degree theft. 6/23/08 RP 3; RP 11.

down those 14 counts of first degree theft into 90 counts of second and third degree theft. CP 151-192. This fundamentally altered the case in a way that may not have been contemplated by Ms. Glascoe-Grant when she initially decided to use Mr. Floberg as an expert witness.

Defendant's argument that Ms. Glascoe-Grant was deficient is without merit. Similarly, defendant's attempt to bootstrap any deficient performance of Ms. Glascoe-Grant's onto his second attorney is equally without merit.

Assuming *arguendo,* this court finds Ms. Glascoe-Grant was deficient, defendant's ineffective assistance of counsel claim still fails because he cannot satisfy the second prong of the ***Strickland*** test: prejudice. Just because defendant was not acquitted on all charges does not mean he was prejudiced by the tactical decision of counsel. Defendant must still show that, absent the error, there is a reasonable probability that the outcome of the trial would have been different. Here, there is no probability that the outcome would have been different because there was significant evidence in this case that defendant had committed the thefts: 1) the thefts involved incentive programs defendant supervised; 2) his name was written on many of the refunds slips; 3) the customer service employees remembered giving the money for the refund slips to defendant; 4) defendant was known to carry large amounts of cash; and 5) defendant's purchases appeared to be disproportionate to his income. RP 222-23, 1042, 1650.

b. Defendant's second attorney was effective.

Defendant claims his second attorney had an actual conflict because she argued defendant's prior attorney, Ms. Glascoe-Grant, was ineffective. BOA 33-34. Defendant's argument is without merit.

For defendant's argument to succeed he must establish that Ms. Glascoe-Grant was ineffective. Then, he must show that Ms. Glascoe-Grant was placed in the position of arguing her own ineffectiveness to create actual conflict. Finally, defendant must show that the conflict created by Ms. Glascoe-Grant having to argue her own ineffectiveness was imputed to defense counsel. Defendant's argument fails because, as argued above, Ms. Glascoe-Grant was effective. Because she was effective, there was no actual conflict to impute to the second attorney.

Defendant relies on ***District Court for the Twenty-First Judicial District v. McCall***, 783 P.2d 1223, 1223 (Colo. 1989) to support his argument that whenever there is an allegation of ineffective assistance of counsel, there is a per se actual conflict such that no one in the same public defender's office can represent the defendant. BOA at 34. This case was is no longer good law. The holding in ***McCall*** was grounded in, the former Code of Professional Conduct, which has been superseded by the Colorado Rules of Professional Conduct (Colo. RPC). *See* ***People v. Shari***, 204 P.3d 453, 459 (Colo. 2009). The comments to Colo. RPC 1.11 "make clear that government attorney's individual conflicts are not

imputed to the entire government agency for which he works." ***Shari***, 204 P.3d 453, 459.

Defendant also argues that his second attorney was ineffective because RPC 3.7 states that a lawyer cannot act as an advocate in a matter to which she is a necessary witness. BOA at 35. If defendant is alleging that defense counsel was ineffective for failing to make a motion to withdraw based upon RPC 3.7, then his argument fails. In order to succeed on a claim of ineffective assistance of counsel for failing to make a motion, defendant would have had to show that the motion would have been successful. Defendant's motion to withdraw based upon RPC 3.7 would have not been granted. Courts are reluctant to disqualify an attorney RPC 3.7 and require a motion for disqualification that "'must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated, that the evidence is unobtainable elsewhere, and that the testimony is or may be prejudicial to the testifying attorney's client.'" ***Pub. Util. Dist. No. 1 v. Int'l Ins. Co.***, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994)(*quoting* ***Cottonwood Estates, Inc. v. Paradise Builders, Inc.***, 128 Ariz. 99, 105, 624 P.2d 296 (1981)). Here, Ms. Glascoe-Grant's actions with respect to filing a witness list that included Robert Floberg as a witness were a matter of record. *See* BOA Appendices A, B, C. Additionally, Floberg has testified as a handwriting expert in more than 50 cases. RP 1111. Finally, there was no evidence that only Ms. King could testify as Floberg's qualifications, experience

and conclusions. Defense counsel cannot be deficient for failing to make a motion that would not have been granted.

