

NO. 40593-8-II

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

STATE OF WASHINGTON, RESPONDENT

v.

JAYCEE FULLER, APPELLANT

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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Appeal from the Superior Court of Pierce County  
The Honorable Katherine M. Stolz

No. 40593-8-II

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**BRIEF OF RESPONDENT**

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

1. Whether the defendant's rights to be free from double jeopardy were satisfied where the sentencing court merged counts I and II prior to sentencing and did not reduce to judgment both verdicts or conditionally vacate either.
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6. Whether the defendant failed to show ineffective assistance of counsel where his trial counsel chose not to object to an instruction based on a previously-approved WPIC.

B. STATEMENT OF THE CASE.

1. Procedure

On April 7, 2009, Jaycee Fuller, hereinafter referred to as the "defendant," was charged by information with first-degree felony murder with a deadly weapon sentence enhancement for the March 8, 2009 homicide of Mohamud Ahmed. CP 1-2. On October 8, 2009, the State

filed an amended information, which added count II, a charge of premeditated first-degree murder with a deadly weapon enhancement pertaining to the same homicide. CP 22-23. *See* 10/8/09 RP 4.

The case was called for trial before the Honorable Judge Stolz on January 27, 2010, 1/27/10 RP 9; RP 9. The parties argued motions on February 1, 2010, including defendant's motion to suppress video, RP 29-48, the defendant's motion to suppress testimony concerning the defendant's plan to commit a robbery, RP 119-125, and a hearing pursuant to Criminal Rule (CrR) 3.5, RP 51-96. RP 25-125.

During the CrR 3.5 hearing, Detective Gene Miller testified that he interviewed the defendant. RP 69-70. During that interview, Miller detailed what had happened to the defendant in the third person, and concluded by saying, "something bad happens; and somebody ends up dead." RP 69-70. Miller testified that the defendant "was nodding his head up and down" during this description, and did not deny what happened. RP 70.

The trial court held that evidence of the defendant's nodding during the interview was admissible and denied the defendant's motion to suppress the video. RP 96-101.

The parties selected a jury on February 2 and 3, 2010. RP 129-162, and gave their opening statements. RP 162; 2/3/10 RP 3-17 (State's opening); 17 (defendant's opening).

The State then called Hershi Mohamed, RP 162-65, Officer John Warczak, RP 165-88, Officer Robert Denully, RP 188-207, Crime Scene Technician Aubrey Askins, RP 207-60, Crime Scene Technician Vanessa Peterson, RP 262-68, Detective Brian Vold, RP 268-315, Detective Gene Miller, RP 315-76, 551-60, 680-83, 828-32, 875, Dr. Jacquelyn Morhaime, RP 376-416, Curtis Alm, RP 421-50, Lucretia Randle, RP 451-60, Timothy Brownlee, RP 461-69, Detective Stefanie Willrich, RP 469-74, Wilma Crane, RP 474-89, Rochelle Campbell, RP 490-99, Jeri Vinther, RP 505-10, Forensic Specialist Paul Depoister, RP 511-19, Detective Frederick Phillip Pavey, RP 520-46, Don Karunanayake, RP 548-51, Grant Fredericks, RP 569-635, Detective Steven Reopelle, RP 641-79, Ahmed Roble, RP 684-704, Donald Henrichsen, RP 704-28, Detective Richard Voce, RP 729-36, Crime Scene Technician Lisa Rossi, RP 736-50, Richard Coyne, RP 750-55, Robert Page, RP 758-61, Zakee Perry, RP 771-84, Heather Perry, RP 784-92, Michael Stafford, RP 792-804, Forensic Scientist Susan Wilson, RP 807-28, Forensic Scientist Christopher Sewell, RP 835-75, and Forensic DNA Analyst Romy Franco, RP 923-40.

The State rested and the defendant did so immediately thereafter without calling any witnesses. RP 940.

The defendant, however, moved to dismiss count I of the amended information, charging felony first-degree murder. RP 944-48. That motion was denied. RP 948.

On February 16, 2010, the parties discussed proposed jury instructions. RP 941-43, 948-59, 2/17/10 RP 4. The defendant took exception to the court's failure to instruct the jury on manslaughter. RP 952-57, but made no other objections and took no other exceptions to the court's instructions to the jury. RP 959. Specifically, the defendant did not object to instruction 25. RP 959. *See* CP 108-37.

The court read the instructions to the jury, 2/17/09 RP 5, and the parties gave their closing arguments on February 17, 2010. 2/17/10 RP 5-31 (State's closing), 2/17/10 RP 32-49 (defendant's closing), 2/17/10 RP 49-62 (State's rebuttal).

The jury returned verdicts of guilty to counts I and II the same day and answered the special verdict forms pertaining to those counts in the affirmative, indicating that the defendant was armed with a deadly weapon at the time of the commission of the crimes charged in counts I and II. CP 138-41.

At a sentencing hearing conducted on April 12, 2010, the court denied the defendant's motion to vacate either count I or II, and instead, merged count II into count I. 4/12/10 RP 3-5. *See* CP 182-83, 146-65, 184-86. The court then sentenced the defendant on that count to 320 months in total confinement plus 24 months for the deadly weapon sentence enhancement, for a total of 344 months in total confinement, and 24 to 48 months in community custody. RP 11-12; CP 166-77.

The defendant filed a timely notice of appeal. CP 187-99. *See* RP 12-13.

## 2. Facts

Mohamud Ahmed was a twenty-two-year-old man born in Somalia, who immigrated to the United States in 2005, and took a job as a taxi driver for King Cab company, RP 163-64; RP 690. He picked up his final fare, a person who flagged him down, at 3:05 a.m. on March 8, 2009. RP 699, 701, 343-46. According to a GPS tracking system, Ahmed's cab came to a stop at 3:20 that morning. RP 829, 343-46. Amed had been murdered, leaving behind a father and four brothers. RP 163-64.

Tacoma Police Officer John Warczak was on patrol that morning, when, at about 5:22 a.m., he saw Ahmed's taxi cab "stopped southbound in the northbound lane" of Lawrence Street between 38th and 36th in

Tacoma, Washington. RP 165-67, 173. Warczak observed the apparent driver of the cab lying down next to the cab, "covered in blood." RP 167. The driver's left arm was caught in the vehicle's seatbelt. RP 182. Warczak checked for vital signs, but the driver was cold and "obviously, deceased." RP 167.

The cab's meter was running and displayed a total of approximately \$70.00. RP 170, 185-87. The total on the meter was, given the cab company's fare schedule, consistent with the cab leaving Masa restaurant on Sixth Avenue at 2:05 a.m., or 3:05 a.m., corrected for daylight savings time. RP 343-46. The interior light was activated, the engine running, and the transmission in drive. RP 170. There was a one-dollar bill on the rear passenger floorboard, RP 170, *see* RP 291-96, a large amount of blood spatter throughout the driver's side of the cab and blood smeared on the outside of the cab. RP 170.

Officer Denully, who arrived after Warczak, observed a male victim lying outside the door of the cab, with a large amount of blood coming from underneath him. RP 188-92. Denully indicated that the center console of the cab appeared to have been moved towards the rear seat area and that its lock top seemed to have been broken. RP 193. *See* RP 231. However, Detective Vold later testified that he felt that the lock had simply failed due to repeated use. RP 300. Officer Denully saw a

business card for the cab company” next to the dollar bill in the backseat.

RP 193. *See* RP 291-92.

Tacoma Police Detective Gene Miller arrived at the scene at about 6:33 a.m. RP 320. He noticed a blood trail extending from the rear wheel area of the cab on the driver’s side. RP 323. He saw the victim lying face down by the side of the cab, with his left arm caught in the seatbelt. RP 323-26.

Miller also noticed a black stocking cap with a white stripe in a parking lot near the taxi. RP 356-57, 664-65. The cap had a “Keg Steakhouse and bar logo.” RP 357-59. It had apparent blood on the outside of it, one long hair that appeared to about ten and a half inches in length and dark brown in color, and two shorter, apparent animal hairs inside of it. RP 357-61. Detective Miller submitted the hat, the hairs, and oral swabs from the victim to the Washington State Patrol Crime Laboratory. RP 361-62, 370.

Detective Reopelle contacted the Keg restaurant and Rochelle Campbell of the Keg identified a department of licensing photo of the defendant as the Jaycee Fuller who used to work at the restaurant. RP 653.

Aubrey Askins, a Tacoma Police Department crime scene technician, took video and photographs of the crime scene, which was

published to the jury. RP 207-19. He took photographs of shoe impressions, RP 216-19, which apparently led from the cab through an adjacent parking lot, and to a retaining wall. RP 374-75. However, there was no detail to these impressions to justify making a cast of them. RP 255-56, 352, 646. Askins also collected two hairs from the “interior rear left door frame,” and placed them in separate containers. RP 233. He took swabs of suspected blood found in the interior of the cab, RP 234, and tried to locate latent finger- or palm prints on interior and exterior surfaces of the cab, but was unable to do so. RP 237-39. He also tried to find latent prints on the dollar bill and card located in the back of the cab, but did not find any. RP 239-40.

Detective Reopelle followed footprints which seemed to lead from the scene over a retaining wall and into property owned by Tacoma Water to the fence on the north and west sides of the property, but found nothing. RP 649-50. Reopelle testified that the retaining wall was approximately ten feet high from which someone would not be able to safely jump. RP 654. Police also used dogs to search for the suspect and evidence, but were unable to locate anything additional. RP 671-73, 680-83. According to Detective Miller, when more than twenty minutes have elapsed since a suspect fled the scene, dogs are usually not able to track that suspect. RP 829-30. In this case, the dog did not arrive on scene until 5:40 a.m., about

two hours and twenty minutes after Ahmed's cab stopped moving. RP 830.

The cab was moved, via a flatbed truck, from the scene to the Tacoma Police Department, RP 346-47, 360, Detective Brian Vold worked with the forensics unit to process the taxi for evidence. RP 270. They began with the left rear fender of the vehicle and worked their way around the exterior first, RP 271, before searching the interior. RP 271-80. Vold noticed two trails of what appeared to be blood coming down from the front seat and into the back left seat. RP 288. There was blood spatter on the center console. RP 288, 290, 299. Vold observed a significant amount of blood on the driver's seat of the cab, including blood on the headrest, several downward stains on the upper right side of the backrest of the seat, and large stains on the seat itself. RP 298. There was also a significant amount of blood found on the driver's door, including the door handle and the window and door controls. RP 298. Vold noticed scattered, dark droplets of apparent blood on the back seat behind the driver's seat, as well as a lesser amount of blood on the right side. RP 296-97. There was also a blood smear on interior and exterior of the rear, driver's side door. RP 307. Vold surmised, based on the blood evidence he saw, that the assailant was sitting in this back seat and exited through the rear, driver's side door. RP 304.

