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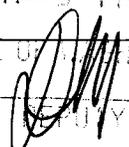
COURT OF APPEALS  
DIVISION II

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

STATE OF WASHINGTON  
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STATE OF WASHINGTON, RESPONDENT

v.

ROBERT WILSON, APPELLANT

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

No. 09-1-00181-4

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**BRIEF OF RESPONDENT**

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MARK LINDQUIST  
Prosecuting Attorney

By  
STEPHEN TRINEN  
Deputy Prosecuting Attorney  
WSB # 30925

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

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

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2. Whether the court properly joined and consolidated the counts where the defense did not move to sever and where the defendant suffered no prejudice from consolidation and certainly not enough to overcome the strong preference for judicial economy?
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5. Whether sufficient evidence supported the convictions?
6. Whether the appellant failed to establish that defense counsel was ineffective?
7. Whether there was no cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

On January 12, 2009, based on an incident that occurred on December 15, 2008, the State charged the defendant, Robert Sherman Wilson, with one count of robbery in the first degree as Count I. CP 1.

On March 6, 2009 the State filed a motion to join charges. CP 309-318.

On May 28, 2009, the defense filed a memorandum opposing the State's motion to join charges. CP 34-48. That same day, only the motion to join/consolidate was assigned to be heard by the Honorable Judge Ronald Culpepper. CP 51. The court granted the motion to consolidate cause numbers 09-1-00181-4 with 08-1-05561-4 and 09-1-00027-3, but allowed the defense to move for severance at time of trial if necessary. CP 49-50, 52-53; RP 05-28-09, p. 21, ln. 15-17.

On May 28, 2009 the court also allowed the State to file an Amended Information that added a firearm sentence enhancement to Count I and also added as Count II a charge of unlawful possession of a firearm in the first degree. CP 32-33; RP 05-28-09, p. 21, ln. 18 to p. 24, ln. 4.

On November 2, 2009 the State filed a Second Amended Information that charged the defendant based on incidents that occurred on three dates:

December 15, 2008

Count I, Robbery in the First Degree with a firearm sentence enhancement;

Count II, Unlawful Possession of a Firearm in the First Degree;

January 2, 2009

Count III, Unlawful Possession of a Stolen Vehicle;

Count IV, Attempting to Elude a Pursuing Police Vehicle;

November 18, 2008

Count V, Attempting to Elude a Pursuing Police Vehicle;

Count VI, Unlawful Possession of a Firearm in the First Degree;

Count VII, Unlawful Possession of a Controlled Substance;

Count VIII, Obstructing A Law Enforcement Officer (Conduct Only, Not False Statement).

CP 70-73.

The joined and consolidated case proceeded to trial before the Honorable Judge Ronald Culpepper. RP 05-28-09, p. 20, ln. 4 to p. 21, ln. 17; CP 52-53. The court also specified that it was granting leave for the defense to move to sever at the time of trial should that become necessary. RP 05-28-09, p. 21, ln. 15-17. The jury found the defendant guilty of all counts and also found the defendant was armed with a firearm when he committed the robbery in Count I. CP 198, 200, 202-208.

On December 30, 2009 the court sentenced the defendant to a total of 200 months incarceration (140 mos. on count I + 60 mos. FASE on Count I). CP 241-255.

A notice of appeal was timely filed on January 26, 2010. CP 280-295.

2. Facts

a. November 18, 2008

Officer Scott Engle is an officer with the City of Puyallup. 1 RP 41, ln. 14. On November 18 of 2008 around 12:00 a.m. Officer Engle was on duty alone, when he came across a vehicle that he thought was driving at a very high rate of speed. 1 RP 42, ln. 11 to p. 43, ln. 8. It was a 35 mph zone and Officer Engle was able to initially get a reading that the car was moving at 67 mph. 1 RP 43, ln. 9-18. At the time Officer Engle was traveling eastbound on 104<sup>th</sup> Street E. and the vehicle was coming directly at him in the oncoming lane. 1 RP 43, ln. 22-24. Officer Engle performed a U-turn and went and stopped the car. 1 RP 44, ln. 3-4.

Officer Engle contacted the vehicle at the driver's side window. 1 RP 44, ln. 17-18. The vehicle only contained the driver. 1 RP 44 ln. 19-21. Officer Engle explained why he stopped the driver and asked for his license and insurance. 1 RP 45, ln. 4-6. The driver handed Officer Engle a paper, temporary driver's license. 1 RP 45, ln. 8-9. However, Officer Engle was unable to view the license at that time because Officer Engle observed a handgun on the floorboard of the car. 1 RP 45, ln. 14-16.

The handgun was to the right of the driver in the lower left corner of the floorboard area. 1 RP 45, ln. 20-23. The entire gun was visible. 1 RP 45, ln. 24 to p. 46, ln. 1. It appeared to be a large, real silver handgun. 1 RP 46, ln. 4.

Upon seeing the gun, Officer Engle immediately began giving commands to the driver not to make any movements toward the gun, as well as drawing his handgun from its holster and backing away from the car. 1 RP 46, ln. 10-19. Officer Engle also notified dispatch that he had an armed driver. 1 RP 47, ln. 17-20. Notwithstanding Officer Engle's command, the driver leaned forward in the car. 1 RP 46, ln. 20-22.

The vehicle then immediately took off and sped away 1 RP 47, ln. 12. Officer Engle immediately returned to his patrol vehicle and began to chase the car. 1 RP 48, ln. 7-8. As the vehicle was fleeing from him, it was going between 90 and 95 mph. 1 RP 50, ln. 5-6.

After a while the vehicle was in a residential area and came to a stop, partially at the front of a driveway and partly on the road. 1 RP 52, ln. 1-6. The driver was running across the front yard around the house. 1 RP 53, ln. 3-4. Officer Engle got out of his patrol car and moved to his trunk area so he had cover. 1 RP 53, ln. 5-6. Several other patrol cars arrived to help within approximately two minutes. 1 RP 53, ln. 18-20.

Officer Engle called for a canine to track the suspect. 1 RP 54, ln. 6. He ran with the K-9 officer for quite some time, from a half hour to an hour, because the track was quite long. 1 RP 54, ln. 13-21. However, the dog was not able to find the suspect who was never apprehended. 1 RP 55, ln. 8-17.

