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DIVISION II

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

STATE OF WASHINGTON, RESPONDENT

v.

HEZZIE ALEX BAINES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin

No. 07-1-04225-5

Brief of Respondent

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

1. Has defendant failed to show that the prosecutor committed reversible misconduct where the prosecutor's arguments were proper or not so sufficiently flagrant and ill-intentioned that an instruction could not have cured any potential prejudice?
2. Did defendant receive effective assistance of counsel where counsel's performance was neither deficient nor resulted in prejudice?
3. Has defendant failed to show that he is entitled to relief under the doctrine of cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

On August 14, 2007, the Pierce County Prosecutor's Office charged HEZZIE ALEX BAINES, hereinafter "defendant," with one count of burglary in the second degree. CP 1-2, 3-4. In addition, the State alleged the aggravating factor of defendant's offender score resulting in a sentence that was too lenient or other current offenses going unpunished, pursuant to RCW 9.94A.535(2)(c). CP 3-4. On October 2, 2007, the State amended the charge to allege a deadly weapon enhancement for defendant's use of a bat during the crime and removed the high offender score aggravating factor. CP 22-23.

Jury trial commenced before the Honorable Thomas P. Larkin on December 2, 2008. RP 1. In open court, the State filed a second amended information to add a charge of attempted residential burglary, also with a deadly weapon enhancement. CP 34-35; RP 6.

Once testimony was complete, the court declined to instruct the jury on the deadly weapon enhancement for both counts. RP 156.

The jury found defendant not guilty of burglary in the second degree, but found defendant guilty of attempted residential burglary. CP 59, 60; RP 214.

Defendant's offender score was 23, giving him a standard range of 47.25-60 months. CP 90-150, 151-163. The State requested the high end of the standard range. RP 227. Defendant requested the low end, with 12 months plus one day in prison, and the balance on electronic home monitoring. RP 240. The court imposed a mid-range sentence of 54 months. CP 151-163; RP 245.

2. Facts

On August 13, 2007, Eric Sylstad came home from work to find two men on the back deck of his house. RP 52-53. As soon as Mr. Sylstad came into view, the men jumped off the deck. RP 53. One man ran very fast and Mr. Sylstad was unable to catch him. RP 53. The second man, who Mr. Sylstad identified at trial as defendant, did not run as quickly and Mr. Sylstad gave chase. RP 53.

As he was chasing defendant, Mr. Sylstad heard defendant say that he was not breaking into Mr. Sylstad's house. RP 53, 82. Defendant then swung a small bat that Mr. Sylstad recognized as belonging to his daughter. RP 53, 82. Mr. Sylstad called 9-1-1 for assistance.

When defendant climbed over the fence separating Mr. Sylstad's back yard from his neighbor's property, Mr. Sylstad gave up the chase. *See* RP 53-54. He saw defendant attempt to climb the barbed-wire fence on the far side of his neighbor's property, but defendant got tangled in the wire and fell, face first, on the ground. RP 55. Defendant eventually disentangled himself from the fence and fled. *See* RP 56-57. By this time, the 9-1-1 operator told Mr. Sylstad that officers were in his driveway and he went to meet them. RP 57.

Mr. Sylstad gave the officers defendant's description and the direction he had been headed in. RP 57. A few minutes later, Mr. Sylstad was informed that officers had a man in custody. RP 57. The officer drove Mr. Sylstad to the location, a couple of blocks away, in order to make an identification. RP 58.

Mr. Sylstad recognized the person the officers had apprehended as defendant. RP 58. He noticed that defendant was wearing a white tank top instead of the blue tee-shirt he had been wearing during the chase. RP 58. Defendant was also bleeding from a cut on his head. RP 58.

When Mr. Sylstad returned home, he found damage around the back door of his house. RP 59-61, 86. The weather strip seal attached to the door was damaged and the wood around the door jamb was scarred. RP 59-61. To Mr. Sylstad, it looked like someone had tried to pry the door open. RP 62. Mr. Sylstad knew the damage had not been there earlier, as his family uses the back door as their regular entrance. RP 86.

Mr. Sylstad thought that the bat defendant had thrown at him had been stored within a shed that housed his hot tub located on his deck. RP 63. He noticed that the door to the hot tub enclosure was open, despite the fact that had locked it the night before. RP 63-64.

Later that evening, Mr. Sylstad's neighbor had followed defendant's path across his own back yard and found a screwdriver belonging to Mr. Sylstad near where defendant had gotten caught in the barbed wire fence. RP 66. According to Mr. Sylstad, who has worked in construction all his life, the damage to his door was consistent with the size and shape of the screwdriver. RP 61, 67. The screwdriver had also been locked in the hot tub enclosure. RP 66.