Forensic Specialist Paul Depoister was able to recover latent impressions from the trunk of the cab, the driver's side rear quarter panel, and the exterior of both rear doors.. RP 514. He also collected prints from the defendant. RP 515. The latent prints collected from the cab and the prints collected from the defendant were then analyzed by latent print examiner Toni Martin. RP 516.

Crime Scene Technician Vanessa Peterson vacuumed the cab for trace evidence and also recovered a latent impression from the top portion of the front passenger seat belt buckle, which was also later analyzed by Toni Martin. RP 263-66. *See* RP 282.

On March 9, 2009, Dr. Jacquelyn Morhaime, a forensic pathologist, performed an autopsy on Mohamud Ahmed. RP 382-85. She noted that Ahmed's clothing was stained with blood and that the pattern of such staining was consistent with Ahmed bleeding while in a seated, upright position. RP 388-89. During her external examination of Ahmed's body, Morhaime observed "two sharp injuries to the neck region." RP 391. One, just below the chin was superficial and consistent with a knife being held upward below someone's chin. RP 399. The other was approximately five and three-quarters inches in length "on the skin." RP 397. The wound was approximately two and one-quarter inches deep in the neck. RP 398. It transected several layers of muscle in the right

side of the neck, the major artery and major vein in the right side of the neck, and caused injury to the airway of Ahmed. RP 400. Given this wound, Morhaime estimated that Ahmed would have gone into shock within three minutes and died within five. RP 403-04, 410-11.

There was also a “a single sharp injury of the torso which was a stab type wound” and “several sharp injuries to the right hand,” “two superficial scraping type of injuries on the left hand and a single scraping type of injury on the left leg.” RP 391. By “sharp injury” Morhaime meant an injury inflicted by a sharp object. RP 394.

Morhaime concluded that the evidence was consistent with a time of death between 3:15 and 3:30 in the morning. RP 406.

Curtis Alm testified that he had known the defendant for over ten years, though he had lost touch with him until he again saw him on about March 22, 2009. RP 421-22, 435-36. The defendant told him that he had no money, no job, and that he was being evicted. RP 422-23.

The defendant made similar statements to Michael Stafford, RP 795, and told him that he was approached by a third person about robbing someone. RP 795-96. The defendant also told Alm that he hated King Cab because it only hired Somali drivers. RP 435, 448, 454.

Alm testified that, although the defendant had kept his hair really long, it was shaved when he saw him in the third week of March, 2009.

RP 423. The defendant wore his hair in a ponytail, which Alm described as the defendant's "pride." RP 423.

Lucretia Randle, Alm's significant other, testified that the defendant's head was "clean-shaven" when she saw him in late March, 2009. RP 452. The defendant told her he had shaven his hair because he wanted to become a Navy SEAL and so that other potential employers would take him more seriously. RP 452.

Alm also stated that the defendant had owned a "Keg cap beanie," but that the defendant told him he lost it "doing collections," after jumping out of a third-story window about three weeks before March 28, 2009. RP 424-26. *See* RP 452-54. However, the defendant also told Randle that he lost the cap shortly after he received it as a Christmas bonus from the Keg, at which he worked. RP 453.

The defendant had a habit of carrying knives according to Alm, and carried a knife with a blade of seven to eight inches which hung over his shoulder. RP 426-27.

The defendant did not seem surprised when he was arrested. RP 429. After his arrest, the defendant's mother came to Alm's residence and requested the defendant's computer, which she believed could establish his innocence. RP 429. She had apparently told the defendant

that she believed the computer would show that he was using it at the time of the murder. RP 877.

Detective Reopelle participated in a search of the defendant's room after his arrest, and found a receipt from the Pawn X-Change, dated March 3, 2009 with the defendant's name on it. RP 656-57. He also found a pair of black boots in that bedroom with very worn tread. RP 657-59. The size and lack of tread on the bottom of those boots was consistent with the shoe impressions leading from the murder scene. RP 659. Reopelle also found a red matchbox in the defendant's bedroom, which bore the same Keg logo as on the cap. RP 659-60.

Detective Richard Voce, with the Pierce County Data Recovery Unit, examined the defendant's computer and found that, while the computer was running at the time of the murder, no one was actively operating it at the time. RP 732-33, 877-78.

According to Timothy Brownlee, manager of the Pawn X-Change pawn shop on Sixth Avenue in Tacoma, the defendant pawned an item at the store on March 3, 2009. RP 463.

Rochelle Campbell, a manager at the Keg restaurant, observed the photograph of the cap found at the murder scene, and testified that caps of that sort were not available for sale to the general public and were only made available to employees at Christmas parties for employees of the

restaurant's University Place and Puyallup locations. RP 491. Campbell testified that the defendant was employed by the University Place location when these caps were distributed. RP 491. Washington Employment Security Department records officer Robert Page reviewed records which confirmed that the defendant was employed by the Keg in 2006 and 2007. RP 760. Campbell testified that she saw the defendant wearing his cap on a weekly basis. RP 492. She also testified that the defendant had long hair, which ended past his shoulders that he wore it in a ponytail. RP 492.

Wilma Crane, the general manager of Tacoma Yellow Cab company, testified that the defendant leased a cab from the company starting from sometime between January and March, 2009. RP 476. Crane testified that, at the time the defendant worked for Yellow Cab, he had long hair drawn in a ponytail. RP 478. Crane testified that the defendant also wore a stocking cap with a Keg logo on it. RP 478. She observed a photograph of the cap found at the murder scene and testified that the defendant wore a cap just like it. RP 478. The defendant told Crane that he didn't like foreigners taking jobs. RP 479, 485.

Jeri Vinther, an administrative assistant at Tacoma Yellow Cab company, testified that the defendant worked as a driver at the beginning of 2008, and that he wore a Keg "skullcap." RP 503-07. She observed a photograph of the cap found at the murder scene and testified that the

defendant wore a cap similar to it, and in fact, that she could see no difference in the cap. RP 508.

Donald Henrichsen performed maintenance for the El Popo Apartments when the defendant was a tenant there. RP 704-06. The defendant had long hair when he lived there, and Henrichsen remembered him wearing a knit cap, though he did not remember that cap bearing a logo. RP 706. Henrichsen testified that the defendant was evicted from his apartment because he did not pay the rent. RP 706. Henrichsen cleaned out the defendant's former apartment, and put the trash he found inside in the apartment complex dumpster. RP 706-07.

After being evicted from that apartment, on March 12 or 13, 2009, the defendant called Zakee Perry and arranged to stay with Perry and his wife in their apartment. RP 775. The defendant moved in with Perry on March 13, 2009. RP 776. When Perry had last seen the defendant in early January, 2009, the defendant had long hair which he usually kept in a ponytail, but, by March 13, 2009, the defendant had cut his hair. RP 774-76, 786-87. The defendant also had a couple red marks on his face, which Perry described as scratches. RP 776-77, 787-88.

Detective Pavey, who is assigned to the Major Crimes / Video Unit, was asked by Detective Miller to collect surveillance video from businesses in the area of Sixth and Pine in Tacoma from 12:00 a.m. to

3:15 a.m. on March 8, 2009. RP 523. Detectives tried to get video from approximately ninety businesses. RP 554. Pavey then contacted Masa restaurant in Tacoma and obtained video from two cameras at the restaurant from midnight to 3:00 a.m. RP 521-25.

Detectives Pavey and Filbert then went to the Pawn X-Change and obtained video from all of its cameras from 3:53 p.m. to 4:00 p.m. on March 3, 2009. RP 526-27. Detective Pavey also obtained video from Anthony Truck Repair on South 36th in Tacoma and from a liquor store. RP 528-29. Detective Pavey reviewed the video from Anthony Truck Repair and saw a cab resembling a King cab traveling south on South Lawrence Street. RP 531. About 25 minutes later, according to the video from the Masa restaurant, the cab drove eastbound on 6th Avenue in front of Masa. RP 532, 545-46. The cab is then seen seconds later on the liquor store video driving east on 6th Avenue before performing a U-turn to drive westbound. RP 532. The Masa video also shows the cab traveling back westbound on 6th Avenue seconds later. RP 532. The video indicated that this occurred shortly after 2:00 in the morning, or just after Masa, which is a restaurant and bar, closed. RP 544-45.

Ahmed picked up his last fare on the 2800 block of Sixth Avenue in Tacoma, Washington, which is where Masa was located. RP 552-53. Pavey sent some of the video, as well as photographs of the cap recovered

from the crime scene, to forensic video analyst Grant Fredericks. RP 539, 575. Detective Miller also took 400 hours of video of the defendant's apartment, which was also sent to Grant Fredericks. RP 556-57. Grant Fredericks reviewed the video provided by Masa and testified that he saw a person moving by the door to 6th Avenue who wore a cap, which had no unexplainable inconsistencies with that found at the crime scene by police. RP 578-84. The man could have had long hair in a ponytail. RP 585-86. Fredericks also reviewed video from the Pawn X-Change and found that the man pictured in that video had a ponytail. RP 587. He testified that there was nothing about the individual in the Masa video that was inconsistent with the person shown in the Pawn X-Change video. RP 598-99.

On April 2, 2009, Detective Miller, accompanied by other detectives, executed a search warrant on the defendant's former El Popo apartment. RP 878-79. He had seen, via video surveillance, items being removed from the defendant's apartment and being placed in a dumpster. RP 879. When he arrived at the apartment complex, he checked the dumpster and found that it was empty. RP 879.

Detective Miller then went to the City of Tacoma landfill and requested that the truck which had collected the garbage be dumped so that they could search it. RP 880-81. Miller then found a piece of mail

addressed to the defendant in the pile. RP 882. He found a box full of items which bore the defendant's name. RP 882. Miller also found a black jacket, black pants, a bag of hair that was dark brown in color and 12 to 14 inches in length. RP 883-84. He found two Tacoma News Tribune newspapers, RP 883, one dated March 9, 2009, and one dated March 10, 2009, the first two days after the murder. RP 883; RP 741-42. Both contained front-page articles about the murder. RP 883; RP 741-42. All of these items were found in close proximity to the mail addressed to the defendant and the box of items bearing the defendant's name. RP 883; RP 741.

