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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

LARRY DUNOMES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 08-1-02399-2

BRIEF OF RESPONDENT

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

1. Whether defendant can raise an issue of improper opinion evidence for the first time on appeal when the challenged evidence does not meet the criteria for RAP 2.5 to apply.
2. Whether defendant has failed to show that the prosecutor committed misconduct or that the argument challenged on appeal was so flagrant and ill-intentioned that no curative instruction could have eliminated the prejudice.
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5. Whether defendant has failed to show the existence of any trial error, much less an accumulation of prejudicial error so as to warrant relief under the cumulative error doctrine.
6. Whether defendant's argument that he is entitled to have a jury determination that he is a persistent offender must be rejected as it is contrary to controlling authority.
7. Whether the court should remand for correction of scrivener's errors in the judgment.

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecutor's Office filed an information in cause number 08-1-02399-2 on May 19, 2008, charging Larry Darnell Dunomes, hereinafter "defendant", with assault in the first degree on

victim Sonya Bailey, and assault in the first degree on victim Jarvis Bailey. CP 1-2. The State filed an amended information on November 14, 2008, which added four counts: attempted murder in the first degree against Sonya Bailey, attempted murder in the first degree against Jarvis Bailey, and two counts of bribing a witness on October 29, 2008, naming each Sonya Bailey and Jarvis Bailey as victims. CP 129-133.

On October 27, 2008, the State filed a persistent offender notice indicating that conviction on a most serious offense could result in a life sentence. CP 335.

On November 20, 2008, the court ordered defendant to be evaluated to determine his competency to understand the nature of the proceedings against him, to aid in his own defense, as well as to determine whether he was able to form the mental state of “intent” at the time of the offenses. CP 134-137. Defendant was found to be incompetent. On December 10, 2008, the trial court ordered defendant to be committed to Western State Hospital for 90 days to have his competency restored. CP 163-164.

Based upon a Forensic Psychiatric Report that indicated defendant was currently competent to stand trial, the court entered an order of competency on March 18, 2009. CP 165-181, 182-183.

The State filed a second amended information on December 2, 2009. This information dismissed count six, bribing a witness as alleged against Jarvis Bailey.

Defendant's trial commenced on November 16, 2009, before the Honorable James Orlando. The jury convicted defendant of two counts of assault in the first degree, CP 263, 264, two counts of attempted murder in the first degree, CP 266, 268, and bribing a witness. CP 270. The jury also returned special findings that defendant was armed with a deadly weapon at the time he committed the two counts of assault and two counts of attempted murder. CP 271, 272, 273, 274.

At the sentencing hearing held on December 18, 2009, the State presented evidence showing the defendant to be a persistent offender based upon a prior Louisiana conviction for aggravated battery, and a prior Washington conviction for arson in the first degree. To prove defendant's Louisiana conviction by a preponderance, the prosecutor called defendant's community corrections officer, who testified that defendant had been under supervision by the Department of Corrections prior to May 15, 2008. 9 RP 715. A forensic examiner testified that she had compared defendant's booking fingerprints taken on May 16, 2008, with those provided by the Louisiana Department of Corrections. 9 RP 718-719. She concluded that the fingerprints taken in Louisiana were those of the

defendant. 9 RP 719. The prosecutor entered the certified copy of the prints taken in Louisiana and a copy of defendant's King County 1994 conviction for the most serious offense of arson in the first degree as exhibits to the sentencing hearing. 9 RP 719, 722. The State also submitted a mandate and opinion from a Washington appellate court reviewing in one of defendant's prior convictions, in which the court upheld the determination that defendant's prior aggravated battery conviction from Louisiana was comparable to an assault in the second degree in Washington, and should be included in the criminal history. 9 RP 720. Defense counsel responded that she had researched defendant's 1988 Louisiana conviction for aggravated battery, and concluded that it constituted a most serious offense in Washington, 9RP 712. Defendant disagreed. 9 RP 712.

The trial court found that defendant's aggravated battery conviction in Louisiana was comparable to Washington's charge of assault in the second degree. 9RP 728. The court found defendant to be a persistent offender, and he was sentenced to life without parole for the attempted murders in the first degree, and 84 months on the bribery charge.¹ CP 291-304. The court also imposed 24 months for the deadly

¹ The court correctly did not impose sentence on the two convictions for assault, finding they merged with the attempted murder convictions; the judgment, however, improperly lists the assault convictions. 9RP 727-728; CP 291-304. This error requires correction. *See, infra*.

weapon special verdict. Defendant was ordered to have no contact with the victims. 9 RP 726.

Defendant timely filed a notice of appeal.

2. Facts

Sonya Bailey testified that she has been married to defendant for over ten years. 6 RP 298. On May 13, 2008, she drove him to an apartment in Seattle and then returned to a friend's house in Tacoma. 6 RP 298-300. Defendant came to the friend's house the next day and argued with Sonya.² 6 RP 301. Defendant demanded the keys to Sonya's car, then left driving it away. 6 RP 303-304. Sonya spent the evening with her brother, Jarvis Bailey, visiting friends at their houses. 6 RP 304-312; 7 RP 401-404. That same evening, Sonya Bailey made a phone call to defendant. 6 RP 313-316.

Later that night Sonya and her brother were walking on "I" street between 11th and Earnest S. Brazill (also called 12th) Streets, when they saw Sonya's Volvo turning doughnuts in the street before speeding toward them. 6 RP 318-319; 7 RP 409, 416-417. Sonya ran to a nearby building and jumped down into a window well. 6 RP 321.

² As more than one witness has the last name of Bailey, first names will be used for the sake of clarity. No disrespect is intended.

The Volvo stopped partially on the curb and defendant got out of the driver's seat. 7 RP 418-419. Jarvis testified that defendant approached him, said "Die, mother fucker die," then stabbed him in the stomach. 7 RP 419-420. After the stabbing, defendant got into the Volvo and drove down the hill of Brazill Street. 7 RP 424.

When defendant backed off the curb, Sonya jumped out of the window well and ran down Brazill Street to an alley. 6 RP 322-324. Bailey hid for a moment and then fled when she saw her car approaching her location. 6 RP 325. Defendant chased her with the car as she ran across a parking lot. 6 RP 326. Sonya ran to Yakima where she tripped and fell. 6 RP 332. Defendant got out of the car and approached Sonya. Defendant then began to stab Sonya's legs with a knife. 6 RP 333. Sonya testified that when she asked if he was really trying to kill her, defendant replied "Die bitch, die." 6 RP 333-334. After stabbing Sonya numerous times, defendant fled in her car. 6 RP 338-339. Sonya had stab wounds to her abdomen, both legs and defensive cuts on her hands. 6 RP 357-360.

Dr. Eggebrotten was the surgeon who performed emergency surgery on Sonya. 8 RP 521, 530-532. In his opinion, the injuries to her abdomen would have resulted in her death had she not had surgery to repair the internal injuries caused by the stabbing. 8 RP 542-544. Sonya also has permanent and long term disability to her hands and feet, as well as permanent scarring. 8 CP 551.

Dr. Inouye is a trauma surgeon who works at Tacoma General and St. Joseph's Hospitals. 9 RP 596. He provided medical service to Jarvis on May 15, 2008, 9 RP 597. Jarvis had a stab wound to his upper abdomen, which untreated would have been lethal. 9 RP 599, 601, 604-605. Jarvis had three injuries to his small bowel and colon. 9 RP 602. This type of wound can lead to weakening of the stomach muscles and hernia. 9 RP 606-607. Jarvis has a permanent scar from the stabbing and he will require surgery to repair the hernia as he has pain whenever he bends down to pick things up. 7 RP 430; 9 RP 608.