3. THE COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL

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). An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.3d 1353 (1997). 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). To determine whether a trial irregularity effected the trial's outcome, 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).

After a jury trial, Alberto Escalona was convicted of second degree assault with a deadly weapon. ***Escalona***, 49 Wn. App. 251, 252, 742 P.2d 190 (1987). On appeal, he asserted the trial court erred when it denied his motion for a mistrial. ***Escalona***, 49 Wn. App. 251, 252. At trial, Phillipe Vela, the victim and sole witness to the incident, testified that Escalona had grabbed a knife and threatened to kill him. ***Escalona***, at 252. Vela also testified that he was very nervous because Escalona had a record and had already stabbed someone. *Id.* at 253. Defense counsel moved to strike the statement and made a motion for a mistrial, which the court denied. *Id.* The court did instruct the jury to disregard Vela's answer. *Id.*

The court held that the trial court abused its discretion when it denied Escalona's motion for a mistrial. *Id.* at 256. The trial irregularity was serious involving improper 404(b) evidence that Escalona had committed the exact same crime in the past. *Id.* at 255. The State's case was weak, and Vela was the other person other than defendant who witnessed the incident. *Id.* And given how inherently prejudicial evidence that Escalona had stabbed someone else before was, it was unlikely that the curative instruction given by the judge could insure Escalona received a fair trial. *Id.* at 255-56.

In the present case, defendant asserts that the trial court abused its discretion when it denied defendant's motion for a mistrial because a "[v]iolation of the constitutional right to counsel is a serious irregularity." BOA 15-16. However, as argued above, defendant's allegation that his right to counsel was violated is without merit.

The first prong in the ***Escanola*** test is the seriousness of the irregularity. Here, there was no serious trial irregularity because it is not objectionable for the prosecutor to whisper to opposing counsel a request for copies of exhibits; nor is it a comment on defendant's right to counsel to point out when the defendant is hesitating when answering questions; nor even to impeach his testimony that he had not seen certain exhibits before trial by asking if he had reviewed them with his attorney prior to trial. RP 1372, 1392; 1495, 1792. As the prosecutor pointed out in her response to the motion for a mistrial, she did not ask about the substance of defendant's conversations with his attorney, she merely wanted to point out that it was not credible that defendant had not seen the refund slips prior to the day he testified at trial. CP 469-74.

The second prong of the test not been satisfied. In none of the instances of alleged misconduct was any improper testimony given. In each instance defense counsel objected and the court sustained the objection. Additionally, the whispered requests for copies were directed at defense counsel and did not elicit any testimony. In fact, the whispered requests should not even be considered because there is no evidence that

the jury even heard them. The two instances occurred during the prosecutor's cross examination of defendant, and defendant did not answer either question. The second prong has not been satisfied.

The final prong is whether the court instructed the jury to disregard the trial irregularity. Here, the court sustained all objections to the alleged misconduct and included a jury instruction directing the jury to disregard any questions regarding defendant looking at his attorney or reviewing evidence with his attorney. RP: CP 204 (Ins. No. 6). Defendant complains that "the court should have at least questioned the jury to determine whether they had heard [the whispered requests]. BOA at 16, n. 6. However, defense counsel made no such request, and neither the court nor the court reporter heard the whispered requests, making it unlikely the jury did either. RP 1372-80, 1392-99.

Unlike ***Escalona***, the trial court in the present case did not abuse its discretion in denying defendant's motion for a mistrial. There was no serious irregularity, all objections were sustained so there was no improper testimony, and the court gave a very strongly worded jury instruction that cured any prejudice that resulted from these alleged instances of misconduct.

4. DEFENDANT'S CONVICTIONS FOR 57 COUNTS OF SECOND DEGREE THEFT AND 27 COUNTS OF THIRD DEGREE THEFT DO NOT VIOLATE DOUBLE JEOPARDY.