At the time, Officer Engle was able to identify the suspect as Robert Wilson from a photo another officer had pulled up on the

computer. 1 RP 56, ln. 2-15. When the incident was over and Officer Engle was returning to the police station he got back in his patrol car and realized that the paper temporary driver's license had either been thrown or dropped on the floorboard of his patrol car in the chaos. 1 RP 57, ln. 1-5. Officer Engle looked at the driver's license and recognized the photo on it as the person who was driving the vehicle, Robert Wilson. 1 RP 57, ln. 6-23; Ex. 54. A records check on the vehicle did not show it was stolen. 1 RP 62, ln. 1.

Officer Ketter also located methamphetamine in the vehicle. 1 RP 62, ln. 5 to p. 63, ln. 23.

Officer Engle identified the defendant, Robert Wilson, as the driver of the vehicle who fled from him. 1 RP 63, ln. 24 to p. 64, ln. 3.

b. December 15, 2008

On December 15, 2008 at about Alysha Chandler was working alone at Java 2 Go. 1 RP 170, ln. 10 to p. 171, ln. 1. At about 3:20 p.m. a white man with a big nose who was taller and slender, and who she had never seen before as a customer came up to her window. Compare 1 RP 171, ln. 4-19 with 1 RP 176, ln. 9-20. The man put his whole upper body inside the window, pulled out a gun and said, "Open the register and give me the money." 1 RP 171, ln. 18-24. Ms. Chandler was scared and opened the register and gave him the money, which was about \$120. 1 RP 172, ln. 1-5.

The gun was blockish and silver and black. 1 RP 172, ln. 1-10.

He cocked the gun in front of her, had her lift up the drawer to see if there was any money under there, which there wasn't, and asked her for her purse, which she told him she didn't have. 1 RP 172, ln. 11-21. After that he told her that he wasn't there, he never did this and if she told, he would come and slice her up. 1 RP 172, ln. 21-24. Ms. Chandler believed him. 1 RP 172, ln. 25 to p. 173, ln. 1.

Ms. Chandler called the police right away and it took them about ten minutes to respond. 1 RP 173, ln. 4-7. Ms. Chandler told the jury that she identified a photo from a montage and that she was pretty sure the photo she picked was of the defendant. 1 RP 174, ln. 4-18. From the stand, Ms. Chandler also identified the defendant in court as the person who committed the robbery and that she had no doubts that he was the person. 1 RP 174, ln. 19 to p. 175, ln. 8.

On December 15, 2008 at about 3:28 p.m. Pierce County Sheriff's Deputy Filing was dispatched to go to a reported armed robbery at the Java 2 Go drive-up coffee stand. 1 RP 77, ln. 11-25. It took him about three minutes to arrive there. 1 RP 77, ln. 20-22. Deputy Filing contacted Alysha Chandler, a barista who was working at the time and was the victim of the armed robbery. 1 RP 78, ln. 9-12.

Ms. Chandler gave a description of the robber as a white male, cleanly shaven, approximately six feet tall, medium build, wearing a black stocking cap, white leather jacket with red sleeves, black gloves and dark pants. 1 RP 78, ln. 22-25. She also said he used a silver handgun that had

a hammer on it, because the suspect cocked it. 1 RP 79, ln. 4-13. She also indicated that the robber took money. 1 RP 79, ln. 14-15. Ms. Chandler saw the robber's face. 1 RP 79, ln.1-3.

Because the suspect fled the scene on foot, officers attempted to use a K-9 unit to locate the suspect, but were unsuccessful in finding him. 1 RP 79, ln. 20 to p. 80, ln. 3.

The firearm was visible in surveillance video from the coffee stand security system. 1 RP 80, ln. 11 to p. 81, ln. 8. On the video, Deputy Filing could see the firearm and could tell from the video that it was a real semi-automatic firearm. 1 RP 83, ln. 13 to p. 84, ln. 4.

Deputy Filing also obtained still photos from the security video and they were used to create fliers for Crime Stopper, which were then distributed around the Graham area. 1 RP 85, ln. 8. Photos from the video also revealed that the pockets on the suspect's pants had a white embroidered design on both back pockets that was kind of unique. 1 RP 87, ln. 15-18.

At some point Deputy Filing received information about the possible identity of the robber of Java 2 Go. 1 RP 87, ln. 24 to p. 88, ln. 1. He was given a possible name of the suspect, as well as a possible time and place where the suspect would be. 1 RP 88, ln. 2-20. On January 2, 2009 Deputy Filing along with five other units went to 14300 block of 50<sup>th</sup> Avenue E in Tacoma, just a few miles south of where Puyallup would start. 1 RP 87, ln. 24 to p. 89, ln. 18. Robert Wilson was the suspect they

were looking for. 1 RP 89, ln. 19-22. Officers were also aware of the November 18 incident in Puyallup and the fact that Robert Wilson was a suspect in that incident. 1 RP 89 to p. 23 to p. 90, ln. 9.

c. January 2, 2009

On January 2, 2009 officers positioned themselves discretely around the residence and one of the officers had a vantage point that afforded him a view of the target residence. 1 RP 91, ln. 1-9. At approximately 4:50 p.m. officers observed a dark-colored pickup truck pull into the driveway. 1 RP 91 n. 8-19. At that point Deputy Filing and another marked unit started heading toward the residence. 1 RP 91, ln. 17-22.

Deputy Filing was maybe two houses away to the north of the house where the suspect had arrived when the truck pulled back out of the driveway. 1 RP 91, ln. 24 to p. 92, ln. 2. Deputy Filing wasn't going fast, and the pickup was not going fast either. 1 RP 93 ln. 21-23. The two vehicles were driving right toward each other, so Deputy Filing turned on his overhead lights and his wigwags. 1 RP 93, ln. 23-24.