Crime Scene Technician Lisa Rossi was assigned to assist detectives in serving a search warrant on defendant's apartment, but was diverted to the City of Tacoma landfill, where she photographed the items of evidence recovered from the garbage truck. RP 737-39. Rossi tried, but could not recover fingerprints from the newspapers. RP 747. Rossi also photographed a pair of jeans recovered in the same area. RP 743.

At the defendant's former El Popo apartment, Detective Miller found a pair of scissors on the kitchen counter area with several hairs attached to it, RP 895, and Rossi found hair in the bathroom in a quantity greater "than a natural shedding." RP 750. *See* RP 895-96.

Susan Wilson, a forensic scientist with the microanalysis section of the Washington State Patrol Crime laboratory, examined the Keg Steakhouse and Bar hat found at the murder scene. RP 807-09. She found 18 human hairs, and many animal hairs and hair fragments embedded in the hat. RP 810-11. Of these, only one hair was found to, perhaps, be suitable for DNA analysis. RP 813. Wilson also examined the hairs found lying loosely in that hat by Detective Miller and determined that there was one human and two animal hairs. RP 811.

Christopher Sewell, the supervising forensic scientist at the Tacoma Washington State Patrol Crime Laboratory, received, among other things, the Keg cap, the oral swabs from Ahmed, and oral swabs from the defendant. RP 845. He tested the cap, found that it had blood on it, obtained a Deoxyribonucleic Acid (DNA) profile of that blood, and DNA profiles from the samples of Ahmed and the defendant. RP 847-48. Sewell found that the DNA profile of the blood found on the outside of the cap matched that of Ahmed. RP 849. The random match probability of that profile, that is, the probability of selecting an unrelated individual at random from the United State population with a matching profile, was one in two-hundred-forty quadrillion<sup>1</sup>. RP 849-51 .

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<sup>1</sup> There was also a small amount of DNA found on the outside of the cap from a second source, which was statistically insignificant. RP 851-52.

Sewell also scraped biological material from the inside of the cap and developed a single-source DNA profile of that material. RP 853. That DNA profile matched that of the defendant with a random match probability of one in four-hundred-forty trillion. RP 854. There are only about 6.8 billion people currently living on earth. RP 850-51.

The Washington State Patrol Crime Laboratory does not use mitochondrial DNA testing, and therefore, cannot test hairs without roots. RP 860-61, 915. Therefore, the 26.5-centimeter hair found in the Keg cap and another hair found in the door well of the rear driver's-side door of the taxi cab were sent for DNA testing to a private lab called Orchid Cellmark. RP 899-900, 915.

Romy Franco, a forensic DNA analyst at Orchid Cellmark in Dallas, Texas, received a hair collected from the Keg restaurant cap, a hair collected from the bottom of the rear driver's-side door of the cab, and a buccal swab from the defendant for testing. RP 922-27. Based on his testing, Franco found that the hair from the cab was not that of the defendant, but that the defendant could not be excluded as the source of the hair found in the Keg cap. RP 928. The FBI maintains a mitochondrial DNA population database, which, at the time of Franco's testimony, was composed of 4,839 entries. RP 929. The profile of the

hair found in the cap has only been seen in this database two times. RP 929-32.

After Detective Miller learned that the blood on the Keg cap was a match for that of Ahmed, he located and arrested the defendant. RP 900-02. Detectives Miller and Willrich took the defendant to a Tacoma Police Department interview room where he was read the *Miranda* warnings. RP 902-904. *See* RP 51-96.

During that interview, Detective Miller asked the defendant if he had heard about the murder of the cab driver. RP 904. The defendant stated that he had, and went on to say that he heard that there was a Keg restaurant cap found at the scene. RP 904. He then spontaneously admitted that he had owned and worn a beanie-style Keg restaurant cap, but said that he had gotten rid of it sometime before that. RP 904. Within minutes, the defendant changed his version of events and said that although he had gotten the cap at a party, he got rid of it the same night. RP 904-05.

Detective Miller then explained to the defendant that he knew the defendant owned a Keg cap and said that he “had video of him on Sixth Avenue wearing the cap on the night of the incident.” RP 905. The defendant did not deny this, but stated that he would like to see the video. RP 906-07.

The defendant went on to admit to the detective that he was in financial distress, and in fact, provided additional details the detective did not have. RP 908-09. Detective Miller then presented the defendant “with a scenario,” in which he described a third person situated in the defendant’s financial situation, using the same conditions that the defendant said he was facing, and the defendant nodded his head up and down in the affirmative. RP 909-10, 921-22. Detective Miller concluded that scenario by asking if “this person that [he] just described, in this moment of desperation, does something bad; and someone ends up dead,” is “this person a bad guy or just someone that made a mistake?” RP 910, 922. The defendant replied, someone who made a mistake. RP 910, 922.

C. ARGUMENT.

1. THE DEFENDANT’S RIGHTS TO BE FREE FROM DOUBLE JEOPARDY WERE SATISFIED BECAUSE THE SENTENCING COURT MERGED COUNTS I AND II PRIOR TO SENTENCING AND DID NOT REDUCE TO JUDGMENT BOTH VERDICTS OR CONDITIONALLY VACATE EITHER.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend.

V. It applies to the states through the due process clause of the Fourteenth Amendment. *State v. Wright*, 165 Wn.2d 783, 801, 203 P.3d 1027 (2009)

(citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)).

The Washington State Constitution similarly mandates that no person shall “be twice put in jeopardy for the same offense.” Wn. Const. Art. I, Sec. 9. “Washington’s double jeopardy clause is coextensive with the federal double jeopardy clause and ‘is given the same interpretation the Supreme Court gives to the Fifth Amendment.’” *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); *State v. Adel*, 136 Wn.2d 629, 632, 632, 965 P.2d 1072 (1998) (citing *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)).

Both clauses have been interpreted to protect against the same triumvirate of constitutional evils: “being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) ***punished multiple times for the same offense.***”

*Turner*, 169 Wn.2d at 454 (emphasis added).

“The term ‘punishment’ encompasses more than just a defendant’s sentence for purposes of double jeopardy.” *Id.* at 454-55. “Indeed, even a conviction alone, without an accompanying sentence, can constitute ‘punishment’ sufficient to trigger double jeopardy protections.” *Id.* at 455. Therefore, “a defendant convicted of alternative charges may be judged and sentenced on one only,” and courts “should enter a judgment on the greater offense only and sentence the defendant on that charge without

reference to the verdict on the lesser offense.” *State v. Trujillo*, 112 Wn. App. 390, 411, 49 P.3d 935 (2002) (citing *State v. Gohl*, 109 Wn. App. 817, 824, 37 P.3d 293 (2001)). See *Turner*, 169 Wn.2d at 463-66.

Thus, “a court may violate double jeopardy either by reducing to judgment both the greater and the lesser of two convictions for the same offense or by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid.” *Turner*, 169 Wn.2d 448, 464, 238 P.3d 461 (2010). While “double jeopardy does not require permanent, unconditional vacation of the lesser of the two convictions for the same criminal conduct,” *Id.* at 455-61, “a judgment and sentence must not include any reference to the vacated conviction –nor may an order appended thereto include such a reference.” *Id.* at 464-65. In short, “explicit *conditional* vacation of a lesser conviction,” whether oral or written, “violates double jeopardy.” *Id.* at 465 (emphasis added).

However, when a sentencing court merges one verdict into another, the first verdict “no longer exists” and “[t]hus, the merged conviction is not punishment,” and not violative of the double jeopardy provisions. *State v. Meas*, 118 Wn. App. 297, 305-06, 75 P.3d 998 (2003). Indeed, “[w]hen offenses merge and the defendant is punished only once, there is no danger of a double jeopardy violation” because a

defendant “d[oes] not receive multiple punishments.” *State v. Johnson*, 113 Wn. App. 482, 489, 54 P.3d 155 (2002).

Further, “it remains the law that a lesser conviction previously vacated on double jeopardy grounds may be reinstated if the defendant’s conviction for a more serious offense based on the same act is subsequently overturned on appeal.” *Turner*, 169 Wn.2d at 466.

Double jeopardy claims raise questions of law, which appellate courts review *de novo*. *Id.* at 454.

In the present case, the jury returned guilty verdicts to both the felony first-degree murder of Ahmed charged in count I and the intentional first-degree murder of Ahmed charged in count II of the amended information. CP 138, 140. *See* CP 22-23.

“Felony murder and intentional murder of the same victim are alternative means of committing one offense, and are therefore the same offense for double jeopardy purposes.” *State v. Johnson*, 113 Wn. App. 482, 487, 54 P.3d 155 (2002). As a result, the trial court held that “Counts I and II shall be merged into a single count of murder in the first degree committed by alternative means, premeditated and felony.” CP 184-86. Because when “the conviction for felony murder merge[s] into the intentional murder conviction, it in essence no longer exists,” *Meas*, 118 Wn. App. at 306, the sentencing court here eliminated one of the two first-degree murder counts entirely.

The sentencing court then entered judgment on one offense only and sentenced the defendant only on that one conviction. CP 166-77. Because the court here entered judgment on one offense only and sentenced the defendant on that charge without reference to the verdict on the other offense. *See* CP 166-77. *See Trujillo*, 112 Wn. App. at 411, and did not conditionally vacate the other verdict while directing, in some form or another, that it nonetheless remains valid, *Turner*, 169 Wn.2d at 464, it did not violate the double jeopardy protections.

Therefore, the defendant's sole conviction of first-degree murder in count I should be affirmed.

Nevertheless, the defendant seems to argue that the sentencing court reduced both verdicts to judgment "by including the relevant subsection for each in the judgment and sentence," or at least that it directed, by its order merging counts that the conviction nonetheless remains valid. Appellant's Opening Brief, p. 28-29. However, the law is clear that when one count is merged into another, that count no longer exists. *Meas*, 118 Wn. App. at 306. Therefore, far from directing that the other count remain valid, or retaining "both convictions in some form," Appellant's Opening Brief, p. 28-29, the court here eliminated one count entirely. *Compare* CP 22-23 with CP 166-77. Indeed, as held in *Johnson*, the court here "properly understood that because felony murder and intentional murder are alternative means, there could be only one conviction." *Johnson*, 113 Wn. App. at 489.