Detective Vold testified that he is currently assigned to the Tacoma Police Department homicide unit and was assigned to investigate this case the night it occurred. 6 RP 567- 569. On May 16, 2008, he was notified that defendant had been taken into custody in a traffic stop. 6 RP 575. Detective Vold met the defendant who had been transported to the police department. When he introduced himself and asked defendant about the correct pronunciation of his last name, defendant did not respond. 8 RP 577. Detective Vold noted that defendant was limping as they escorted him to a holding cell. 6 RP 577. When he pulled up defendant's left pant leg, Detective Vold found a bloody sock tied around a wound to defendant's calf. 6 RP 577. Detective Vold asked defendant several times if he wanted the wound to be treated at a hospital. 6 RP 578. Defendant repeatedly declined and said he wanted to use the jail infirmary. The jail

infirmary, however, declined to treat the injury so defendant was transported to a hospital for treatment. 6 RP 578-579.

Barbara Bond, an advanced registered nurse practitioner employed by Tacoma Emergency Care Physicians, treated defendant on May 16, 2008. 4 RP 468-470. She testified that defendant was in custody and attended by a police officer while she treated a stab wound in his leg. 4 RP 475. Ms. Bond testified that defendant indicated that he had been stabbed with a 6 inch kitchen knife in his left calf on May 15, 2008. 4 RP 471-472. Ms. Bond asked defendant how he had been stabbed, but he did not answer her. 4 RP 472. She testified that the wound appeared to be one day old, and was consistent with a stab wound from a knife. 4 RP 474.

The jury heard a recording of a telephone call made by defendant from jail to Sonya on October 29, 2008. 6 RP 367. Defendant told Sonya that he was expecting to receive settlement money from a case and offered to give Sonya and J _____³ Bailey at least \$10,000. EX . 6.⁴ Defendant asked repeatedly if Sonya wanted him to go to jail for life, and if she wanted the money. EX. 6. Sonya declined several times to accept the money. Ex. 6. In ending the conversation, defendant stated, “at least I tried.” Exhibit 6.

³ The name on the jail recording begins with a “J” but it is not clear whether it is Jarvis, the defendant’s sister, or Jibreel, the son of Sonya Bailey and defendant.

⁴ The record below does not contain a transcript of the contents of this exhibit.

Dr. Edward Kelly testified that he interviewed defendant on December 10, 2008, and January 9, 2009. 8 RP 553-554. Dr. Kelly had two discussions with defendant about his memory of the assaults he committed on March 15, 2008, and of his phone call to Sonya Bailey on October 29, 2008. 8 RP 553-565, 554 564. Testifying from his notes of these conversations, Dr. Kelly related for the jury defendant's statements as to his recollections as to what happened the night of the assaults, including defendant's claim that a drink he consumed prior to the assaults had been drugged. 8 RP 556. Dr. Kelly testified that defendant also stated that he had called Sonya Bailey "to offer her money not to testify." 8 RP 564.

Defendant did not present any witnesses. 9 RP 622.

C. ARGUMENT.

1. DEFENDANT FAILED TO PRESERVE A CLAIM OF IMPROPER OPINION EVIDENCE IN THE TRIAL COURT AND DOES NOT PRESENT A CLAIM THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

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; 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). “Opinion testimony” means evidence that is given at trial while the witness is under oath and is based on one’s belief or idea rather than on direct knowledge of facts at issue. *State v. Demery*, 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001). Washington courts have “expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt.” *State v. Demery*, 144 Wn.2d at 760, quoting *Heatley*, 70 Wn. App. at 579. 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.

The following has been found not to constitute improper opinion testimony: a taped confession which included a detective’s questions that essentially accused the defendant of lying, *Demery, supra*; an officer’s opinion based solely on his experience and his observation of the defendant’s physical appearance and performance on the field sobriety tests that he was “obviously intoxicated and affected by the alcoholic drink . . . [and] could not drive a motor vehicle in a safe manner.”

Heatley, 70 Wn. App. at 576, 579-80; a CPS worker's statement -"I believe you"- to a child in an out of court interview said to encourage the child to disclose; *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993). The Supreme Court has required compliance with ER 103 before considering claims of improper admission of opinion testimony. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

If no objection is made to the challenged evidence in the trial court, the Supreme Court has held that a defendant may not automatically raise the issue as one of manifest error of constitutional magnitude under RAP 2.5. *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.2d 125 (2007). RAP 2.5(a)(3) does not permit all asserted constitutional claims to be raised for the first time on appeal, but only certain questions of "manifest" constitutional magnitude. *State v. Scott*, 110 Wn.2d 682, 687- 688, 757 P.2d 492 (1988). In *Kirkman*, the Court stated:

Admission of a witness opinion on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error. "Manifest error" requires a nearly explicit statement by the witness that the witness believed the victim. Requiring an explicit or almost explicit statement by the witness on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.

Id. at 937. In the case of improper opinion testimony, a defendant can show manifest constitutional error only if the record contains "an explicit

or almost explicit witness statement on an ultimate issue of fact."

Kirkman, 159 Wn.2d at 938.

In the case now before the court, defendant asserts that there was improper opinion testimony admitted at trial during the testimony of Dr. Kelly. This witness, who is employed at Western State Hospital, interviewed defendant about his recollection of the assaults on December 10, 2008. 8 RP 553-554, CP 165-181. Dr. Kelly made the following recitation of defendant's recollection of the assaults, based on his notes of the interviews:

He indicated that he was wasted. He denied using any drugs that evening. He expressed a suspicion that one of two women he had been drinking with at the lounge had slipped something into his drink while he was in the restroom, and my recollection is he identified one of the women as being from New York City and one from the South.

But he could provide no evidence, other than a suggestion that it had an oily taste. And he also indicated that he continued to drink this drink that he thought something had been put in, even though he was suspicious because it had an oily taste.

8 RP 556. Defendant's counsel did not object to this testimony at trial. Defendant now argues that the italicized portion of the testimony was a comment by Dr. Kelly on his veracity, and that it violated his constitutional right to a trial by jury.

Defendant has not met his burden of showing that this claim may be challenged for the first time on appeal. Defendant makes no argument how the above testimony meets the criteria established by the court in *Kirkland*. It clearly does not. Dr. Kelly did not make an “explicit statement” that defendant’s testimony was not credible. He simply stated that defendant suggested no reason other than the “oily taste” of his drink to believe that it had been drugged. Since Dr. Kelly did not provide his opinion on the credibility of defendant, there is no impermissible comment which results in a manifest error. The challenged testimony is clearly a statement of fact regarding the content of a past conversation in contrast to an expression of the witness’s current opinion as to the credibility of the defendant. Any jury listening to this would understand it to be a statement of the evidence proffered by the defendant at that time of the conversation and not a statement as to whether any other evidence existed or could be produced at trial. The statement is not an opinion about the defendant’s veracity at all.

As defendant has failed to show that the testimony falls within the narrow class that may be challenged for the first time on appeal, this court should find that this claim is not properly before the court and summarily dismiss it.

2. DEFENDANT HAS FAILED TO SHOW THE PROSECUTOR COMMITTED MISCONDUCT OR THAT THERE WAS ANY RESULTING PREJUDICE THAT COULD NOT HAVE BEEN ELIMINATED BY A CURATIVE INSTRUCTION HAD ONE BEEN REQUESTED.

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).

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).

An appellate court reviews a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v.*

Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L.Ed.2d 322 (1998).

In closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), *cert. denied*, 532 U.S. 1008 (1998). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87. Consequently, prosecutorial remarks, even if they are improper, are not grounds for reversal if invited or provoked by defense counsel, or if they are a pertinent reply to defense counsel's arguments. *Russell*, 125 Wn.2d at 86. Thus, in evaluating a prosecutorial misconduct claim, the court must examine the prosecutor's remarks in context with defense counsel's closing argument.

