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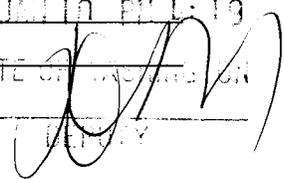
COURT OF APPEALS  
DIVISION II

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

STATE OF WASHINGTON  
BY 

STATE OF WASHINGTON, RESPONDENT

v.

RYAN JACKSON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Susan K. Serko

No. 09-1-04241-3\*

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**Brief of Respondent**

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\* The brief of Appellant incorrectly lists the case number as 09-1-00177-4

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

1. Whether the court failed to suppress evidence obtained as a result of the defendant's seizure where any challenge to the defendant's seizure was waived because it was not raised below, and the lawfulness of the seizure is supported by the facts that do exist in the record?
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B. STATEMENT OF THE CASE.

1. Procedure

On September 21, 2009, based on an incident that occurred on September 19, 2009, the State filed an information charging Ryan Jackson with one count of Attempted Robbery in the First Degree. CP 1-2. On February 1, 2010, the case was assigned to trial before the Honorable Susan Serko. CP 64. The court returned a verdict of guilty on February 4, 2010.

On March 26, 2010, based on an offender score of 12, the court sentenced the defendant to a sentence of 96.75 months, the low end of the standard range. CP 44-57.

The notice of appeal was timely filed on March 26, 2010. CP 58.

## 2. Facts

On September 19, 2009, at about 1:30 a.m., Kelly Crithfield had been at a bar called The Mix for about two-and-a-half hours. I RP 38, ln. 18-19; p. 42, ln. 19-20; p. 46, ln. 16-18. While there, he was coming upstairs from a karaoke area when he tripped on a tricky part of the stairs and hit the bar so that he was bleeding from a little spot. I RP 77, ln. 10-17. A Mr. Little who was at the bar with his wife's uncle helped Mr. Crithfield, got him something to drink and they sat there for about 45 minutes. I RP 76, ln. 20-24; p. 77 ln. 15-24.

Mr. Little gave Mr. Crithfield a walk home three blocks, so they walked up St. Helens street toward Mr. Crithfield's apartment. I RP 38, ln. 18-23; p. 41, ln. 15. Mr. Little noticed some men ahead of him and at first didn't really think anything of it, until he got 15 to 20 feet away when he noticed a little different attitude of walking from the other side of the sidewalk and the men just kind of checking Mr. Crithfield and Mr. Little out. I RP 78, ln. 18-23. One would go on one side of the sidewalk, one would be on the other side of the sidewalk, and then they would talk. I RP 78, ln. 23-25. As a result, Mr. Little felt uncomfortable walking up to the situation. I RP 78,ln. 25 to p. 79, ln. 1.

First the men asked Mr. Crithfield and Mr. Little for spare change. I RP 79, ln. 15-16. A man came up in between the two and said, "How's it going?" I RP 38, ln. 18-23; p. 41, ln. 15. Mr. Crithfield did not respond and the person asked if Mr. Crithfield had any cash, to which Mr.

Crithfield answered that he did not. I RP 38, ln. 23 to p. 39, ln. 11. Then the men asked Little and Crithfield for their wallets, and for jewelry and were told they weren't getting any of that. I RP 79, ln.; 15-17; p. 81, ln. 10-11; p. 93, ln. 4-7.

The man stopped walking with them and Mr. Crithfield and Mr. Little continued to walk forward. I RP 38, ln. 15-16.

Within ten seconds, the man came up again in between them and was holding a handgun and pointing it directly at Mr. Crithfield's stomach. I RP 38, ln. 16-19. The man told Mr. Little he wasn't asking him, that he was telling him to give him those items. I RP 81, ln. 13-15. When he saw the gun, Mr. Crithfield stopped, looked down and just froze. I RP 38, ln. 20-21. Mr. Little ran into the middle of the street and started yelling "Help" loudly. I RP 38, ln. 23-24; p. 81, 24 to p. 82, ln. 2.

The man with the gun turned and walked toward the middle of the street where Mr. Little was and within a few seconds a black car drove up and the man got into the passenger side of the car and drove away. I RP 40, ln. 4-7.

Although it was the middle of the night, Mr. Crithfield was able to get a good look at the man with the gun because he had been directly in front of Mr. Crithfield and there were streetlights, as well as lights from a nearby auto dealership. I RP 42, ln. 21-24. The man who pointed the gun at him was a 30-year-old African American male with a blue and white

checkered short-sleeved collared shirt, was of medium build, and a little shorter than Mr. Crithfield. I RP 42, ln. 14-16; p. 43, ln. 3-7.

During this time, Mr. Crithfield called 911 and was able to report what happened. I RP 40, ln. 8-13. The police arrived and Mr. Crithfield told them what happened and wrote a written report. I RP 40, ln. 17-18.