The suspect vehicle was in the proper lane of travel and Deputy Filing was not, he was in the opposite lane of travel. 1 RP 94, ln. 2-3. Rather than stopping, the suspect vehicle tried to go into the opposite lane of travel and get around Deputy Filing real quick, however Deputy Filing was able to turn and cut the truck off. 1 RP 94, ln. 2-6. The suspect vehicle then backed up and got parallel with the road, so that Deputy

Filing thought he was going to turn around and try to get away from him. 1 RP 94, ln. 7-9. Deputy Filing didn't let that happen and as he approached the pickup truck he rammed it into a ditch that's along the roadway and pinned the vehicle into the ditch. 1 RP 94, ln. 9-12. Deputy Filing did that to keep the vehicle from fleeing and endangering lives by having a big pursuit, and instead stopped it right there. 1 RP 94, ln. 13-14.

As all of this was happening, Deputy Filing had all his lights going so there was a massive amount of light and he could see inside the truck and see that the driver matched the description of the suspect, Robert Wilson. 1 RP 96, ln. 1-6.

The driver got out of the vehicle and began running eastbound to a residential yard and hopped a couple of fences. 1 RP 98, ln. 2-6. Deputy Filing called for Wilson to stop and identified himself as police, but Wilson did not stop. 1 RP 99, ln. 3-4. Although Wilson was running fast, Deputy Filing was able to catch up with him and ultimately caught Wilson. 1 RP 98, ln. 7-8; p. 99, ln. 22 to p. 100, ln. 2; p. 100, ln. 22 to p. 101, ln. 5.

After he caught Wilson, Deputy Filing noticed that Wilson's pants had a white embroidered design on the flaps of the back pockets. 1 RP 101, ln. 10 to p. 102, ln. 25. Additionally, a records check revealed that the truck Wilson was driving belonged to one Jose Garcia-Perez and had been reported stolen. 1 RP 106, ln. 6 to p. 108, ln. 8. In the ignition of the vehicle was a shaved key for a different make of vehicle. 1 RP 108, ln. 22

to p. 109, ln. 19. Inside the vehicle Deputy Filing found several other shaved keys. 1 RP 111, ln. 1-15. Among other items found in the vehicle were a white crystal-like substance, several pills, and a small baggie containing a white powdery substance. 1 RP 115, ln. 10-23; Ex. 45A, 45B, 45C, I RP 153-54.

Deputy Filing also prepared a photo montage including a photo of Wilson that was presented to the robbery victim Alysha Chandler. 1 RP 119, ln. 20 to p. 122, ln. 4. Ms. Chandler quickly and positively identified the defendant Robert Wilson from the montage. 1 RP 122, ln. 3-19.

C. ARGUMENT.

1. MOST OF THE ARGUMENT SECTIONS OF THE BRIEF OF APPELLANT FAIL TO PROVIDE PROPER CITATION TO THE RELEVANT PORTIONS OF THE RECORD AND SHOULD NOT BE CONSIDERED.

Per RAP 10.3(a)(6) the argument in a brief must be supported by citation to the relevant parts of the record. Where a brief fails to do so, the court should not consider the issue on appeal. *Farmer v. Davis*, No. , Slip. Op. at 6 (2010) (citing *State v. Tinker*, 155 Wn.2d 219, 224, 18 P.3d 885 (2005)).

Most of the argument sections of the Brief of Appellant fail to contain citations to the relevant portions of the record. Instead the appellant apparently seeks to rely on the statement of facts for the relevant

citations to the record. However, neither the court nor the State should have to search the statement of facts or guess as to which citations in the statement of facts are intended to support the argument sections in the brief. Accordingly, while the State has done its best to identify those portions of the record the defense relies upon to support its claims, the court should decline to consider the arguments because they are not properly supported by citations to the relevant portions of the record.

## 2. THE COURT PROPERLY JOINED THE COUNTS.

Joinder allows two or more offenses to be joined in one charging document with each offense stated in a separate count, when the offenses:

(1) are of the same or similar character, even if not part of a single scheme or plan; or (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

CrR 4.3(a). Because the rule is written in the disjunctive, if one of the two prongs of the test is met, the court need not inquire further. *State v. Williams*, 156 Wn. App. 482, 400, 234 P.3d 1174 (2010); *State v. Bryant*, 89 Wn. App. 857, 866, 950 P.2d 1004 (1998).

This rule is construed expansively to promote the public policy of conserving judicial and prosecution resources. *State v. Hentz*, 32 Wn. App. 186, 189, 647 P.2d 39 (1982), *rev'd in part on other grounds by*, 99 Wn.2d 538, 663 P.2d 476 (1983). However, joinder may in some

circumstances result in prejudice, so the court must consider a number of factors prior to deciding whether to grant joinder:

(1) the strength of the evidence on each count; (2) the clarity of the defenses on each count; (3) the court's instructions on considering each count separately; and (4) the cross admissibility of the evidence of each count.

*Williams*, 156 Wn. App. at 500-01; *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). The question of whether two offenses are properly joined is a question of law reviewed de novo. *Bryant*, 89 Wn. App. at 864, 950 P.2d 1004.

Once offenses are properly joined, they are consolidated for trial unless the court severs them. See CrR 4.3.1; CrR 4.4; *Williams*, 156 Wn. App. at 501. A defendant may ask the court to sever an offense if doing so will promote a fair trial. CrR 4.4; *Williams*, 156 Wn. App. at 501; *Bryant*, 89 Wn. App. at 864. However, a defendant who seeks to sever offenses has the burden of showing that joinder is so prejudicial that it outweighs the need for judicial economy. *Williams*, 156 Wn.2d 500; *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). Thus, to prevail on a claim that a trial court's decision not to grant severance was error, the defense has the heavy burden of demonstrating that the trial court's action in was an abuse of discretion. *Bryant*, 89 Wn. App. at 864; *State v. Kalakosky*, 121 Wn.2d 525, 536, 852 P.2d 1064 (1993); *State v. Hentz*, 32

Wn. App. 186, 189, 647 P.2d 39 (1982), *reversed on other grounds by State v. Hentz*, 99 Wn.2d 538, 663 P.2d 476 (1983).

Moreover, where a trial court denies a pre-trial motion to sever the offenses, that issue is waived and cannot be raised on appeal if it was not renewed before the close of trial. *Bryant*, 89 Wn. App. at 864; CrR 4.4(a)(2).

