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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.

RYNA RA, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Thomas J. Felnagle

No. 05-1-04549-5

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**BRIEF OF RESPONDENT**

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MARK LINDQUIST  
Prosecuting Attorney

By  
MELODY CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

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

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6. Was defendant denied the right to a fair trial where the statements made by the State in closing did not constitute prosecutorial misconduct? (Appellant's Assignment of Error 8, 8, 12)<sup>1</sup>

7. Has defendant failed to demonstrate the existence of any prejudicial error in her trial much less an accumulation of it necessary for application of the cumulative error doctrine? (Appellant's Assignment of Error 13)

B. STATEMENT OF THE CASE.

1. Procedure

On May 16, 2006, the State charged defendant, Ryna Ra, by corrected amended information with one count of attempted murder in the first degree, one count of drive-by shooting and two counts of unlawful possession of a firearm in the second degree. CP Supp. 105-107. Defendant went to trial which resulted in convictions for attempted murder in the first degree, drive by shooting and one count of unlawful possession of a firearm in the second degree. *See State v. Ra*, 144 Wn. App. 688, 692, 175 P.3d 609 (2008). Defendant appealed his conviction and the court reversed and remanded for a new trial finding that the trial court had

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<sup>1</sup> Appellant lists two assignments of error as number 8; both deal with alleged prosecutorial error.

mishandled the gang evidence. *Id.* Defendant did not challenge his offender score on appeal. He did challenge the trial court's denial of his self-defense instruction in his Statement of Additional Grounds. *Id.* at 706. The court found that defendant did not present sufficient evidence to raise a self-defense claim but did remark that this issue would have to be determined anew by the new trial court on retrial. *Id.* at 707.

The case was called for trial on February 17, 2009 in front of the Honorable Thomas Felnagle. 2/17/09RP 2.<sup>2</sup> The State filed a second amended information on February 18, 2009. 2/18/09RP 3, CP 1-2. The information reflected that the fourth count, one count of unlawful possession of a firearm, had been dismissed by the trial judge in the first trial. 2/18/09RP 3.

The jury found defendant guilty of the lesser included offense of attempted murder in the second degree with a firearm enhancement. 4/10/09RP 3, CP 57, 58, 60. The jury also found defendant guilty of drive by shooting and unlawful possession of a firearm. 4/10/10RP 3, CP 18, 59.

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<sup>2</sup> The nine volumes of VRPs in this case contain some that are sequentially paginated and some that are not. As such, the State will refer to the VRPs as follows: 2/17/09RP, 2/18/09RP, the volume labeled 2/19/09: 2/19/09amRP, the volume labeled volume IV: 2/19/09pmRP, volume labeled volume V: 2/23/09RP, the volume labeled VI: 2/24/09amRP, volume labeled 2/24/09: 2/24/09pmRP, volume labeled VII: 2/25/09RP, and 4/10/09RP.

Sentencing was held on April 10, 2009. 4/10/09RP 3, CP 70-83. Defendant was determined to have an offender score of five points, which was agreed upon by both counsel. 4/10/09RP 3, CP 70-83. Defendant was sentenced to the high end of the standard range of 206.25 months plus 60 months for the firearm enhancement. 4/10/09RP 3-4, 11, CP 70-83.

Defendant filed this timely appeal. CP 87-102.

## 2. Facts

On September 14, 2005 Vianna Cornatzer was at her boyfriend's, James Huff's, house. 2/19/09pmRP 407-8. They were with their friends Ashley Suhovernik and Nick Serdar. 2/19/09pmRP 408. They decided to go to the waterfront and arrived at Ruston Way after dark. 2/19/09pmRP 408, 410, 2/23/09RP 513, 560, 603. They parked at the Les Davis Pier. 2/19/09pmRP 411, 2/23/09RP 561, 604. After they parked, they heard the people in the SUV parked next to them talking loudly. 2/19/09pmRP 412. They soon realized the people in the SUV were talking to them. 2/19/09pmRP 413, 2/23/09RP 563, 605. The people in the SUV were saying, "Hey, look at that ass" and "Hey baby, nice ass" and "I want to tap that ass." 2/19/09pmRP 414, 450, 2/23/09RP 515, 536, 605-6.

There were four people in the SUV, all Asian males, and at one point all of the people in the car were yelling. 2/19/09pmRP 416-7, 2/23/09RP 570, 606. They were trying to provoke her boyfriend, Mr.

Huff. 2/19/09pmRP 417, 453. They yelled at Mr. Huff, "Why don't you come do something about it?" "We're going to take your girlfriend away from you." 2/19/09pmRP 418. Mr. Huff told them to shut up, asked them what their problem was and started to walk toward the SUV.

2/19/09pmRP 418, 2/23/09RP 516, 538, 543. Ms. Cornatzer tried to stop him but Mr. Huff continued. 2/19/09pmRP 418, 419-20.