The officers left the scene and Mr. Little and Mr. Crithfield walked back to Mr. Crithfield's apartment complex where they sat down on the outside steps and exchanged phone numbers so that they could be in further contact if they needed to be. I RP 41, ln. 13-18; p. 83, ln. 16-19. While they were sitting there, two men walked by right on the sidewalk directly in front of Mr. Crithfield's apartment complex and Mr. Crithfield heard someone say, "Those are the guys." I RP 41, ln. 20-22. Then, Mr. Little asked Mr. Crithfield if he saw who had just walked by and Mr. Crithfield said no. I RP 41, ln. 20-24; p. 83, ln. 16-21. Mr. Little told Mr. Crithfield that one of the two men that just walked by was the guy who held them up at gunpoint. I RP 41, ln. 24 to p. 42, ln. 1.

Mr. Crithfield did not see the two men when they originally passed by, but then they both ran across the street in front of them, got into a black car and drove away, and then Mr. Crithfield did see the man from behind and recognized that he was dressed the same. I RP 42, ln. 2-7; p. 43, ln. 8-11. Mr. Little also testified that the two men who walked by the apartment building were the two who held them up for sure. I RP 84, ln. 3-5.

Mr. Crithfield called 911 again to let the police know he had seen the man again right in front of the apartment complex and told them what happened. I RP 43,ln. 24 to p. 44, ln. 1; p. 85, ln. 2-4. The dispatcher told them it was best for them to go inside off the street, so Mr. Little went to his car and drove home, while Mr. Crithfield went into his apartment. I RP 44, ln. 1-4; p. 85, ln. 4. About half an hour later, Mr. Crithfield received a call from a police dispatcher who said that there was an officer in a car down at the entryway to the apartment complex who was ready to drive Mr. Crithfield to identify a possible suspect. I RP 44, ln. 4-8.

Mr. Crithfield went with the officer who drove him about six blocks away where they came upon a scene where there were a couple of police cars surrounding a black car. I RP 44, ln. 11-16. An officer in another car pulled a man from one of the cars. I RP 44, ln. 16-23. The officer in Mr. Crithfield's car put light on the person. I RP 45, ln. 2-4. Mr. Crithfield was able to get a very good look and identified the person as the one who held him up earlier in the night. I RP 44, ln. 24 to p. 45, ln. 6. Mr. Crithfield also identified the defendant in court as that same person. I RP 45, ln. 7-17. Mr. Crithfield had no doubt about either identification. I RP 55, ln. 17-22. Similarly, Mr. Little identified the defendant as the person with the gun. I RP 85, ln. 14-25.

C. ARGUMENT.

1. A CHALLENGE TO THE DEFENDANT'S SEIZURE MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL, AND WHAT RECORD THAT EXISTS ON THE SEIZURE SUPPORTS ITS LAWFULNESS.

The defense argues that the exclusionary rule mandates the suppression of evidence because the defendant was unlawfully seized. *See* Br. App. 14-17. However, suppression issues not raised at the trial court level are waived. *See State v. Millan*, 151 Wn. App. 492, 2112 P.3d 603 (2009). Additionally, where the issue was not raised below, the court lacks an adequate record for review on appeal. *Millan*, 151 Wn. App. at 500-501. Here, no suppression issue was raised, and accordingly the issue was waived and may not be raised for the first time on appeal.

Moreover, contrary to the defense assertion, the limited information the record does contain on this issue supports the validity of the officers' stop and arrest of the defendant.

It is a well established exception to the warrant requirement under both the Fourth Amendment and the Washington Constitution, Article I § 7, that an officer may conduct an investigative detention where there is a substantial possibility that criminal activity has occurred or is about to occur. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). *See also State v. Armenta*, 134 Wn.2d 1, 20, 948 p.2d 1280 (1997) (holding *Terry*

stops permissible under the Washington Constitution); *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968). Probable cause is not required for a Terry stop because it is significantly less intrusive than an arrest. *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed.2d 357 (1979); *Kennedy*, 107 Wn.2d at 6. See also *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999)(overturned on other grounds by *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)).

Here, the officers had the initial report from Mr. Crithfield and Mr. Little giving the officers descriptions of the suspects. I RP 40, ln. 14-18; p. 42, ln. 8-16; p. 82, ln. 19-24. Mr. Crithfield described the person with the gun as a 30-year-old African American male with a blue and white checkered short-sleeved collared shirt. I RP 42, ln. 14-16. About 45 minutes later, Mr. Crithfield was able to call police and report to them that he had just seen the suspects again in the same vicinity, just a few blocks away from the first encounter. I RP 41, ln. 13 to p. 42, ln. 7; p. 54, ln. 13-19. This time, as well as the first time, Mr. Crithfield was able to report the suspects had returned to a black car. I RP 40, ln. 4-7; p. 42, ln. 3-5.

The officers were driving around when officer Billman observed a group of four to five males that were milling around in an alleyway in the 500 block of south 7<sup>th</sup>. I RP 141, ln. 2-6. Among them was a subject that matched the description of the robbery suspect, who was wearing a blue and white shirt. I RP 141, ln. 6-13.