The double jeopardy clause of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution prohibit the imposition of multiple punishments for the same offense. ***Whalen v. United States***, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980); ***State v. Westling***, 145 Wn.2d 607, 610, 40 P.3d 669 (2002); ***State v. Calle***, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). The federal and state double jeopardy clauses provide identical protections. ***State v. Gocken***, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Although the protection itself is constitutional, it is for the Legislature to decide what conduct is criminal and to determine the appropriate punishment. ***Calle***, 125 Wn.2d at 776. The court's role is limited to determining whether the Legislature intended to authorize multiple punishments. *Id.* When the trial court has imposed cumulative punishment without legislative authorization, it has also violated the separation of powers doctrine. *See* ***State v. Frohs***, 83 Wn. App. 803, 810, 924 P.2d 384 (1996) "[W]hen a defendant is convicted of multiple violations of the same statute, the double jeopardy question focuses on what 'unit of prosecution' the Legislature intends as the punishable act under the statute." ***Westling***, 145 Wn.2d at 610. The "unit of

prosecution" is the legislatively defined scope of the criminal act. ***State v. Adel***, 136 Wn.2d 629, 634-35, 965 P.2d 1072 (1998). This inquiry is resolved by examining the relevant statute in order to ascertain what the Legislature intended. *Id.*; ***In re Davis***, 142 Wn.2d 165, 172, 12 P.3d 603 (2000). If the statute is ambiguous as to the unit of prosecution, "the ambiguity should be construed in favor of lenity." ***State v. Adel***, 136 Wn.2d 629, 634-35, 965 P.2d 1072 (1998). Absent a threshold showing of ambiguity, a court derives a statute's meaning from the wording of the statute itself, and does not engage in statutory construction or consider the rule of lenity. ***State v. Tili***, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

a. Defendant's unit of prosecution argument is prohibited by the invited error doctrine; alternatively, defendant's convictions for 84 counts of theft do not violate double jeopardy because each individual transaction is a separate theft.

In ***State v. Carosa***, 83 Wn. App. 380, 381, 921 P.2d 593 (1996), Marcella Carosa was convicted of three counts of second degree theft. Carosa worked as a checkout clerk at a supermarket. ***Carosa***, 83 Wn. App. 380, 381. On three different work days, Carosa removed several small amounts of cash from the cash register during her shift. *Id.* Carosa admitted to stealing the money, but asserted that she should have been charged with multiple misdemeanor thefts rather than three counts of second degree theft. *Id.* at 382. The court noted that Carosa was not

charged under the aggregation statute, but as a single count of larceny committed at the same time, same place, on three different work shifts. The court found that just because she took several smaller amounts over the course of one day, it did not convert her single theft into multiple small thefts. *Id.* at 383.

In ***State v. Kinneman***, 120 Wn. App. 327, 332, 84 P.3d 882 (2003), Zachary Kinneman was convicted of 67 counts of theft: 39 counts of second degree theft, and 28 counts of first degree theft. Kinneman had been hired to act as an escrow and closing agent for five separate real estate transactions. The mortgage company, Option One, wired $499,506.96 to Kinneman's Interest on Lawyer Trust Account (IOLTA) in four separate transactions. ***Kinneman***, 120 Wn. App. 327, 331. Over the next 16 months, Kinneman made 67 unauthorized withdrawals from his IOLTA account, diverting over $200,000 to his own use. ***Kinneman***, at 331.

On appeal, Kinneman alleged that the multiple withdrawals from his IOLTA account constitute a single count of first degree theft, and the State subjected him to double jeopardy by dividing the theft into multiple counts. *Id.* at 333. Relying on ***State v. Turner***, 102 Wn. App. 202, 6 P.3d 1226 (2000), Kinneman argued that the Legislature did not intend to punish an offender multiple times based upon a series of takings from the same victim. ***Kinneman***, at 335. The Court of Appeals disagreed, noting that ***Turner*** was a case in which the prosecutor aggregated the individual

incidents of theft based upon the four different schemes used to commit the crimes, whereas Kinneman was charged with a separate count of theft for each unauthorized withdrawal. *Id.* at 336.