Mr. Huff was arguing back and forth with the occupants of the SUV and cussing back and forth to them. 2/19/09pmRP 418, 2/23/09RP 539. He told them, "Fuck you" and "Quit talking shit to my girlfriend." 2/19/09pmRP 418-9, 451, 454, 2/23/09RP 607. Mr. Huff told the occupants to get out of the car. 2/19/09pmRP 420, 423. The individuals stayed in the car but kept saying, "Why don't you do something about it?" and "Hey pussy, why are you walking away?" 2/19/09pmRP 421, 453, 454, 2/23/09RP 549. The individuals threatened to kick his ass and made threats of physical violence. 2/23/09RP 520, 542, 608, 624, 626, 631, 640, 651.

Mr. Huff did not have a weapon. 2/19/09pmRP 421, 2/23/09RP 518, 551, 568, 570, 614. He was standing in front of the front passenger side window. 2/19/09pmRP 428, 463. Mr. Huff never touched anyone in the vehicle. 2/19/09pmRP 423, 2/23/09RP 525, 614. Mr. Huff either hit or kicked the car. 2/19/09pmRP 456, 476. Mr. Huff never made any threats to kill. 2/23/09RP 581-9, 2/23/09RP 570-1.

Gunshots started to go off. 2/19/09pmRP 425. Ms. Cornatzer observed flashes and gunshots coming from the SUV. 2/19/09pmRP 425, 459. Witnesses heard 3-4 shots all in quick succession. 2/19/09pmRP 425, 2/23/09RP 569, 612. The shots were fired from the front seat of the SUV. 2/19/09pmRP 426, 2/23/09RP 610, 647. The barrel of a gun could be seen protruding from the passenger side. 2/19/09pmRP 426.

Mr. Huff testified that the right front passenger pulled a gun. 2/23/09RP 516-7, 520-1. Mr. Huff testified it was a black handgun. 2/23/09RP 521. Mr. Huff tried to kick the gun away but slipped and hit the door. 2/23/09RP 522, 523-4, 552, 556. The first rounds were fired toward his head. 2/23/09RP 523. Mr. Huff was then shot in the chest. 2/23/09RP 522. After the last shot the SUV drove away. 2/19/09pmRP 426, 429, 2/23/09RP 569.

Mr. Huff walked back toward the group and said he'd been shot. 2/19/09pmRP 426, 427, 2/23/09RP 571. There was blood all over. 2/19/09pmRP 430, 2/23/09RP 571. Mr. Huff was in a lot of pain. 2/23/09RP 531. He was bleeding profusely and it was clear he had been shot in the stomach. 2/23/09RP 681. He had been shot through the left lung, spleen, and stomach. 2/23/09RP 531.

The window on Ms. Suhovernik's car was also hit by gunfire. 2/19/09pmRP 439, 460, 2/23/09RP 572, 618.

A police officer passed the SUV on his way into the parking lot. 2/23/09RP 616. Mr. Serdar called 911 and also flagged down the police

car. 2/23/09RP 617, 672. He told the officer that the SUV leaving the parking lot had a person in it who had shot his friend. 2/23/09RP 672. A high risk felony stop was performed on the vehicle minutes later, around 10:45 p.m. 2/19/09amRP 25-6, 42, 2/23/09RP 673-5. The vehicle was stopped less than a mile from the Les Davis Pier. 2/19/09amRP 28-9. The front seat passenger was identified as defendant, Ryna Ra. 2/29/09amRP 44, 46. Defendant denied being involved in any shooting or any other type of altercation. 2/19/09amRP 51. Defendant did not complain of any injuries. 2/19/09amRP 52. A black handgun was found underneath the driver's seat. 2/23/09RP 660. The gun was loaded. 2/23/09RP 685

A gun was located 1/3 of a mile from the location of the stop. 2/19/09amRP 53. The gun was a silver, semi-automatic, Smith and Wesson, 9mm gun. 2/19/09amRP 54, 57. The gun was loaded. 2/23/09RP 686. Three spent shell casings were found to the right of where the suspect vehicle had been parked. 2/19/09pmRP 489, 494, 2/23/09RP 687. Another spent shell casing was found at the scene the next day. 2/24/09amRP 722. All four bullets recovered were fired out of the Smith and Wesson, 9mm handgun found on the road. 2/24/09amRP 730, 735, 737, 741, 744.