While the defendant argues that this Court's decision in *Meas* is no longer good law, but there is nothing in *Turner* or any other case subsequent to *Meas* that suggests this is the case. While it is true that under *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007), and *Turner*, 169 Wn.2d 448, "even a conviction alone, without an accompanying sentence, can constitute 'punishment' sufficient to trigger double jeopardy protections," *Turner*, 169 Wn.2d at 445, *Meas* made clear that when one verdict merges into another, that verdict "in essence no longer exists." *Meas*, 118 Wn. App. at 306. Thus, while there may originally be two verdicts, merger eliminates one of them. Consequently, the subsequent conviction is as to one verdict only and cannot trigger double jeopardy protections. As a result, *Meas* is not inconsistent with *Womac* or *Turner*, and could not have been rendered invalid by either decision.

Regardless, the validity of *Meas* is not vital to the decision of the present case. The simple fact is that the sentencing court here reduced only one count to judgment, sentenced on only that count, made no reference to any other count in its judgment and sentence, and in no way conditionally vacated either verdict while directing, in some form or another, that it remain valid. *See* CP 166-77, 184-86. Hence, under *Turner*, 169 Wn.2d at 464, the sentencing court did not violate the defendant's double jeopardy protections.

Therefore, the defendant's rights to be free from double jeopardy were satisfied, and his sole conviction of first-degree murder should be affirmed.

2. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT OR THAT ANY UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED.

“Without a proper timely objection at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice.” *State v. Curtiss*, 161 Wn. App. 673, 250 P.3d 496 (2011); *State v. Larios-Lopez*, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998)). This is because the absence of an objection “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (emphasis in original).

Even where there was a proper objection, an appellant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect.” *State*

*v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009); *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)); *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Hence, a reviewing court must first evaluate whether the prosecutor's comments were improper. *Anderson*, 153 Wn. App. at 427. "The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *Anderson*, 153 Wn. App. at 427-28, 220 P.3d 1273. It is not misconduct for a prosecutor to argue that the evidence does not support a defense theory, *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, review denied, 115 Wn.2d 1014, 797 P.2d 514 (1990)), and "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *Russell*, 125 Wn.2d at 87. Moreover, "[r]emarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Id.* at 86.

"A prosecutor's improper comments are prejudicial 'only where 'there is a substantial likelihood the misconduct affected the jury's

verdict.’” *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (quoting *Brown*, 132 Wn.2d at 561, 940 P.2d 546; *Fisher*, 165 Wn.2d at 747. “A reviewing court does not assess ‘[t]he prejudicial effect of a prosecutor’s improper comments... by looking at the comments in isolation but by placing the remarks ‘in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *Id.* (quoting *Brown*, 132 Wn.2d at 561; *State v. Johnson*, 158 Wn. App. 677, 683, 243 P.3d 936 (2010). “[R]emarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999); *Larios-Lopez*, 156 Wn. App. at 261.

Prosecutorial misconduct may be neutralized by a curative jury instruction, *Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), and juries are presumed to follow the court’s instructions. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

In the present case, although the defendant argues that the deputy prosecutor committed misconduct in three ways, Appellant’s Opening Brief, p. 30-57, he is incorrect.

a. The Deputy Prosecutor’s puzzle analogy was proper.

First, the defendant argues that the deputy prosecutor “misstated the law of reasonable doubt” and minimized the burden of proof beyond a reasonable doubt by comparing “the certainty required to decide the

case... to the trivial matter of figuring out what picture is shown on a jigsaw puzzle.” Appellant’s Opening Brief, p. 31-40. The defendant is mistaken.

Indeed, this Court very recently rejected an almost identical argument, holding that “the State’s comments about *identifying* the puzzle with certainty before it is complete are *not* analogous to the weighing of competing interests inherent in a *choice* that individuals make in their everyday lives.” *State v. Curtiss*, 250 P.3d 496, 509-10 (2011) (emphasis on “not” added). In *Curtiss*, the deputy prosecutor argued:

[R]easonable doubt is not magic. This is not an impossible standard. Imagine, if you will, a giant jigsaw puzzle of the Tacoma Dome. ***There will come a time when you’re putting that puzzle together, and even with pieces missing, you’ll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.***

*Curtiss*, 250 P.3d at 509. This Court held that such an argument did not equate proof beyond a reasonable doubt with the certainty required to properly identify a partially-completed puzzle. *Curtiss*, 250 P.3d at 509. Rather, it was a proper “analogy” used “to describe the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof.” *Curtiss*, 250 P.3d at 509.

The same can be said of the deputy prosecutor’s arguments in the present case. In this case, the deputy prosecutor who gave closing argument did not explicitly draw any analogy between a puzzle and proof

beyond a reasonable doubt. *See* 2/17/10 RP 5-31. While he referred to specific pieces of evidence as pieces of “the puzzle,” 2/17/10 RP 10, 21, 24, 27, he never equated solving a puzzle with being convinced beyond a reasonable doubt, and therefore, never misstated the law or minimized his burden of proof. Indeed, under *Curtiss*, 250 P.3d at 509, he committed no misconduct whatsoever.

Neither did the deputy prosecutor who gave rebuttal argument.

That prosecutor stated the following:

Now, I want to talk a little bit about the concept of beyond a reasonable doubt. The keyword there is ‘reasonable.’ Nothing in this world is 100 percent certain and nothing in a courtroom is 100 percent certain. We just need to prove the elements of the crime beyond a reasonable doubt.

[The first deputy prosecutor] went over with you what the elements of this crime are.... All we need to prove beyond a reasonable doubt are the elements of a crime and you will have in your jury instructions the elements of the crime.

2/17/10 RP 58-59.

This, in fact, is the instruction that talks about beyond a reasonable doubt. I want to highlight the last sentence of this instruction. You will have it back in the jury room in its entirety: “If, after such consideration, you have an abiding belief in the truth of the charge you are satisfied beyond a reasonable doubt.” An abiding belief in the truth of the charge because this is, after all, as we talked about from the beginning a truth-seeking process.

What I’m going to do now if use a jigsaw puzzle to illustrate the concept of beyond a reasonable doubt. Let’s say that someone is telling us that this is a picture of

Tacoma. We get a few pieces of the evidence and this is what we can see. From what we might think it looks like Tacoma, but we don't know –

[DEFENSE ATTORNEY]: *Objection; argument*, Your Honor. It requires a jury to fill in evidence that they may or may not have.

THE COURT: Also, again, this is just closing argument. The jury is one who will be making the decision as to what facts support, what proposition when they get into deliberation. Overruled.

[DEPUTY PROSECUTOR]: Thank you, Your Honor. I ask defense counsel if he has an objection to cite a legal basis, but I will go forward. Thank you.

[DEPUTY PROSECUTOR]: So we look at that portion of the puzzle and we do not have enough pieces or enough evidence beyond a reasonable doubt that it's pieces of Tacoma. But let's say we get some more pieces. Now, we have more pieces, more evidence that suggests this is Tacoma. But we may not yet have enough pieces, enough evidence to know beyond a reasonable doubt that it's Tacoma.

Now, we have more pieces. We have more evidence and we can see beyond a reasonable doubt that this is a picture of Tacoma. We can see the freeway. We can see Mount Rainier and we can see the Tacoma Dome.

*A trial is very much like a jigsaw puzzle. It's not like a mystery novel or CSI or a movie. You're not going to have every loose end tied up and every question and answer. What matters is this: Do you have enough pieces of the puzzle? Do you have enough evidence to believe beyond a reasonable doubt that the defendant is guilty?*

*Beyond a reasonable doubt, you just need enough pieces of the puzzle, enough evidence to have an abiding belief in the truth of the charge; to believe in the truth that the defendant attempted to rob Mohamed Amned; to believe in the truth that the defendant murdered Mohamed Ahmed.*

2/17/10 RP 59-61(emphasis added). The deputy prosecutor also summarized this in a PowerPoint slide, which read:

Beyond a reasonable doubt: enough pieces of the puzzle, enough evidence, to have an abiding belief in the truth of the charge.

Ex. 261.

In this argument, the deputy prosecutor never states that the standard of proof beyond a reasonable doubt is the same as the certainty required to discern what picture a partially-completed jigsaw puzzle depicts. Rather, he is simply making the proper point that proof beyond a reasonable doubt does not mean proof beyond all doubt and that an element or crime can be proven beyond a reasonable doubt even though it is not proven to the point of 100 percent certainty. As the deputy prosecutor here correctly stated, proof beyond a reasonable doubt does not necessarily require that every loose end is tied up and every question answered. *Compare* RP 61 with CP 108-137. As in *Curtiss*, the present prosecutor's comments "about *identifying* the puzzle with certainty before it is complete are *not* analogous to the weighing of competing interests inherent in a *choice* that individuals make in their everyday lives." *State v. Curtiss*, 250 P.3d at 509-10.

Hence, these comments were not improper and the defendant has failed to meet his burden of showing prosecutorial misconduct.

While the defendant relies on *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010), to argue the contrary conclusion, such reliance is

misplaced. In *Johnson*, the deputy prosecutor argued, “[y]ou add a third piece of the puzzle, and at this point even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma.” *Johnson*, 158 Wn. App. at 682. In so arguing, the deputy prosecutor was implicitly equating proof beyond a reasonable doubt to “intuiting the subject of a partially completed puzzle.” *Id.* at 683. In so doing, the deputy prosecutor “trivialized the State’s burden,” and “focused on the degree of certainty the jurors needed to act.” *Id.* at 685. Such argument was, therefore, improper.

In this case, however, the deputy prosecutor made no statements which equated proof beyond a reasonable doubt to the certainty required to identify a partially-completed puzzle. Therefore, he neither trivialized the State’s burden nor focused on the degree of certainty required to act, and as a result, this case is distinguishable from *Johnson*.

Indeed, the deputy prosecutor’s comments were, as this Court held in *Curtiss*, a proper “analogy” used “to describe the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof.” *Curtiss*, 250 P.3d at 509. As such, they were not improper and the defendant has failed to meet his burden of showing prosecutorial misconduct.

However, even assuming the impropriety of the deputy prosecutor's comments, the defendant has failed to show that they were prejudicial.