- a. Here, The Defense Challenge To The Joinder Is Improper Where The Trial Court Granted Leave For The Defense To Move To Sever At The Time Of Trial If Necessary And The Defense Brought No Such Motion.

The defense never brought a motion to sever the charges prior to the conclusion of trial. *See, e.g.*, I RP 8, ln. 24 to p. 9, ln. 3. This is despite the fact that when it initially granted the motion for joinder, the trial court specifically stated that it was giving the defense leave to move to sever at the time of trial should that become necessary. RP 05-28-09, p. 21, ln. 16-17.

Because the defense did not bring a motion to sever the offenses at trial, that issue is waived. *See Russell*, 125 Wn.2d at 63 (holding that in evaluating whether joinder was proper it need not consider the strength of the State's evidence as to count 2 because the defense never sought to sever count 2 from count 3); *Bryant*, 89 Wn. App. at 864; CrR 4.4(a)(2).

b. The Court's Grant Of The State's Motion  
For Joinder Was Proper On The Merits.

i. **Joinder Was Proper**

Because joinder may in some circumstances result in prejudice, the court must consider a number of factors prior to deciding whether to grant joinder:

(1) the strength of the evidence on each count; (2) the clarity of the defenses on each count; (3) the court's instructions on considering each count separately; and (4) the cross admissibility of the evidence of each count.

*Williams*, 156 Wn. App. at 500-01; *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). The State's memorandum to the trial court correctly identified this standard to the court. CP 15.

The defense claim on this issue is that the evidence was not cross-admissible, and that therefore joinder was reversible error. Br. App. 20ff.

As a preliminary matter, the defense claim on this issue fails for a simple reason. The issue of cross-admissibility is but one of four factors for the trial court to consider. Assuming solely for the purposes of argument that the defense were completely correct in its claims on this issue, it has at most only shown that one factor should have been interpreted differently. The defense has failed to make any showing that a change in that one factor alone is sufficient to overcome the court's determination on the other factors. For this reason the defense has failed to meet their burden and the claim fails at the outset. However, the

defense claim that the evidence was not cross-admissible is also without merit.

**ii. The Strength of the Evidence on Each Count**

The first factor regarding the strength of the evidence on each count weighs in the State's favor.

**α. The Counts Charged For The Incident That Occurred On November 18, 2008**

As to the charges based on the November 18 incident there is no question that someone eluded from Officer Engle. The evidence is strong that the person who eluded was the defendant, Robert Wilson. When stopped the driver presented Officer Engle with a temporary driver's license for the defendant, and Officer Engle recognized the person on the license as the driver of the vehicle. Officer Engle identified the defendant in court as the person who drove the vehicle. As a result there was strong evidence that the defendant eluded a pursuing police vehicle on November 18, 2008. Officers searched the vehicle after the driver fled it and found methamphetamine. The evidence was thus strong that the defendant at least had constructive possession of the methamphetamine where there was no passenger in the car at the time Officer Engle stopped it. The evidence is also strong that the driver fled the vehicle. Indeed, the

evidence on these issues was so strong that the defense did not even really dispute it in closing.

The evidence was less strong regarding whether the defendant possessed a firearm, but only a little so. Officer Engle said he observed a firearm in the vehicle, which caused him to back away from the vehicle and, draw his own weapon and call for backup. It was upon Officer Engle's observation of the firearm that the defendant accelerated away from the scene. When he abandoned the vehicle, the defendant took the gun with him, and in a subsequent search of the vehicle officers found ammunition. The only issue as to the strength of even this evidence was whether or not the gun Officer Engle observed was in fact a real gun or a fake gun. However, there was sufficient circumstantial evidence for the jury to infer that the gun was in fact real. This is especially so where the gun in the eluding appeared very similar to the gun in the robbery and Deputy Filing testified that the gun in the robbery was in fact a real gun.

For all these reasons, the totality of the evidence of the crimes charged based on the incident that occurred on November 18, 2008 was strong.

β. The Evidence Was Strong  
With Regard To The Counts  
Charged For The Incident  
That Occurred On December  
15, 2008.

The evidence was strong that a robbery occurred at the Java 2 Go. The robbery was recorded by surveillance cameras. The robber displayed a firearm, and based on the video and the fact that the defendant cocked the slide, Deputy Filing, an expert on guns having among other things been trained as a sniper with the Army Rangers, testified that it was in fact a real gun. There was strong evidence that a robbery occurred and that the robber was armed with a firearm.

Thus, the only issue as to the strength of the evidence of these crimes was the identity of the robber. However, the victim identified Wilson as the robber, both from a photo montage and in court. That alone was strong evidence that the defendant was in fact the robber. Even so, the identification was not unimpeachable, as the defense attempted to argue that the identification was not reliable because either it didn't comply with federal forensic standards, it was suggestive, or that the victim's identification of the defendant was not accurate. The evidence of the similarity of the pants the defendant wore at the time of arrest to those of the robber further reinforced the identification of the defendant as the robber. Additionally, the fact that the defendant was observed by Officer

Engle with a gun that was similar to the one used in the robbery was another fact that further reinforced the identification of the defendant as the robber as one that was correct.

There was strong evidence that the defendant was the robber. That evidence was strong based upon the victim's identification, however it was further reinforced by the evidence from the two other incidents.

γ. The Evidence Was Strong  
With Regard To The Counts  
Charged For The Incident  
That Occurred On January 2,  
2009.

Of all the counts, those based on the incident that occurred on January 2, 2009 are the strongest. Deputy Filing testified that the defendant did not stop when he turned on his lights and that the defendant attempted to go around his car, then backed up and attempted to turn around when Deputy Filing blocked his way, so that Deputy Filing felt it necessary to push the defendant into a ditch to avoid a high speed chase. Then the defendant ran from the vehicle and did not stop even when Deputy Filing identified himself as police and told him to do so. These facts constitute strong evidence that the defendant was in fact eluding the officers. Nor did the defense dispute that the vehicle the defendant was driving when officers apprehended him had been reported stolen. Accordingly, the evidence of these charges was strong as well.

The State's evidence as to each of the crimes was strong, however, it became even stronger together because of the way the evidence from each of the incidents reinforced each other. Accordingly, this factor strongly favors the grant of joinder.