Defendant admitted to having the gun that night. 2/24/09amRP 760, 767. Defendant, however, denied making comments to the girls. 2/24/09amRP 761, 763, 764. Defendant said the victim was getting mad and shined the flashlight at him. 2/24/09amRP 763. Defendant claimed

that the victim ran toward the car and that defendant then fired a warning shot into the air. 2/24/09amRP 765, 767. Defendant claimed he just wanted to scare the victim. 2/24/09amRP 766, 769, 770. The victim continued to approach the car and jump kicked the car. 2/24/09amRP 765. Defendant then shot two more times and shot the window of a car. 2/24/09amRP 765. Defendant claimed that the victim grabbed the car door and that defendant had no intention to shoot him. 2/24/09amRP 765, 766, 758. Defendant also claimed that the victim grabbed his arm and tried to injure him. 2/24/09amRP 767, 786. Defendant admitted that he was not injured. 2/24/09amRP 767.<sup>3</sup>

Mr. Huff was in the hospital for an extended period of time. 2/19/09pmRP 442, 2/23/09RP 534.

Defendant was not legally permitted to possess a weapon. 2/19/09amRP 64, Ex. 15.

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<sup>3</sup> The defendant did not testify at the trial, but portions of his previous testimony from his first trial were read into the record in the State's case in chief.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERROR IN OVERRULING THE DEFENSE OBJECTION TO A STATEMENT MADE BY WITNESS HUFF WHERE THE STATEMENT WAS NOT IMPROPER OPINION TESTIMONY.

Generally, no witness may offer testimony in the form of a direct statement, an inference, or an opinion regarding the guilt or veracity of the defendant or on the credibility of a witness; such testimony is unfairly prejudicial to the defendant “because it invades the exclusive province of the jury.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In the case at hand, the challenged statements do not qualify as improper opinion testimony. Opinion evidence is testimony given during trial, while the witness is under oath, based on one’s beliefs or ideas rather than on direct knowledge of facts at issue. *State v. Demery*, 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001). In determining whether a challenged statement constitutes impermissible opinion testimony, the court should consider the circumstances of the case, including the following factors: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and, the other evidence before the trier of fact. *Demery*, 144 Wn.2d at 758-59.

Washington courts have “expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt.” *Demery*,

144 Wn.2d at 760, quoting *Heatley*, 70 Wn. App. at 579. Whether testimony constitutes an impermissible opinion on guilt will generally depend on the specific circumstances surrounding each case. *Heatley*, 70 Wn. App. at 579. The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

In the instant case, the State was trying to ascertain where in the car the person who shot Huff was sitting. The testimony defendant asserts is improper opinion evidence is as follows:

Huff: I approached the car and started arguing, and he pulled the gun out --

State: Who pulled a gun out?

Huff: The passenger, right passenger.

State: Which one?

State: Ryna Ra, I believe,

Defense Counsel: Objection. He doesn't know who it was.

Huff: It was the right passenger is all I can — front passenger

Court: Let's start with another question, lay the appropriate foundation.

State: When you say a person pulled a gun, where was that person seated?

Huff: In the front right passenger.

State: And would you recognize that person if you saw him again today?

Huff: I couldn't -- I couldn't recognize the person when I was getting shot at.

State: My question is, if you -- well --

Huff: didn't know who was shooting. I couldn't see their face. I found out who it was —

State: Okay. Later?

Huff: Yeah, later.

State: All right. Did you actually ever —

Defense Counsel: Objection. Move to strike that whole line. He learned the identity later. That's hearsay. It goes to the ultimate question, as well.

Court: Overruled. But, I will say this, the jury should not make any assumptions based on what other people told him.

State: I'm going to go back to that. Your Honor,

State: The person that was in the front right seat that you described as having a gun, after the incident, during the incident, at any point did you get a visual of that person such that you would know who that person was if you saw them later on the street?

Huff: No.

State: Okay. So, anything you know about who shot you as far as the actual person, you have no personal knowledge of that?

Huff: It happened too fast. I couldn't see.

2/23/09RP 516-18. The State was trying to ascertain if the right passenger who pulled the gun was sitting in the front or the back seat. The witness answered that he believed it was Ryna Ra. 2/23/09RP 517. This was the extent of the supposed identification of defendant. The witness did not state that defendant shot him or that defendant was guilty. The court then responded to defendant's objection by asking the State to lay the proper foundation. 2/23/09RP 517. The witness then clarified that the person with the gun was in the right front passenger seat. 2/23/09RP 517. The State then sought to clarify just what the extent was of the witness' knowledge. 2/23/09RP 517-8. The State was in no way trying to seek the identity of the shooter but was trying to determine where the shot came from. The State established for the jury that the witness could not identify defendant and any information he may have as to the actual identity of the shooter was not personal knowledge and learned later. 2/23/09RP 517-8.

The State actually clarified what the witness actually knew and didn't know. The court did not error overruling the defense objection.

Further, the jury had already heard testimony that defendant was sitting in the right front passenger seat. Officer Grant had already testified that he had detained the right front seat passenger and that that passenger had been identified as defendant. 2/19/09amRP 44, 46. The court properly handled the testimony. In reviewing the circumstances and what the jury already had heard as testimony, the witness' statement was not an opinion as to defendant's guilt. The witness' statement did not invade the province of the jury. The trial court did not error.

