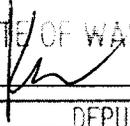


FILED
COURT OF APPEALS
DIVISION II

10 FEB 16 PM 3:57

NO. 39164-3-II

STATE OF WASHINGTON

BY  DEPUTY

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

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM MANUS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 07-1-01796-0

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Stephen Trinen
Deputy Prosecuting Attorney
WSB # 30925

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

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Whether the defendant is precluded from claiming the trial court abused its discretion where there was no objection below on the basis now asserted on appeal?..... 1

2. Whether the fact that the defendant was arrested on new charges was relevant impeachment evidence? 1

3. Whether, even if the court did err in permitting the cross-examination, such error was harmless? 1

4. Whether trial counsel was effective?..... 1

5. Whether the prosecutor’s closing statements were not misconduct and any error was harmless? 1

B. STATEMENT OF THE CASE. 1

1. Procedure 1

2. Facts..... 3

C. ARGUMENT..... 6

1. IS THE DEFENDANT PRECLUDED FROM CLAIMING THE TRIAL COURT ABUSED ITS DISCRETION WHERE THERE WAS NO OBJECTION BELOW ON THE BASIS NOW ASSERTED ON APPEAL?..... 6

2. THE FACT THAT THE DEFENDANT WAS FIRST ARRESTED ON CRIMINAL CHARGES AND THEN OFFICERS DISCOVERED A WARRANT WAS RELEVANT IMPEACHMENT EVIDENCE..... 11

3. EVEN IF THE COURT WERE TO HOLD THAT THE ADMISSION OF THE FACT THAT THE DEFENDANT WAS ARRESTED FOR CRIMINAL ACTIVITY WAS ERROR, ANY SUCH ERROR WAS HARMLESS..... 13

4.	TRIAL COUNSEL WAS NOT INEFFECTIVE.....	14
5.	THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING AND ANY ERROR WAS HARMLESS.....	17
6.	THERE WAS NO CUMULATIVE ERROR.....	22
D.	<u>CONCLUSION</u>	27-28

Table of Authorities

State Cases

<i>City of Kennewick v. Day</i> , 142 Wn.2d 1, 5, 11 P.3d 304 (2000).....	8
<i>In re Lord</i> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994)	24
<i>In re Pers. Restraint of Davis</i> , 152 Wn.2d 647, 714, 101 P.3d 1 (2004)	15, 16
<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	26
<i>State v. Alton</i> , 89 Wn.2d 737, 575 P.2d 737 (1978)	14
<i>State v. Anderson</i> , 153 Wn. App. 417, 220 P.3d 1273, 1280 (2009).....	22
<i>State v. Badda</i> , 63 Wn.2d 176, 385 P.2d 859 (1963).....	26
<i>State v. Belgarde</i> , 110 Wn.2d 504, 507, 755 P.2d 174 (1988).....	17, 19
<i>State v. Binkin</i> , 79 Wn. App. 284, 902 P.2d 673 (1995), <i>review denied</i> , 128 Wn.2d 1015 (1996).....	19, 21
<i>State v. Bryant</i> , 89 Wn. App. 857, 873, 950 P.2d 1004 (1998)	18, 20
<i>State v. Castellanos</i> , 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)	8
<i>State v. Coe</i> , 101 Wn.2d 772, 789, 681 P.2d 1281 (1984)	24, 26
<i>State v. Costich</i> , 152 Wn.2d 463, 477, 98 P.3d 795 (2004)	12
<i>State v. Finch</i> , 137 Wn.2d 792, 839, 975 P.2d 967 (1999)	18, 20
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 174, 163 P.3d 786 (2007).....	6, 7
<i>State v. Guloy</i> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).....	7, 8
<i>State v. Hentz</i> , 32 Wn. App. 186, 190, 647 P.2d 39 (1982), <i>rev'd on other grounds</i> , 99 Wn.2d 538, 663 P.2d 476 (1983)	9
<i>State v. Hoffman</i> , 116 Wn.2d 51, 93, 804 P.2d 577 (1991)	17, 19