Officer Billman pulled up, announced himself and told the individual that he needed to talk to him. I RP 141, ln. 9-13. Officer Billman advised the suspect and his friends to standby, saying that he needed to talk to the suspect about an incident that occurred. I RP 141, ln. 14-15. The suspect attempted to turn and walk away, so Officer Billman told him, no, that he needed him to stay here until they can sort this out. I RP 141, ln. 15-17. Then the suspect reluctantly presented officer Billman with ID or something with his name on it. I RP 141, ln. 18-19.

At that point, Officer Billman started interviewing everyone and talking to people about what was going on. I RP 141, ln. 19-21. Officer Billman identified the suspect as Mr. Jackson, the defendant on trial. I RP 141, ln. 22 to p. 142, ln. 6. The officers located a gun on the defendant. I RP 59, ln. 17-25; p. 142, ln. 19-24. It was a CO<sub>2</sub> powered bb gun, however it appeared to be a real gun. I RP 60, ln. 17 to p. 61, ln. 11. At some point while this was going on, Mr. Crithfield appeared and identified Jackson as the person who pointed the gun at him. Apparently there was also a warrant for Jackson's arrest. I RP 12, ln. 19 to p. 13, ln. 3.

It was reasonable for officers to stop Jackson where he matched the description Crithfield gave, and shortly before officers contacted Jackson, Crithfield had called in to report that Jackson was in the area. It was reasonable for officers to arrest Jackson either because Crithfield identified him as the person who attempted to rob Crithfield, or because there was a warrant for Jackson's arrest.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE EVIDENCE IT ADMITTED AND EXCLUDED.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. *Thomas*, 150 Wn.2d at 856; *Guloy*, 104 Wn.2d at 421.

Even when an objection was made at trial, the trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). An abuse of discretion exists only when no reasonable person would have taken the position adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

Relevant evidence is:

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

*State v. Wilson*, 144 Wn. App. 166, 176, 181 P.3d 887 (2008)

(quoting ER 401). Under that definition, to be relevant evidence must: 1) have a tendency to prove or disprove a fact; and (2) the fact must be of consequence in the context of other facts and the applicable substantive law. *State v. Sargent*, 40 Wn. App. 340, 349, 698 P.2d 598 (1985) (citing 5 K. Tegland, Wash. Prac., Evidence § 82 at 168 (2d ed. 1982) [now published as 5 K. Tegland, Wash. Prac., Evidence § 401.2 at 258, (5th ed. 2007)]). It is also the case that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Sergeant*, 40 Wn. App. at 349, ln. 4 (citing ER 403).

- a. The Trial Court's Exclusion Of The Written Statements Of Crithfield And Little Was Not An Abuse Of Discretion And Did Not Violate Due Process.

The court's refusal to admit the written statements of Mr. Crithfield and Mr. Little was proper. *See* I RP 53; p. 66; 95, ln. 23 to p. 96, ln. 2. The defense argues that they should have been admitted for purposes of challenging the credibility of the witnesses. Br. App. 42. However, such a position misunderstands the proper procedure for using

hearsay evidence to impeach witnesses. This is particularly so where the defense failed to make any foundational showing that the statements were inconsistent with testimony. The statements were not inconsistent where the witnesses did not disavow them.

Under the hearsay rule, a statement is formally defined as not being hearsay if it is a prior statement that is inconsistent with the declarant's testimony in court and was given under oath subject to the penalty of perjury at a hearing or similar proceeding. *See*, ER 801(d)(1)(i). At trial, the defense argued that the written statements were available for purposes of impeachment as prior inconsistent statements. I RP 112, ln. 13-16. Here, the declarations were not given at a prior hearing. The witnesses did not dispute or disavow the statements. The defense failed to show that the statements were inconsistent with the witness' testimony at trial. Accordingly, they were not admissible.

The defense also argued that the statements were admissible as a prior consistent statement. I RP 112, n. 12-13. However, there was no allegation that the witness' testimony was a result of recent fabrication. *See* ER 801(d)(1)(ii).

The court properly denied the direct admission of the written statements themselves. It did, however, allow them to be published to the jury as illustrative exhibits regarding the quality of the handwriting of the defendants as potentially indicative of intoxication. I RP 115, ln. 6-8.

The court did not err in refusing to admit the handwritten statements of Mr. Crithfield and Mr. Little. Even if the court were to hold it was error, any such error was harmless. As to this issue, the defense has failed to meet their burden to show an abuse of discretion. Accordingly, this claim should be denied.

b. The Court Properly Permitted Officers To Refresh Their Recollection From The Exhibits

A witness's memory may be refreshed by "a song, a scent, a photograph, an allusion, even a past statement known to be false" Tegland, Karl, COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, 2010-2011 Ed., p. 345 (quoting *United States v. Rappy* 157 F.2d 964, 967 (2d Cir. 1946)). When a writing is used, the court must comply with the requirements of ER 612. Under that rule, the general requirements are that: 1) the witness' memory needs refreshing; 2) opposing counsel has the right to examine the writing; and 3) the trial court is satisfied that the witness is not being coached, that the witness is using the notes to aid rather than supplant the witness' own memory. *State v. Williams*, 137 Wn. App. 736, 750, 154 P.3d 322 (2007) (citing *State v. Little*, 57 Wn.2d 516, 520-21, 358 P.2d 120 (1961)).