2. THE TRIAL COURT DID NOT ERROR IN DENYING THE DEFENSE REQUEST FOR INSTRUCTIONS ON SELF-DEFENSE WERE DEFENDANT DID NOT PRESENT SUFFICIENT EVIDENCE TO WARRANT THE GIVING OF THE INSTRUCTION.

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

Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *Id.*

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

*State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v.*

*Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions

that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

An instruction not warranted by the evidence need not be given. *State v. Jamerson*, 75 Wn.2d 146, 150, 443 P.2d 654 (1968). Before a defendant can raise self defense before the jury, he/she must produce some evidence tending to prove that the act was done in circumstances amounting to self defense. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). While the threshold burden of production is low, it is not non-existent. *Id.* Defendant must have raised credible evidence that he was in fear of death or great personal injury at the hand of the victim in order to be entitled to a self-defense instruction. *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). A defendant cannot deny striking somebody and then claim to have struck the person in self defense. *State v. Barragan*, 102 Wn. App. 754, 763, 9 P.3d 942 (2000), citing *State v. Aleshire*, 89 Wn.2d 67, 71, 568 P.2d 799 (1977).

- a. The trial court did not error in refusing to give defendant's proposed self-defense instructions.

In this case, defendant proposed an instruction on self-defense. 2/24/09pmRP 2-3, CP 4-17. After consideration, the court declined to give the self defense instructions because there was insufficient evidence presented to support the instructions. 2/24/09pmRP 4-5. The court first

inquired as to whether there were any material facts that were presented in the instant trial that had not been presented in the previous trial.

2/24/09pmRP 3. Defense counsel indicated that there were no new material facts presented in the instant trial. 2/24/09pmRP 2-3. The court made a record as to his decision:

Okay. I've got the benefit of the Court of Appeals' decision on this, and the benefit of the defense, both of which are valuable to me. The majority opinion, of course, is valuable because it indicates that there was not sufficient evidence in the first trial. That gives me their feedback. And now that I know there are no material differences between the two trials, I have a pretty good idea of the position of the Court of Appeals.

Judge Quinn-Brintnall in her partial dissent points out that this needs to be looked at fresh after I've heard all of the evidence, and that's appropriate, and I'm going to do so. The evidence that supports the finding of self-defense would be that Mr. Huff was provoked, he was mad, he breaks free from his girlfriend, he's running at the vehicle, the SUV. He's been involved in an exchange of unpleasanties with the occupants of the vehicle. He isn't deterred by a warning shot. He kicks at the SUV and then he grabs Mr. Ra by the arm. Those are the factors most favorable to Mr. Ra at this point.

Quite frankly, I come to the same conclusion Judge Fleming did in the first trial, and that is that that's insufficient to support a self-defense instruction where the standard is the use of deadly force based on fear of death or great bodily injury.

If you were to-be able to use deadly force in this circumstance, you would almost always be able to use deadly force. And the distinction between the use of deadly force and fear of battery, and the general use of force would be a meaningless distinction. I can't see any way that there is sufficient evidence to support a self-defense instruction under these circumstances, and I'm going to decline to give it.

2/24/09pmRP 4-5. The court engaged in a consideration of the theory of self-defense based on the facts adduced at the instant trial and found them to be insufficient to warrant a self-defense instruction. The court also referred to the previous decision of this court that indicated that there was insufficient evidence to support the self-defense instruction. *See Ra*, 144 Wn. App. at 706-7. There was no evidence that the victim was “armed or that he threatened anything other than a fistfight.” *Id.* at 706. Deadly force was not necessary in this situation and therefore there was insufficient evidence to warrant a self-defense instruction.

The instruction was properly denied.

- b. Defendant’s claims as to sufficiency of the evidence in regards to the drive by shooting and attempted murder in the second degree are not properly raised as sufficiency claims.

Defendant raises an issue to sufficiency of the evidence in regards to the charge of drive by shooting by alleging that defendant could have negated the element of reckless discharge if he had been able to raise his self-defense claim. Brief of Appellant, page 22-24. He also alleges that he would have been able to negate the element of intent in regards to the charge of attempted murder in the second degree had he been able to argue self-defense. Brief of Appellant, page 24-26. Defendant, however, does not claim that the State presented insufficient evidence in regards to any element as actually presented at the trial. Defendant’s claims involve a

hypothetical situation that did not occur. These claims are not properly brought under sufficiency of the evidence. As noted about, defendant was not entitled to a self-defense instruction. The court should decline to consider these improper claims of insufficient evidence.

- c. Defendant in his assignment of error number 7 assigns error to his trial counsel's failure to request a manslaughter jury instruction, but provides no argument or authority to support his position.

An issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). In the present case, defendant assigns error to trial counsel failing to request a manslaughter instruction. Brief of Appellant, page 1. Defendant provides no argument or authority to support his claim, and therefore this court should decline to review the issue.