**iii. The clarity of the defenses as to each incident**

The likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical in each charge. *Russell*, 125 Wn.2d at 64-65. Here, as in *Russell*, the primary defense to all the charges was one of general denial. The defense really didn't have a strong position with regard to the incidents that occurred on November 18 and January 2 and did not put on much of a defense other than general denial, although it did more specifically argue that the State had failed to prove that the gun Officer Engle observed was in fact a real gun. With regard to the robbery that occurred on December 15, 2008, the defense was again general denial, based on a more specific claim of misidentification.

There were no incompatibilities in the defenses as to the crimes that arose from each of the three incidents. Accordingly, the second factor also weighs in favor of the grant of joinder.

**iv. The Court Properly Instructed  
The Jury To Consider Each Count  
Separately.**

The court properly instructed the jury that:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 166 (Instruction No. 4). This instruction is a proper statement of the law. Nor did the defense ever propose any other instruction. II RP 238, ln. 14ff. Accordingly, this factor also weighs in favor of joinder. *See State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245 (2010).

**v. The Cross Admissibility Of The  
Evidence Of Each Count.**

As a matter of law this factor is the weakest for defendants. That is because the trial court need not sever counts just because the evidence is not cross admissible. *McDaniel*, 155 Wn. App. 860 (citing *State v. Markle*, 118 Wn.2d 424, 439, 823 P.2d 1101(1992)).

Here the evidence from the three incidents is cross-admissible for two reasons. First and foremost because it reinforces that the identification of Wilson as the robber was correct. Secondly, the January incident included flight that serves as evidence of consciousness of guilt as to the robbery. The November eluding incident also serves as

evidence of consciousness of guilt as to the charge of unlawful possession of a firearm, which charge was also at issue in the robbery.

Officer Engel testified that he believed that the gun he observed in Wilson's car in November was a revolver. Deputy Filing testified that the gun in the robbery was a semi-automatic. However, it was the State's theory of the case that the guns observed in each incident were strikingly similar in appearance. Additionally, when Officer Engle saw the gun, he only got a brief look at it, because as soon as he recognized that it was a gun he rapidly backed away from Wilson's vehicle and drew his own gun, at which point Wilson took off. However, when the car was recovered, the ammunition found in the vehicle was consistent with that used in a semi-automatic, not a revolver. Additionally, Officer Engle was so distracted by the observation of the gun and the high speed chase, that until he found it in his vehicle later, he forgot that he had Wilson's temporary driver's license. From that it is reasonable to infer that his recollection of whether the gun was a revolver or semiautomatic was not the most reliable.

For these reasons, the evidence would have been cross admissible even if the separate offenses had not been joined and consolidated at trial.

In *State v. McDaniel*, the court held that even though juvenile convictions were admitted in that case notwithstanding that fact that such

convictions are presumed inadmissible and very prejudicial, even this fourth factor of cross admissibility did not weigh in favor of severance because little use or mention was made of the prior juvenile convictions. *McDaniel*, 155 Wn. App. at 861. The court in *McDaniel* then went on to hold that severance was not necessary in that case.

The holding in *McDaniel* is particularly instructive here because it is the primary case the defense relies upon for the claim that consolidation was error. Br. App. 22 (citing *McDaniel*, 155 Wn. App. at 854). The State recognizes that the defense relies on *McDaniel* for a different proposition, namely the degree to which the evidence of flight is probative. Br. App. 22 (citing *McDaniel*, 155 Wn. App. at 854). The test applied in *McDaniel* is that,

[T]he probative value of evidence of flight “as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant’s behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

*McDaniel*, 155 Wn. App. at 854 (quoting *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001) (quoting *United States v. Myers*, 550 F.2d 1036, 1049 (5<sup>th</sup> Cir. 1977))).

Interestingly, *Myers* involved a situation where a suspect in a robbery fled from law enforcement on two occasions, although under facts completely unlike this case. The first was when a plainclothes FBI agent who did not identify himself in any way ran toward the suspect, who fled into a mall and disappeared. *Myers*, 550 F.2d at 1048. The second was when an FBI agent in an unmarked car suddenly crossed over into their lane of travel and drove straight at the suspects forcing a collision which the suspects on their motorcycle attempted to avoid. *Myers*, 550 F.2d at 1048-49. Immediately thereafter another officer in an unmarked car and not wearing a uniform, pulled up alongside the motorcycle. *Myers*, 55 F.2d at 1048-49. At that point the two suspects each moved about three feet away from the motorcycle in opposite directions, and the officer testified that he believed the two were beginning to flee, despite contradictory testimony on the issue from an officer at a separate trial. *Myers*, 55 F.2d at 1048-49.

However, the defense reliance on *McDaniel* for this proposition is misplaced for the following reason. *McDaniel* involved a situation where the defendant was a passenger in a car that fled from police, not the driver. Which is why the court in *McDaniel* went on to say, “Fundamentally, an inference of flight requires evidence of volitional behavior by the defendant, not another person.” *McDaniel*, 155 Wn. App. at 854

However, the defendant's reliance on *McDaniel* is misplaced for an even more basic reason. Evidence of consciousness of guilt is only one, and indeed the lesser, of two reasons for the admissibility of the evidence from the other incidents. The other reason, as argued above was that both incidents, when combined with the facts of the robbery, provided relevant evidence reinforcing the identification of Wilson as the person who committed the robbery. Indeed, this is why the evidence from the November and January incidents would have been cross admissible in any case.

**vi. Nothing In The Record Supports The Defense Claim That The Prosecutor Intentionally Misrepresented The Facts To The Court At The Hearing On The Joinder Motion.**

The defense also claims that,

“[i]n the instant case, the prosecutor improperly urged the court to find that the separate cases would be cross-admissible. For the reasons set forth above, the prosecutor argued facts that she knew were not true in order to win the motion for consolidation of cases.

Br. App. 20.

In support of this claim the defense draws upon picayune distinctions between the summary of facts presented at the motion hearing on joinder and the facts as elicited at trial.