Defendant's wife, Jennifer Baines, testified for the defense. RP 109, 130. According to Mrs. Baines, she had come home from work that day to find defendant and one of defendant's childhood friends, Troy, at her house. RP 110. Troy was loud and drunk. RP 111. Soon after she arrived home, defendant asked her to go for a ride with him and Troy. RP

112. Defendant drove them from their house in Lakewood to a park in East Tacoma, across the street from Mr. Sylstad's house. RP 112. The entire way, Troy was arguing with them because he wanted to go to the store to get more alcohol. RP 113. At the park, Mrs. Baines got out of the car to watch some children play football. RP 113. Later, she saw Troy running with defendant's car keys and defendant chasing him. RP 114-15. Mrs. Baines did not investigate, but continued to sit and watch the game. RP 115.

Eventually Mrs. Baines became upset that defendant did not return and took a bus home. RP 116. According to Mrs. Baines, it took her only 20 to 30 minutes to get home. RP 116. When she got home, she got her keys and called her mother for a ride back to retrieve the car. RP 116.

Mrs. Baines did not see defendant for the rest of the day, but she did receive a phone call from defendant later that evening, telling her that he was in jail. RP 116. Mrs. Baines mother, Sharon Steele, also testified that she gave Mrs. Baines a ride to somewhere in East Tacoma. RP 122.

Defendant chose to testify on his own behalf. RP 130. Defendant admitted that he had been convicted of crimes of dishonesty, four counts of possession of stolen property, in 2005. RP 131, 144. According to defendant, he entered guilty pleas in that case because the stolen items were in his car, but he did not enter a guilty plea in this case because he was innocent. RP 131.

Defendant testified that Troy, a man he had not seen or heard from in years, had appeared at his house unexpectedly. RP 132. Troy was drunk and acting in a loud and obnoxious manner. RP 133. He and Troy had been talking, catching up on each others' lives, when Mrs. Baines came home and told defendant to make Troy leave. RP 134. Defendant decided to take Mrs. Baines and Troy for a ride in the car, because he did not want Troy in his house and "wanted to be done with him." RP 134. Defendant wanted Mrs. Baines to go with them because, "She's a good passenger." RP 135.

Defendant claimed he had no destination in mind, but eventually stopped at a park in East Tacoma. RP 135. He stopped because Troy was "getting on [defendant's] nerves" and he did not like being around him. RP 135. Troy wanted to stop at a store for alcohol. RP 137.

Once they got to the park, Troy grabbed defendant's keys and said he would be back. RP 138. When defendant attempted to get his keys back, Troy began beating him. RP 138. Troy then ran, still holding the keys. RP 138. According to defendant, he chased Troy, and that was how they ended up in Mr. Sylstad's back yard. RP 138-39.

Defendant claimed that neither he nor Troy were on Mr. Sylstad's deck, but were fighting in the yard. RP 140. Despite Troy's attempts to flee, he was managing to beat defendant severely. RP 139. Defendant picked up a small bat he found lying in Mr. Sylstad's yard. RP 139. Even though defendant was swinging the bat, Troy continued to beat him up. RP 139.

When Mr. Sylstad came home, he immediately accused defendant and Troy of attempting to break into his house and threatened to call the police. RP 139. Troy ran away, but defendant stopped and told Mr. Sylstad that no one was trying to break in. RP 139. Defendant said that he told Mr. Sylstad that he needed help because Troy had beat him up and taken his keys. RP 139. When Mr. Sylstad called 9-1-1, defendant ran because he knew he had an outstanding warrant. RP 139-40. Defendant also said he merely dropped the bat when he went over the fence. RP 141.

According to defendant, he never attempted to break into Mr. Sylstad's house, he never entered the hot tub enclosure on the deck, he never picked up a screwdriver, and he never intended to burglarize the house. RP 142, 148.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT DURING CROSS EXAMINATION, CLOSING ARGUMENT, AND REBUTTAL CLOSING WHERE THE PROSECUTOR'S ACTIONS WERE EITHER 1) NOT IMPROPER, 2) NOT SUFFICIENTLY FLAGRANT OR ILL INTENTIONED AS TO BE REVERSIBLE ERROR, OR 3) DID NOT AFFECT THE VERDICT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996).

Defendant contends that during closing argument, the prosecutor committed misconduct by commenting on his Fifth Amendment and Article I § 9 right to remain silent, commenting on his Sixth Amendment and Article I, § 22 right to counsel by disparaging defense counsel, misstating the evidence, misstating the jury's role in a case, and inciting the jury's passions, prejudices and sympathy to bolster witness credibility. *See* Appellant's Brief at 1-4. As more fully articulated below, defendant's contentions, with the exception of misstating the jury's role in a case, are without merit.