3. THE TRIAL COURT DID NOT ERROR IN DENYING DEFENDANT'S MOTION FOR MISTRIAL WHEN THE STATE'S WITNESS' COLLAPSE IN THE COURTROOM WAS BRIEF AND ISOLATED.

The trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. See *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). "A trial court abuses its discretion only when its decision is

manifestly unreasonable or is based on untenable reasons or grounds.” *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A trial court’s denial of a motion for mistrial will be overturned only when there is a “substantial likelihood” the error prompting the motion affected the jury’s verdict. *Rodriguez*, 146 Wn.2d at 269-70. A trial court should deny a motion for a mistrial unless “the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *Id.* at 270 (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

The trial court is in the best position to determine the prejudice of the statement in context of the entire trial. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). If an objection was made, the appellate court will still give deference to the trial court’s ruling when examining the conduct for prejudice because “the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant’s right to a fair trial. *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

A reviewing court should examine the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow. *See State v. Crane*, 116 Wn.2d 315, 332-333, 804 P.2d 10 (1991) *superseded on other grounds by*

statute as stated in *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

In the instant case, a single isolated incident occurred during the testimony of the victim, James Huff. During direct testimony, Mr. Huff was being asked questions about the shooting. The prosecutor asked Mr. Huff what happened after he was hit in the chest. 2/23/09RP 525. Mr. Huff responded, "Um." and the prosecutor asked him if he needed a break. 2/23/09RP 525. Mr. Huff responded, "I'm feeling like I am having a flash...." 2/23/09RP 525. The prosecutor immediately turned to the judge and the court said, "Let's take a short break. If the jury will step into the jury room." 2/23/09RP 525.

After the recess, the State put on the record what had happened during the time the jury was walking out of the courtroom.

Your Honor, Mr. Huff went downstairs to smoke a cigarette with a friend, the next witness, Nick. And he's not doing very well. He collapsed here in-the courtroom. I think Your Honor walked off the bench, but he was physically doubled over. The jurors were here for part of that, to be honest. The jurors walked out. He didn't say anything. Then he had a seat here; he's crying. He keeps saying he's having a flashback.

2/23/09RP 525-6. The defense attorney then asked for a mistrial because of the emotion involved and the fact the jury would be likely to show sympathy toward Mr. Huff. 2/23/09RP 526-7. The State argued against the mistrial and again clarified as to the extent of the incident. "My point

in making the record is just so that the record is clear of what the jury did see and didn't see, because the judge --the Court had left the bench. And it takes awhile for the jury to get out of the courtroom. But, they did not -- excuse me — the witness did not say anything else.” 2/23/09RP 527.

When defense counsel pointed out that the jury, and the court had heard the defendant say he was having a flashback, the State again clarified. “He didn't say anything else after that. He was just — was standing, and I'll just let the Court know, he turned his back to the jury. He stood here as if he was going to walk off, but he turned around and went down like this pretty much until, I think, the jury was gone. 2/23/09RP 528.

The court did not error in denying the defense motion for a mistrial. The trial court engaged in a significant analysis of the incident and its impact on the jurors.

Okay. You know, there's a line, I guess, where the Court has to say that things have gotten so far into the realm of emotion or sympathy that the jurors can't focus on the job at hand. I don't think this is that kind of situation. Trials are about real people with real issues, experiencing real emotions, and you can't take that out of the case. All you can do is make a reasoned judgment about how the display of emotion may have impacted the jury. And while this was certainly, I guess you'd call, dramatic, it wasn't something that was prolonged or even unexpected given the circumstances.

And I think Mr. Greer is right when he points out that it doesn't really indicate whether or not Mr. Ra was the one that fired the shot; or, if he did -- the shots, or, if he did fire the shots, whether or not they were fired in self-defense. So, in that sense, it's not an indictment of him.

On the other hand, Mr. Underwood certainly has a point that it can engender sympathy for Mr. Huff's position, but, again, I don't think it was so prolonged so much as to overemphasize Mr. Huff's wound to the point where the jury is not going to be able to do its job any further. I'm going to deny the motion for a mistrial.

2/23/09RP 528-9. The court engaged in an analysis of the effect of the incident. 2/23/09RP 528-9. The court clearly weighed both sides of the issue and specifically addressed the potential prejudice to defendant.

2/23/09RP 529. The court specifically found that the incident did not rise to the level of a mistrial as the incident was not prolonged to the point where the jury would be presumed to not be able to do their job.

2/23/09RP 529. Because the court engaged in such analysis and because the trial court is in the best position to analyze this situation in the context of the entire trial, this trial court cannot be said to have abused their discretion and there is nothing that supports disturbing the court's ruling on appeal.