<i>State v. Johnson</i> , 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998)	24, 25
<i>State v. Kinard</i> , 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979)	25
<i>State v. Kitchen</i> , 110 Wn.2d 403, 409, 756 P.2d 105 (1988).....	23
<i>State v. Lough</i> , 125 Wn.2d 847, 853, 889 P.2d 847 (1995).....	7
<i>State v. Mak</i> , 105 Wn.2d 692, 726, 718 P.2d 407, <i>cert. denied</i> , 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).....	19, 21
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985)	18, 19, 20, 22
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	15, 16
<i>State v. McNeal</i> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002)	16
<i>State v. Murphy</i> , 44 Wn. App. 290, 295, 721 p.2d 30, <i>review denied</i> , 107 Wn.2d 1002 (1986).....	10
<i>State v. Pastrana</i> , 94 Wn. App. 463, 479, 972 P.2d 557 (1999).....	18, 20
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993)	15
<i>State v. Russell</i> , 125 Wn.2d 24, 87, 882 P.2d 747 (1994).....	19, 21, 24
<i>State v. Russell</i> , Slip. Op. 38233-4-II, 3, ___ Wn.2d ___, ___ P.3d ___ (2010)	6, 7, 8, 10, 11
<i>State v. Sargent</i> , 40 Wn. App. 340, 349, 698 P.2d 598 (1985).....	9
<i>State v. Stevens</i> , 58 Wn. App. 478, 498, 795 P.2d 38, <i>rev. denied</i> , 115 Wn.2d 1025, 802 P.2d 38 (1990).....	25, 26
<i>State v. Swan</i> , 114 Wn.2d 613, 658, 700 P.2d 610 (1990)	6
<i>State v. Thang</i> , 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).....	7
<i>State v. Thomas</i> , 150 Wn.2d 821, 856, 83 P.3d 970 (2004)	6, 8
<i>State v. Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976).....	26
<i>State v. Wall</i> , 52 Wn. App. 665, 679, 763 P.2d 462 (1988).....	25

<i>State v. Weber</i> , 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).....	18, 20
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952).....	18, 19, 20, 22
<i>State v. Whalon</i> , 1 Wn. App. 785, 804, 464 P.2d 730 (1970).....	25
<i>State v. Whelchel</i> , 115 Wn.2d 708, 728, 801 P.2d 948 (1990).....	13
<i>State v. Williams</i> , 103 Wn. App. 231, 234, 11 P.3d 878 (2000).....	10
<i>State v. Wilson</i> , 144 Wn. App. 166, 176, 181 P.3d 887 (2008).....	9
<i>State v. Ziegler</i> , 114 Wn.2d 533, 540, 789 P.2d 79 (1990).....	17, 19

Federal and Other Jurisdictions

<i>Beck v. Washington</i> , 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).....	18, 20
<i>Brown v. United States</i> , 411 U.S. 223, 232 (1973).....	23
<i>Neder v. United States</i> , 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999).....	23
<i>Rose v. Clark</i> , 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).....	23
<i>Whelchel v. Washington</i> , 232 F.3d 1197 (9 th Cir. 2000).....	13, 14

Rules and Regulations

ER 103	7
ER 401	9
ER 404(b)	6, 7

Other Authorities

Karl B. Tegland, Washington Practice, Evidence, Law and Practice,
vol. 5 § 82 at 168 (2d ed. 1982).....9

Karl B. Tegland, Washington Practice, Evidence, Law and Practice,
vol. 5, § 401.2 (5th ed. 2007).....9

Karl B. Tegland, Washington Practice, Evidence, Law and Practice,
vol. 5, § 404.10, 404.21, 404.404.24, 404.25 (5th ed. 2007).....7

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

1. Whether the defendant is precluded from claiming the trial court abused its discretion where there was no objection below on the basis now asserted on appeal?
2. Whether the fact that the defendant was arrested on new charges was relevant impeachment evidence?
3. Whether, even if the court did err in permitting the cross-examination, such error was harmless?
4. Whether trial counsel was effective?
5. Whether the prosecutor's closing statements were not misconduct and any error was harmless?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On April 3, 2007, William Manus was charged with one count of Unlawful Possession of a Controlled Substance, Cocaine, based on an incident that occurred the preceding day. CP 3.

On May 24, 2007, the defendant failed to appear for a continuance hearing he had been ordered to attend. CP 6, 8; Exs. 6-11. On June 16, 2007, the State filed an amended information adding a second count of Bail Jumping based upon the defendant's failure to appear.