- a. The prosecutor's questions during cross examination of defendant were proper as they related to the credibility of defendant's testimony.

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Where a criminal defendant testifies in his own defense, “his credibility may be impeached and his testimony assailed like that of any other witness....” *Brown v. United States*, 356 U.S. 148, 154, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958).

Testimony regarding a defendant's pre-arrest silence is admissible for the limited purpose of impeachment after the defendant has taken the stand. *State v. Easter*, 130 Wn.2d 228, 237, 922 P.2d 1285 (1996). “[N]o constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State's issuance of Miranda warnings.” *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008)(citing *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980)).

Evidence of a defendant's flight is admissible if it creates “a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt

or was a deliberate effort to evade arrest and prosecution.” *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001) (quoting *State v. Nichols*, 5 Wn. App. 657, 660, 491 P.2d 677 (1971)). Flight is an admission by conduct. *Freeburg*, 105 Wn. App. at 497.

In *Jenkins*, the defendant stabbed the victim and was not apprehended until he turned himself in, two weeks later. 447 U.S. at 232. At trial, the defendant claimed that he stabbed the victim in self defense. *Id.* On cross-examination, the prosecutor asked the defendant, “And I suppose you waited for the Police to tell them what happened?” *Id.* at 233. After the defendant admitted that he did not wait at the crime scene, the prosecutor asked, “Did you ever go to a Police Officer or to anyone else?” *Id.* The defendant again responded that he did not. *Id.* In holding that the prosecutor’s questions were proper, the Court determined that:

[I]mpeachment follows the defendant’s own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. We conclude that the Fifth Amendment is not violated by the use of pre-arrest silence to impeach a criminal defendant’s credibility.

Id. at 238.

In *State v. Hamilton*, 47 Wn. App. 15, 16, 733 P.2d 580 (1987), the defendant shot his ex-girlfriend’s new boyfriend. The defendant left the scene prior to the arrival of aid. *Id.* Shortly after the police arrived, the defendant phoned the house three separate times and spoke to one of the responding officers. *Id.* The defendant testified and claimed for the

first time that the shooting was accidental. *Id.* at 17. On cross-examination, the prosecutor questioned the defendant regarding his failure to inform the officer that the shooting was an accident. *Id.* The court, relying on *Jenkins*, held that the defendant's pre-arrest silence was properly introduced to impeach him once he testified on his own behalf. *Id.* at 20-21.

Here, defendant took the stand on his own behalf. RP 129. He claimed that Troy had taken his keys and he ended up in Mr. Sylstad's backyard because he was pursuing Troy. RP 138-39. Troy assaulted defendant, but defendant continued to chase him. RP 139. Defendant claimed that he had been beaten so severely by Troy that he was bleeding from his "mouth and everything else." RP 149. Defendant also claimed that when Mr. Sylstad saw them, defendant asked him for help because Troy had assaulted him. RP 139, 140.

On cross-examination, the following exchange took place:

- Q. And you were really the victim here, correct?
A. I was getting beat up by him, yeah.
Q. And this wasn't someone you had any allegiances to, and it seems like you were trying to get rid of Troy, correct?
A. Yeah, I was.
Q. So you were the victim of a pretty decent assault. Would you say that that is fair to say?
A. I guess if you look at it like that.
Q. So instead of reporting the assault to the police and instead of waiting for medical aid, because you're the victim of the crime and you know exactly what it looks like you're doing back there, you run; isn't that correct?
A. I ran because I had a warrant.
Q. I understand that. So instead - - why would you run

because you had a warrant, Mr. Baines?

A. Because I didn't want to go to jail that day.

Q. Because you don't want to take accountability for whatever it was - - the reason for the warrant; is that correct?

RP 149. Defendant's objection to the last question was overruled by the court. RP 150.

Like the defendants in *Jenkins* and *Hamilton*, defendant testified in his own behalf and voluntarily exposed himself to impeachment. For the first time at trial, defendant presented his own excuse for his failure to wait at the scene. What was explored on cross-examination was that if defendant were truly in need of help, his actions prevented assistance. This was proper exploration so the jury could assess whether defendant's explanation for his flight was credible. The State was entitled to explore defendant's explanation and determine why, if his reasons for being present were innocuous, he would flee rather than stay, explain what happened, and obtain aid. As defendant's act of testifying subjected his credibility to the same scrutiny as any other witness, the prosecutor was entitled to impeach defendant's credibility by the fact of his flight.