Further, the case that is cited by defendant, *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963) is distinguishable from the instant case. In *Swenson*, the witness had several emotional episodes in front of the jury during cross examination. *Id.* at 272-6. There were also spectators that yelled comments during the cross examination. *Id.* at 275. The court also expressed great concern for the witness's well-being and these

comments were made in front of the jury. *Id.* 274-6. In contrast, the court noted that the witness was fine during the entire three hours of direct examination. *Id.* at 273. Based on the specific facts of the case, the court found that defendant was denied his due process and was not able to adequately cross-examine the witness. *Id.* at 278. However, the court also noted the “well-established rule that the court has broad discretionary powers to take remedial action in neutralizing the effect of incidents and irregularities at trial and the court’s decisions in this respect will be upheld unless abuses of discretion is clearly shown.” *Id.* at 279.

In the instant case, there was one isolated incident. There was nothing connecting this incident to the victim showing his scars later in the testimony. The scars were shown briefly to the jury and any mention of Mr. Huff’s military experience was very brief.<sup>4</sup> 2/23/09RP 533-4. The jury was walking out when the incident itself happened and the extent of the incident was very brief and not at all pointed toward defendant. The incident happened during direct and not during cross. Further, while defense counsel asked for a mistrial, once the mistrial was denied, defense counsel did not ask the court to address the incident with the jury. In fact, the testimony continued as if the incident had never occurred. The

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<sup>4</sup> The scars were shown to the jury by agreement of the parties. 2/19/09amRP 1-14.

incident was isolated, minimal and not emphasized by the court. There is nothing here that rises to the level of a mistrial or the level of the number and content of the incident in *Swenson*.

The foreign cases that defendant cites again involve multiple instances or more prolonged instances. In contrast, the instant case is similar to *State v. Sellers*, 279 Neb. 220, 77 N.W.2d 779 (2010). In *Sellers*, the co-defendant testified against Sellers, and during her testimony, she cried a lot and vomited into a trash can. *Id.* at 225. The trial court denied the defense motion for mistrial. *Id.* The court engaged in an analysis of cases involving emotional outbursts and noted that the trial court is in the best position to deal with them. *Id.* at 226. The court upheld the trial court's denial of the mistrial finding that the incident did not have any bearing on the guilt or innocence of the defendant. *Id.* at 227. Similarly, the incident in the instant case was much less dramatic and prolonged than the incident in *Sellers* and did not have any bearing on the guilt or innocence of defendant. The trial court engaged in the proper analysis of the situation. The trial court did not err in denying the defense motion for a mistrial.

4. THE LAW OF THE CASE DOCTRINE IS APPLICABLE AS DEFENDANT COULD HAVE EASILY CHALLENGED HIS OFFENDER SCORE IN HIS PRIOR APPEAL AND THEREFORE, SHOULD BE PRECLUDED FROM RAISING THIS CLAIM IN THIS APPEAL.

The defendant alleges for the first time in this appeal that the State failed to prove his offender score by a preponderance of the evidence. Brief of Appellant, pages 18-20. The law of the case doctrine precludes such review unless the defendant can demonstrate an application of law that was clearly erroneous and that it would be a manifest injustice to apply the doctrine. *State v. Worl*, 129 Wn.2d 416, 425-26, 918 P.2d 905 (1996). The court has held that the law of the case doctrine applies not only when an issue has been litigated in a prior appeal, but when an issue could have been determined if it had been presented. *Id.* at 425. The court stated:

It is also the rule that questions determined on appeal, *or which might have been determined had they been presented, will not again be considered on a subsequent appeal* if there is no substantial change in the evidence at the second determination of the cause.

*Id.* at 425, quoting *Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988)(emphasis added).

The court has further held:

Under the doctrine of “law of the case,” as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until

such time as they are “authoritatively overruled.” Such a holding should be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.

*Id.* at 426, citing **Greene v. Rothschild**, 68 Wn.2d 1, 10, 402 P.2d 356, 414 P.2d 1013 (1965).

In the present case, defendant could have raised his claim that the State did not prove his offender score by a preponderance of the evidence in the appeal following the defendant’s first trial. Defendant points out that the court did not address this issue on his first appeal, but fails to note that he did not raise the issue. Brief of Appellant, page 18. As noted at sentencing, defendant’s score was calculated at a prior hearing and there is nothing that changes that calculation. 4/10/09RP 12-13. Further, defense counsel represented to the court that he was in agreement with the State’s calculation and in agreement with the standard ranges. 4/10/10RP 3-4. The defense attorney did not raise any issue with the offender score until after the court had pronounced sentence when the defense attorney noted they were not stipulating. 4/10/10RP 12. However, the defense attorney never alleges any issues with the offender score nor denies the State’s assertion that the score had previously been proved to Judge Fleming.<sup>5</sup>

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<sup>5</sup> Indeed there is an exhibit record from the first sentencing noting that an exhibit was presented as to defendant’s prior record. *See* CP Supp. 108.