In ***State v. Turner***, Vernon Turner was convicted of three counts of first degree theft for money he embezzled from his employer, Washington Citizen Action (WCA). 102 Wn. App. 202, 203. Turner embezzled money using four different schemes over a 10 month period. The schemes were: (1) a series of unauthorized payments to himself from WCA's payroll account; (2) unauthorized payments to a third person from WCA's payroll account; (3) unauthorized payments to himself from a nonpayroll account; and (4) unauthorized purchases on WCA's credit card. ***Turner***, at 204. The prosecutor aggregated all the thefts under each scheme and charged Turner with one count of first degree theft for each scheme. *Id.*

In reversing two of Turner's three convictions, the court held that the theft statute was ambiguous as to whether multiple theft schemes committed over the same period of time, and against the same victim, may be punished separately. *Id.* at 211. Thus, the holding in ***Turner*** prevents the State from aggregating multiple thefts under a particular scheme. It does not, however, prevent the opposite: charging each theft individually. In fact, the ***Turner*** court specifically did not address whether the State was free to charge each of the 72 thefts individually. *Id.* at 212.

Here, defendant alleges that his double jeopardy rights were violated as a result of his 84 convictions for theft, because two thefts

occurred, one for each incentive program, on 45 different days. BOA at 45. As Loss Prevention Manager for the University Place Fred Meyer' store, defendant was in charge of two loss prevention programs: (1) Buck-a-Beep; and (2) Recoveries. RP 167-72. The programs were administered at the end of each fiscal period and paid employees who participated in the incentive program for that period. RP 175-76, 321. Typically, the loss prevention manager would run the totals for the two programs and present the necessary paperwork to customer service for the cash payouts at the same time. RP 341-42. While these programs were supposed to be paid out once during each fiscal month, evidence adduced at trial showed that defendant prepared fraudulent refund receipts for the two programs multiple times per week. Ex. Nos. 3, 5-88, 100-14. Defendant argues on appeal that because he always presented the fraudulent refund slips for the Buck-a-Beep and the Recoveries programs at the same time, and the cash payouts were processed only several minutes apart, that the unit of prosecution should be per day rather than two (one for each program that was processed that day).

Initially, the State charged defendant with 14 counts of first degree theft. CP 1-6. Defendant made a motion to dismiss arguing that, under ***Turner***, the State improperly aggregated the multiple thefts that occurred during the month into 14 separate counts. CP 9-19; 6/23/08 RP 4-36. The court denied the motion to dismiss, but ruled that the State could not charge 14 counts of first degree theft. CP 48-49; 6/23/08 RP 31-36.

Instead, the court ruled that the State may individually charge all first degree thefts, all instances of second degree thefts, and may either (1) aggregate all third degree thefts under RCW 9A.56.010(18)(c), or charge all third degree thefts individually. 6/23/08 RP 31-36.

The State filed a second amended information charging defendant with 45 counts of second degree theft, and defendant objected. CP 50-69[12]; RP 3-5, 6. Each count represented a single incident of theft that consisted of the two fraudulent refund slips submitted on a given day for the Buck-a-Beep and Recoveries programs. RP 6-7, 9. The State argued then, as defendant now argues, that each day defendant presented fraudulent refund slips for the two programs was one instance of theft. RP 6-7, 9. Defendant objected and argued that combining the two refund slips into one count aggregated two separate transactions, and was therefore contrary to Judge Chuschcoff's June 23, 2008, ruling. RP 3-5. The court agreed, and the State was required to treat two fraudulent refund slips as two separate thefts. RP 10. Having been successful in separating the two transactions, defendant now claims this was error. *See* RP 8.