If defense counsel fails to object to an improper remark, it waives the error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.* at 86. If a curative instruction could have cured the error, and the defense failed to request one, then reversal is

not required. *Binkin*, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark meets this heightened standard. *Id.*

The prosecution may not make closing arguments about the defendant's post-arrest silence in order to imply guilt. *State v. Belgarde*, 110 Wn.2d 504, 510-12, 755 P.2d 174 (1988). But when the testimony or argument does not “highlight or call attention to defendant's post-arrest silence in such a fashion or to such a degree as to penalize defendant,” it fails to violate due process and the right to a fair trial. *State v. Johnson*, 42 Wn. App. 425, 431-32, 712 P.2d 301 (1985), *review denied*, 105 Wn.2d 1016 (1986). To establish prosecutorial misconduct, the defendant must show that the prosecutor's action was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039, 95 P.3d 758 (2004).

In the case now before the court, defendant contends that the prosecutor improperly adduced evidence of the defendant exercising his Fifth Amendment right to remain silent, and further commented upon his exercise of this right in closing arguments.

The record shows that in the State's case, the prosecutor called Barbara Bond, a nurse practitioner employed by Tacoma Emergency Care Physicians who had treated defendant's leg wound at a hospital after his arrest and prior to him being booked into the County Jail. 6 RP 578-579; 7RP 467-469. It is clear that the defendant was under arrest at the time of this treatment and that he was accompanied by an officer while at the hospital. 7RP 475. Ms. Bond testified that defendant told her that he had received the stab wound to his calf the day before and that it had been caused by a six-inch kitchen knife. 7RP 471-472. Then the following exchange occurred:

Prosecutor: Did you ask him how it happened.

Witness: Yes.

Prosecutor: Did he give you any information when you asked him how it happened?

Witness: No, he did not.

Prosecutor: He didn't answer you?

Witness: He didn't answer.

7RP 472. There was no objection to the admission of this evidence. *Id.* The prosecutor then went on to ask questions about Ms. Bond's observations about the defendant's mental state at the time of her examination. *Id.*

It would appear from the record that neither the prosecutor nor defense counsel viewed the interchange between Ms. Bond and defendant to be a custodial interrogation.⁵ While there was a hearing pursuant to CrR 3.5, these statements were not addressed. See CP 336-341. This is consistent with law governing what constitutes “custodial interrogation.” See, *State v. Anderson*, 94 Wn.2d 176, 184, 616 P.2d 612 (1980) (statements made to a Eastern State Hospital worker while defendant was there for a court ordered competency/insanity examination); *Illinois v. Perkins*, 496 U.S. 292, 110 S. Ct. 2394 (1990)(undercover law enforcement agent need not give *Miranda* warnings to an incarcerated subject before asking questions that may elicit an incriminating response as this is not custodial interrogation); *State v. Brooks*, 38 Wn. App. 256, 684 P.2d 1371 (1984)(jailhouse informants); *Escamilla v. State*, 143 S.W. 3d 814 (Tx. Crim. App. 2004)(defendant’s incriminating statements made to doctors and nurses, while being treated for injuries at hospital after he was arrested for shooting off-duty police officer, were not subject to *Miranda* warnings as it was not custodial interrogation by state agents). Moreover, the Washington State Supreme Court has held that evidence that a defendant

⁵ As a result the record was not developed as to whether defendant was or was not advised of his *Miranda* rights after being arrested. Although there is testimony by both Deputy Hamilton and Detective Vold at both the pretrial hearing and the trial, the record is ambiguous as to whether defendant was read his rights upon arrest.

refused to answer a question does constitute a comment on the defendant's right to remain silent. *State v. Sweet*, 138 Wn. 2d 466, 480, 980 P.2d 1223 (1999).

In the case now before the court, the evidence challenged on appeal was admitted without objection. It cannot be discerned from the record that admission of the evidence could have been challenged as being obtained in violation of defendant's Fifth Amendment rights. Consequently, defendant has failed to prove any misconduct in adducing the evidence.

In closing argument, the prosecutor referred to this evidence on more than one occasion. The first reference comes during an extended argument as to why the jury should conclude that the crimes were committed with a deadly weapon; the knife used in the attacks was never recovered. 9RP 636-639. In the course of this argument the prosecutor reiterates the statements that defendant made to Ms. Bond regarding the source of his injury and in doing so, touches on the evidence that defendant did not respond to Ms. Bond's question about how he had received the knife cut on his leg. 9 RP 637-638. This was a correct summation of the evidence adduced. *See*, 4RP 471-472. The focus of this argument, moreover, is the defendant's statement to her that his wound was caused by a six inch kitchen knife, and how that blade length was consistent with depth of the two victims' knife wounds. *Id.* The closing argument focused on defendant's statements about the knife and

its size- which would indicate that it was a deadly weapon as a matter of law; defendant's silence was not the focus of this argument. The prosecutor did not argue that defendant's silence as to how he got his injury was evidence of his guilt. Defendant has failed to show that this argument was improper.

The second time the prosecutor referenced this evidence was when he was discussing what, if any, possible defense could be discerned from the trial evidence. 9RP 666-668. The prosecutor first refers to the excuse that defendant proffered when he called his wife and attempted to bribe her into lying or not showing up for court; defendant told his wife that he didn't know what had happened because somebody put something in his drink. 9RP 666-667. The prosecutor suggests that defendant proffered this in an effort to calm his wife down and make her more susceptible to a bribe. The prosecutor then looks at the statements that defendant made to Dr. Kelly two months later to argue that the defendant's memory of what happened has improved, although he was still maintaining that he was drunk and drugged from something that had been put in his drink. In statements to Dr. Kelly, defendant denied that he had a knife, but said he had a piece of the car that had broken off and that it was pointed; defendant recalled swinging it at the victims. 7RP 553-561. The prosecutor pointed out all of the details of the night of the assaults that defendant could recall when he spoke with Dr. Kelly. 9RP 668-670. In the course of this argument he stated:

[Defendant] recalls committing the crime but came up with the car part story, but wouldn't tell Nurse Bond how he got stabbed.

And then he just kind of decided to be somewhat vague at times with Doctor Kelly. He told Doctor Kelly ... "It is supposed that I stabbed him." in reference to what he did to Jarvis."

9RP 668. The clear thrust of the entire argument is that the defendant's story is an ever-evolving one that should not be trusted, especially his claims that he used a car part and that the reason he did these crimes was because someone put something in his drink. For on neither of these claims had defendant been consistent. Defendant told Ms. Bond he had been stabbed with a knife not a car part. He did not mention being involuntarily drugged to her, even though an involuntary drugging with an unknown substance could have serious health consequences. The prosecutor's arguments were not focused on the silence as being evidence of guilt, but that defendant's story was inconsistent and illogical -both internally and over time - leading to the conclusion that he kept modifying his explanation to fit the situation. Again, defendant has failed to show improper argument. Certainly, defendant has failed to show that this argument was so flagrant and ill-intentioned that no curative instruction⁶

⁶ Arguably, a curative instruction that the court gave for another purpose would also cure any prejudice on this claim. *See*, 9RP 676.

could have eliminated the prejudice. As there was no objection made in the trial court, this is the standard that he must meet.

Finally, even if this court were to find some impropriety about this argument, the court should find that it was harmless beyond a reasonable doubt. A constitutional error is harmless if the appellate court is convinced, beyond a reasonable doubt, that the prosecutor's comment did not affect the verdict. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The comments at issue here had nothing to do with the bribery charge, which had not even been committed at the time that the defendant encountered Ms. Bond. Moreover, the evidence was uncontroverted that defendant stabbed his wife and brother-in-law with a knife, causing life threatening injuries. The defense closing focused first as to the State's proof with regard to the bribery charge. 9RP 677-683. As to the attempted murders, there was no argument that defendant had not done the acts, but only that the State's evidence did not prove beyond a reasonable doubt that he had the requisite mental state at the time of these acts. 9RP 683-689. The case did not involve a credibility contest as defendant did not testify or present any evidence in his behalf, but what reasonable inference the jury could discern from the nature of the acts and his subsequent explanations to other people. The evidence in this case showed defendant was trying to kill his wife and brother in law at the time he chased them down in a car then attacked them with a kitchen knife. He stated he wanted each to die at the time he was attacking with the knife.