4/10/09RP 12-14. Defendant cannot establish that any error occurred, and therefore fails to show that the trial court's action was clearly erroneous. This court should apply the law of the case doctrine and refuse to consider this issue.

5. THERE WAS SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF UNLAWFUL POSSESSION OF A FIREARM WHERE DEFENDANT STIPULATED TO A PRIOR FELONY AND THE FACT THAT HE COULD NOT LAWFULLY POSSESS A GUN ON THE DATE OF THE INCIDENT, THE STIPULATION WAS MARKED AS AN EXHIBIT AND WAS READ TO THE JURY.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157

(1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff*, 25 Wn. App. at 593. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In order for defendant to be convicted of unlawful possession of a firearm in the second degree, the State had to prove that on September 14, 2005, in the State of Washington, the defendant knowingly had in his possession or control a firearm and that the defendant had previously been adjudicated guilty of a felony that was not a serious offense. *See* CP 1-2, 19-56, instruction 25, RCW 9.41.040(2)(a)(i). Defendant challenges the proof of defendant's priors in order to prove this conviction. *See* Brief of Appellant, page 20-22.

However, appellant does not address the stipulation that was executed by both parties and presented to the jury. *See* Ex. 15.<sup>6</sup> The court read the agreed stipulation to the jury on February 19, 2/19/09Am RP 64. The stipulation reads as follows: "It is hereby stipulated by and between the parties as follows: That the defendant has previously been adjudicated guilty as a juvenile of a felony crime and, therefore, not lawfully permitted

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<sup>6</sup> The stipulation was read to the jury but did not go back to the jury room since it was dated from the first trial. There was no objection from defendant. 2/19/09amRP 16-17, 2/25/09 RP 839.

to possess a firearm on September 14, 2005.” *See* Ex. 15, 2/19/09amRP 64, 2/25/09 RP 786. The State reread the stipulation to the jury in its closing. 2/25/09 RP 786.

As defendant affirmatively stipulated to this element, there is no basis for a claim of insufficient evidence. The State proved the charge beyond a reasonable doubt.

6. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). 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)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court

determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) *citing State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed 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." *Stenson*, 132 Wn.2d at 719, *citing Gentry*, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) *citing State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986).

“Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Russell*, 125 Wn.2d at 86, citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

Here, defendant asserts that the prosecutor committed misconduct where he allegedly (a) stated his personal belief as to defendant’s guilt, and (b) argued facts not in evidence. The State’s arguments were proper arguments based on the court’s instructions and the evidence adduced at trial.

- a. The State did not express a personal belief during closing and the trial court did not error in denying the defense motion for a mistrial.

It is improper for a prosecutor personally to vouch for the credibility of a witness. *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985). Prosecutors may, however, argue inferences from the evidence; prejudicial error will not be found unless it is “clear and unmistakable” that counsel is expressing a personal opinion. *State v.*

*Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *citing Sargent*, 40 Wn. App. at 344.

Defendant alleges that two statements, one during the State's initial closing and one during the State's rebuttal, were impermissible opinion statements. The first occurred during the State's initial closing. The State argued, "The State believes firmly that the evidence in this case has proven that the defendant acted with premeditated intent." 2/25/09RP 785. The second occurred in the State's rebuttal when the State argued, "The State believes, again, firmly, based on this evidence that the defendant is guilty." 2/25/09RP 835. Defendant objected to both of these statements in the trial court level and then asked for a mistrial. 2/25/09RP 785, 835. In denying the motion for the mistrial, the trial court indicated that while he didn't think "belief" was the appropriate word to use, the statements did not rise to the level of a personal opinion. The State did not say, "I, deputy prosecuting attorney, believe this." 2/25/09RP 841. The statement was not a personal opinion of the prosecutor but rather was expressing the position of the State that the evidence shows that defendant is guilty of the charges. 2/25/09RP 841. This is a proper inference from the evidence and proper argument for the State to make. Because the argument did not express a personal opinion and the court engaged in a proper analysis of the situation, the trial court cannot be said to have

abused their discretion. The statements were not error and the trial court did not error in denying the motion for a mistrial.

Further, defendant alleges that the State argued to the jury that if they considered defendant's testimony they would not be doing their job. Brief of Appellant, page 26, 32. However, defendant does not provide any cite for this challenged argument and the undersigned attorney could not locate it in the closing. This court should decline to consider this unsupported argument made by defendant.

- b. The prosecutor's arguments were logical inferences from the evidence presented, did not inflame the passions or prejudices of the jury and the jury is presumed to disregard any statements not supported by the evidence.

A prosecutor's allegedly improper statement is reviewed in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). 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). 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 court instructed the jury:

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 lawyers' statements are not evidence. The evidence is the testimony and 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 19-56, Instruction 1, *see also* Washington Pattern Jury Instructions

Criminal, WPIC 1.02. When a court gives an instruction to the jury, the jury is presumed to follow the instruction. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976).