The fact that defendant ran away is admissible to show an inference of guilt. It is unrefuted that defendant fled the scene. While defendant claimed that he ran because he had a warrant, his flight also suggests consciousness of guilt. Defendant was already running when Mr. Sylstad came home and found him on the rear deck of the house. RP 53,

72. Defendant's attempts to run away supports a reasonable inference that defendant fled the scene to avoid arrest and prosecution.

- b. Defendant has failed to prove that the arguments made by the prosecutor, which did not provoke an objection, were so flagrant or ill intentioned that any prejudice could not have been cured by court instruction.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

If an instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Id.*

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Id.*

For the first time on appeal, defendant makes several claims that the prosecutor committed misconduct throughout his closing argument. *See* Appellant's Brief at 14-47. As he appears to be challenging the entire argument, the State has organized its response by category, rather than per statement.

Misconduct requires defendant to show that the prosecutor was acting in bad faith and that the prosecutor's challenged arguments were improper. Defendant has failed to meet his burden. The claim of prejudicial misconduct should be rejected.

i. Argument that defendant's flight represented consciousness of guilt was proper.

As noted above, evidence of a defendant's flight is admissible if it creates "a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution."

Freeburg, 105 Wn. App. at 497. The inference of flight must be substantial and real, not speculative, conjectural, or fanciful. *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). Flight is an admission by conduct. *Freeburg*, 105 Wn. App. at 497.

Defendant claims that the prosecutor violated his Fifth Amendment right to pre-arrest silence was violated during closing argument:

Again, why does the defendant run? If he's truly - - if you believe Mr. Sylstad that the defendant just ran, there was oh no, help me, I am the victim of an assault here, help me out. The defendant runs long before that. He runs. He could have stopped and told the defendant - - or could have told Mr. Sylstad about this, that he was the victim. We're not here burglarizing your house. I just want you to know my buddy is really drunk. He is being a jerk. I need some help. Can you call 911? Look, you can see injuries on my face. I am not here doing anything. Just give me some help. That is not what Mr. Sylstad told you happened. He ran because of consciousness of guilt.

RP 177-78. Defendant made no objection at trial. *See* RP 178.

As flight is admissible to show consciousness of guilt, the State's suggestion that defendant fled the scene because he was guilty of the crime is proper. Defendant cites no authority to suggest that fleeing from the scene of a crime prior to the arrival of police officers is equivalent to pre-arrest silence. Rather, a suspect's Fifth Amendment privilege against self-incrimination attaches when 'custodial interrogation' begins. *State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002). Here, defendant's flight preceded any custodial interrogation as there were no police present and his flight was admissible as consciousness of guilt.

The prosecutor's statements in the case at hand are supported by the evidence and were based on reasonable inferences from the evidence.

ii. The prosecutor properly challenged the credibility of defendant's testimony.

“A comment on an accused's silence occurs when the State uses the evidence to suggest guilt.” *State v. Keene*, 86 Wn. App. 589, 594, 938 P.2d 839 (1997). But “no constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State's issuance of *Miranda*¹ warnings.” *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). When a defendant speaks to private citizens, the State is not compelling him to speak, and the Fifth Amendment does not apply. *See State v. Valpredo*, 75 Wn.2d 368, 369, 450 P.2d 979 (1969); *see also, United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998)(rights not violated by use of a defendant's silence when speaking to his employer).

While defendant frames the issues in this case as comments on his pre-arrest silence, his flight occurred solely in the presence of Mr. Sylstad, a private citizen. Defendant's pre-arrest silence was never implicated in this case.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

In this case, when defendant testified in his own defense, his credibility was subject to the same scrutiny as that of any other witness. In closing argument, the State indicated that defendant's testimony was not credible, because as the victim of a theft and assault he should have wanted to receive assistance, rather than run away.

Why does the defendant not stop when the police are called? Ask yourself this: Sure, [defendant] will tell you that he ran because of the warrant, but you have got a situation here that sure looks like you committed a pretty serious crime, looks like you're trying to break into someone's house. Why not face the law and say you know what? I do have an arrest warrant. Let's deal with it, but I want you to know that I stuck around because I'm not guilty here. I want you to know that it looks pretty bad, but I want you to know that this is really what happened.

RP 178. Again, defendant did not object to this argument. *See* RP 178.

When reviewed in the context of the entire argument, it is clear that the prosecutor was arguing that defendant's testimony was not credible. As defendant offered the jury an excuse as to why he did not remain at the scene when police were on their way, the State could argue that defendant's theory was implausible in light of the evidence presented.