Considering the evidence presented in this case, this court can state beyond a reasonable doubt that the verdict was unaffected by the prosecutor's argument.

A defendant claiming prosecutorial misconduct during closing argument bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense.⁷ *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).

Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

a. The Prosecutor's Closing Comments Were Proper Argument.

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)).

⁷ Defendant sets forth a different standard on page 18 of his brief.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). Attorneys may argue credibility and draw inferences from the evidence. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied* 516 U.S. 1121 (1996).

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006), quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983), *overruled on other grounds by State v. Davis*, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984). A prosecutor arguing credibility only commits misconduct when it is 'clear and unmistakable' he is expressing a personal opinion rather than arguing an inference from the evidence. *McKenzie, supra.* at 53-54; *Papadopoulos, supra* at 400.

In 1966, the U.S. Supreme Court decided *Miranda v. Arizona*, which found that the protections of the Fifth Amendment right against self-incrimination extended beyond trial proceedings to provide protection to a person subjected to custodial police interrogation. *Miranda v. Arizona*, 384 U.S. 436, 499, 504, 526, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1965). The question here is whether defendant was subject to custodial interrogation when he did not respond to a question asked by Ms. Bond as she was treating the stab wound on his leg.

It cannot be determined from the trial record whether defendant was advised of his Fifth Amendment rights, and if so, whether he invoked or waived his rights.⁸ This case involves post-arrest silence in response to questions posed by a private citizen. When defendant was being treated in a public hospital by Nurse Bond, he was in custody and escorted by an officer. 8 RP 579. Ms. Bond's treatment included three questions: the date he had received his wound, how large the knife was, and how the wound had been inflicted. Defendant answered the first two questions, but he remained silent when she asked how the wound had been inflicted.

⁸ The Sate will presume that defendant did invoke his right to remain silent.

This is not an instance which involves custodial interrogation in which an officer asks defendant questions which might tend to incriminate him. Therefore, the protections afforded by *Miranda* were not triggered by this conversation. A defendant's statement that is not in response to an officer's question is freely admissible. Nor did defendant invoke his right to remain silent. He simply did not answer.

The Washington Supreme Court addresses this situation in *State v. Easter* 130 Wn.2d. 228, 241 922 P.2d 1285 (1996). In *Easter*, the defendant remained silent during an investigation by a State Patrol trooper. The Court noted that there might be a different result when the silence was to a citizen rather than "a law enforcement officer or other representative of the State." *Id* at 241. Ms. Bond was acting as a private individual, not a state agent, when she treated defendant. Her questions were relevant to treating his injury. As stated by Justice Stevens above, "in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent."

In this case, defendant knew that he did not have to answer the nurse's question, and he did not do so. Defendant's Fifth Amendment right to remain silent is not implicated in this instance. The prosecutor did not violate the defendant's *Miranda* rights when he elicited this testimony

from Ms. Bond, or when he discussed defendant's silence in his closing. Therefore, the prosecutor's closing argument which referenced his silence was proper conduct. For while the United States Supreme Court has often debated about the reach of the Fifth Amendment, it has always agreed that "a necessary element of compulsory self-incrimination is some kind of compulsion." *Hoffa v. United States*, 385 U.S. 293, 304, 87 S. Ct. 408, 17 L.Ed.2d 374 (1966).

In 1976, the U.S. Supreme Court held that the protections given in *Miranda* also meant that a prosecutor could not draw unfavorable inferences from that fact that a person exercised his right to remain silent after his arrest. *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976). Sweet was transported back to Washington by Deputy Wagner. During the transport, Deputy Wagner asked Sweet if he would be willing to take a polygraph and Sweet said he would. Deputy Wagner then asked if he would make a written statement, Sweet answered that he would after he spoke with his attorney. Defense counsel did not object to this testimony at trial. Neither a polygraph result nor a written statement was introduced at trial. Defendant appealed, alleging that his Fifth Amendment right to remain silent was violated.

The Washington State Supreme Court found that Deputy Wagner's testimony was at best a "mere reference to silence which is not a 'comment' on the silence and is not reversible error absent a showing of prejudice." *Id* at 481. In its holding, the Supreme Court stated that *Sweet* and *Easter* had "significant" differences. *Id*. In *Easter*, an officer testified that Easter was a 'smart drunk' in that he was evasive and did not talk or get close enough for the officer to make a good observation about whether he was intoxicated. *Sweet, supra*. In closing, the *Sweet* prosecutor referred to the defendant several times as a "smart drunk." *Id*. Such prosecutorial conduct is not present in this case.

During his closing, the prosecutor has wide latitude to draw reasonable inferences from the evidence and express the inferences to the jury. He did juxtaposed defendant's discussion with Dr. Kelly about his memory of the assaults against his silence when Ms. Bond asked him how he received the stab wound, 9 RP 668. The thrust of the prosecutor's argument was that defendant's recollection was vague at times and more detailed at other times as he fabricated his defense strategy. This is not a personal opinion; rather the prosecutor is arguing an inference from the evidence. This is proper argument.

Defendant's brief next references the prosecutor's remarks about defendant's decision to call Ms. Bailey and attempt to bribe her after he had stabbed her and inflicted such serious injuries. 9 RP 688. Again, the prosecutor is drawing reasonable inferences from the evidence. This is not an attempt to inflame the passions of the jury. It is an invitation to reasonably analyze the evidence.

b. The Prosecutor's Remarks Did Not Prejudice Or Impassion The Jury.

The prosecutor's duty is to ensure a verdict free of prejudice and based on reason. *State v. Huson*, 73 Wash.2d 660, 662, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S. Ct. 886, 21 L.Ed.2d 787 (1969). Although reference to the heinous nature of a crime and its effect on the victim can be proper argument, it is improper for a prosecutor to appeal to the prejudice and passions of the jury, or to assume facts not in evidence. *State v. Claflin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985); *see also State v. Jones*, 71 Wn. App. 798, 808, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994).

When deciding whether the misconduct warrants reversal, we consider its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005). A defendant shows prejudice

only if he shows a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Pritle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

In his closing argument, the prosecutor touched lightly on one occasion to defendant's silence in response to Ms. Bond's question. He continued on to discuss the two questions defendant had answered in their conversation, and did not return to the fact of his silence. The prosecutor then discussed the various theories defendant used to explain the reason for the assaults. When taken in the context of the entire case, neither of these passing comments is proper argument. The comment did not appeal to the prejudice and passions of the jury. Not only was the prosecutor's comment proper, but defendant has not shown prejudice, and certainly has not shown a substantial likelihood that the comments affected the jury's verdict. Defendant is not entitled to a new trial based on this issue.

3. THE STATE PRESENTED SUBSTANTIAL EVIDENCE TO SUPPORT EACH ALTERNATIVE MEANS OF COMMITTING THE CHARGE OF BRIBERY IN THIS CASE.

Criminal defendants have a right to a unanimous jury verdict. Washington Constitution. article 1, § 21. A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Stephens*, 93 Wn.2d 186, 190,

607 P.2d 304 (1980). Jury unanimity issues can arise when the State charges a defendant with committing a crime by more than one alternative means, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976).

In an alternative means case, the threshold test is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is sufficient to support each of the alternative means submitted, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction. *State v. Lobe*, 140 Wn.2d 897, 905, 167 P.3d 627 (2007); *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231 (1994); *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987).

To sustain a conviction on bribery, the State must show beyond a reasonable doubt:

- (1) That on or about October 29th, 2008 the defendant offered a benefit upon a witness or person he had reason to believe was about to be called as a witness in any official proceeding or upon a person whom he had reason to believe might have information relevant to a criminal investigation; and
- (2) That the defendant acted with intent to influence the testimony of that person or induce that person to avoid legal process summoning her to testify or induce that person to absent herself from official proceedings to which she had been legally summoned; and
- (3) That any of these acts occurred in the State of Washington.