Defendant challenges the State's assertion that "tap that ass" means to have sex. 2/25/09RP 795, 823. The two statements that defendant challenged were not objected to in the trial court. Defendant cannot show that these statements were flagrant and ill intentioned when witness Nicholas Serdar testified that the people in the car were catcalling the girls and were yelling that they wanted to have sex with the girls and that they were hot. 2/23/09RP 605-6. The argument made by the State is a reasonable inference from the evidence presented and cannot be said to be flagrant and ill-intentioned. If the jury felt that the statement was not supported by the evidence, then they were presumed to have followed the court's instructions and disregarded the testimony. There was no error.

The argument that there was testimony that the people in the car thought that had killed Mr. Huff is a reasonable inference from the testimony. 2/25/09RP 803. Defense counsel did not object to this argument. The car takes off, they throw the gun out the window and when they are caught, defendant initially denies being involved in any type of shooting. 2/19/09amRP 26, 51, 52-3. The logical inference for flight is consciousness of guilt. The prosecutor incorrectly believed that the actual testimony had been that the people in the SUV thought they killed Mr. Huff. He wasn't sure. 2/25/09RP 803. If the evidence didn't support that statement then the jury was presumed to disregard it but the argument itself is a logical inference and cannot be deemed to be flagrant and ill-intentioned. There was no error.

Defendant challenges the prosecutor's argument about a person walking down the street with a wife or a girlfriend and hearing another guy yell, "Nice ass" as being confrontational. 2/25/09RP 794-5. Defendant did not object to this statement. This is not an argument designed to inflame the passion or prejudice of the jury. It is a reasonable argument that is a logical inference for the situation presented and lays out the State's theory of the case. There is no error.

In his closing argument, the defense attorney tried to garner sympathy for the defendant by arguing that defendant was not making

catcalls, he was nervous, he was in fear, he was frightened and that he was sucked into this confrontation by the victim. 2/25/09RP 805, 8100, 814, 819-20. The State in response argued that this wasn't a calm Happy Days moment. 2/25/09RP 823. Defendant was in the car with other individuals who were making continuous derogatory comments toward the victim's girlfriend and encouraging the victim to come and fight. 2/25/09RP 823-4. The State then made the statement that, "It's not Happy Days. You know, this was confrontational.....Defense counsel says poor, poor Mr. Ra. You know, his buddy is the one saying nice ass, not me. His buddy is the one saying it. The best he had of premeditation is this right here. This weapon is fully loaded. This weapon is not a toy." 2/25/09RP 824. Defense counsel did not object to this argument. While perhaps not the most artful language, the State's argument is in response to the defense argument that defendant was just an innocent bystander in this incident who was forced to shot the victim because of the actions of his friends. The evidence is contrary to this. Further, the fact that his friends are catcalling does not justify defendant pulling out a fully loaded weapon and firing it four times. The State's argument is in response to defense counsel's argument and was not flagrant or ill-intentioned.

Finally, defendant challenges that State's argument that the testimony of the State's witnesses was not inconsistent and particularly

that the prior testimony of Nick Serdar was not inconsistent. 2/25/09RP 828-9. Defense counsel did not object to this argument. The State is responding to defense counsel's argument that the State's witnesses made up their story. 2/25/09 828. The State is permitted to argue their theory of the case and to argue logical inference from the evidence. Here, the State is pointing out the consistencies and the different perceptions of the different witnesses. 2/25/09RP 828-9. The State is permitted to review the evidence and the jury then is the one to judge the credibility of the witnesses. Again, if the arguments are not supported by the evidence then the jury is presumed to follow the court's instructions and disregard the argument. The State was permitted to make this argument and it cannot be said to be flagrant or ill-intentioned. The prosecutor did not commit prosecutorial misconduct. There is no error.

7. DEFENDANT HAS FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL 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. Defendant has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

Defendant cannot show that the challenged testimony of witness Huff was improper opinion evidence especially when the jury had already heard testimony as to defendant's location in the vehicle. The court properly denied defendant's request for a self-defense instruction where the evidence did not support the giving of such an instruction. The trial court did not abuse its discretion in denying the defense motion for a mistrial in regards to a single, isolated incident where the victim said he was having a flashback and doubled over in front of the jury.

Further, the State proved defendant was guilty of unlawful possession of a firearm where defendant stipulated to the element disputed on appeal. Defendant also cannot raise an issue that he could have raised in the previous appeal for the first time in this appeal.

The prosecutor did not commit misconduct where his argument was supported by the evidence, in response to defense counsel and not prohibited by case law. Defendant cannot prevail under the doctrine of cumulative error.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the convictions and sentence below.

DATED: MARCH 19, 2010.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

*Melody M. Crick by K. Proctor*  
MELODY M. CRICK 14811  
Deputy Prosecuting Attorney  
WSB # 35453

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.

3/19/10 *[Signature]*  
Date Signature

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