The prosecutor compared defendant's story to the evidence presented. The prosecutor noted that Mr. Sylstad saw defendant run immediately upon his arrival. RP 177-78. The prosecutor also pointed out that Mr. Sylstad did not testify that defendant asked for help, which suggested that defendant's version of the event was not credible. RP 177-79. The prosecutor's argument suggested that defendant's story lacked

credibility because if defendant was truly a victim of assault and theft, the mere fact of an outstanding warrant should not have precluded him from seeking help.

Also, as noted above, it was not improper for the State to argue that defendant's flight inferred a consciousness of guilt. The State elicited no testimony, nor offered any argument that defendant refused to speak to the police officers once he was apprehended. It was defendant's action of running away and his reasoning that was challenged.

Moreover, if defendant had objected at trial, he could have had the option of proposing a limiting instruction to cure any prejudice. Defendant has failed to show that this argument so flagrant or ill-intentioned that it could not have been cured by an instruction from the court.

iii. The State's comments regarding defense counsel were not so flagrant or ill-intentioned that any prejudice incurred could not have been cured by instruction.

Comments that demean the role of defense counsel are improper. *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008). They impugn the integrity of the adversary system and are inconsistent with the prosecutor's obligation to ensure a verdict is free from prejudice and based

on reason rather than passion. *Viereck v. United States*, 318 U.S. 236, 247-48, 63 S.Ct. 561, 87 L.Ed. 734 (1943); *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

In *Warren*, the Court held that the prosecutor committed misconduct when it told the jury that there were a number of mischaracterizations in defense counsel's argument as "an example of what people go through in a criminal justice system when they deal with defense attorneys." 165 Wn.2d at 29. The prosecutor also described defense counsel's argument as a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing." *Id.* Despite finding that these remarks were improper, the Court determined that the defendant's failure to object precluded review, as they were not so flagrant or ill-intentioned that no instruction could have cured them. *Id.* at 29-30.

Here, on rebuttal closing argument, the prosecutor stated:

. . . There's also a story as old as time that a defense attorney gets up here and acts indignant, and therefore, there must be some truth in what he said. In the end, that is just an attempt to fill the room with smoke and set aside that which you know you're looking for.

RP 199. Later, the prosecutor pointed out that the evidence supported a finding of guilt and that defense counsel had argued when a defense attorney admits that the situation "looks bad" for his client, that was

“defense speak” for when the evidence suggests guilt. RP 202. Defendant made no objection to either of these statements.

While the prosecutor’s argument could have been better phrased, essentially, counsel was arguing that the jury should not be misled by defense counsel’s emotion, but to focus on the evidence presented. The prosecutor’s unfortunate phrasing of a proper statement of the law was far less egregious than the argument in *Warren* which informed the jury that all defense attorneys lie. Just as the *Warren* Court noted that an instruction could have cured any error, so it could have here.

Defendant cites to *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002), *review denied*, 148 Wn.2d 890 (2003), to support his contention that the prosecutor’s statements are reversible error. *See* Appellant’s brief at 28-29. *Gonzalez* is easily distinguishable.

In *Gonzales*, the prosecutor argued in closing, “I have a very different job than the defense attorney.... I have an oath and an obligation to see that justice is served.” 111 Wn. App. at 283. The defense attorney objected, but the court overruled the objection and stated “that objection is not well taken.” *Id.* The prosecutor continued to develop her theme by arguing that the defense attorney “has a client to represent, I don’t. Justice, that’s my responsibility and justice is holding him responsible for the crime he committed.” *Id.* On appeal, this court held that the prosecutor’s statements were improper because the prosecutor “disparaged the role of defense counsel and sought to ‘draw a cloak of righteousness’

around the State's position." *Id.* 282-83 (quoting *United States v. Frascone*, 747 F.2d 953, 957-58 (5th Cir. 1984)). But because other grounds existed for reversal, the court did not decide whether the improper statements warranted reversal. *Gonzales*, 111 Wn. App. at 284.

As the court declined to review whether the statements warranted reversal, defendant's assertion that *Gonzales* supports reversal is erroneous. Also, the defendant in *Gonzales* preserved the issue for appeal when he objected to the prosecutor's statements. Moreover, the arguments in *Gonzales* addressed the roles of the prosecutor versus defense counsel in a vacuum, whereas in this case the arguments were specific to defense counsel's behavior in this case. *Gonzales* does not support a finding that the improper remarks in this case were so flagrant or ill-intentioned that an instruction could not have cured any potential prejudice.

iv. The prosecutor's argument was based on the evidence and reasonable inferences from the evidence presented at trial.