RCW 9A.72.090, CP 219-261, instruction number 28. In this case, defense argues that the jurors could not have been unanimous on any of

the acts described in section (2) because substantial evidence does not support the third means alleged, that he attempted to induce Sonya Bailey to absent herself from a proceeding to which she had legally been summoned.

The prosecutor published a recording of a call defendant placed on October 29, 2008, from the Pierce County Jail. 6 RP 367, Trial Exhibit 6. The evidence records Sonya Bailey as she answers the phone and defendant speaks to her. *Id.* Defendant apologizes to Bailey for his assault on her. Bailey argues that he is not sorry. After 1:40 minutes on the phone, defendant broaches the topic: "I've got something that I want to ask you here. The lawyer is reaching a settlement when I got hit up in Seattle. ... I want you and J _____ (unintelligible) to have \$10,000-." *Id.* The victim cuts defendant off with protests that she doesn't want money. Defendant repeats "You don't want money?" The victim again states that she does not and defendant inquires "Is there any kind of way I can say or do anything?" The victim again protests. *Id.*

After 2:37 minutes of conversation, defendant broaches the fact of his persistent offender status, "they are trying to give me life." The victim states that there is nothing she can do anyway because the State puts up the charges. After 3:12 minutes, defendant brings up whether she won't attend the trial, "[S]o what you say, you're not coming?" The victim states that she is coming and defendant asks, "Even if you get the \$10,000?" Bailey tells defendant she will not get up on the stand and lie. Defendant

then challenges, "So even if I do life, is that what you want?" After 4:30 minutes of conversation defendant again asks "I'm just wanting to know if you would do that." The victim says she will not, and defendant again asks, "Not even for money." As he terminated the call, defendant said, "Well, at least I tried." Exhibit 6.

Also admitted as evidence on the bribery count was defendant's statement to Dr. Kelly. Defendant told him that that he called Bailey from jail and "offered her money not to testify." 8 RP 565.

The victim was a necessary witness in this case, essential to prove defendant's identity, the content of the phone call which preceded the assaults, the facts of his pursuit assault on her, his intent that she die, and to describe her injuries and disabilities. If Bailey changed her testimony, avoided legal process, or disregarded her legal summons, the case against defendant may not have been successful. Defendant's offer did not specifically instruct Sonya Bailey how to avoid testifying. However, each time she stated that she did not want his money, he waited before he again broached the topic of \$10,000, and very subtly accused her of causing him to be sentenced to a life term. Seven times in a 4:30 minute call, defendant asked Bailey to do something for him, offered her money, or asked if she is going to be at the trial.

As the prosecutor noted in closing, the approach to bribing a spouse who you stabbed numerous times and left for dead would need to be delicate. 9 RP 690. Therefore defendant's approach to asking her not

to testify would need to be cautious and subtle. It is also clear from the tape that defendant's offers or suggestions would have been more explicit had the victim not cut him off with emphatic protest each time he broached the topic of her attendance at the trial.

The evidence shows that Sonya Bailey, who had been defendant's wife for 10 years, understood his intentions perfectly. She clearly rejected his suggestion that she not attend the trial by saying that she "had to." From this statement, the jury could infer that Sonya was under subpoena to testify. For it is the subpoena which compels a witness to court. Sonya Bailey later stated that she would not take the stand and lie. She also indicated that she would attend the trial even if he gave her \$10,000. Again, defendant did not deny her understanding of his intentions.

The defense argues that since the State presented no evidence that Sonya Bailey had been subpoenaed at the time defendant attempted to bribe her. Therefore, he could not act "with intent to induce her to absent herself from legal proceedings to which she had been legally summoned." Charges had been pending since May, and defendant called Bailey in October. Even if she had not been subpoenaed at the time defendant spoke with her, it was reasonable to infer that she would be. To require the State to show that a victim had already been summoned to a proceeding would put form over substance, an absurd requirement.

This interpretation would allow a defendant to induce a witness to absent herself from a legal proceeding up until the time she received a subpoena without repercussion. Furthermore, this would allow a defendant to escape punishment for asking people who were not ultimately summoned to absent themselves from trial. This interpretation would defeat the orderly presentation of evidence at trial, and undermine public confidence in the judicial process.

The State presented substantial evidence, a confession from the defendant, that he attempted to bribe the State's witness to induce her not to testify against him. Simply because defendant did not specify that she use one method of avoidance over another, he can not escape responsibility for his bribery attempt. The jury had sufficient evidence to reach a unanimous verdict on any of the three alternative methods presented in the jury instruction.

4. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING BOTH DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEEDON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The U.S. Supreme Court has stated that "the essence of an ineffective-assistance claim is that counsel's

unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305, (1986). In determining whether defense counsel was ineffective, the judicial scrutiny of counsel's performance must be highly deferential. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052 (1984).

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The *Strickland* test has two prongs, both of which must be met by defendant. The first prong is:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" as guaranteed to the defendant by the Sixth Amendment.

The Washington State Supreme Court gave further clarification to the application of the first prong of the *Strickland* test. The Supreme Court in *State v. Lord* stated:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

State v. Lord, 117 Wn. 2d 829, 883, 822 P.2d 177 (1991). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim of ineffective assistance of counsel. *Id.* Because the presumption runs in favor of effective representation, the defendant must show from the record an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

The second prong of the *Strickland* test is:

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

State v. Lord, 117 Wn. 2d 829, 883, 822 P.2d 177 (1991).

Under the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lord, supra* at 883-884. Because the defendant must prove both prongs of *Strickland*, it may be found that he did not meet his burden based upon a lack of prejudice, without determining if counsel's performance was deficient. *Id.*

Defendant asserts that his counsel was deficient for failing to object when a witness gave improper opinion testimony, and for failing to *promptly* object to improper argument by the prosecutor in closing. As will be discussed below, defendant's claim is without merit

- a. Defendant has failed to show that any improper opinion evidence was adduced; therefore the failure to object cannot be considered deficient performance.

In addition to challenging the admission of the evidence as being improper as discussed in the second argument section of this brief, defendant further asserts that his attorney's failure to object to Dr. Kelly's testimony constituted deficient performance. To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) the absence of legitimate strategic or tactical reason for not objecting, (2) that the trial court would have sustained the objection if made, and (3) the result of the trial would have differed if the evidence

had not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). The substance of Dr. Kelly's testimony is set for *supra*. Defendant fails to show the inadmissibility of this evidence.

As previously argued, this testimony did not constitute comment on defendant's credibility. The challenged testimony is clearly a statement of fact regarding the content of Dr. Kelly's past conversation with the defendant, as opposed to an expression of the witness's current opinion as to the credibility of the defendant. Any jury listening to this would understand it to be a statement summarizing the evidence proffered by the defendant during the course of the conversation. Dr. Kelly does not make any statement as to whether any other evidence existed or could be produced at trial, just that defendant offered no other evidence during their conversation. Dr. Kelly's testimony did not amount to an opinion of guilt; consequently defendant cannot show that his attorney was deficient for failing to object. Defendant fails to show that the testimony was otherwise improper. As defendant cannot show that an objection would have been sustained had one been made, this will not provide a basis for deficient performance.

Even if this court were to view the challenged testimony as bordering on improper as opinion testimony, defendant cannot overcome the presumption that the lack of an objection was a matter of trial tactics.

The decision of when or whether to object is a classic example of trial tactics and only in “egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Defendant makes none of these showings. Dr. Kelly’s testimony was that defendant had only the “oily taste” of his drink to support his theory that he had been drugged by something that was slipped into his drink shortly before the assaults occurred. It is reasonable to conclude that counsel would not want to call attention to the fact that only evidence supporting defendant’s claim of involuntary intoxication were his own statements. An objection would have called attention to this fact. Defendant has not overcome the presumption that there was a tactical reason not to object.