On February 26, 2009, the case was assigned to the Honorable Judge Ronald Culpepper for trial. [CP Criminal Case Reassignment]; RP 4ff. The start of trial was otherwise delayed by the fact that the defendant did not have trial clothes available through the jail, so the trial was apparently recessed until March 2, 2009. RP 4-15. A CrR 3.5 motion to suppress statements made by the defendant was heard March 2nd. RP 15. The defense also filed that day a motion and memorandum to suppress evidence and statements. CP 35, 36-39. The issues relating to the suppression of evidence other than statements were heard in the context of the CrR 3.5 hearing. *See*, CP 37; RP 03-02-09, p. 68, ln. 21 to p. 71, ln. 9. The court's rulings as to the CrR 3.5 hearing and suppression motion are not germane to the issues on this appeal.

The case proceeded to trial and the jury returned verdicts of not-guilty as to Count I, Unlawful Possession of a Controlled Substance; and guilty as to Count II, Bail Jumping. CP 75, 76.

On March 27, 2009, the defendant was sentenced to 51 months. CP 95. This appeal was timely filed on April 16, 2009. CP [Notice of Appeal].

2. FACTS

Because the jury acquitted the defendant of possession of a controlled substance, the only facts presented below are those pertinent to the charge of bail jumping, the charge for which Manus was convicted and that is at issue on appeal.

After being charged with the underlying offense of Unlawful Possession of a Controlled Substance, Cocaine, the court imposed conditions of release and set a bail amount. Exs. 4, 5. On May 10, 2007, the defendant signed a scheduling order directing him to appear for court on May 24, 2007, at 8:30 a.m. Ex. 6, 8. The defendant posted bail on May 10, 2007, and was released from custody. Ex. 7. On May 24, 2007, the defendant failed to appear for court as ordered. Ex. 9.

The defendant claimed he had memory problems and had a seizure the morning of court as a friend was on the way to pick him up and take him there. RP 223, ln. 8 to p. 224, ln. 25. However, Manus's mother testified that the fainting/seizure episode he described happened about two weeks after May 3rd. RP 196, ln. 4-8.

Manus testified that later his bail bond agent called to say that he missed a court date and that he needed to get a warrant quashed. RP 225, ln. 12-25. That was on a Friday, and he couldn't do anything about it until

the following Monday. RP 226, ln. 15-18. Manus claimed that he planned to go in and quash his warrant, but that he was arrested before he could go to court. RP 226, ln. 17-24.

On direct examination, defense counsel questioned Manus regarding his arrest on the warrant for failure to appear in court. Manus testified as follows:

Q: Now you didn't make the court date on May 24, 2007. When did you next have any contact with the court or anything like that?

A: Well, it was - - I want to say almost - - I want to say three weeks, but I think I it was four weeks to the day, maybe a little more. It was a Friday. I was arrested on the 25th. That Friday prior to my mom had told me that Ron had called and Ron is a bondsman from C.J. Bail bond. He said: You missed court. You need to get a warrant quashed.

I said: What is it you want me to do?

And he told me what I needed to do. I said that's not a problem. He said if you get the warrant quashed, bring me a copy.

But, see, this was news to me because this was on a Friday when my mom told me. She said: Hey, you missed court. She said; Ron called me and told me that you missed court and you need to find out what's going on.

And I said: Man, court.

So I started going through some papers, which is what I have to do a lot. I started digging through stuff; I have court, court, court. And I was, like, Oh, man. And that was the day I had the seizure because it was on the 24th. It was three weeks to the day after my mom's birthday when all that happened.

Q: So you found out about the phone call from Ron on Friday?

A: Yes.

Q: And do you remember about the time?

A: I found out from my mom probably 5:00, if not later. I

don't remember the exact time. Let's see; bingo was over.
I would say probably around 5:30.

Q: And that was on a Friday. What happened - - anything happen over the weekend?

A: Well, there was nothing I could do until Monday.

Q: And on Monday what happened?

A: On Monday - - well, on Monday afternoon I knew that I could go to the fifth floor and see a lady named Lisa Contris, who could help me get the warrant quashed, and on Monday morning I was placed under arrest.

Q: So your plan was to go Monday morning?

A: I got arrested like Monday afternoon.

RP 225, ln. 7 top. 226, ln. 24.

Cross examination with the deputy prosecutor proceeded as

follows:

Q: [...] You testified that you were arrested roughly three weeks, maybe four weeks after you failed to appear because of this warrant and that's not entirely true, correct?

A: Its one of the reasons.

Q: You were arrested because of new charges; is that correct?

A: Yes.