If the court erred in ordering the State to charge each transaction separately, then that error was invited. Under the invited error doctrine, a party may not set up error at trial and then complain about the error on

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[12] There are two second amended informations. The first was filed on 6/24/08 with 45 counts of second degree theft, and the second was filed on 7/9/08 with 90 counts of second and third degree thefts. CP 50-69, 90-131.

appeal. ***In re Pers. Restraint of Tortorelli,*** 149 Wn.2d 82, 94, 66 P.3d 606 (2003). Having argued that the two transactions must be treated as individual thefts, defendant cannot now allege that his double jeopardy rights were violated when they were charged separately.

Alternatively, if the court reaches this issue, this court should find that, under ***Kinneman***, charging each individual transaction as a separate theft was appropriate.

b. Defendant's convictions do not violate double jeopardy because the jury instructions and closing argument protected defendant from being twice convicted for the same crime.

Defendant alleges his double jeopardy rights were violated where the theft from the Buck-a-Beep program and the theft from the recovery program that occurred on the same date resulted in two second degree theft charges, and the jury instructions for those two counts had the same to convict language. BOA at 48. Defendant's argument fails because the jury instructions and closing argument made abundantly clear that each date had two transactions, and the jury must match the two "to convict" instructions with the two refund slips for that particular day. RP 1811-1816.

The court should reject defendant's argument that double jeopardy was violated because the jury could have relied upon the same single theft for both counts when defendant was charged with two second degree thefts for one day.[13] The trial court instructed the jury that a separate crime was charged in each count, that they must decide each count separately, and that their verdict on one count should not control their verdict on any other count. CP 205 (Ins. No. 7).

In ***State v. Ellis***, 71 Wn. App. 400, 859 P.2d 632 (1993), this court rejected the same argument that defendant is making in the present case. Jerry Ellis was convicted of two counts of child molestation and two counts of first degree child rape committed during similar time period against the same victim. ***Ellis***, 71 Wn. App. 400, 403. The jury was instructed that each count represented a separate crime, that the jury must decide each count separately, and that the verdict on one count should not control the verdict on the any other count. *Id.* at 402. Additionally, in closing argument, the prosecutor explained that a separate act supported each of the four counts. In rejecting Ellis' double jeopardy argument, the

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[13] Of the 90 counts charged, there were 14 dates in which both the Buck-a-Beep and the Recoveries program thefts resulted in second degree theft charges. CP 151-192. All other days had a second degree theft for one program, and a third degree theft for the other. The two counts of theft two occurred in Cts I, II, XI, XII, XIII, XIV, XVII, XVIII, XXX, XXXII, XXXIX, XL, IL, L, LXII, LXIII, LXVII, LXVIII, LXIX, LXX, LXXIII, LXXIV, LXVII, LXVIII, LXXIX, LXXX. CP 303-392.

court stated that the ordinary juror would understand that when two counts charge the very same type of crime, each count requires proof of a different act. ***Ellis*** at 406.

Defendant relies upon two Division One cases, ***State v Berg***, 147 Wn. App. 923, 198 P.3d 529 (2009), and ***State v. Borsheim***, 140 Wn. App. 357, 165 P.3d 417 (2007), to support his argument. These cases are not binding on this court, and this court should decline to abandon its holding in ***Ellis*** to follow ***Berg*** and ***Borsheim***.

Bryan Borsheim was convicted of four counts of first degree rape of a child. ***Borsheim***, 140 Wn. App. 357, 362. Borsheim appealed on double jeopardy, and jury unanimity grounds alleging that the jury instructions allowed the jury to convict him of all four counts based upon the same a single underlying event. ***Borsheim***, at 362. Borsheim was charged with four counts of first degree rape of a child that occurred between September 1, 2000, through September 8, 2003. *Id.* at 363. The victim testified to almost weekly acts of vaginal or oral intercourse that Borsheim forced her to submit to. The jury was instructed that a separate crime was charged in each count, and that the jury needed to decide each count separately. *Id.* at 364. However, rather than four to convict instructions, there was only one to convict instruction that included all four counts. This instruction read in part:

> To convict the defendant of the crime of Rape of a Child in the First Degree, as charged in counts 1, 2, 3, and 4, each of the following elements of the crime must be proved beyond a reasonable doubt as to each count:

Ellis, at 364. Relying on ***State v. Hayes***, 81 Wn. App. 425, 431, 914 P.2d 788 (1996), the court noted in sexual abuse cases the court must instruct the jury that they must find separate and distinct acts for convictions on each count. ***Borsheim*** reasoned that the single to convict instruction without the 'separate and distinct' language was insufficient to protect Borsheim from being exposed to multiple punishments for a single offense.