Nor can he show that the court would have sustained an objection had one been made. To the extent Dr. Kelly’s testimony includes direct statements made by the defendant, these would not be “hearsay” but statements of a party opponent which are properly admissible under ER 801(d)(2). Finally, defendant has made no showing that the outcome of his trial would have been different had this evidence not been admitted. There was abundant evidence in this case that defendant had committed

the crimes, including his confession to Dr. Kelly. Defendant has not met either prong of *Strickland* on this claim.

- b. Defendant Cannot show deficient performance based upon the timing of counsel's objection to improper closing argument as this is a matter of trial tactics.

Defendant's second claim of deficient performance pertains to an objection that defense counsel made to this portion of the prosecutor's closing argument:

Did he sound remorseful in his call to Sonya five months later, the first time he spoke to her after this incident? And how did he act in court when Sonya and Jarvis testified? You will have to make up your own minds from that because you were able to judge his demeanor as to whether he had any regard for them.

9 RP 645. Defense counsel did not lodge a contemporaneous objection, but waited until the prosecutor had completed his closing and the jury was not present. At that point, defense counsel objected that the prosecutor had improperly commented on the defendant's right to remain silent by focusing the jury on his demeanor in the courtroom. 9 RP 675-676. The court sustained the objection and read a curative instruction to the jury when it returned to the courtroom:

The defendant is not compelled to testify and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

9 RP 676-677, CP 219-261. Because defendant's counsel did timely object to the prosecutor's statement, and a curative instruction was given to the jury, any prejudice flowing from the prosecution's argument was eliminated by the trial court.⁹ Defendant cannot show either deficient performance or resulting prejudice and this claim is without merit.

Defendant's sole argument as to this constituting deficient performance is in regard to the timing of the objection. Defendant asserts that counsel should have objected to the prosecutor's remarks immediately after they were made. However, defense counsel indicated at the time she made her objection that she delayed it so as to not interrupt the prosecutor's closing. 9 RP 676. This decision is a legitimate trial strategy. When attorneys interrupt argument of opposing counsel, the jurors can perceive this as rude and obstreperous conduct. Additionally, when the basis for an objection is that the argument has improperly commented on the defendant's right to remain silent, an objection made in the presence of the jury citing these grounds can add additional emphasis

⁹ In *State v. Smith*, 144 Wn.2d 665, 678, 30 P.2d 1245 (2001), the prosecutor argued that defendant was someone who looked like he had an attitude and a chip on his shoulder. *Id.* at 679. The Washington Supreme Court stated that the comments made by the prosecutor were "likely improper." However, the Court found that they were not so flagrant that they could not have been cured by an instruction. *Id.* at 680.

to the violation. It is not uncommon for attorneys to allow counsel to conclude an argument, and have the jury out of the courtroom, before raising an objection on this basis. Finally, the delay did not prejudice the defendant in any way. The court considered the objection and gave a curative instruction.

Defendant has not made a showing that his attorney did not exercise reasonable professional judgment or that he was prejudice by the alleged deficient performance; he has not met either prong of *Strickland*.

This court must begin with a strong presumption that defendant received effective assistance. Defendant's arguments have done nothing to undermine this presumption. When viewed in the light of all the circumstances, defendant has not met his burden to show that his counsel was less than reasonably professional in her trial tactics and strategies. Nor has defendant shown that prejudice resulted or that it affected the outcome of his trial.

5. AS DEFENDANT HAS NOT SHOWN ANY ERROR, MUCH LESS AN ACCUMULATION OF PREJUDICIAL ERROR, HE IS NOT ENTITLED TO RELIEF UNDER THE DOCTRINE OF CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that

"an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder v. United States*, 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. *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 errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See, Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not

prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *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).

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, *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, some so many times that a curative instruction lost all effect, *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. *State v. Stevens*, 58 Wn. App. at 498.

As addressed earlier in the brief, defendant has failed to show the existence of any error, much less an accumulation of prejudicial error. As such, he has failed to show that he is entitled to relief under the doctrine of cumulative error.

6. IT WAS PROPER FOR THE TRIAL COURT TO DETERMINE THAT DEFENDANT WAS A PERSISTENT OFFENDER AS THIS IS NOT AN ISSUE WHICH MUST BE DECIDED BY A JURY.

The U.S. Supreme Court has held that the existence of any fact *other than that of a prior conviction* must be found by a jury beyond a reasonable doubt. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111, 123 S. Ct.732 (2003), *emphasis added*, citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct 2348 (2000). *Apprendi* concerned a defendant who pleaded guilty to a firearm charge. The State then moved to enhance the sentence by filing a “hate crime” allegation. The trial court imposed an enhanced sentence. Apprendi appealed, arguing that due process requires that a finding of a “hate crime” be proved to a jury beyond a reasonable doubt. *Id.* at 469.

The *Apprendi* Court distinguished between “facts” as elements of the crime which the state had the burden of proving, and “sentencing factors,” which are not found by a jury, but which can affect the sentence a judge imposes. *Id.* at 485, citing *McMillan v. Pennsylvania*, 477 U.S. 79, 85-86, 106 S. Ct 2411 (1986). The Supreme Court articulated in *McMillan* that due process “requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense.*” *Id.* at 85.

It is well established law in Washington that the prior convictions used to prove that a defendant is a persistent offender need not be charged in the information, submitted to the jury, or proved beyond a reasonable doubt. *State v. Smith*, 150 Wn.2d 135, 142, 75 P.3d 934 (2003); citing *State v. Manussier*, 129 Wn.2d 652, 682, 921 P.2d 473 (1996); *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001). The Washington Supreme Court declined to extend the holding of *Apprendi* to sentencing enhancements, which are based on the fact of prior convictions. *Smith*, *supra* at 142. Prior convictions are proved by certified copies of the judgment and sentence, and identity can be proved by fingerprints. *Id.* at 143. “While technically questions of fact, they are not the kind of facts for which a jury trial would add to the safeguards available to a defendant. *Id.*

Defendant objects that he is entitled to a jury finding beyond a reasonable doubt on the elements of the crime and also on the facts “labeled as sentencing factors” because they increase the maximum penalty for the crime. Defense argues that the Supreme Court has rejected arbitrary distinctions between elements of a crime and “sentencing factors. Defendant mistakenly relies on *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct 2531 (2004), which states, “*Other than the fact of a prior conviction, any fact which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury. Supra.* at 301, (emphasis added).

Blakely does not bar judges from considering any facts other than the elements of a crime when imposing a sentence. “Our precedents make clear, however, that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Id.* at 303. *Apprendi*, *Blakely* and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) were each overturned because the judge made a finding *other than that a defendant had a prior conviction* in order to impose a sentence beyond the statutory maximum. The facts the judges considered were mitigating or aggravating factors, which are the sole purview of the jury. *Smith*, *supra*, at 143

Defendant also relies on *Roswell* for his argument that “persistent offender” status is an element of the assault and attempted murder charges alleged, because it alters his sentence. *Roswell* is not analogous to this case because it involves a sex crime in which the offense level is dependant on the defendant’s prior convictions for sex offenses. “The legislature may define the elements of a crime when it enacts a criminal statute.” *State v. Roswell*, 165 Wn.2d 186, 196 P.3d 705 (2008). *Roswell* does not alter or overturn the holding in *Smith*, *Apprendi* or *Blakely*, and is not applicable in this case.

Citing due process concerns, defense seeks a rational basis for using prior convictions as elements in some crimes, and aggravators in others. As pointed out in *Langstead*, the rationale for treating persistent

offenders and first time offenders differently is that the first group is different, in that it has more felony convictions than the second group.

State v. Langstead, 155 Wn. App. 448, 456, 228 P. 3d 799 (2010). Since the two groups are not similarly situated, it is not a violation of the Due Process Clause to treat them differently.