No misconduct occurs when a prosecutor does no more than make arguments from evidence. *State v. Clapp*, 67 Wn. App. 263, 274, 834 P.2d 1101 (1992), *review denied*, 121 Wn.2d 1020, 854 P.2d 42 (1993). Prosecutors may draw and express reasonable inferences from the evidence during closing argument. *State v. Harvey*, 34 Wn. App. 737, 739, 664 P.2d 1281, *review denied*, 100 Wn.2d 1008 (1983).

Defendant claims that the prosecutor committed misconduct by misstating the evidence when he argued that defendant “flat out” claimed that Mr. Sylstad’s testimony was not true. *See* Appellant’s Brief at 38. Defendant made no objection at trial. The prosecutor’s argument was a reasonable inference based on the evidence.

In the present case, the prosecutor argued that there were two versions of the events that took place in Mr. Sylstad’s back yard and that defendant wanted the jury to find his version more credible than the State’s. Under the State’s version, defendant said nothing to Mr. Sylstad except that he was not burglarizing the house as he fled the scene of the crime. RP 174. The picture defendant painted; however, was much different. According to defendant, he did not run away, but explained the entire situation to Mr. Sylstad and asked for help.

While defendant never stated that Mr. Sylstad was either lying or mistaken, defendant’s version of events was incompatible with Mr. Sylstad’s testimony. As the prosecutor’s argument was reasonably based on the evidence presented at trial, he did not misstate the evidence when he argued that defendant claimed Mr. Sylstad’s version of the event was not true.

In addition, defendant has failed in his burden to show that the argument was so flagrant or ill-intentioned that an instruction could not have cured any prejudice. The jury was instructed in part:

The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyer's statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 36-58 (Jury instruction 1). Also, in response to an objection to an unrelated argument, the court stated:

I am going to remind the jurors that it is your collective memory of what happened and what the facts are, not Counsel's, not mine.

RP 179. Once the judge admonished the jury, the prosecutor encouraged the jurors to rely on their memory of the testimony, and to discard any statement that he made which did not agree with their recollection of the evidence presented. RP 179.

A jury is presumed to have followed a court's instruction and any prejudice resulting from the prosecutor's statements was cured by the court's instruction.

v. The prosecutor's closing argument was not an improper appeal to the jury's passion or prejudice.

Appealing to the jury's "passion and prejudice" through the use of inflammatory rhetoric and prejudicial allusions to matters outside the record constitute misconduct because they encourage the jury to render a

verdict based on something other than admitted evidence. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

When reviewing a prosecutor's rebuttal argument, "[r]emarks 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. Russell*, 125 Wn.2d 24, 86; 882 P.2d 747 (1994).

Here, the prosecutor argued in rebuttal:

If you think [Mr. Sylstad] wanted this, if you think he wanted this, if you think he wanted to be harassed for the last 16 months of his life, he wanted his daughter to be sleeping in his bed for three months, if you think that he wanted to have to spend money to replace the doors, if you think that he wanted police showing up at his house and you think that he wanted the worry and panic that comes with not knowing where your daughters are on the night of the burglary, or if you think that he wanted that and he decided to get up here and lie and tell you a bunch of things that aren't true, then by all means find the defendant not guilty.

RP 199-200. These remarks were not an appeal to the jury to decide the case on an improper basis. They were about factors the jury could consider in deciding Mr. Sylstad's credibility. Also, this argument was neither inflammatory rhetoric nor prejudicial allusions to matters outside

the record², as it was made in response to defendant's closing argument and the record substantially supported each of these statements.

In addition, the prosecutor's argument was a fair response to arguments made by defense. During defendant's closing, he argued that the State had only circumstantial evidence to support its theory of the case and implied that circumstantial evidence was insufficient to support a finding of guilt. *See* RP 192-94, 195. Defendant suggested that Mr. Sylstad was not credible:

Let's make an assumption. We don't have any evidence, and we have a man's word that told me this is what happened. I drove up, I saw this man, and then I checked and somebody was doing something. Well, that is easy when you don't have to present any evidence to prove your case. Where is the evidence? You ask yourself that. Why? Why don't we have more evidence? Why doesn't he have anything other than just two people talking?

RP 194-95.

The prosecutor's statement in rebuttal was a response to defendant's suggestion that Mr. Sylstad's testimony was not evidence, not credible, and the jury could not decide the case based on his testimony.

The prosecutor's statement on rebuttal closing was not an appeal to the jury's passion or prejudice through the use of inflammatory rhetoric

² The record supports each of the statements the prosecutor made during this argument. Mr. Sylstad testified that, after the attempted burglary he was shaken up (RP 79), his daughter slept in his bed for two and a half months following the event (RP 76), his doors had damage to the frame and weather stripping (RP 59-61, 67-68, 84), he was frightened because he thought his daughters were home during the attempted burglary (RP 54, 72).

and allusions to matters outside the record, but was a proper response to argument made by the defense.