The rule permits the opposing party to introduce relevant portions of the document as evidence, but that does not mean the document is directly admissible as substantive evidence. Tegland, Karl, WASHINGTON PRACTICE, VOL. 5A: EVIDENCE LAW AND PRACTICE, §612.6. Rather, if the document is objectionable as hearsay, or under some other rule, the opposing party is entitled to introduce the relevant portions of the document only on the issue of the witness' credibility. Tegland, Karl, WASHINGTON PRACTICE, VOL. 5A, § 612.6 (citing *State v. Savaria*, 82 Wn. App. 832, 842, 919 P.2d 1263 (1996), *overruled on other grounds by State v. C.G.*, 150 Wn.2d 604, 607, 80 P.3d 594 (2003)).

i. **The Court Properly Allowed Officer Spencer To Refresh His Recollection From His Own Report.**

The defense claims that the court erroneously admitted Officer Spencer to refresh his recollection based upon Crithfield's written statement over the defense objection. Br. App. 34 (citing RP 58). However, Officer Spencer did not use Crithfield's written statement to refresh his recollection at that point. Rather, he used his own report. *See I RP 58, ln. 20 to p. 59, ln. 11.* Indeed, after initially objecting, the State rephrased the query to Officer Spencer as to whether it would help refresh

his recollection to refer to his report, and defense counsel withdrew his objection. I RP 59, ln. 9-10. During the remainder of his testimony, Officer Spencer did not make use of any other writing to refresh his recollection.

ii. **The Court Properly Allowed Officer Billman To Refresh His Recollection From The CAD Log.**

Under ER 803(a)(5), not excluded by the hearsay rule is a recorded recollection:

a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

*See also State v. Mathes*, 47 Wn. App. 863, 737 P.2d 700 (1987). The CAD log was independently admissible as a past recollection recorded and not subject to the hearsay rule. If admissible, the record may be read into evidence, but may not itself be received as an exhibit unless offered by an adverse party. *See* Tegland, Karl, COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, p. 432.

Officer Billman's testimony about the information in the CAD log was not error. Even if there were error, it was not an abuse of discretion

and was harmless where the information was otherwise admissible. The defendant's challenge on this issue should be denied.

c. The Court Properly Admitted Ochoa's Testimony

The defense claims that the admission of Mr. Ochoa's testimony about his encounter with Jackson violated the prohibition on other bad acts evidence under ER 404(b). Br. App. 37ff. The defense argument is misplaced because the evidence was not admitted as an other bad act to show the defendants character or general propensity. See *State v. Lillard*, 122 Wn. App. 422, 430-31, 93 P.3d 969 (2004). However, Mr. Ochoa himself testified that the defendant did not use the gun to coerce money out of him and that he probably would have given the defendant the money even if he had not displayed the gun.

Rather, the evidence was admitted to show identity, namely, for the purposes of establishing that Jackson was the same person who attempted to rob Mr. Crithfield and Mr. Little, and also for the purpose of showing that the gun appeared to be real. The evidence was also admissible because it was so connected in time, place, circumstance, and means employed that proof of the other misconduct is necessary for a complete description of the crime charged. See *Lillard*, 122 Wn. App. at 431-32. See also Tegland, Karl, Washington Practice, vol. 5, § 404.18, p.

531 (“Admissibility on a res gestae theory often overlaps with other theories”). Other bad acts evidence is also admissible to show unusual similarities. See *State v. DeVincentis*, 150 Wn.2d 11, 17-20, 74 P.3d 119 (2003); *State v. Lough*, 125 Wn.2d 847, 852-53, 889 P.2d 487 (1995).

Finally, evidence of misconduct is admissible to prove identity when identity is at issue. See *State v. Sanford*, 128 Wn. App. 280, 115 P.3d 368 (2005).

Here, identity was at issue. The common scheme between the attempted robbery of Mr. Crithfield and Mr. Little with the contact of Mr. Ochoa was relevant to establishing identity. Additionally, Jackson’s contact with Mr. Ochoa was also part of the res gestae of the crime insofar as it showed how officers contacted Jackson, and how he was connected to the attempted robbery of Mr. Crithfield and Mr. Little. The contact with Mr. Ochoa was also relevant to showing that Mr. Crithfield and Mr. Little correctly identified Mr. Jackson as the attempted robber. Jackson’s contact with Mr. Ochoa was also relevant to the issue of whether or not the gun appeared real.

For all these reasons, the court did not abuse its discretion when it admitted the testimony of Mr. Ochoa regarding his contact with Jackson.

3. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN THE USE OF EVIDENCE IN THE CASE.

Where none of the State's evidence was improperly admitted, the prosecutor did not engage in misconduct.