Q: And as a result of the new charges they found this warrant; is that correct.

A: Yeah.

[...]

RP 260, ln. 13-23.

In the course of closing, the State argued the following:

He testifies that when he's picked up, it was only because of the warrant in this case, but on cross-examination he admitted, Well, no, there was new charges and then they found the warrant.

RP 332, ln. 2-6.

C. ARGUMENT.

1. IS THE DEFENDANT PRECLUDED FROM CLAIMING THE TRIAL COURT ABUSED ITS DISCRETION WHERE THERE WAS NO OBJECTION BELOW ON THE BASIS NOW ASSERTED ON APPEAL?

The admission or exclusion of relevant evidence is generally within the discretion of the trial court. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). However, the interpretation of an evidentiary rule is a question of law which the appellate court reviews *de novo*. *State v. Russell*, Slip. Op. 38233-4-II, 3, ___ Wn.2d ___, ___ P.3d ___ (2010) (citing *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)). The trial court abuses its discretion if it exercises that discretion on untenable grounds or for untenable reasons. *Russell*, Slip. Op. 38233-4-II at 3 (citing *Foxhoven*, 161 Wn.2d at 174). Moreover, failure to adhere to the requirements of an evidentiary rule can be an abuse of discretion. *Russell*, Slip. Op. 38233-4-II at 3 (citing *Foxhoven*, 161 Wn.2d at 174).

ER 404(b) prohibits a court from admitting evidence of a persons' character for the purpose of proving that the person was likely to have acted in conformity with that character on a particular occasion. ER 404(b); *Russell*, Slip. Op. 38233-4-II at 3 (citing *Foxhoven*, 161 Wn.2d at 175). *See also*, KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE, LAW AND PRACTICE, VOL. 5, § 404.10, 404.21, 404.404.24, 404.25 (5th ed.

2007). However, ER 404(b) evidence may be admitted for other purposes. **Russell**, Slip. Op. 38233-4-II at 3 (citing **Foxhoven**, 161 Wn.2d at 175). Relevant here, evidence of other wrongs or acts may be admissible to show motive, intent or absence of mistake or accident. *See*, KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE, LAW AND PRACTICE, VOL. 5, § 404.10, 404.21, 404.404.24, 404.25 (5th ed. 2007).

Before admitting ER 404(b) evidence a court must (1) find by a preponderance of the evidence that that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

Russell, Slip. Op. 38233-4-II at 3 (citing **Foxhoven**, 161 Wn.2d at 175); **State v. Thang**, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); **State v. Lough**, 125 Wn.2d 847, 853, 889 P.2d 847 (1995). The four-part analysis must be made on the record, and a limiting instruction must be given to the jury. **Russell**, Slip. Op. 38233-4-II at 3 (citing **Foxhoven**, 161 Wn.2d at 175).

However, with regard to the admission of evidence, on appeal a party may assign error only on the specific ground made at trial. **Russell**, Slip. Op. 38233-4-II at 4. 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). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and

failure to do so precludes raising the issue on appeal. *Thomas*, 150 Wn.2d at 856; *Guloy*, 104 Wn.2d at 421. The specific objection at trial must be the basis of the argument on appeal, or the defendant has lost the opportunity for review. *Russell*, Slip. Op. 38233-4-II at 4.

Here, the sole objection the defense made at the trial court level to the cross examination regarding the defendant's arrest was to that the State not identify the charges for which the defendant was arrested. RP 251, ln. 3-20. The objection to the specific nature of the charges for which Manus was arrested appears to be unfair prejudice. *See*, RP 244, ln. 14-22. The court held that the State didn't need to ask about the nature of the new charges for which Manus was arrested. RP 250, ln. 19-24.

The defendant may not now raise for the first time on appeal challenges to the admission of the evidence on any basis other than that objected to below. *See*, *Russell*, Slip. Op. 38233-4-II at 4. This precludes the defendant's claim that the basis for which the court permitted the cross examination was erroneous. *See* Br. App. 11.

Even when an objection has been made at trial, the trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). An abuse of discretion exists only when no reasonable person would have taken the position adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39

(1982), *rev'd on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

Relevant evidence is:

[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

State v. Wilson, 144 Wn. App. 166, 176, 181 P.3d 887 (2008) (quoting ER 401). Under that definition, to be relevant evidence must: 1) have a tendency to prove or disprove a fact; and (2) the fact must be of consequence in the context of other facts and the applicable substantive law. *State v. Sargent*, 40 Wn. App. 340, 349, 698 P.2d 598 (1985) (citing Karl B. Tegland, *Washington Practice, Evidence, Law and Practice*, vol. 5 § 82 at 168 (2d ed. 1982) [now published as Karl B. Tegland, *Washington Practice, Evidence, Law and Practice*, vol. 5, § 401.2 (5th ed. 2007)].