- vi. **The prosecutor’s argument that to believe defendant’s story the jury had to find that the State’s witness was “lying and/or grossly mistaken” was a permissible inference from the evidence presented at trial.**

It is misconduct for a prosecutor to misstate the law by implying that in order to acquit, a jury must believe the State’s witnesses are “either lying or mistaken,” because such statement improperly shifts the burden of proof. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (citing *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991)), review denied, 131 Wn.2d 1018 (1997). A jury is actually required to acquit *unless* it had an abiding conviction of the truth of the State’s witnesses. *Fleming*, 83 Wn. App. at 213 (emphasis added). Similarly, it is improper for a prosecutor to falsely state that in order to believe the defendant, it would have to find that the State’s witnesses are lying. *State v. Wright*, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995), superseded by statute on other grounds by RCW 9.94A.360(6). To say a jury must find the witness is lying is misleading because a jury does not have to conclude that the witness is lying in order to believe the defendant. *Wright*, 76 Wn. App. at 826. Yet where a jury must resolve a conflict in witness testimony to reach a verdict, a

prosecutor may argue that, in order to believe a defendant, the jury must find that the State's witnesses are mistaken. *Id.* This argument does no more than state the obvious and is based on permissible inferences from the evidence. *Id.*

Here, defendant contends that the prosecutor committed reversible misconduct when he indicated that, to believe defendant's story, the jury had to find that the victim "is lying and/or grossly mistaken . . ." RP 171. Yet the prosecutor's argument was a permissible inference from the evidence. The jury was presented with two, incompatible versions of the event and had to determine which version it found more credible. The prosecutor did not suggest that the jury could only believe defendant if the jurors believed Mr. Sylstad *lied*; he argued that the jury would have to find Mr. Sylstad's version was *wrong*, for whatever reason the jurors chose to believe.

As defendant's testimony was incompatible with Mr. Sylstad's, the prosecutor's argument that to believe defendant was to find that Mr. Sylstad was either lying or mistaken was reasonable.

- c. Any improper argument did not affect the jury's verdict as the State presented overwhelming evidence, sufficient for any reasonable jury to reach the same result, absent the error.

In a criminal case, a not guilty plea puts the burden on the State "to prove every essential element of a crime beyond a reasonable doubt."

State v. Magers, 164 Wn.2d 174, 183, 189 P.3d 126 (2008). Where the alleged prosecutorial misconduct affects a constitutional right, the two prong test is (1) whether the prosecutor's conduct was improper, and (2) whether there is a substantial likelihood that the misconduct affected the verdict. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006); *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); *State v. Dixon*, 150 Wn. App. 46, 57-58, 207 P.3d 459 (2009).

In *Casteneda-Perez*, Division One held that a prosecutor committed misconduct where he gave the jury the impression that in order to acquit, it had to find the State's police officer witnesses were lying. 61 Wn. App. at 362-63. Nonetheless, although the court found the misstatement of the law amounted to misconduct, it ultimately held the error was harmless and affirmed the conviction. *Id.* at 364-65.

Here, the prosecutor argued that the only options before the jury were to find defendant guilty or to believe defendant's story. *See* RP 171. This statement is somewhat different from the statements made in *Casteneda-Perez*, but its effect as a misstatement of the State's burden of proof is the same. The jury was required to acquit defendant if the State failed to prove each element of the crime charged. The prosecutor's argument was an incorrect statement of the law.

The prosecutor's statement was harmless; however, as it did not affect the jury's verdict. The State presented overwhelming evidence to convict defendant and the jury's verdict indicated that it did not accept the prosecutor's arguments.

"A person commits the crime of residential burglary when he enters or remains unlawfully in a dwelling with intent to commit a crime against a person or property therein." CP 36-58 (Jury instruction 14); RCW 9A.52.025(1). "A person commits the crime of attempted residential burglary when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime. CP 36-58 (Jury instruction 13). "A substantial step is conduct, which strongly indicates a criminal purpose and which is more than mere preparation. CP 36-58 (Jury instruction 16).

The State presented overwhelming evidence to prove defendant was guilty of attempted residential burglary. Mr. Sylstad's observed gouges around his door that had not been present before. A flat-head screwdriver belonging to Mr. Sylstad was found directly along the path defendant had run. The damage was consistent with someone jamming the screwdriver into the door frame in an effort to pry the door open. Defendant immediately fled the scene when Mr. Sylstad arrived. It was reasonable for the jury to infer that Mr. Sylstad's arrival interrupted

defendant's attempts to pry the back door of the house open with the screwdriver. All of the evidence in this case is consistent with the jury's verdict of guilt.