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

The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be

sustained by him who claims such injustice.” *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

For the reasons explained above, no evidence was improperly admitted and the prosecutors conduct was not improper. The defense argues that the prosecutor clearly knew that hearsay from the police reports was inadmissible because the prosecutor strenuously sought to keep out the written statements by Mr. Crithfield and Mr. Little. Br. App. 40. However, that argument is based on an ignorance of the rules of evidence and a resultant misperception of the State’s actions.

As indicated above, the police reports could properly be used to refresh the officers’ recollections and/or as a past recollection recorded. However, the State did not seek to directly admit any of those documents, and instead properly had the officers testify based upon those documents.

On the other hand, the defense sought to directly admit the written statements of Mr. Crithfield and Mr. Little. However, those statements were not themselves directly admissible. Rather, they could be used to refresh the witness’ recollections, and/or be read into the record as appropriate. Indeed, this is what the State argued that defense trial counsel was obligated to do when it objected that simply admitting the statements was the improper way to impeach the witnesses with those statements. I RP 114, ln. 19 to p. 115, ln. 5.

Both defense counsel at trial and counsel on appeal share the same ignorance as to the proper use of the statements for purposes of impeachment. The Statements were not directly admissible because they were hearsay. Nonetheless, the court allowed them to be published to the jury as illustrative exhibits regarding the quality of the handwriting as possibly indicative of the level of intoxication of the witnesses. The court's ruling was not an abuse of discretion, and even if it was error, it was harmless.

The defense has failed to show that the prosecutor's conduct was flagrant and ill intentioned. The record shows otherwise. There was no prosecutorial misconduct.

#### 4. TRIAL COUNSEL WAS NOT INEFFECTIVE

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.

a. Crithfield’s Testimony Did Not Include Improper Hearsay.

The defense claims that Crithfield testimony consisted of improper hearsay when he testified as to what he told the officers the defendant looked like. Br. App. 28. The defense acknowledges that trial defense counsel did not object to the testimony, and accordingly raises it in a claim for ineffective assistance of counsel. The defense challenges the following testimony as improper hearsay rising to the level of ineffective assistance of counsel:

Q. And do you recall what you told the officers the man looked like?

A. I believe I told them that it was a 30-year-old African American male with a blue and white checkered short-sleeved shirt, collared shirt.

Br. App. 28 (quoting I RP 42, ln. 12-16). The defense claims this is “unmitigated hearsay” as well as “irrelevant” However, the testimony was highly relevant and also not hearsay.

Subject to certain definitional exceptions, hearsay is an out of court statement offered to prove the matter asserted. *State v. Edwards*, 131 Wn. App. 611, 632, 128 P.3d 631 (2006). A statement is not hearsay if it is used to show the effect on the listener, without regard to the truth of the statement. *Edwards*, 131 Wn. App. at 632-33.

Here, the out of court statement was that, “it was a 30-year-old African American male with a blue and white checkered short-sleeved shirt, collared shirt” [that robbed Crithfield and Little]. The defense at trial was that this was a case of misidentification. The statement is relevant to prove what Crithfield told the officers and thus, the appearance of the person the officers looked for and detained for Crithfield to identify. Crithfield’s statement to the officers goes directly to whether the officers detained the correct person.

The defense could have requested a limiting instruction, but there was no point to doing so, since the State then could have had Crithfield testify directly as to the description of the person who attempted to rob him. Thus, asking for a limiting instruction was a pointless waste of breath and trial counsel properly recognized that it was more expedient not

to request such an instruction. Thus, the failure to object or request a limiting instruction was a legitimate trial strategy.

The defense has also failed to 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). See Br. App. 28-29. Absent such a showing, the defense claim on this issue must be denied for those reasons as well. Trial counsel's failure to object was not ineffective.

- b. Trial counsel's lack of objection to Officer Spencer's testimony did not constitute ineffective assistance of counsel.

The defense claims that Officer Spencer improperly testified to out of court statements made by Robert Ochoa and James Tucker. Br. App. 29. The defense objects to the following testimony:

[II]Q. Officer Spencer, were there two incidents that occurred that night?

A. Yes, ma'am.

Q. And were Mr. Ochoa and Mr. Tucker involved with the second of the two incidents?

A. Yes, ma'am.

Q. And were you present when Mr. Ochoa and Mr. Tucker were asked to identify someone?

A. Yes, ma'am.

Q. And did they make an identification?

A. Yes, ma'am.

Q. Who did they identify?

A. The defendant.

Br. App. 29-30 (quoting I RP 65, ln. 13-25).

This questioning occurred on re-direct. However, shortly prior, on cross examination the following exchange occurred.

[Δ]Q. When you responded to 51 South 7<sup>th</sup> Street, you detained Mr. Jackson, correct?

A. Yes, sir.

Q. And that was in conjunction with an Officer Billman?

A. Yes, sir.

Q. Were [sic] there anyone else around?

A. Yes, there was another possible subject with Mr. Jackson.

Q. And what happened to that person?

A. During the suspect elimination, the victims couldn't identify him as one of the suspects that did the crime.

Q. Were [sic] there anyone else around?

A. No sir.

Did you – so there were not people by the name of Ochoa – Mr. Ochoa and Mr. Tucker around?