In the present case, as in *Curtiss*, the trial court gave a proper instruction on proof beyond a reasonable doubt, and a proper instruction that the jury "must disregard any remark, statement, or argument [made by the lawyers] that is not supported by the evidence or the law in my instructions." CP 108-37(instructions 1 & 2); *Curtiss*, 250 P.3d at 509. Because this Court "presume[s] that the jury follows the court's instructions," *Id.* (citing *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001)), this Court must presume that even if the deputy prosecutor misstated the law with respect to proof beyond a reasonable doubt, the jury would, under instruction number 1 disregard that misstatement, and, under instruction number 2, apply the proper standard. *Curtiss*, 250 P.3d at 509.

This is especially true given other statements made by both deputy prosecutors. In his closing argument, the first deputy prosecutor stated that the State must prove all of the elements of the charged crimes "beyond a reasonable doubt in order for you [the jury] to return a verdict of guilty." 2/17/10 RP 7. The second deputy prosecutor noted stated, "[a]ll we need to prove beyond a reasonable doubt are the elements of a

crime,” and told the jury that it could find the elements of the crimes charged in the jury instructions. 2/17/10 RP 59. That deputy prosecutor then went on to point the jury specifically to the court’s proper instruction on proof beyond a reasonable doubt and then read verbatim from that instruction. 2/17/10 RP 59-60.

In this context, there could be no “substantial likelihood” that the deputy prosecutor’s comments regarding a jigsaw puzzle, even if they were to be construed as improper, “affected the jury’s verdict,” and therefore, they could not have been prejudicial. *Yates*, 161 Wn.2d at 774. Because the deputy prosecutor’s comments were a proper “analogy” used “to describe the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof,” *Curtiss*, 250 P.3d at 509, and because, even if they were construed as improper, they were not prejudicial, the defendant has failed to meet his burden of showing prosecutorial misconduct. Therefore, his conviction should be affirmed.

b. The deputy prosecutor did not improperly comment on defendant’s partial silence.

Second, the defendant argues that the deputy prosecutor committed misconduct when he, through testimony and argument, drew negative inferences from the defendant’s partial silence. The defendant is mistaken

because the defendant did not remain silent and the deputy prosecutor did not invite the jury to infer the defendant's guilt from silence.

“The Fifth Amendment to the United States Constitution states, in part, no person ‘shall... be compelled in any criminal case to be a witness against himself’ and applies to the states through the Fourteenth Amendment. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285, 1289 (1996). Article I, section 9 of the Washington State Constitution guarantees that “[n]o person shall be compelled in any criminal case to give evidence against himself.” Thus, “[b]oth the United States and Washington Constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence.” *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505, 508 (2009); U.S. Const., Amend. V; Wn. Const., Art. I, Sec. 9. The Washington State Supreme Court has stated that it “interpret[s] the two provisions equivalently.” *Easter*, 130 Wn.2d at 235.

However, both the U.S. and Washington State Supreme Courts have distinguished between “prearrest silence”, which is “based upon the Fifth Amendment right to remain silent before *Miranda* warnings are given” and “postarrest silence”, which is “based upon due process under the Fourteenth Amendment when the State issues *Miranda* warnings.” *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1, 9 (2008).

The Fifth Amendment prohibits impeachment based upon the exercise of prearrest silence only “where the accused does not waive the right and does not testify at trial.” *Burke*, 163 Wn.2d at 217. *But see Purtuondo v. Agard*, 529 U.S. 61, 69-70, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (citing *Jenkins v. Anderson*, 447 U.S. 231, 236, n.2, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980), which noted that it was not clear whether the Fifth Amendment even protects “prearrest silence”). Because prearrest silence “lacks such ‘implicit assurance’ from the State about its punitive effect in future proceedings”, it does not implicate due process principles. *Easter*, 130 Wn.2d at 236-37. Therefore, “no constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State’s issuance of Miranda warnings.” *Burke*, 163 Wn.2d at 217.

However, the Washington State Supreme Court has determined that “when the defendant testifies at trial, use of prearrest silence is limited to impeachment and may not be used as substantive evidence of guilt.” *Id.* (citing *State v. Lewis*, 130 Wn.2d 700, 705-06, 927 P.2d 235 (1996)). The Court noted that “[i]mpeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful.” *Id.* at 219.

“In circumstances where silence is protected, a mere reference to the defendant’s silence by the government is not necessarily a violation of

this principle.” *Id.* at 217. Rather, it is only “when the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated.” *Id.*

“Courts have generally treated comments on post-arrest silence as a violation of a defendant’s right to due process because the warnings under *Miranda* constitute an ‘implicit assurance’ to the defendant that silence in the face of the State’s accusations carries no penalty” such that the subsequent use of post-arrest silence “after the *Miranda* warnings is fundamentally unfair and violates due process.” *Easter*, 130 Wn.2d 228 at 236 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S. Ct. 1710, 1716-17, 123 L. Ed. 2d 353 (1993)); *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S. Ct. 2240, 2244-45, 49 L. Ed. 2d 91 (1976)). Hence, “[d]ue process under the Fourteenth Amendment prohibits impeachment based on a defendant’s *silence* after he receives *Miranda* warnings, even if the defendant testifies at trial.” *Knapp*, 148 Wn. App. at 420 (emphasis added).

However, “[w]hen a defendant does not remain silent and instead talks to police, the state may comment on what he does *not* say.” *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001). See *State v. Hager*, 171 Wn.2d 151, 158, 248 P.3d 512 (2011). This is because “[a]s to the subject

matter of his [or her] statements, the defendant has not remained silent at all.” *Anderson v. Charles*, 447 U.S. 404, 408, 100 S. Ct. 2180 (1980). Hence, a “prosecutor [i]s entitled to argue the failure of the defendant to disclaim responsibility after [that defendant] voluntarily waive[s] his right to remain silent and when his questions and comments show[] knowledge of the crime.” *State v. Young*, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978); *State v. MacDonald*, 122 Wn. App. 804, 811, 95 P.3d 1248 (2004) (noting that “a prosecutor may ‘argue the failure of the defendant to disclaim responsibility after he voluntarily waived his right to remain silent and when his questions and comments showed knowledge of the crime,’” and holding that this comment “referred to a defendant who waived the right to remain silent during an interrogation –not when testifying on his own behalf at trial.”)

Moreover, “where a defendant waives the right to remain silent and makes a partial statement to police, the State may use the statement to impeach the defendant’s inconsistent trial testimony.” *State v. Scott*, 58 Wn. App. 50, 791 P.2d 559 (1990) (citing *State v. Belgarde*, 110 Wn.2d 504, 511, 755 P.2d 174 (1988)). Further, “the State’s right to comment upon inconsistencies between a defendant’s post-*Miranda* ‘partial silence’ and trial testimony by the defendant” has been found to “extend, with equal logic, to inconsistencies between such partial silence and defense

theories pursued at trial without actual testimony from the defendant.”

*Scott*, 58 Wn. App. at 55.

During the deputy prosecutor’s direct examination of Zakee Perry, the following exchange occurred:

Q. When was the next time you heard from him [i.e., the defendant]?

A. When he called me from jail

....

Q. Did he tell you what he was charged with?

A. Yeah. He did tell me he was charged with murder.

....

Q. So you haven’t talked to him [i.e., the defendant] in a week or so, and he calls you from jail and tells you he’s charged with murder. Did he ever tell you one way or the other whether he did it?

A. No. We didn’t – we didn’t really talk—

[DEFENSE ATTORNEY]: I object, Your Honor.

THE COURT: Okay. Just a second.

[DEFENSE ATTORNEY]: I object on the prior ruling, premised on the prior ruling

....

Q Mr. Perry, to restate the question, your friend calls you. You haven’t talked to him in a week, and he tells you that he’s calling you from the jail and that he’s been arrested for murder; and this is the first you had heard of it at all. Did he ever tell you whether or not he committed the murder.

A. No. Once again, we – ***other than him telling me what he was charged with, we didn’t actually, discuss it. He didn’t say anything to me about it.***

RP 778-81 (emphasis added).

The conversation to which Mr. Perry referred obviously occurred after the defendant’s arrest, and, given the testimony of Detective Miller,

after the defendant had been advised of the *Miranda* warnings. See RP 902-904, RP 51-96. However, because the statement at issue was given to a private party rather than to an agent of the State, *Miranda* was not applicable, see, e.g., *State v. Heritage*, 152 Wn.2d 210, 216, 95 P.3d 345 (2004). Hence, there was no “implicit assurance” in Miller’s *Miranda* warnings to the defendant that any statements or partial silence made to Perry would not be introduced as evidence against him at trial. Therefore, there could be no due process violation in the use of such evidence at trial. See *Easter*, 130 Wn.2d 228. As a result, the defendant has failed to show that the deputy prosecutor acted improperly, and hence, failed to show prosecutorial misconduct.

Moreover, the defendant, through his attorney’s opening statement, told the jury that “[n]owhere did [he, the defendant,] ever admit to anyone that he had committed this crime.” 2/3/10 RP 17. Because “the State’s right to comment upon inconsistencies between a defendant’s post-*Miranda* ‘partial silence’ and trial testimony by the defendant” extends “to inconsistencies between such partial silence and defense theories pursued at trial without actual testimony from the defendant,” *Scott*, 58 Wn. App. at 55, the deputy prosecutor here had a right to inquire about whether the defendant had, contrary to his assertion, in fact admitted to anyone that he had committed this crime. Thus, the deputy prosecutor’s

question was not improper, and the defendant has failed to show prosecutorial misconduct.

However, even were the question to be considered improper, the answer, and therefore, the actual testimony admitted, was not. Perry's answer to the deputy prosecutor's question was that he and the defendant "didn't actually, discuss it," that is the defendant's guilt or innocence. Because there was no discussion, there could be no admission or denial, and there could, therefore, be no silence upon which to comment.

For these reasons, the defendant has failed to show that the deputy prosecutor's question was improper. Therefore, he has failed to show prosecutorial misconduct and his conviction should be affirmed.

The defendant also complains about the following exchange, which occurred during the deputy prosecutor's direct examination of Detective Miller:

- A. I, basically, just continued on with knowing that —or telling him that I had video of him on Sixth Avenue on the night of the incident wearing his Keg cap, knowing that he had gotten into the cab on the 2800 block of Sixth Avenue and that it was his Keg cap that was recovered from the scene.
- Q. (By [Deputy Prosecutor]) And what did the defendant say when you told him this?
- A. He didn't make any attempt to deny the information. His comment was —  
[DEFENSE ATTORNEY]: Objection.  
THE COURT: Okay.  
[DEFENSE ATTORNEY]: I've already made my objections on this issue, Your Honor.