In ***State v. Berg***, Division One reached a similar result. Edward Berg was convicted of one count of third degree rape of a child, and two counts of third degree child molestation, for acts alleged to have occurred over the same time period. ***Berg***, 147 Wn. App. 923, 930. The victim testified to multiple incidents where Berg would touch her over and under her clothing, on her chest and buttocks during the night, and on one occasion where Berg put his fingers inside her vagina and licked her vagina. ***Berg***, at 928. On appeal, Berg alleged the jury instructions allowed him to be convicted twice for a single act of child molestation. *Id.* at 930. In this case the court gave a to convict instruction for each count, but the instructions did not require the jury to decide each count based

upon a separate and distinct underlying event from the other counts. *Id.* at 935.

The ***Berg*** court rejected the State's argument that Berg was protected against double jeopardy because the State presented evidence of separate acts and explained to the jury in closing that the jury had to agree that two particular acts occurred. "The State offers no authority for the proposition that evidence or argument presented at trial may remedy a double jeopardy violation caused by deficient instructions." ***Berg***, at 935. However, it is well settled that closing arguments can adequately protect constitutional rights. *See* ***State v. Petrich***, 101 Wn.2d 566, 683 P.2d 173 (1984), *overruled on other grounds,* ***State v. Kitchen***, 110 Wn.2d 403, 756 P.2d 105 (1988). When facts show two or more criminal acts that could constitute a crime charged, the jury must unanimously agree on the same act to convict the defendant. ***Petrich***, 101 W.2d at 569. Therefore, the State must elect the specific criminal act on which it is relying for conviction, or the trial court must instruct the jury that all the jurors must agree that the State proved the same underlying criminal act beyond a reasonable doubt. ***Kitchen***, 110 Wn.2d at 411.

The right to a unanimous verdict and the right to be free from double jeopardy are both constitutional rights. *See* Wash. Const. art. I, §21 and Wash. Const. art. I, §9. Because the right to jury unanimity can be

adequately protected by either a jury instruction or an election in closing, then the right to be free from double jeopardy can be similarly protected.

That is especially true under the facts of this case where there were two offenses charged for each date based upon the two separate transactions. RP 303-92. Here the prosecutor carefully explained in closing that each count represented a separate transaction, and that there were two transactions on every date resulting in two counts charged for that date. RP 1811, 1813-16.

Defendant's double jeopardy argument is without merit.

5. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF HANDWRITING EXPERT, ROBERT FLOBERG.

Defendant next alleges that the trial court erred in admitting the testimony of handwriting expert Robert Floberg without a ***Frye***[14] hearing. A ***Frye*** hearing is appropriate when an expert intends to testify to new or novel scientific techniques. If the scientific evidence being offered is neither new nor novel, then no ***Frye*** hearing is necessary. ***State v. Thorrell***, 149 Wn.2d 724, 754, 72 P.3d 708 (2003). The core concern under ***Frye*** is whether the expert testimony or other evidence being

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[14] ***Frye v. United States***, 293 Fed. 103 (D.C, Cir. 1923).

offered is "based on an established scientific methodology." ***State v. Russell***, 125 Wn.2d 24, 41, 882 P.2d 747 (1994).