A. Those are the victims that arrived on the scene that I didn't have contact with.

I RP 63, ln. 5-21.

Thus, on cross examination, defense counsel had already brought up Mr. Ochoa and Mr. Tucker, and they were identified as additional victims. This then became relevant to why the officers detained and arrested Jackson.

Additionally, with regard to Officer Spencer's testimony that the defense objects to, almost all of it consists of Officer Spencer's direct observations, not statements by Mr. Ochoa and Mr. Tucker, so that it isn't hearsay. The only portion of the testimony that might not be a direct

observation by Officer Spencer is the answer that they identified the defendant. Assuming that answer is treated as a statement by Mr. Tucker and Mr. Ochoa, it wasn't offered to prove the truth of the matter asserted, but rather to show why the officers detained and arrested Jackson.

Moreover, on direct examination, Mr. Ochoa himself testified that he identified Jackson as the person who displayed the gun to him. I RP 134, ln. 20 to p. 135, ln. 8.

For all these reasons, there was no improper admission of hearsay, and even if there was, the admission was harmless.

The defense also argues that the testimony violated the defendant's right of confrontation under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct 1354, 158 L.Ed.2d 177 (2004). Br. App. 30ff. However, as indicated above, the testimony was not objected to. I RP 65, ln. 13-25. Moreover, statements that are not hearsay are non-testimonial and do not fall under *Crawford*. See *State v. Fleming*, 155 Wn. App. 489, 502, 228 P.3d 804 (2010). Similarly, statements that fall under a firmly rooted exception to the hearsay rule are not subject to *Crawford*. *State v. Grenning*, 142 Wn. App. 518, 541, 174 P.3d 706 (2008). There is nothing in the report regarding when Officer Spencer said they identified the defendant whether he was referring to a separate statement by Mr. Tucker, as opposed to a joint statement by Mr. Ochoa and Mr. Tucker. Absent such showing, the defense cannot establish that a violation of Jackson's confrontation rights occurred, much less that any claimed violation was harmful.

The defense has also failed to 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). *See* Br. App. 29-33. Absent such a showing, the defense claim on this issue must be denied for those reasons as well. Trial counsel's failure to object was not ineffective.

- c. Trial counsel was not ineffective for failing to challenge the defendant's seizure where that seizure was lawful.

As indicated in section 1 above, Officer Billman's seizure of Jackson was lawful where Jackson closely matched the description Crithfield provided to officers, and Crithfield had reported him to be in the area shortly before Officer Billman Contacted Jackson. Because the seizure of the defendant was lawful, trial counsel's failure to raise the issue was not ineffective.

Here, the defense has failed to show: 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; *Riley*, 121 Wn.2d 22. Accordingly, the defendant's claim of ineffective assistance of counsel as to this issue should be denied.

5. THE COURT DID NOT DEMEAN TRIAL COUNSEL BEFORE THE JURY.

The defense argues that the court demeaned defendant's trial counsel in front of the jury by requiring him state his objection to Ochoa's testimony before the jury. Br. App. 43ff (citing I RP 121). When defense counsel did so in front of the jury, the court stated, "overruled" without further elaboration. Br. App. 43 (citing I RP 130). On appeal, the defense argues for the first time on appeal that by doing this the court improperly demeaned trial counsel.

The defense position on this issue suffers from a number of flaws. First and foremost is the fact that that defense has failed to cite any authority in support of its claim that requiring defense counsel to state its objections during the course of testimony (and therefore in front of the jury) constitutes an implicit disparagement of defense counsel that is an abuse of discretion, and particularly one that requires reversal. See Br. App. 43-44. The court will not consider arguments that are unsupported by citations to relevant authority. See *Ensley v. Pitcher*, 152 Wn. App. 891, 906 n. 12, 222 P.3d 99 (2009) (citing RAP 10.3(a)(6)); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Before elaborating on the additional flaws in the defense position, it is necessary to understand the objection raised and the court's consideration of it.

The issue first arose during the direct examination of Officer Billman, who contacted Robert Ochoa who had just finished having an encounter with Jackson that was similar to the encounter of Crithfield and little. Jackson approached Mr. Ochoa, asked him for money and cigarettes and displayed a gun immediately prior to Officer Billman contacting Jackson and Ochoa. I RP 130-132. Apparently, Officer Billman had also received a report from a woman who wished to remain anonymous about a man in a blue shirt running around waving a gun. I RP 105, ln. 19-22.