Even assuming the jury found Mrs. Baines' testimony in support of defendant credible; she could not cast a reasonable doubt given the evidence against defendant. Mrs. Baines never saw defendant when he was in Mr. Sylstad's yard. She had lost sight of him when he was fighting with Troy. She had no knowledge as to what happened when defendant left her. The only two witnesses with any information regarding defendant's activities in Mr. Sylstad's yard were defendant and Mr. Sylstad.

Also, at sentencing the trial judge observed that the evidence against defendant was overwhelming. The judge found defendant's actions to be "exceptionally comical and incompetent." RP 245. Imposing a mid-range sentence, the judge stated, "I heard the facts in the case, and there's really only one conclusion that could be drawn from those facts." RP 244.

Finally, the jury's own verdict indicates that the prosecutor's improper statements did not affect its verdict. Defendant was charged with both attempted residential burglary and burglary in the second degree. The crimes were based on two different actions. The burglary charge was based on defendant's entering the hot tub enclosure in order to retrieve the child's bat and the screwdriver. RP 184. Either the jury did

not find sufficient proof that the hot tub enclosure was a building, or it determined there was insufficient proof that defendant entered it. As the jury acquitted defendant of this charge, it was clear that the jury did not accept the State's argument that it had to find defendant guilty unless the jurors found him credible. The jury properly held the State to its burden of proof beyond a reasonable doubt, and found that the State failed to meet that burden with respect to second degree burglary.

The prosecutor's argument shifting the burden of proof was improper, but the error was harmless as the argument did not affect the outcome of the trial.

2. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL'S PERFORMANCE WAS NEITHER DEFICIENT NOR RESULTED IN PREJUDICE.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was

rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also, State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *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.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. 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.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993)

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable

effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

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 objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but 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).

Generally, a defense attorney's failure to object to a prosecutor's closing argument is not deficient performance because lawyers "do not commonly object during closing statement 'absent egregious misstatements.'" *In re Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (quoting *U.S. v. Necochea*, 986 F.2d 1273, 1281 (9th Cir.1993)).

Here, defendant claims that he received ineffective assistance of counsel for his counsel's failure to object to the prosecutor's arguments that misstated crucial evidence, misstated the jury's role, relieved the State

of its burden of proof, and played to the passions and prejudice of the jury. *See* Appellant's Brief at 46-47. Defendant can show neither deficient performance nor prejudice.

As argued above, the prosecutor argued reasonable inferences based on the evidence presented at trial. The prosecutor did not misstate evidence and did not play to the passions and prejudice of the jury. Counsel's failure to object to proper argument was not deficient performance.

Counsel's performance was also not deficient for his failure to object to the prosecutor's improper statement that, to acquit defendant, the jury would have to believe defendant's story. Instead of an objection, counsel chose to address this statement during his closing argument. Counsel attempted to persuade the jury that defendant was credible, Mr. Sylstad was not, and that the State presented insufficient evidence to overcome defendant's version of the event. Counsel's choice to negate the prosecutor's statement by addressing its flaws in his own argument, was a tactical decision of representation.

Even if counsel's performance was deficient, defendant cannot show prejudice. Based on the jury's verdicts in this case, it is clear that his failure to object to the prosecutor's statement had no adverse effect on the jury's decision. As noted above, the jury applied the proper standard of proof and held the State to its burden when it found defendant guilty of attempted residential burglary, but acquitted him of the more serious crime

of burglary in the second degree. Since the jury was unaffected by the State's improper argument, counsel's failure to object did not affect the outcome of the case.

3. DEFENDANT HAS FAILED TO SHOW THAT HIS TRIAL WAS RIFE WITH ERROR WARRANTING REVERSAL UNDER THE DOCTRINE OF CUMULATIVE ERROR

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 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, 681 P.2d 1281 (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 error 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) (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) (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) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the

prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

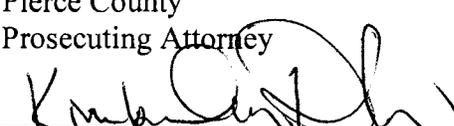
In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief.

D. CONCLUSION.

Defendant was not denied a fair trial based on prosecutorial misconduct, ineffective assistance of counsel, or cumulative error as he suffered no prejudice resulting from error. The State respectfully requests this Court to affirm defendant's conviction for attempted residential burglary.

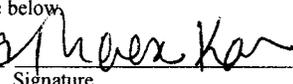
DATED: December 3, 2009.

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Pierce County
Prosecuting Attorney


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Deputy Prosecuting Attorney
WSB # 39218

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.

12-3-09 
Date Signature

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