Here, both parties and the court apparently labored under the misapprehension that the defendant testified that he had been arrested “for this” meaning the bench warrant for his failure to appear. That understanding is not supported by the record. Nonetheless, the defense did not object to, nor challenge the belief that the defendant testified that he was “...arrested for this.” The court did: (1) decide that the defendant was first arrested for other criminal charges, not the warrant; identify that the evidence was being admitted to impeach the defendants (misperceived) claim that he was arrested on the warrant; (3) determined

the impeachment was relevant to the defendant's claim he intended to go to court that same afternoon; and (4) found the evidence more probative than unfairly prejudicial. RP 246, ln. 3-23; p. 250, ln. 6-20. The only objection was to the State mentioning the charges for which Manus was arrested. RP 251, ln. 11-12; Cp. RP 243, ln. 14-21.

Because defense counsel did not object on the basis of any of the court's determinations regarding the four-part test, those issues are now waived on appeal. *See, State v. Williams*, 103 Wn. App. 231, 234, 11 P.3d 878 (2000).

The court in *Russell* held that the court had an obligation to give a limiting instruction regarding 404(b) evidence, and because it failed to do so, the court overturned Russell's conviction. *Russell*, Slip. Op. 38233-4-II, p. 5. However, here the appellant has not assigned any error to the jury instructions, so that issue is not properly before the court, and may not be raised for the first time in the reply brief. However, the failure to give such an instruction does not merit reversal where the outcome of the trial would not have been materially affected by the giving of the instruction. *See, Russell*, Slip. Op., p. 5 (citing *State v. Murphy*, 44 Wn. App. 290, 295, 721 p.2d 30, *review denied*, 107 Wn.2d 1002 (1986)).

It is on this basis that *Russell* is distinguishable from the present case. In *Russell*, the charges involved sex crimes perpetrated on a minor, and the other bad acts evidence included other acts of abuse of the victim which were used to show the *Russell's* lustful disposition toward the victim. *Russell*, Slip. Op. at 3. There was no evidence of the crimes other than the victim's testimony. *Russell*, Slip. Op. at 2-3. Thus, the other bad acts evidence was a central part of the State's case.

Here, the evidence regarding the reason for the arrest of Manus was limited to the fact that he was arrested on new criminal charges. This was admitted for the limited purpose that Manus intended to go to court that afternoon, but was arrested before he could do so. Moreover, here, the evidence was argued only for that limited purpose as impeachment evidence to the credibility of the defendant's claims. Accordingly, the outcome of the trial would not have been materially affected by the giving of a limiting instruction.

2. THE FACT THAT THE DEFENDANT WAS FIRST ARRESTED ON CRIMINAL CHARGES AND THEN OFFICERS DISCOVERED A WARRANT WAS RELEVANT IMPEACHMENT EVIDENCE.

The appellate court may affirm on any ground the record adequately supports even if the trial court did not consider that ground.

State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, Manus claimed that he was going to go to court to get his warrant quashed on Monday, but that he was arrested that day. However, his testimony was inconsistent, both with itself, and with his claim. First, he claimed that he planned to go to court Monday afternoon, but that he was arrested Monday morning. RP 226, ln. 19-22. Then he claimed that he was arrested Monday afternoon. RP 226, ln. 24.

The fact that he was arrested on unrelated criminal charges goes to his credibility when he claims he planned to go to court to have his warrant quashed. It is particularly significant where his final answer was that he was not arrested until the afternoon. The fact that he was arrested on other criminal charges in the afternoon, which was when he should have been in court to have his warrant quashed, would suggest that he was otherwise occupied with his criminal activity, and in fact had no intention of going to court that afternoon.

For this reason, it was not error for the court to allow cross examination on the fact that he was arrested for new criminal activity. The decision of the trial court should be affirmed as there is an alternative valid basis for admission of the cross examination.

3. EVEN IF THE COURT WERE TO HOLD THAT THE ADMISSION OF THE FACT THAT THE DEFENDANT WAS ARRESTED FOR CRIMINAL ACTIVITY WAS ERROR, ANY SUCH ERROR WAS HARMLESS.