Defense counsel made a premature objection to officer Billman's testimony out of concern that the line of questioning was going to lead down a road where it was going to introduce 404(b) evidence about another uncharged event. I RP 103, ln. 24 to p. 104, ln. 2. There was extensive discussion of these issues outside the presence of the jury. I RP 103, ln. 16 to p. 111, ln. 5. Initially the court sustained the defendant's objection regarding the report by the anonymous female. I RP 111, ln. 2-5

While the jury remained out of the courtroom, and the court and parties discussed this and other matters, Mr. Ochoa arrived and was available for testimony. To defuse a number of the issues raised by defense counsel, the State took his testimony out of order and prior to resuming with the testimony of Officer Billman. I RP 116,ln. 4-11. Prior to the testimony of Mr. Ochoa, defense counsel expressed concern that

Mr. Ochoa would be asked to testify regarding 404(b) evidence. I RP 117, ln. 13-16. Discussion of this issue went on for some time. I RP 117, ln. 13 to p. 122, ln. 16.

On page 121, the court tells defense counsel that he would need to make his objections for the record, when the challenged line of questioning is pursued by the prosecutor. I RP 121, ln. 8-10. The court then advised defense counsel that she would overrule the objection. I RP 121, ln. 10 to p. 122, ln. 12. The court then continues,

I will overrule any objections, but if you want to preserve your objections, please make them during the course of the testimony.

I RP 122, ln. 14-16.

At the time the court advised defense counsel of this, Mr. Ochoa had not yet begun to testify. There were aspects of his testimony that defense counsel agreed were relevant and appropriate, and other aspects that the defense objected to. I RP 117, ln. 13-15. The defense objection to 404(b) evidence was a broad and general objection. Accordingly, the court's position was reasonable insofar as it would need defense counsel to object to specific questions by the prosecutor or testimony by Mr. Ochoa in order to know and make an accurate record of what the defense considered objectionable.

The defense also argues on appeal that it was also improper of the court to overrule the objection by simply saying “overruled” and not further elaborating on the reason for that. Br. App. 43-44. However, the issue underlying the objection was that the defense did not want evidence of other misconduct (bad acts) coming before the jury. By explaining the reason for overruling defense counsel’s objection, the court would first: emphasize that evidence before the jury; and second, cause the jury to hear from the court why the evidence was relevant, thereby effectively have the court making the State’s argument as to the relevance and weight the jury should give the evidence. Such an explanation by the court would be tantamount to a comment on the evidence and improper under the circumstances. *See, e.g., State v. Jackson*, 125 Wn. App. 552, 558, 104 P.3d 686 (2004).

The court may also affirm the trial court on any other valid basis. The court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, the evidence about Jackson’s interaction with Mr. Ochoa was relevant to the issue of identity because it was part of a unique pattern of conduct that was extremely similar to that experienced by Mr. Crithfield and Mr. Little. Because the defense put Mr. Crithfield’s identification of Jackson at issue, Jackson’s repetition of the same unique

and unusual conduct toward Mr. Ochoa was highly relevant to the issue of whether Crithfield had in fact properly identified Jackson. For further discussion and authority on this issue, *see* section 2.c above.

6. SUFFICIENT EVIDENCE SUPPORTED THE VERDICT

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).

To prove attempted Robbery in the First Degree, the State was required to prove that:

- 1) On or about the 19<sup>th</sup> day of September, 2009 the defendant did an act which was a substantial step toward the commission of Robbery in the First Degree, to wit:

- a) the unlawful taking of personal property, not belonging to the defendant, from the person or in the presence of another; and
  - b) with intent to commit theft of the property; and
  - c) the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
  - d) the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
  - e) in the commission of these acts, or in immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon;
- 2) That the act was done with the intent to commit Robbery in the First Degree;
  - 3) That the act occurred in the State of Washington

CP 33. *See also State v. Cook*, 69 Wn. App. 412, 415, 848 P.2d 1325 (1993); WPIC 100.02; WPIC 37.02.

Here, the evidence supported each element.

Mr. Little testified that as they were walking up the road they saw two men who have made some movements, and that was when they started getting asked for money, if they had any spare change, for their wallets, and for jewelry. I RP 79, ln. 15-18. Then one of them approached with the gun and basically told Mr. Little that he wasn't asking Mr. Little, he was telling Mr. Little to give him those items. I RP 81, ln. 10-15. Mr. Little then went out into the street and yelled for help, while Mr. Crithfield called 911, causing the two men to put the gun away and leave. I RP 82, ln. 14-17.

In court, both Mr. Crithfield and Mr. Little identified Jackson as the person who attempted to rob them. I RP 45, ln. 7-17; p. 85, ln. 14-25. Officer Spencer testified that it appeared to be a real gun. I RP 61, ln. 21-25. Mr. Little testified that he knew it was a gun, a real gun. I RP 82, ln. 10-13.

Several witnesses testified that the incident occurred in Tacoma. I RP 46, ln.1-2; p. 59, ln. 15-16; p. 77, ln. 6-9; p. 129, ln. 10-12. Several witnesses also testified that this happened on September 19, 2009. I RP 45, ln. 15; 76, ln. 15-18; p. 100, ln. 17-18; p. 101, ln. 9-11.

Based on these facts, the jury could find beyond a reasonable doubt that Jackson attempted to rob Mr. Crithfield and Mr. Little in a way that amounted to attempted robbery in the first degree.

In raising this issue, the defense improperly seeks to have the court adopt the self-serving defense interpretation of the facts, and then improperly substitute that interpretation for that of the jury.