In the present case, trial counsel did not allege that the handwriting analysis that was being offered by the State was new or novel. RP 60-61, 1088-92; CP 77-86. Nor did she allege that Floberg employed an analysis or technique that was disfavored within the relevant scientific community. *Id.* Instead, within her motion to withdraw for ineffective assistance of counsel, she asked in the alternative that the court exclude Floberg's testimony. CP 77-86. In this context, trial counsel asserted that handwriting analysis did not meet the ***Frye*** standard. To support her argument, trial counsel produced no experts or witnesses to testify regarding that status of handwriting analysis in the scientific community. RP 1088-92. Instead, she argued that the "lack of schooling renders this type of evidence more 'voodoo' than scientific." CP 77-86. The court denied defendant's motion to exclude, and noted that she would follow Washington precedent, which permitted handwriting expert testimony. RP 1096-97. *See* ***State v. Haislip***, 77 Wn.2d 838, 467 P.2d 284 (1970) (handwriting expert testified at trial on behalf of State regarding forgery charge).

6. THE TRIAL COURT'S RESTITUTION ORDER WAS PROPER.

Defendant asserts that the trial court unlawfully delegated its judicial authority to authorize probation officer to fix the amount of

restitution payments. Defendant does not challenge the total amount of restitution, only that the trial court, rather than probation, should set the payment amounts. BOA at 51. A court's authority to impose restitution is statutory. ***State v. Griffith*** 164 Wn.2d 960, 195 P.3d 506 (2008). The courts have repeatedly held that the trial courts have broad authority to order restitution under the statute. ***State v. Enstone***, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). RCW 9.95.210(2)(b) gives the court the authority to order a person convicted of a crime to make restitution, under such terms as the court deems appropriate, to any person who has suffered a loss as a result of the crimes the offender has committed. RCW 9.94A.760 states in the relevant part:

> The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law. On the same order, the court is also to set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligation. *If the court fails to set the offender monthly payment amount, the department shall set the amount if the department has active supervision of the offender, otherwise the county clerk shall set the amount.*

(emphasis added). In the present case, paragraph 4.1 of the felony judgment and sentence states that payments are to be set by the CCO (Community Corrections Officer), or by the clerk. CP 412-29. On the misdemeanor judgment and sentence, the court ordered the Department of Corrections supervision for a period of three years. CP 430-36. Thus,

under RCW 9.94A.760, the court properly ordered restitution payments to be set by either defendant's CCO, or the court clerk.

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

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.*

As argued above, there was no error and, thus, there could be no cumulative error. Here, defendant received a fair trial. It was not a perfect trial, but no trial is perfect. *See* ***Brown v. United States***, 411 U.S. 223, 232. When the entire trial is viewed as a whole, it is clear that if the court were to find any errors, those errors were harmless. This is particularly true when the court looks at the combined strength of the State's case and the jury's verdicts. The State's evidence included testimony that defendant was responsible for the two loss prevention programs from which the money was stolen; that the thefts stopped as soon as defendant was terminated; that the customer service representatives remembered giving the money for the loss prevention programs to defendant; that the handwriting expert conclusively concluded that defendant had written six of the fraudulent refund receipts; and that defendant's spending was disproportionate to his $36,000 salary. RP 227, 707, 708, 866, 1042, 1288, 1470; 7/21/08 RP 24-25. The jury's verdicts, which convicted defendant on some counts, but acquitted or could not reach a verdict on others, reinforces that defendant's trial was fair. RP 1897-1910; CP 303-92. The jury's thoughtful evaluation of the evidence is further evidence that defendant's trial was fair.

Defendant's claim of cumulative error is without merit.

D. CONCLUSION.

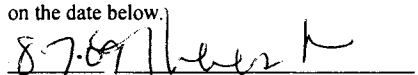
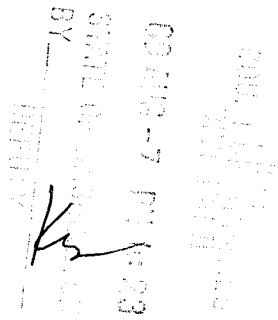
For the reasons argued above, the State respectfully asks this court to affirm defendant's convictions.

DATED: August 7, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

KAREN A. WATSON
Deputy Prosecuting Attorney
WSB # 24259

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.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