Two different standards for harmless error have been applied to Washington cases. In *State v. Welchel*, the Washington Supreme Court held that a constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *State v. Welchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)(holding the error was harmless where statements were admitted in violation of the defendant's rights under the confrontation clause). The court in *Welchel* held that independent of the improperly admitted statements, there was overwhelming evidence to support the defendant's conviction so that the erroneous admission was harmless beyond a reasonable doubt. *Welchel*, 115 Wn.2d at 730.

However, when the same case went before the Ninth Circuit Court of Appeals on an appeal to a habeas corpus motion, the Ninth Circuit held that the standard for harmless error was whether a given error had a substantial and injurious effect or influence in determining the jury's verdict. *Welchel v. Washington*, 232 F.3d 1197, 1205-06 (9th Cir. 2000). In *Welchel*, the Ninth Circuit affirmed the Federal District Court's grant of habeas corpus relief to the defendant, holding that the statements were not cumulative of other evidence, and were inherently

suspect. *Whelchel*, 232 F.3d at 1208. The court also noted that the other evidence did not point overwhelmingly to Whelchel's guilt. *Whelchel*, 232 F.3d at 1208. The court did find harmless error as to other improperly admitted statements where they were merely cumulative. *Whelchel*, 232 F.3d at 1211.

Here, the fact that the defendant was arrested on new charges was not argued as character evidence, but rather as rebuttal of his claim that he intended to go to court and was arrested before he could make it. Because the evidence was properly admissible for other legitimate purposes, its admission was harmless error, if error at all.

4. TRIAL COUNSEL WAS NOT INEFFECTIVE.

The defendant has not yet alleged ineffective assistance of counsel as a result of the failure to raise a suppression challenge related to the lawfulness of the search of the vehicle incident to the Bliss's arrest. In anticipation the defendant might assert such an argument, neither should the defendant now be permitted to raise such a challenge in the reply brief. An appellate court will generally refuse to consider a constitutional question which is raised only in a reply brief. *See State v. Alton*, 89 Wn.2d 737, 575 P.2d 737 (1978).

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on

consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., 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, 899 P.2d 1251 (1995).

Moreover, to raise a claim of ineffective assistance of counsel for the first time on appeal, the defendant is required to establish from the trial record: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. *McFarland*, 127 Wn.2d at 333-34; *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993).

However, where an appellant claims ineffective assistance of counsel for trial counsel's failure to object to the admission of evidence, the burden on the appellant is even higher. To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: not objecting fell below prevailing professional norms; that the proposed objection would likely have been sustained; and that the result of the trial would have been different if the evidence had not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). To prevail on this issue, the appellant must also rebut the presumption that the trial counsel's

failure to object “can be characterized as legitimate trial strategy or tactics.” *In re Pers. Restraint of Davis*, 152 Wn.2d at 714 (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added in original)). Deliberate tactical choices may only constitute ineffective assistance if they fall outside the wide range of professionally competent assistance, so that “exceptional deference must be given when evaluating counsel’s strategic decisions.” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004)(quoting *McNeal*, 145 Wn.2d at 362).

Courts engage in a strong presumption that counsel’s representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. The burden is on an appellant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. *McFarland*, 127 Wn.2d at 334.

Here, trial counsel was not ineffective for two reasons. First, for the reasons explained in section 2 above, the cross examination was otherwise properly admissible to impeach the defendant’s claim that he intended to go to court to have his warrant quashed. There was no point to the defense objecting because the evidence was properly admissible to impeach Manus’s claim that he intended to go to court that afternoon to quash his warrant. Second, the State also could have used the defendant’s false statement to police officers at the time of his arrest both as evidence

of his consciousness of his guilt (as to the bail jumping) and as further evidence that he had no intention of going to court that afternoon. By declining to object, the defense did not bring those issues to the fore, and therefore capitalized on the State's failure to explore the fact that the defendant gave a false name to the officers at the time of his arrest. Having such evidence before the jury would have been highly detrimental to the defendant's defense as to the bail jumping charge. Thus, failing to object to evidence that was properly admissible on another basis was a sound tactical decision by the defense.