The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.

Medina v. California, 505 U.S. 437, 443, 112 S. Ct. 2572, 120 L.Ed.2d 353 (1992).

The trial court properly found by preponderance that defendant had two prior most serious offenses. This finding was not a fact which must be submitted to a jury. The trial court properly imposed sentence on the defendant. Defendant's request that his sentence be vacated should be denied.

7. THE STATE CONCURS THAT THE JUDGMENT AND SENTENCE CONTAINS SCRIVENER'S ERRORS WHICH SHOULD BE CORRECTED.

The State concurs that the sentencing court erred in checking the second paragraph in section 4.5 of the judgment and sentence, as defendant was not convicted to any crime enumerated in RCW 9.94.030(31)(b)(i). CP 291-304, page 8, section 4.5. The State joins

defense in asking that this scrivener's error be corrected.

Additionally, section 2.3 of the judgment and sentence also lists counts 1 and 2 in the sentencing data. Those counts of assault in the second degree merge with the counts of attempted murder in counts 3 and 4. While the court properly did not impose sentence on counts 1 and 2, there should be no reference to them in the judgment and sentence. CP 291-304, page 5. *See* Appendix A.

Finally, section 4.5(a) in the judgment and sentence should specify that counts 3 and 4 run consecutively to each other. CP 291-304, page 5, section 4.5(b). Count 5, bribery, should run concurrently. CP 291-304, page 5.

The State joins defendant's request that the first error be corrected, at which time the errors in 2.3 and 4.5(a) could be corrected as well.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court of affirm the judgment below.

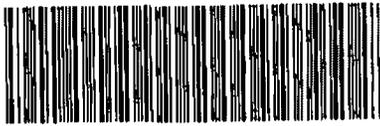
DATED: August 19, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

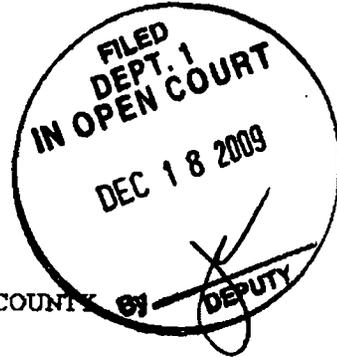

KAREN PLATT
Deputy Prosecuting Attorney
WSB # 17290

APPENDIX “A”

Judgment and Sentence



08-1-02399-2 33399623 JDSWCD 12-21-09



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 08-1-02399-2

vs.

LARRY DARNELL DUNOMES,

Defendant.

WARRANT OF COMMITMENT

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other Custody

DEC 21 2009

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

X 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 12/18/09

By direction of the Honorable
[Signature]
JUDGE
KEVIN STOCKS ORLANDO
CLERK
By: *[Signature]*
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

DEC 21 2009 *[Signature]*

FILED
DEPT. 1
IN OPEN COURT
DEC 18 2009
BY *[Signature]*
DEPUTY

STATE OF WASHINGTON

ss:

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this

_____ day of _____, _____.

KEVIN STOCK, Clerk

By: _____ Deputy

tm c

08-1-02399-2



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

DEC 21 2009

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-02399-2 NCO

vs

JUDGMENT AND SENTENCE (JS)

LARRY DARNELL DUNOMES

Defendant.

- Prison [] RCW 9.94A.712 Prison Confinement
- [] Jail One Year or Less
- [] First-Time Offender
- [] Special Sexual Offender Sentencing Alternative
- [] Special Drug Offender Sentencing Alternative
- [] Breaking The Cycle (BTC)
- [] Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

SID: WA16982686
DOB: 08/16/1964

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on December 2, 2009 by [] plea [X] jury-verdict [] bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	ASSAULT IN THE FIRST DEGREE (E23)	9A.36.011(1)(a) 9.94A.125/9.94A.602 9.94A.310/9.94A.510 9.94A.370/9.94A.530 9.94A.525(19) 9.94A.535(3)(t)	D	05/15/08	TPD 081360163

JUDGMENT AND SENTENCE (JS)
(Felony) (7/2007) Page ____ of ____

09-9-16070-9

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

08-1-02399-2

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
II	ASSAULT IN THE FIRST DEGREE (E23)	9A.36.011(1)(a) 9.94A.125/9.94A.602 9.94A.310/9.94A.510 9.94A.370/9.94A.530 9.94A.525(19) 9.94A.535(3)(l)	D	05/15/08	TPD 081360163
III	ATTEMPTED MURDER IN THE FIRST DEGREE (D1-A)	9A.32.030(1)(a) 9A.28.020 9.94A.125/9.94A.602 9.94A.310/9.94A.510 9.94A.370/9.94A.530	D	05/15/08	TPD 081360163
IV	ATTEMPTED MURDER IN THE FIRST DEGREE (D1-A)	9A.32.030(1)(a) 9A.28.020 9.94A.125/9.94A.602 9.94A.310/9.94A.510 9.94A.370/9.94A.530 9.94A.525(19) 9.94A.535(3)(l)	D	05/15/08	TPD 081360163
V	BRIBING A WITNESS (KK7)	9A.72.090(1)(a)(b)(c)(d) 9.94A.525(19)		10/29/08	TPD 081360163

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the SECOND AMENDED Information

A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s) I, II, III and IV. RCW 9.94A.602, 9.94A.533.

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	ADULT JUV	TYPE OF CRIME
1	AGG BATTERY	02/24/88	St. Gabriel, LA	02/24/88	A	NV
2	ARSON I	06/10/94	King Co., WA	03/18/94	A	V
3	UNLAW SOL TO DEL CON SUB	09/27/99	Pierce Co., WA	05/26/99	A	NV
4	ATT UPCS	06/04/02	Pierce Co., WA	03/11/02	A	NV
5	UPCS	08/29/03	King Co., WA	05/20/02	A	NV
6	UPCS	08/29/03	King Co., WA	05/06/03	A	NV
7	BAIL JUMPING	12/02/05	Pierce Co., WA	01/05/05	A	NV
8	COMM. CUSTODY		Pierce Co., WA			

The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

[X] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	9	XII	LIFE		LIFE	LIFE/ \$50,000
II	9	XII	LIFE		LIFE	LIFE/ \$50,000
III	9	XV	LIFE		LIFE	LIFE/ \$50,000
IV	9	XV	LIFE		LIFE	LIFE/ \$50,000
V	9	IV	63-84 MONTHS	NONE	63-84 MONTHS	10 YRS \$20,000

2.4 [] **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence:

[] within [] below the standard range for Count(s) _____.

[] above the standard range for Count(s) _____.

[] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

[] Aggravating factors were [] stipulated by the defendant, [] found by the court after the defendant waived jury trial, [] found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. [] Jury's special interrogatory is attached. The Prosecuting Attorney [] did [] did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defend' s past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

[] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

[] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows:

III. JUDGMENT

3.1 The defendant is GUILTY of the Courts and Charges listed in Paragraph 2.1.

3.2 The court DISMISSES Courts _____ The defendant is found NOT GUILTY of Courts

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN	\$ _____	Restitution to: _____
	\$ _____	Restitution to: _____
		(Name and Address--address may be withheld and provided confidentially to Clerk's Office).
PCV	\$ 500.00	Crime Victim assessment
DNA	\$ 100.00	DNA Database Fee
PUB	\$ 200.00 2800.00	Court-Appointed Attorney Fees and Defense Costs
FRC	\$ 200.00	Criminal Filing Fee
FCM	\$ _____	Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____

\$ _____ Other Costs for: _____

\$ 2800.00 TOTAL

The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for 1/8/10

RESTITUTION. Order Attached

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ _____ per month commencing _____ RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT
The defendant shall not have contact with JARNIS BAILEY OR SONYA BAILEY (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4a BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR: PERSISTENT OFFENDER. The defendant was found to be a Persistent Offender.