That claim is even less tenable in light of the fact that defense counsel was present at the hearing, argued against joinder, and therefore had an opportunity to dispute any of the State's factual claims that the defense disagreed with. The idea that any factual variances between the motion hearing and trial were the result of an intentional attempt to mislead the trial court is wholly unsupported by the record and constitutes a form of unwarranted speculation which it would be improper for this court to engage in.

The defendant is not entitled to raise a challenge to joinder where the defense made no motion to sever counts prior to the conclusion of trial. Moreover, when all four factors regarding joinder are considered together, every one of them favors the offenses in this case being joined for trial. Even if the court were to hold in favor of the defense argument on cross-admissibility, the remaining three factors would still weigh in favor of the strong preference for judicial economy and thus outweigh the defense challenge as to cross-admissibility. *See, e.g. State v. Vermillion*, 66 Wn. App. 332, 832 P.2d 95 (1992).

The trial court properly joined and consolidated the offenses for trial, and that joinder did not unlawfully prejudice the defendant. Accordingly, the defendant's claim on this issue should be denied as without merit.

3. THE DEFENDANT WAS NOT DEPRIVED OF THE OPPORTUNITY TO CONFRONT A WITNESS AGAINST HIM.

This argument is not supported by relevant citations to the record and should therefore not be considered per RAP 10.3(a)(6).

This claim is without merit for two reasons. First, it was waived where the defense did not object to the testimony regarding the informant's claims that the person in the flyer was Wilson and did not ask to confront the informant. Second, it is without merit because the information admitted at trial was non-testimonial where it was not hearsay.

a. The Defendant Waived The Right To Confront The Witness By Failing To Object To The Evidence Derived From The Informant And By Not Asking To Confront The Informant.

Even where a violation to the confrontation clause occurs, the right to confrontation may be waived, including by failure to object to the purportedly offending evidence. *Melendez-Diaz v. Massachusetts*, 57 U.S. ---, 129 S. Ct. 2527, 2534 n. 3, 174 L. Ed. 2d 314 (2009).

Here, the defense did not object to the State's examination of Deputy Filing regarding the fact that they were looking for Wilson based on information they obtained from an informant. I RP 87, ln. 21 to p. 89, ln. 15. Moreover, on the cross-examination of Deputy Filing the defense itself elicited testimony regarding the informant's statements identifying

the defendant. *See* 1 RP 136, ln. 3-5ff. This action by defense makes perfect sense.

The defense to the robbery charge was one of general denial with a more specific claim that the defendant was only a suspect in the crime because of a misidentification. In order to present that defense to the jury in a convincing way, it greatly strengthens the defense argument to show where the process of identifying the defendant went wrong and the misidentification came about.

Nor is it surprising that the defense did not seek to confront the informant. That would have involved examining a witness who had been in police custody, and developing in front of the jury how that person knew and was able to recognize Wilson from the photo. The informant was sufficiently connected to Wilson to put officers into contact with a person who could identify the date and time the informant would appear at the residence where he was ultimately contacted and arrested. Examining the informant in order to impeach her identification of Wilson was a losing proposition from the perspective of the defense where the defendant had in any case been identified as the robber by the victim.

- b. The Evidence The State Elicited Regarding The Informant's Recognition Of Wilson From The Flyer Was Both Non-Testimonial And Not Hearsay.

The evidence the State elicited was not hearsay and was non-testimonial.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006).

Here, the state did not elicit any statements offered by the informant in its direct examination. Rather, the State avoided eliciting any statements by the informant and instead focused generally on the fact that Deputy Filing obtained information on a possible suspect in the Java 2 Go robbery and with that name was able to determine a time and place where that witness could be located. I RP 87, ln. 21 to p. 89, ln. 15. The State elicited that the name of the suspect they were looking for was Robert Wilson. I RP 89, ln. 19-22. None of the testimony elicited statements by the informant. Moreover, none of the information was elicited to prove the truth of the matter asserted in any of the informant's statements. Rather, the information was carefully elicited to avoid the informant's statements and to instead only show generally the reason why the officers sought Wilson when and where they did on January 2, 2009.

For evidence of the *Crawford* violation, the defense cites to testimony the State elicited from Deputy Filing on re-direct examination. Br. App. 10 (citing RP 147, 148). However, even there it is clear the State was not eliciting the informant's statements from Deputy Filing, but rather, after the defense admitted the informant's statements in cross, the State was clarifying that Deputy Filing did not initiate the discussion of Wilson with the informant, made no promises to the informant, and that

any compensation the informant received came only from crime stoppers. I RP 147, ln. 16 to p. 148, ln. 24. Indeed, Deputy Filing testified that all the informant said was that it looked like Wilson, and that the only thing the information did for him was make Wilson a person of interest, and help him locate another person who knew where Wilson was going to be at a particular time and place. I RP 148, ln. 14-23. Nor did the defense object to any of that testimony by Deputy Filing.

The defendant's confrontation right was not violated because the State did not seek to elicit any statements from the informant, and to the extent any information from the informant was admitted, it was not offered to prove the truth of the matter asserted in the informant's statements, but rather to show why the officers contacted Wilson when and where they did on January 2.

The defendant's right to confront witnesses was not violated where the defendant waived any such right by failing to object to the testimony regarding the information obtained from the informant. The objection is particularly waived where it was defense counsel who elicited the statements of the informant on cross examination. Additionally, the confrontation clause was not implicated because no hearsay was admitted by the State where it did not elicit statements by the informant from Deputy Filing, and where any information that was elicited was not offered to prove the truth of the matter asserted.

4. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

The defense claims that the prosecutor committed misconduct for four reasons, because: First, she elicited prejudicial testimony about car thief profiles; Second elicited testimony that possession of shaved keys is a crime and then so instructed the jury in closing; Third, by withholding the identity of the informant, but argued the credibility of that witness; and Fourth, by shifting the burden in closing argument. All four claims are without merit.

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).

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)).

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

a. The Prosecutor Did Not Improperly Admit Profile Evidence About Car Thieves.

The defense claims that the State improperly admitted profile evidence regarding car thieves, and that it was not relevant to the defendant. Br. App. 32. Again, this argument is not supported by relevant citations to the record and should therefore not be considered per RAP 10.3(a)(6).