THE COURT: I understand. Subject, of course, to prior objections and subject to the prior ruling, you may continue.

A. ***His comment to me was that he'd actually, like to see the video.***

RP 907.

During rebuttal argument, a different deputy prosecutor stated,

We've already covered the fact that the defendant claimed he got rid of the Keg cap the night he received it at the party. We know that to not be true. But we also know the defendant was aware of the significance of the Keg cap.

He knew he left his cap behind and he knew it was mentioned in the News Tribune articles, so that's why he's making up the story about the Keg cap. ***He didn't however, give consistent stories about the Keg cap, different stories to different people. Detective Miller called him on this and saw him wearing the Keg cap on the video outside Masa. The defendant doesn't deny this. He just says he would like to see that video.***

2/17/10 RP 57-58 (emphasis added). The defendant did not object to this argument. *See* RP 57-58.

Earlier in his direct examination, Detective Miller had testified, without objection, that the defendant had said "that he had heard about there being a Keg restaurant beanie-style cap that was found at the scene." RP 904. The defendant went on to tell Miller that he had "owned and worn a Keg restaurant beanie-style cap in the past," but "that he had gotten rid of it sometime ago." RP 904. The defendant then said that he had gotten rid of the cap the same night that he got it. RP 904. The detective

testified that he then told the defendant that he had video of the defendant “on Sixth Avenue on the night of the incident wearing his Keg cap.” RP 907.

Thus, here, as in *Clark*, the “defendant d[id] not remain silent and instead talk[ed] to police.” See *Clark*, 143 Wn.2d at 765. As a result, the State was entitled to “comment on what he d[id] not say.” *Clark*, 143 Wn.2d at 765. See *State v. Young*, 89 Wn.2d at 621. Hence, under *Clark* and *Young*, when the deputy prosecutor asked Detective Miller “what did the defendant say when you told him this,” and Miller replied, “[h]e didn’t make any attempt to deny the information,” the deputy prosecutor was asking a proper question, to which the detective responded properly.

Moreover, the deputy prosecutor’s comment during closing, 2/17/10 RP 57-58, and the accompanying PowerPoint slide, Ex. 260, p. 23, that the defendant did not deny that Detective Miller saw him “wearing the Keg cap on the video outside Masa,” was also proper because, under *Clark*, the State was entitled to “comment on what [the defendant] d[id] not say.” *Clark*, 143 Wn.2d at 765.

The defendant also notes a PowerPoint slide in which the deputy prosecutor seems to indicate that the defendant did not “really admit or deny” the crime, Ex. 260 at 24, Appellant’s Opening Brief, p. 43, though

he does not seem to explicitly argue that this was improper. *See* Appellant's Opening Brief, p. 1- 68.

It was not improper because a "prosecutor [i]s entitled to argue the failure of the defendant to disclaim responsibility after [that defendant] voluntarily waive[s] his right to remain silent and when his questions and comments show[] knowledge of the crime." *Young*, 89 Wn.2d at 621. Here, the defendant did waive his right to remain silent, RP 904, *see* RP 51-96, and his comments about the murder and the Keg cap found at its location, RP 904, showed knowledge of the crime. Therefore, under *Young*, it was proper for the prosecutor here "to argue the failure of the defendant to disclaim responsibility." *Young*, 89 Wn.2d at 621.

As a result, the defendant here has failed to show that any of the prosecutor's comments or questions were improper, and has, therefore, failed to meet his burden of showing prosecutorial misconduct.

Although the defendant argues that the Washington State Supreme Court's decisions in *Young*, 89 Wn.2d 613, and *Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001), were limited by *Anderson v. Charles*, 447 U.S. 404, 100 S. Ct. 2180 (1980) and *Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008), he is incorrect.

*Charles* held only that "*Doyle* does not apply to the facts of this case," and hence that "*Doyle* does not apply to cross-examination that

merely inquires into prior inconsistent statements.” *Charles*, 447 U.S. at 408-09. However, there is nothing in the holding of *Charles* that states that use of partial silence at trial must be limited to cross-examination regarding inconsistent statements. *Charles* simply held that such cross-examination was proper. Therefore, there can be nothing in the holding in *Charles* that abrogates from the proposition of *Clark* that “[w]hen a defendant does not remain silent and instead talks to police, the state may comment on what he does not say.” *State v. Clark*, 143 Wn.2d at 765. Similarly, there can be nothing in *Charles* which detracts from the validity of *Young*’s holding that a “prosecutor [i]s entitled to argue the failure of the defendant to disclaim responsibility after [that defendant] voluntarily waive[s] his right to remain silent and when his questions and comments show[] knowledge of the crime.” *Young*, 89 Wn.2d at 621. Indeed, the Washington State Supreme Court seems to have recognized the continued validity of both *Clark* and *Young* as late as March, 2011, by quoting *Clark* and citing *Young* for the proposition that “[w]hen a defendant does not remain silent and instead talks to the police, the state may comment on what he does *not* say.” *Hager*, 171 Wn.2d at 158. Hence, *Charles* does not compel a different result in this case.

Nor does *Burke*. *Burke* concerned pre-arrest silence, *see Burke*, 163 Wn. 2d at 207, not the post-arrest partial silence at issue here. It held

that the State there “impermissibly commented upon the defendant’s assertion of the right to remain silent so as to invite the jury to infer guilt from the exercise of a constitutionally protected right.” *Id.* at 223. However, here, unlike in *Burke*, the defendant never asserted his right to remain silent; he waived it. RP 904, *see* RP 51-96. Thus, the State could not have commented upon his assertion of this right to remain silent and *Burke* is distinguishable from the present case.

Indeed, the defendant here has failed to show that any of the prosecutor’s comments or questions were improper, and thus, has failed to meet his burden of showing prosecutorial misconduct.

Therefore, the defendant’s conviction should be affirmed.

- c. The deputy prosecutor properly asked the jury to convict based upon proof beyond a reasonable doubt of the required elements, not emotion, sympathy, or disgust.

Although the defendant argues that the deputy prosecutors here, in their closing and rebuttal arguments, invited the jury to convict based, not upon the evidence, but on emotion, sympathy, and disgust, his argument is not supported by the record.

The defendant cites *State v. Bautista-Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989), which noted that it is improper for a prosecutor to ask a jury to convict based on something other than the evidence, such

as, in that case, the intent “to send a message to *society* about the general problem of sexual abuse.”

In the present case, the deputy prosecutors did not ask the jury to convict based on anything but the evidence. *See* RP 5-31. Specifically, the deputy prosecutor who gave closing argument began by directly the jury’s attention to the charges filed against the defendant and then to the “elements that the State must prove beyond a reasonable doubt in order for you to return a verdict of guilty” to those charges. 2/17/10 RP 6-7. He then discussed the evidence presented at trial which tended to prove the elements of count I, 2/17/10 RP 7-26, and concluded that these elements were proven beyond a reasonable doubt. 2/17/10 RP 27. Based on this alone, the deputy prosecutor argued that “you must find the defendant guilty as to Count I.” 2/17/10 RP 27. The deputy prosecutor then discussed the evidence which tended to prove the elements of count II. 2/17/10 RP 27-31, and concluded by stating, “[s]o when you add up all the evidence that tells you that this defendant is also guilty on Count 2.” 2/17/10 RP 31. The deputy prosecutor then finished his closing argument by stating,

Ladies and gentlemen of the jury, I ask you to carefully consider all the evidence that has been presented in this case and I’m asking you to return a verdict of guilty on Count I and Count II. Thank you.

2/17/10 RP 31. At no time did the deputy prosecutor ask the jury to return a verdict based on anything other than the evidence. *See* 2/17/10 RP 5-31. Therefore, his argument was not improper under *Bautista-Caldera*, 56 Wn. App. 186, or any other law, and the defendant has failed to meet his burden of showing prosecutorial misconduct.

While it is true that the deputy prosecutor also stated in his closing argument that Mr. Ahmed was left to die, Appellant's Opening Brief, p. 54, this was what the undisputed testimony showed. *See, e.g.*, RP 167, 323-26. Although the deputy prosecutor stated that Ahmed "came to the United States to seek a better life for himself from a worn [sic] torn Somalia," 2/17/10 RP 6, and that "he suffered the defendant's hatred," 2/17/10 RP 6, because the defendant believed Ahmed "was one of the people that was out to take his job," 2/17/10 RP 6; Appellant's Opening Brief, p. 54-55, again, the undisputed evidence supported these statements. The undisputed testimony was that Mr. Ahmed immigrated from Somalia to the United States, began working for King Cab company, *see* RP 163-64; RP 690, and that the defendant, an out-of-work taxi driver, "hated" King Cab company because he believed it only hired Somali drivers. RP 435, 448, 454. Therefore, in stating that Ahmed suffered the defendant's hatred because the defendant believed he took his job, the deputy prosecutor did no more than properly draw reasonable inferences from the

evidence. *See State v. Anderson*, 153 Wn. App. 417, 427-28, 220 P.3d 1273 (2009).

Moreover, never did the deputy prosecutor present any of these statements as a reason to convict. *See* 2/17/10 RP 5-31. Rather, he asked the jury to convict only after “carefully consider[ing] all the evidence that has been presented in this case.” 2/17/10 RP 31. Such comments and argument are not improper and, thus, the defendant has failed to meet his burden of showing prosecutorial misconduct.

The defendant also argues that the deputy prosecutor committed misconduct by stating, in rebuttal:

But you have an opportunity to bring back a verdict that is just; justice for the defendant, justice for Mr. Ahmed, and justice for the community. So I’m going to ask you to return the only verdict that will be just in this case, and that’s guilty as charged.

2/17/10 RP 62. *See* Appellant’s Opening Brief, p. 55-56.

However, the deputy prosecutor here never told the jury to return a verdict of guilty because it was the “just” verdict. *See* 2/17/10 RP 62. Rather, the deputy prosecutors, throughout their closing and rebuttal arguments, asked the jury to convict because they had “prove[n] the elements of the crime beyond a reasonable doubt,” not because the jury should simply do what it personally considered just. At no time did either prosecutor tell the jury to ignore the evidence and simply return a verdict

they thought was just. Instead, both told the jury to consider all of the evidence, and based on that evidence return a guilty verdict. *See, e.g.*, 2/17/10 RP 31, 61. A fleeting reference to the fact that a guilty verdict supported by the evidence happens to be “just,” is not enough to render the arguments of these prosecutors improper. As a result, the defendant has failed to meet his burden of showing prosecutorial misconduct.