X The court finds Counts I, II, III, AND IV ARE a most serious offense and that the defendant has been convicted on at least two separate occasions of most serious offense felonies, at least one of which occurred before the commission of the other most serious offense for which the defendant was previously convicted.

X The court finds Counts I, II, III, IV is a crime listed in RCW 9.94A.030(31)(b)(i) (e.g., rape in the first degree, rape of a child in the first degree (when the offender was sixteen years of age or older when the offender committed the offense), child molestation in the first degree, rape in the second degree, rape of a child in the second degree (when the offender was eighteen years of age or older when the offender committed the offense) or indecent liberties by forcible compulsion, or any of the following offenses with a finding of sexual motivation: murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree or burglary in the first degree, or an attempt to commit any crime listed in RCW 9.94A.030(31)(b)(i)), and that the defendant has been convicted on at least one separate occasion, whether in this state or elsewhere, of a crime listed in RCW 9.94A.030(31)(b)(i) or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in RCW 9.94A.030(31)(b)(i).

Those prior convictions are included in the offender score as listed in Section 2.2 of this Judgment and Sentence. RCW 9.94A.030, RCW 9.94A.

(a) CONFINEMENT. RCW 9.94A.570 and RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

Life without the possibility of early release on Counts III AND IV EACH.

84 months on Count V
months on Count
months on Count

Actual number of months of total confinement ordered is: Life without the possibility of early release.

(b) CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

The sentence herein shall run consecutively to all felony sentences in other cause numbers that were imposed prior to the commission of the crime(s) being sentenced.

The sentence herein shall run concurrently with felony sentences in other cause numbers that were imposed subsequent to the commission of the crime(s) being sentenced unless otherwise set forth here.

[] The sentence herein shall run consecutively to the felony sentence in cause number(s)

The sentence herein shall run consecutively to all previously imposed misdemeanor sentences unless otherwise set forth here:

Confinement shall commence immediately unless otherwise set forth here:

4.6 OTHER:

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4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

_____ months on Count _____ months on Count _____

_____ months on Count _____ months on Count _____

_____ months on Count _____ months on Count _____

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

24 months on Count No III _____ months on Count No _____

24 months on Count No IV _____ months on Count No _____

_____ months on Count No _____ months on Count No _____

Sentence enhancements in Counts _ shall run

concurrent consecutive to each other.

Sentence enhancements in Counts _ shall be served

flat time subject to earned good time credit

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

_____ months on Count No _____ months on Count No _____

_____ months on Count No _____ months on Count No _____

_____ months on Count No _____ months on Count No _____

Sentence enhancements in Counts _ shall run

concurrent consecutive to each other.

Sentence enhancements in Counts _ shall be served

flat time subject to earned good time credit

Actual number of months of total confinement ordered is: LIFE WITHOUT PAROLE

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

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The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: _____

4.6 [] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

COMMUNITY CUSTODY is ordered as follows:

Count III for a range from: 18 to 36 Months;

Count IV for a range from: 18 to 36 Months;

Count _____ for a range from: _____ to _____ Months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offense not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers,		
vii) Offense for delivery of a controlled substance to a minor, or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

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While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC, and (8) for sex offenses, submit to electronic monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[] The defendant shall not consume any alcohol.

[] Defendant shall have no contact with: _____

[] Defendant shall remain [] within [] outside of a specified geographical boundary, to wit: _____

[] Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8))

[] The defendant shall participate in the following crime-related treatment or counseling services: _____

[] The defendant shall undergo an evaluation for treatment for [] domestic violence [] substance abuse [] mental health [] anger management and fully comply with all recommended treatment.

[] The defendant shall comply with the following crime-related prohibitions: _____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

[] For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

4.7 [] WORK ETHIC CAMP. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 RESTITUTION HEARING.

Defendant waives any right to be present at any restitution hearing (sign initials) LD

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5.5 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200.

N/A

5.8 [] The court finds that Court _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 **OTHER:** _____

DONE in Open Court and in the presence of the defendant this date: 12/18/09

JUDGE

Print name

[Signature]
KAMES ORLANDO

[Signature]
Deputy Prosecuting Attorney
Print name: MIKE SOMMERFELD
WSB # 24009

[Signature]
Attorney for Defendant
Print name: G. Helen Whitener
WSB # 28968

[Signature]
Defendant
Print name: Larry Dunomes

FILED
DEPT. 1
IN OPEN COURT
DEC 18 2009
X

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: [Signature]

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IDENTIFICATION OF DEFENDANT

SID No WA16982686
(If no SID take fingerprint card for State Patrol)

Date of Birth 08/16/1964

FBI No. 4618481A5

Local ID No. PCSO212962

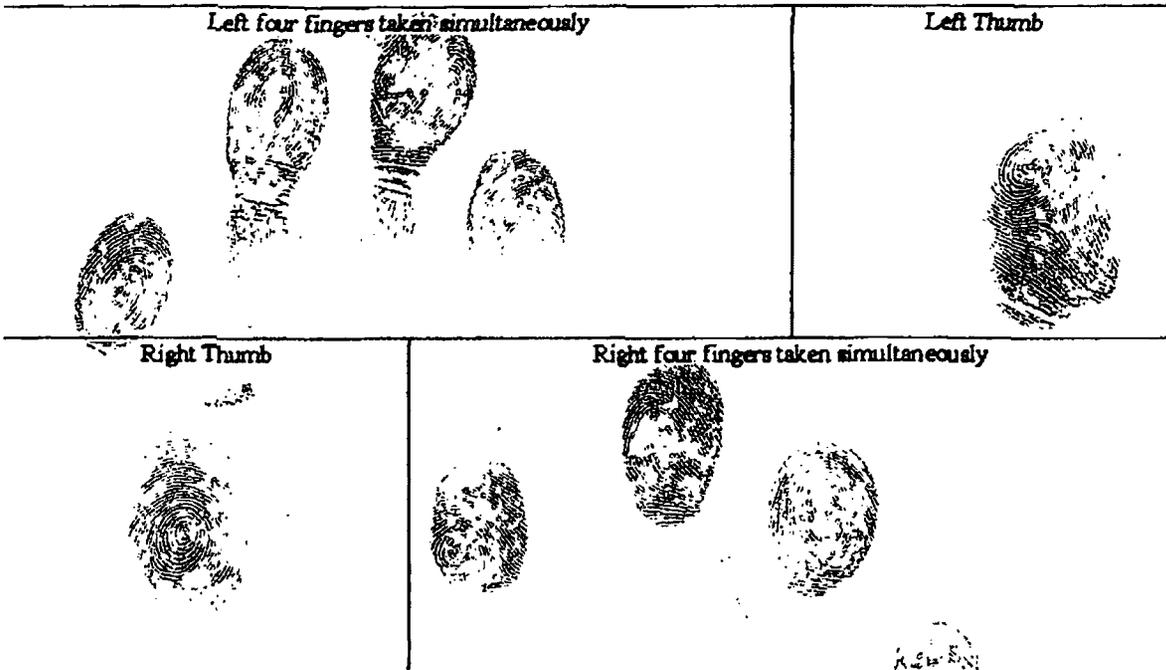
PCN No. 539458639

Other

Alias name, SSN, DOB: _____

Race:					Ethnicity:	Sex:
<input type="checkbox"/> Asian/Pacific Islander	<input checked="" type="checkbox"/>	Black/African-American	<input type="checkbox"/>	Caucasian	<input type="checkbox"/> Hispanic	<input checked="" type="checkbox"/> Male
<input type="checkbox"/> Native American	<input type="checkbox"/>	Other: :	<input checked="" type="checkbox"/>	Non-Hispanic	<input type="checkbox"/>	Female

FINGERPRINTS



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, Jane Cortanti Dated: 12.18.09

DEFENDANT'S SIGNATURE: refused to signed

DEFENDANT'S ADDRESS: Department of Corrections