The prosecutor elicited evidence from Deputy Filing regarding how shaved keys are used in car thefts. I RP 108, ln. 22 to p. 111, ln. 25. That evidence was not profile evidence. Rather, it was evidence regarding how shaved keys are commonly employed to steal cars. That evidence was relevant to show the significance of the shaved keys found in the car. That significance was that it was circumstantial evidence that the defendant knew the car was stolen. See III RP 337, ln. 7 to p. 338, ln. 10.

In that regard, of particular significance was the fact that the defendant had multiple shaved keys, which was consistent with a defendant trying several different keys before finding one that fits the ignition. Such evidence is relevant and highly probative of the defendant's knowledge that the vehicle was stolen.

Here, the defense did not object to the testimony. Nor was the testimony so flagrant and ill intentioned that no instruction could have cured the alleged misconduct. For these reasons, the defendant fails to meet his burden on appeal and this claim should be denied as without merit.

b. The Prosecutor Did Not Commit Misconduct When She Elicited Testimony Regarding The Fact That Possession Of Shaved Keys Is A Crime.

The defense claims that the State elicited improper testimony from Deputy Filing that it is unlawful to possess shaved keys, and then in closing improperly instructed the jury based upon that testimony. Br. App. 33. Again, this argument is not supported by relevant citations to the record and should therefore not be considered per RAP 10.3(a)(6).

At trial the prosecutor had the following exchange with Deputy Filing:

Q. Is it against the law even to possess these types of tools?

A. Yes, it is.

3 RP 110, ln. 18-20.

This testimony was relevant to the fact that Wilson did not lawfully possess the shaved keys, and therefore, there was not a valid explanation for his possession of them. Moreover in closing, while arguing the keys, the State did not argue it was illegal to possess the keys. *See* III RP 337, ln. 7 to p. 338, ln. 10. The prosecutor was not improperly “instructing the jury” as the defense claims, but rather merely arguing circumstantial inferences of the defendant’s intent. Both the testimony and the argument were relevant to the issue of whether the defendant knew the vehicle was stolen, and were therefore proper.

Here, the defense did not object to the testimony. Nor was the testimony or argument so flagrant and ill intentioned that no instruction could have cured the alleged misconduct. For these reasons, the defendant fails to meet his burden on appeal and this claim should be denied as without merit.

c. The Prosecutor Did Not Commit Misconduct  
By Her Argument Regarding The Informant.

The defense claims that the prosecutor committed misconduct by withholding the identity of the informant, but then proceeded to argue the

credibility of that informant. Again, this argument is not supported by relevant citations to the record and should therefore not be considered per RAP 10.3(a)(6).

As explained in section 3 above, the state did not elicit testimonial hearsay of the informant, nor was the defendant's right to confront the witnesses against him violated. It was the defense that elicited statements from the informant in cross examination. Accordingly, the State had no obligation to disclose the identity of the informant.

Nor was it improper for the State to make use of the informant's statement that the defense admitted on cross examination. Both sides are entitled to the benefit of all the evidence put before the jury. The credibility of the informant was not at issue, either in the case or in the State's closing.

Rather, what was significant is that the informant spontaneously advised Deputy Filing that the person in the photo on the flier looked like Wilson. That fact spoke for itself and the credibility of the informant didn't really matter, especially where the photo and the defendant were before the jurors who could make any determination of similarity for themselves. However, the fact of the informant's spontaneous recognition of Wilson was relevant to the fact that Ms. Chandler's identification of Wilson as the robber was credible.

Here, the defense did not object to the testimony. Nor was the testimony or argument so flagrant and ill intentioned that no instruction could have cured the alleged misconduct. For these reasons, the defendant fails to meet his burden on appeal and this claim should be denied as without merit.

d. The Prosecutor Did Not Commit Misconduct In Closing.

On a claim of prosecutorial misconduct the defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). 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). Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury's verdict. *Finch*, 137 Wn.2d 792 at 839. 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. The trial

court is best suited to evaluate the prejudice of the statement. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998) “remarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

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

Here, not only does the defense fail to cite to the relevant portion of the record in violation of RAP 10.3(a)(6), the defendant fails to identify what the prosecutor said that was allegedly misconduct, or why it was misconduct. Instead, on this issue the Brief of Appellant only generally refers to prosecutorial misconduct in closing. For this reason, the court should refuse to consider the issue.

In the fact section of the Brief of Appellant, the defense takes issues with several aspects of the State’s closing. For that reason, it is unclear what specific issue they are objecting to by this argument.

The defense has failed to meet its burden on this issue.

Accordingly, the defendant's claim on this issue should be denied.

5. SUFFICIENT EVIDENCE SUPPORTED THE  
CONVICTION.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[...]great deference [. . .] is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

Here, the defense claims the evidence was insufficient to support Count I, robbery in the first degree (12-15-08); Count II, possession of a firearm in the first degree (12-15-08); Count VI, unlawful possession of a firearm in the first degree (11-18-08). Br. App. 40-44.

a. Sufficient Evidence Supported The Conviction For Robbery In The First Degree.

The defense claims that the evidence was insufficient to convict the defendant of robbery because, according to the defense, Ms. Chandler, the victim of the robbery, could not identify the defendant as the robber. Br. App. 42-43. This claim is frivolous. From the stand, Ms. Chandler identified the defendant in court as the person who committed the robbery and that she had no doubts that he was the person. 1 RP 174, ln. 19 to p. 175, ln. 8.

All the arguments of the defense go to the weight to be accorded this identification. That is a question for the jury, which made its determination when it found the defendant guilty. Even if this court were persuaded by the defense arguments, it may not now properly substitute its judgment for that of the jury. Accordingly, this claim should be denied as without merit.

b. Sufficient Evidence Supported The Conviction For Unlawful Possession Of A Firearm In The First Degree (12-15-08).

The defense claims that the state failed to put forth evidence that the gun used in the robbery was a real gun. Br. App. 43ff. Again, this claim is frivolous.