5. THE PROSECUTOR DID NOT COMMIT
MISCONDUCT IN CLOSING AND ANY ERROR WAS
HARMLESS

The standards regarding harmless error are discussed in section 3 above.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so "flagrant and ill intentioned" that no curative instruction would have obviated the prejudice it engendered. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). 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).

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, 873, 950 P.2d 1004 (1998) "remarks must be read in context." *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury's verdict. *Finch*, 137 Wn.2d 792 at 839. The trial court is best suited to evaluate the prejudice of the statement. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

“It is not misconduct [...] for a prosecutor to argue that the evidence does not support the defense theory. Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.”

State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

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). If a curative instruction could have cured the error, and the defense failed to request one, then reversal is not required. *Binkin*, at 293-294.

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)).

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so “flagrant and ill intentioned” that no curative instruction would have obviated the prejudice it engendered. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). 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).

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, 873, 950 P.2d 1004 (1998) "remarks must be read in context." *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury's verdict. *Finch*, 137 Wn.2d 792 at 839. The trial court is best suited to evaluate the prejudice of the statement. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

“It is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory. Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

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). If a curative instruction could have cured the error, and the defense failed to request one, then reversal is not required. *Binkin*, at 293-294.

Here, the defense did not object to the prosecutor’s remark in closing that are now challenged on appeal. Further, the prosecutor did not act in bad faith.

Here, the State does not dispute that the prosecutor at trial was mistaken about the defendant’s testimony on direct examination. However, that mistake was shared by the court (and apparently by the defense who did not disagree with the mistaken understanding of the defendant’s testimony. That mutual mistaken understanding was discussed expressly and specifically. RP 246, ln. 3-21; p. 250, ln. 6 to p. 251, ln. 20.

Because the parties and the court labored under the same misapprehension regarding the defendant's testimony there was no bad faith. There was merely a mistake as to the defendant's testimony. Accordingly, the prosecutor's statement did not rise to the level of misconduct. *See, Manthie*, 39 Wn. App. at 820 (citing *Weekly*, 41 Wn.2d 727).

Here, any error by the prosecutor in closing was also harmless.

The jury was instructed that:

It is important, however, for you to remember that the lawyers' 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. Argument by counsel in closing is just that, and that the jury must rely on their collective recollection as to the evidence.

CP 54.

Juries are presumed to follow the court's instructions. *See, State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273, 1280 (2009). Because the jury was instructed to treat the State's closing as argument and to rely on their own collective recollection as to the evidence, any error in the prosecutor's closing was harmless.

6. THERE WAS NO 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. *Rose*, 478 U.S. at 577. “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 (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. *Rose*, 478 U.S. 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 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, Russell*, 125 Wn.2d at 93, 94. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See, Russell*, 125 Wn.2d at 93, 94. 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, *rev. 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.”)(emphasis added).

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 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.

Here, the court erred in the basis for which it admitted the cross examination regarding the fact that the defendant was not arrested on a warrant, but for other criminal activity. Notwithstanding that mistake, there was an alternative valid basis for the court to admit the same examination: to impeach the defendant's credibility regarding his claim that he intended to go to court and quash his warrant that afternoon. Thus, the trial court's error was harmless. Defense counsel did not err by the lack of objection, and the State did not commit prosecutorial misconduct in closing where there was no lack of good faith. For these reasons, there was no cumulative error that deprived the defendant of a fair trial.

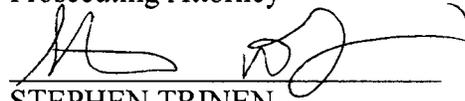
D. CONCLUSION

The defendant is precluded from challenging the court's granting of the cross examination where no objection was made below on the basis the defendant now asserts on appeal. The fact that the defendant was arrested on new criminal charges is relevant to impeach his claim that he planned to go to court that same afternoon to quash his warrant. Even if the court were to hold that allowing the cross-examination was error, it was harmless where it was argued as rebuttal evidence. Trial counsel was not ineffective for failing to object where doing so meant that he did not

alert the State to the fact that the defendant gave a false statement to officers. The error was not cumulative where there was a valid alternative basis for admitting the evidence.

DATED: February 16, 2010.

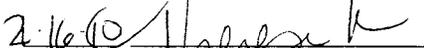
MARK LINDQUIST
Pierce County
Prosecuting Attorney



STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

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.

2-16-10 
Date Signature

FILED
COURT OF APPEALS
DIVISION II
10 FEB 16 PM 3:57
STATE OF WASHINGTON
BY 
DEPUTY