However, even if such comments were considered improper, they were not prejudicial given the court’s instructions and the prosecutor’s extended argument to convict only on the evidence. Indeed, the deputy prosecutor’s comments during closing argument were accompanied by almost simultaneous instruction from the trial court to “not permit sympathy or prejudice to influence their decision,” and “that any arguments, statements that are not supported by the evidence are not to be considered.” RP 6-9. Given such instructions and the deputy prosecutor’s other argument, there is no substantial likelihood that the comments at issue here affected the jury’s verdict, and therefore, even were they to be considered improper, they were not prejudicial. *See State v. Yates*, 161 Wn.2d at 774.

Therefore, the defendant has failed to meet his burden of showing prosecutorial misconduct and his conviction should be affirmed.

Although the defendant argues that “reversal should be granted based upon the cumulative effect of the misconduct even if each individual act of misconduct did not already compel reversal,” Appellant’s Opening Brief, p. 56-57, this argument must fail because, as argued above, there was no misconduct.

Therefore, the defendant has failed to meet his burden of showing prosecutorial misconduct and his convictions should be affirmed.

3. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF MR. STAFFORD AS PROOF OF MOTIVE UNDER ER 404(b).

ER 404(b) provides that

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior to admission of such evidence, the court must (1) find that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of such evidence against its prejudicial effect. *State v. Yarbrough*, 151 Wn. App. 66, 81-82, 210 P.3d 1029, 1036 (2009); *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Thus, “[e]vidence of other bad acts can be admitted under ER 404(b) when a trial court identifies a significant

reason for admitting the evidence and determines that the relevance of the evidence outweighs any prejudicial impact.” *State v. Scott*, 151 Wn. App. 520, 527, 213 P.3d 71 (2009).

“[I]t is well established that the State can prove motive even when it is not an element of the crime charged.” *Yarbrough*, 151 Wn. App. at 83 (citing, inter alia, *State v. Athan*, 160 Wn.2d 354, 382, 158 P.3d 27 (2007) (finding that “[a]lthough motive is not an element of murder, it is often necessary when only circumstantial evidence is available”)).

“Motive” is an inducement, which tempts a mind to commit a crime. *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964 (1998).

“[M]otive goes beyond gain and can demonstrate an impulse, desire or any other moving power which causes an individual to act.” *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

An appellate court “will not disturb a trial court’s ruling under ER 404(b) absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did.” *Yarbrough*, 151 Wn. App. 66, 81 210 P.3d 1029, 1036 (2009). A trial court only “abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons.” *Id.* (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

In the present case, the State sought to introduce the testimony of Michael Stafford, and made an offer of proof by way of a police report, that Stafford would testify that

[i]n early March [the defendant] told Stafford that he needed to come up with about \$300 to avoid being evicted from his apartment at the El Popo apartment complex. When [the defendant] began complaining about being on hard times, he told Stafford he was planning on doing a robbery.... [The defendant] told him someone was going to pay him to commit a robbery. The robbery was going to take place at night, and he would be wearing a mask because the person he was going to rob knew him. Stafford said that [the defendant] mentioned the dollar amount of \$10,000 regarding the robbery, but Stafford could not recall if this was the amount that [the defendant] was going to get paid for his participation or the amount that he was expected to –that he was expecting to be taken in the robbery. [The defendant] later told Stafford that he was not able to do the robbery and that it, quote, didn't go down, but didn't elaborate further.

RP 120-21. *See* RP 795-97 (Stafford's trial testimony).

The State argued that such testimony should be admitted to prove motive for the robbery or attempted robbery underlying the felony murder charged in count I. RP 121. Specifically, the State argued that the defendant "was facing imminent eviction from the El Popo Apartments and, as a result of this, needed money to avoid being evicted; and that's the motive for him robbing or attempting to rob the victim in this case." RP 121. The State argued that "in a case where robbery is the underlying felony, and the motive is to avoid eviction, it's difficult to imagine a statement that's more relevant." RP 122. Finally, the State admitted that such testimony was "prejudicial but not unfairly so." RP 122.

While the defendant did not dispute that the statements were actually made to Stafford, he objected that evidence of those statements was not relevant and that it was overly prejudicial. RP 119-20, 123-24.

The trial court found (1) that the defendant was “telling” things “to a third person,” i.e., Mr. Stafford, RP 125, (2) from which a jury could find that the motive for the felony-murder was robbery, and that given “that the defendant had worked for two [cab] companies,” he may have felt he had no alternative but to murder the driver who may have known him, RP 124, (3) that the testimony at issue was “relevant to the specific facts of this crime,” and finally, (4) that it was admissible. RP 123-25.

The trial court’s decision in this regard cannot be said to be “manifestly unreasonable or based on untenable grounds or reasons.” *Yarbrough*, 151 Wn. App. at 81. Although the defendant now argues that the evidence at issue “was not relevant or necessary to prove anything but propensity,” Appellant’s Opening Brief, p. 62, he is mistaken. Evidence that the defendant was in desperate need of money to avoid losing his home and that he was considering robbing someone he knew to get it, RP 120-21, is certainly relevant to explain why he would rob or attempt to rob Mr. Ahmed, and why he may have felt he needed to ultimately commit the felony murder charged in count I. While the State was not required to show why the defendant would commit the crime charged in count I, “it is

well established that the State can prove motive even when it is not an element of the crime charged.” *Yarbrough*, 151 Wn. App. at 83. Thus, the evidence at issue was relevant to prove motive for count I.

Moreover, because the jury was told, through Stafford, that the defendant ultimately abandoned his original robbery plan, RP 796, *see* RP 121, the prejudicial effect of such testimony was less than its probative value. Given that the defendant did not dispute that these statements were made, *see* RP 119-24, they were sought to be introduced to prove motive, they were relevant to prove the crime charged, and their probative value outweighed their prejudicial effect, the trial court’s decision to admit these statements cannot be said to be “manifestly unreasonable or based on untenable grounds or reasons.” *See Yarbrough*, 151 Wn. App. at 81-82.

Therefore, the trial court properly admitted the testimony of Mr. Stafford as proof of motive under ER 404(b), and its decision to do so and the defendant’s ultimate conviction should be affirmed.

However, even if such testimony was improperly admitted, its admission was harmless.

“An evidentiary error which is not of constitutional magnitude, such as erroneous admission of ER 404(b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome.” *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39

P.3d 294 (2002). “The error is ‘not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.’” *Everybodytalksabout*, 145 Wn.2d at 469. “The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole.” *Id.*

Here, even had the testimony at issue not been admitted, the outcome of the trial would not have been affected. The evidence in this case was very strong, if not overwhelming. The defendant told his friend, Curtis Alm, that he had no money, no job, and that he was facing eviction from his home. RP 422-23. Because the defendant used to work as a cab driver, Alm urged the defendant to get a job at a cab company, RP 444, but the defendant told Alm that he hated King Cab because it only hired Somali drivers. RP 435, 448, 454.

The murder victim in this case, who may also have been robbed, was a Somali immigrant, who worked for King Cab company. RP 163-64, 690. He was killed when his throat was slashed with a sharp instrument. RP 391-411. The defendant was known to carry knives, RP 426-27. The defendant’s cap, which he admitted to owning, RP 904, and had been seen repeatedly wearing, RP 492, 503-07, was found at the murder scene in close proximity to Mr. Ahmed’s body. RP 356-57, 664-65. That cap had Mr. Ahmed’s blood on the outside of it, RP 847-49, and the defendant’s

DNA throughout its interior. RP 853-54. There was no other person's DNA found inside that cap, RP 853, and the DNA profile of the biological material inside the cap matched that of the defendant with a random match probability of one in four-hundred-forty trillion. RP 854.

There were footprints found in landscaping bark leading from the crime scene which were consistent with size and lack of tread on the bottom of boots later found in the defendant's residence. RP 659.

The defendant, who had always kept his hair very long, who wore it in a ponytail as his "pride," suddenly shaved it, just after the March, 2009 murder of Mr. Ahmed. RP 423, 452.

The defendant was found to have two newspaper articles in his possession that described the murder and the fact that his cap was found at its scene. RP 741-42, 883. He told four inconsistent stories as to how he had lost that cap. *Compare* RP 424-26 *with* RP 453 and RP 904-05.

When Detective Miller presented the defendant "with a scenario," in which he described a third person situated in the defendant's financial situation, using the same conditions that the defendant said he was facing, the defendant nodded his head up and down in the affirmative. RP 909-10, 921-22. Detective Miller concluded that scenario by asking if "this person that [he] just described, in this moment of desperation, does something bad; and someone ends up dead," is "this person a bad guy or

just someone that made a mistake?” RP 910, 922. The defendant replied, someone who made a mistake. RP 910, 922.

Given such evidence, Stafford’s testimony is “of minor significance compared to the overall evidence as a whole.”

*Everybodytalksabout*, 145 Wn.2d at 469. Indeed, there is no reasonable probability that the outcome of the trial would have been materially different had Stafford’s testimony not been admitted. Therefore, any error in its admission would not be prejudicial, *see Everybodytalksabout*, 145 Wn.2d at 469, and reversal would not be required.

Because the trial court properly admitted the testimony of Mr. Stafford as proof of motive under ER 404(b), and even if it did not, any error in its admission was harmless, the defendant’s conviction should be affirmed.

4. THE DEFENDANT’S CONVICTION SHOULD BE AFFIRMED BECAUSE THERE WAS NO ERROR COMMITTED AND THEREFORE, THE CUMMULATIVE ERROR DOCTRINE IS INAPPLICABLE.

Under the cumulative error doctrine a court “may reverse a defendant’s conviction when the combined effect of errors during trial effectively denied the defendant her [or his] right to a fair trial, even if each error standing alone would be harmless.” *State v. Venegas*, 155 Wn.

App. 507, 520, 228 P.3d 813 (2010). The “cumulative error doctrine” is “limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn. 2d 910, 929, 10 P.3d 390 (2000). However, the doctrine does not apply where the errors are few and have little or no effect on the trial’s outcome.” *Venegas*, 155 Wn. App. at 520.