Because the jury is entitled to deference, and all the inferences are drawn in the State's favor, the defense argument fails. Sufficient evidence supports the verdict.

7. THE COURT DID NOT FAIL TO ENSURE A UNANIMOUS VERDICT.

The defense argues that the court failed to ensure that the jury's verdict was unanimous. Br. App. 20ff. This argument is based on the fact

that Mr. Ochoa testified regarding his interaction with Jackson. The defense attempts to argue that the jury could have based their decision to convict on that incident, rather than the attempted robbery of Mr. Crithfield and Mr. Little on St. Helen's St.

The court has an obligation to ensure that the jury is unanimous as to which act formed the basis for the verdict where the verdict could be based on multiple separate and distinct acts. *See State v. Carter*, 156 Wn. App. 561, 234 P.3d 275 (2010). However, here multiple acts were not alleged as the basis for the crime, and there is only one act upon which the jury could have based its verdict.

This argument by the defense is not supported by the factual record. First, Mr. Ochoa testified that it appeared that Jackson was trying to explain that there was a misunderstanding about the presence of the gun. I RP 136, ln. 13-20. He told the officers that he voluntarily gave Jackson the money. I RP 136, ln. 21-25; p. 152, ln. 12-14. Mr. Ochoa also testified that he asked Jackson to put the gun away and he eventually did so before the police arrived. I RP 137, ln. 7-12. Mr. Ochoa also testified that he probably would have given Jackson the money even if the gun hadn't come out. I RP 133, ln. 17-19.

When the prosecutor argued Ochoa's testimony in closing, it was only with regard to the identification of Jackson, and whether the gun

appeared real. *See* II RP 220, ln. 9-22; p. 224, ln. 7-8; p. 226, ln. 4-6, 16-18; p. 240, ln. 15-17. When the prosecutor argued the elements of the crime to the jury, she argued it solely in terms of the contact with Mr. Crithfield and Mr. Little on St. Helen's street. II RP 223, ln. 4 to p. 228, ln. 19.

The record in this case clearly establishes that there was only once incident presented to the jury as the basis for this crime, and that was the attempted robbery of Mr. Crithfield and Mr. Little on St. Helens street. Accordingly, the defense argument on this issue is without merit and should be denied.

8. THE COURT PROPERLY DENIED THE MOTION FOR A MISTRIAL

The defense argues that the court should have granted a motion for a mistrial because one or more witnesses saw the defendant outside the courtroom in handcuff's prior to testifying, and identity was an issue in the case. Br. App. 17ff.

First, the defense argument mistakenly conflates two separate issues: 1) the fact of the defendant being handcuffed and led by security, and 2) the witness(es) seeing the defendant prior to his entering the courtroom. Of these two issues, only the fact that the witness(es) saw the defendant is relevant, but even that issue has no merit. Apparently, the defense concern was that the handcuffs particularly identified the

defendant to the witnesses prior to his entry into the courtroom, resulting in a kind of “suggestive show-up type of situation.”

The defense claims that the first issue establishes a dilemma for defense counsel because in order to cross examine the witness about having previously observed the defendant in the hallway, the defense would have to expose the fact that the witness was observed in custody and wearing handcuffs. II RP 194, ln. 5-12. However, that is not necessary because the defense need not raise the issue of the handcuffs in order to effectively examine the witnesses and whether their identification was affected by their observations prior to entering the courtroom.

It would have been sufficient for defense counsel to point out that the witnesses observed the defendant outside the courtroom prior to testimony, and that there was a concern that the witnesses made their identification based on that observation rather than a genuine recollection that he was the person that displayed the gun during the relevant incidents. The court pointed this out. *See* II RP 197, ln. 4-9.

Moreover, as the court noted, that identification couldn't have been any greater than the fact that the defendant was the only person at the table with defense counsel inside the courtroom prior to the witnesses making their identification on the record. Defense counsel made no effort to challenge the identification on that basis, and the defense cannot now show any prejudice from the purported observations of the defendant in the hallway by the witnesses.

Nothing in the record supports the defense claim that they were denied the opportunity to present their defense, or that if they were, that any error was prejudicial.

The defendant's claim on this issue should be denied as without merit.

9. 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, rev. denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”)(emphasis added).

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

592 93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the state was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant's credibility, combined with two errors relating to credibility of state witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial

misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See, *Stevens*, 58 Wn. App. at 498.

Here, where the defendant has failed to show any error, there is also no showing of cumulative error. The defendant's claim should be denied on this issue as well.

D. CONCLUSION.

Where for the foregoing reasons, none of the individual errors alleged by the defense are in fact error, there is also no cumulative error. Accordingly, the Court should deny the defendant's claims and affirm his conviction.

DATED: January 10, 2011.

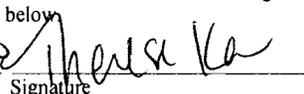
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STATE OF WASHINGTON  
BY  
COURT OF APPEALS  
TACOMA, WA

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1.11.10   
Date Signature