To prove a claim of unlawful possession of a firearm, the State need only prove that the gun at issue is a gun in fact, rather than a “toy gun.” See *State v. Raleigh*, 157 Wn. App. 728, 733-36, 238 P.3d 1211 (2010). The State need not prove that the gun was operable. *Raleigh*, 157 Wn. App. at 734.

Deputy Filing, a former Army Ranger with sniper training, who was an expert on firearms, testified that he could see the firearm on the video and could tell from the video that it was a real semi-automatic firearm. 1 RP 83, ln. 13 to p. 84, ln. 4.

Again, the defense arguments go to the weight to be given to Deputy Filing’s testimony. Based on his testimony, a jury could find the defendant guilty. Accordingly, this claim is without merit and should be denied.

c. Sufficient Evidence Supported The Conviction For Unlawful Possession Of A Firearm In The First Degree (11-18-08).

The defense claims that there was not sufficient evidence to prove that the gun was a real gun. Br. App. at 40-41. The State’s burden of proof as to this issue is discussed in the preceding section.

Officer Engle initially testified that it appeared to be a large, real silver handgun. 1 RP 46, ln. 4. Officer did admit on cross examination that he never tested that gun, never fired it and never determined if in fact it was a real gun or not. 1 RP 64, l n. 22 to p. 65, ln. 6; p. 73, ln. 14-16.

However, when Officer Engle's testimony is combined with the fact that Wilson removed the gun from the car when fleeing, and that ammunition was found in the car, the jury could infer that the gun in fact a gun. Such an inference would only be further reinforced to the extent that the jury was persuaded by the State's argument that the gun in the car and the gun in the robbery were in fact the same gun notwithstanding the fact the Officer Engle thought it was a revolver, not a semi-automatic. If the jury concluded the gun was the same gun, then Deputy Filing's testimony established that it was a gun in fact.

Again the defense arguments go to the weight to be given the evidence, not the sufficiency of the evidence. The claim is without merit and should be denied.

6. THE DEFENDANT'S CLAIM OF  
INEFFECTIVE ASSISTANCE OF  
COUNSEL FAILS.

This argument is not supported by relevant citations to the record and should therefore not be considered per RAP 10.3(a)(6).

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of

the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

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

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

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

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

The Brief of Appellant has two separate argument sections claiming ineffective assistance of counsel. Br. App. 24, 5. The defense raises a total of three separate issues between the two sections.

- a. Defense Counsel Did Not Err When He Introduced The CI’s Recognition Of The Photo In The Crime Stopper Flier To Be Wilson.

Where the defense as to the robbery count was one of general denial combined with a claim of misidentification, the introduction of the informant’s identification of Wilson was a sound tactical decision. This is because in order for the claim of misidentification to be convincing where

Ms. Chandler had identified the defendant, it was important to put before the jury the manner by which Wilson was identified by law enforcement as a suspect in the case. The identification of Wilson by the informant shows how he purportedly was misidentified and associated with the case.

Indeed, as a result of defense counsel introducing the informant's statement, on re-direct Officer Filing explained that all that the informant said was that the person in the picture looked like Wilson. I RP 148, ln. 18. By introducing the informant's statement, the defense was also able to introduce the fact that the informant could have been merely seeking out reward money. I RP 137, ln. 2-11.

Because it was a reasonable tactical decision to introduce the informant's statement, the defense claim that trial counsel was ineffective is without merit. The defendant has also failed to meet his burden to show that he was prejudiced by the introduction of the evidence.

b. Defense Counsel Was Not Ineffective For Stating In Closing That He Did Not Call The Defendant's Sister Because She Had Problems.

While it technically wasn't proper for counsel to make this statement in closing, there was no prejudice to the defendant. The appellant claims that the statement may have undercut the value of the Father's testimony, rendering her statements to her father unreliable. However, the statements were hearsay and not properly admissible in the

first place. The harm claimed on appeal is purely speculative. The defendant cannot meet his burden to show that he suffered any prejudice from the statements.

c. Trial Counsel Was Not Ineffective For Failing To Object To Deputy Filing's Testimony About The Shaved Keys.

Contrary to the defense claim, the testimony about how shaved keys are used to steal cars was not objectionable. Rather, the evidence was admissible to explain how the shaved keys were relevant to the charge of possession of a stolen vehicle.

The defense has failed to show how not objecting fell below the norms of practice. Nor has he shown a prejudice from the lack of objection. Accordingly, this claim too should be denied as without merit.

7. THERE WAS NO CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).

The central purpose of a criminal trial is to determine guilt or innocence. *Rose*, 478 U.S. at 577. “Reversal for error, regardless of its

effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232 (1973) (internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Rose*, 478 U.S. at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also*,

*State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998)

(“although none of the errors discussed above alone mandate reversal....”).

The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93 94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. *See Russell*, 125 Wn.2d at 93, 94. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See Russell*, 125 Wn.2d at 93, 94.

Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990)

(“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”) (emphasis added).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error) and *State v. Kinard*, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error).

Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see e.g.*, *State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the state was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State’s sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see*

e.g., *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four error relating to defendant's credibility combined with two errors relating to credibility of state witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, see e.g., *State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions).

Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See *Stevens*, 58 Wn. App. at 498.

Here, the defense has failed to establish that any of the alleged errors were both harmful such that they accumulated to deprive him of a fair trial. This is particularly so where most of the claimed errors involved evidentiary issues to which the defense did not object.

Where the defense has failed to establish any of the underlying errors, or any harm therefrom, he has also failed to meet his high burden to

establish cumulative error. Accordingly, the defendant's claim on this issue should be denied.

D. CONCLUSION.

For the foregoing reasons, the defendant's appeal is without merit and should be denied.

DATED: May 9, 2011.

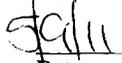
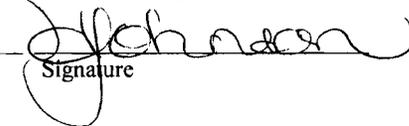
MARK LINDQUIST  
Pierce County Prosecuting Attorney

  
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STEPHEN TRINEN  
Deputy Prosecuting Attorney  
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LM delivery to the attorney of record for the appellant and appellant's attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Signed at Tacoma, Washington, on the date below.

  
Date  
  
Signature

STATE OF WASHINGTON  
BY   
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