As explained in the argument above, there was no error committed in the present case. Because there was no error, there can be no cumulative error. Therefore, the defendant’s argument fails and his conviction should be affirmed.

5. THE DEFENDANT WAIVED ANY ISSUE REGARDING THE COURT’S INSTRUCTION NUMBER 25 CONCERNING THE SPECIAL VERDICT FORMS.

“Though unanimity is required to find the presence of a special finding increasing the maximum penalty,” “it is not required to find the *absence* of such a special finding.” *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (July 1, 2010). Therefore, a jury instruction which states that “unanimity [i]s required for either determination” is error. *Bashaw*, 169 Wn.2d at 147.

In the present case, the jury was given an instruction regarding the deadly weapon sentence enhancements pertaining to then counts I and II, titled instruction number 25:

You will also be given special verdict forms for the crimes charged in counts I and II. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. *If you unanimously have a reasonable doubt as to this question, you must answer “no”.*

CP 108-37 (instruction no. 25). This instruction was modeled on the then current version of Washington Pattern Jury Instruction –Criminal (WPIC) 160.00. *Compare* CP 108-37 *with* WPIC 160.00. *See* RP 959.

Because this instruction states that “unanimity [i]s required” to either answer “yes” or “no,” it appears to run afoul of *Bashaw*, 169 Wn.2d at 147.

However, “RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011). This “general rule has special applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c),

requiring that timely and well stated objections be made to instructions given or refused “in order that the trial court may have the opportunity to correct any error.” *Nunez*, 160 Wn. App. at 157.

A “manifest error affecting a constitutional right” is one of the exceptions that can be raised for the first time on appeal, RAP 2.5(a)(3), however, “an appellant must ‘identify a constitutional error and show how the alleged error actually affected the [appellant’s] rights at trial.’” *Nunez*, 160 Wn. App. at 157-58 (quoting *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). In other words, it must be demonstrated that the claim at issue “implicates a constitutional interest as compared to another form of trial error,” and that the claim at issue is “manifest.” *Id.* at 158. “‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” *Id.* “To demonstrate actual prejudice there must be a ‘plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.’” *Id.* “In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim.” *Id.*

In *Nunez*, the Court considered the same claim that the defendant raises here and held that “[t]he trial court’s failure to instruct the jury that it could acquit [the defendant] of the aggravating factor nonunanimously is... not an error of constitutional dimension.” *Nunez*, 160 Wn. App. at

159. It noted that the Supreme Court in *Bashaw* “recognize[d] that it is common law rule, not the constitution, that permits Washington juries to reject sentence enhancements... less than unanimously.” *Nunez*, 160 Wn. App. at 160-62.

In the present case, the defendant did not object or take exception to instruction number 25 of which he now complains, and indeed, raised no issue regarding it until now. *See* RP 959. Therefore, under RAP 2.5(a), this Court should not entertain this issue unless the defendant can show an exception thereto. He cannot.

The defendant does not claim that the trial court lacked jurisdiction under RAP 2.5(a) or a “failure to establish facts upon which relief can be granted under RAP 2.5(b). Therefore, unless the defendant can ““identify a constitutional error and show how the alleged error actually affected [his] rights at trial,”” *Nunez*, 160 Wn. App. at 157-58, under RAP 2.5(c), this issue should be considered waived.

The Court in *Nunez* has already, very recently held that “[t]he trial court’s failure to instruct the jury that it could acquit [the defendant] of the aggravating factor nonunanimously is... not an error of constitutional dimension.” *Nunez*, 160 Wn. App. at 159. There, like here, the sentence enhancement was imposed following a deliberative procedure to which [the defendant] did not object; which no court, state or federal, has found

to be unconstitutional or unfair, which has been acknowledged to have procedural advantages; and which, in the lesser included crime context, is preferred by a number of jurists and courts. *Id.* at 162-63. “This is not constitutional error.” *Id.* at 163. Therefore, the defendant has not so much as identified a constitutional error, and this issue should be considered waived. *Nunez*, 160 Wn. App. 150.

Although he attempts to distinguish his case from *Nunez* by arguing that that the constitutional error at issue is his “constitutional right to the ‘benefit of the doubt’ under the presumption of innocence,” at no point does he articulate why the presumption of innocence confers a right to a non-unanimous acquittal on a special verdict. *See* Appellant’s Opening Brief, p. 64-68. He argues that an instruction requiring unanimity to acquit of a special verdict “deprives the defendant of the benefit of the doubts some jurors may have had,” but this argument is not significantly different from that considered in *Nunez* that such an instruction “denied [the defendant] the chance that the jury would refuse to find the aggravating factors had it suspended its deliberations short of reaching a unanimous agreement.” *Nunez*, 160 Wn. App. at 159. Therefore, the defendant here has not raised a constitutional issue not considered and rejected by the Court in *Nunez*

The simple, undeniable fact is that there is no constitutional provision, state or federal, which confers the right to an acquittal on a special verdict by a non-unanimous verdict. *Nunez*, 160 Wn. App. 150. As a result, the defendant cannot identify a constitutional error and therefore, under RAP 2.5(a), this issue should be considered waived, and his conviction and sentence affirmed.

6. THE DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL COUNSEL CHOSE NOT TO OBJECT TO AN INSTRUCTION BASED ON A PREVIOUSLY-APPROVED WPIC.

“Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X).” *State v. Yarbrough*, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009); *State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. *Yarbrough*, 151 Wn. App. at 89.

“Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.” *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001) (citing *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the

defendant meet both prongs of a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See also *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was deficient” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *Cienfuegos*, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); *In Re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The first prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Specifically, “[t]o establish deficient performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness.” *Johnston*, 143 Wn. App. at 16. “The reasonableness of trial counsel’s performance is reviewed in light of all the circumstances of the case at the time of counsel’s conduct.” *Id.*; *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). “Competency of counsel is determined based upon the entire record below.” *State v. Townsend*, 142

Wn.2d 838, 15 P.3d 145 (2001) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)).

“To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective.” *Yarbrough*, 151 Wn. App. at 90. This presumption includes a strong presumption “that counsel’s conduct constituted sound trial strategy.” *Rice*, 118 Wn.2d at 888-89. “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *Yarbrough*, 151 Wn. App. at 90 (citing *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

With respect to the second prong, “[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Cienfuegos*, 144 Wn.2d at 229.

In the present case, the defendant argues that his trial counsel was ineffective in failing to object to instruction number 25, the concluding

instruction regarding special verdicts. Appellant's Opening Brief, p. 66-67.

However, defense counsel cannot "be faulted for [even] requesting a jury instruction based upon a then-unquestioned WPIC." *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). *State v. Summers*, 107 Wn. App. 373, 382-83, 28 P.3d 780 (2002) (holding that "trial counsel can hardly be found to fall below acceptable standards by requesting an instruction based upon a WPIC appellate courts had repeatedly and unanimously approved.")

In the present case, the parties discussed jury instructions and the defense attorney chose not to object to instruction number 25 on February 16, 2010. RP 941-59. Instruction 25 was based on and, followed virtually verbatim, the language of WPIC 160.00. *Compare* CP 108-37 (instruction 25) *with* WPIC 160.00. WPIC 160.00 was, at the time, not only unquestioned, but had very recently been approved by the Court of Appeals decision in *State v. Bashaw*, 144 Wn. App. 196, 182 P.3d 451 (April 24, 2008). The defendant in that case, like the defendant here, argued that the trial court should have known that *State v. Goldberg*, 144 Wn. App. 196, 182 P.3d 451 (2008), required a negative finding whenever any juror is not satisfied that the special verdict was proven beyond a reasonable doubt. However, the Court of Appeals, noting that *Goldberg*

“could be interpreted expansively or narrowly,” held that “[w]e do not believe that the court [in *Goldberg*] intended to hold that special verdicts were to have unanimity requirements different from general verdicts.”

*Bashaw*, 144 Wn. App. at 202. The Court went on to note that

There is no discussion in *Goldberg* of the pattern instructions. There is no discussion of special verdicts in general or the policy of permitting one juror to acquit on a special verdict. In short, there is simply no indication that either the pattern instructions or the policy of unanimous special verdicts were at issue in *Goldberg*.

Indeed, as the Court in *Nunez* recently noted, “[i]n the context of a jury’s deciding aggravating factors, we found no case outside the *Bashaw* decisions in which the issue of whether jurors should or should not deliberate to unanimity in order to acquit has been considered.” *Nunez*, 160 Wn. App. at 163.

Thus, at the time defense counsel here failed to object to instruction number 25, that instruction was based on a WPIC which had been approved by the Court of Appeals. WPIC 160.00; *Bashaw*, 144 Wn. App. 196. Because trial counsel cannot be found to fall below acceptable standards by even requesting an instruction based upon an unquestioned WPIC, *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999), or one which an appellate court previously approved, *State v. Summers*, 107 Wn.

App. 373, 382-83, 28 P.3d 780 (2002), the defendant's trial counsel cannot be said to have fallen below acceptable standards.

As a result, the defendant has failed to show that his counsel's performance was deficient, and has failed to show ineffective assistance of counsel.

Therefore, his conviction and sentence, including the 24-month deadly weapon sentence enhancement, should be affirmed.

D. CONCLUSION.

The defendant's rights to be free from double jeopardy were satisfied because the sentencing court merged counts I and II prior to sentencing and did not reduce to judgment both verdicts or conditionally vacate either.

The defendant has failed to meet his burden of showing prosecutorial misconduct or that any unchallenged argument was flagrant and ill-intentioned.

The trial court properly admitted the testimony of Mr. Stafford as proof of motive under ER 404(b).

Because there was no error committed, the cumulative error doctrine is inapplicable.

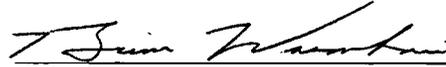
The defendant waived any issue regarding the court's instruction number 25 concerning the special verdict forms.

Finally, the defendant has failed to show ineffective assistance of counsel because his trial counsel chose not to object to an instruction based on a previously-approved WPIC.

Therefore, the defendant's conviction and sentence should be affirmed.

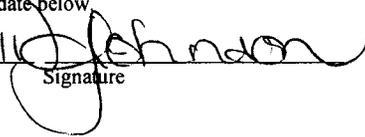
DATED: July 21, 2011.

MARK LINDQUIST  
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Deputy Prosecuting Attorney  
WSB # 28945

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.

7/21/11   
Date Signature

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