NO. 47011-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PIERCE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
JEFFERSON COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-00058-7

BRIEF OF RESPONDENT

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	Catherine Glinski Glinski Law Firm PLLC P.O. Box 761 Manchester, WA 98353 glinskilaw@wavecable.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 4, 2016, Port Townsend, WA **Original e- filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402;** **Copy to counsel listed at left.**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Defendant's claim that the trial court abused its discretion in denying the CrR 8.3 motion to dismiss is without merit when the trial court acted well within its broad discretion in declining to impose the extraordinary remedy of dismissal?

2. Whether the trial court abused its discretion in denying Defendant's motion for a mistrial (based on a witness' brief mention of the word "appeal") when the brief comment was not the sort of irregularity that was so severe that nothing short of a new trial could ensure the Defendant would receive a fair trial, and the trial court was in the best position to weigh the potential prejudice caused by the irregularity?

3. Whether the trial court abused its discretion in admitting evidence the Defendant shoplifted a pellet gun hours before the murders; when the evidence was admissible under ER 404(b) to explain the *res gestae* of the crime and to show evidence of the planning and preparation of the crime?

4. Whether the trial court abused its discretion in allowing Sergeant Apeland to testify he recognized the Defendant in the ATM photographs, when Sergeant Apeland had had several prior contacts with the Defendant and thus the trial court acted well within its discretion in ruling

that the testimony was admissible under Washington law. In addition, even if the trial court erred in this regard, was the error harmless when several other witnesses also identified the Defendant in the ATM footage and, more importantly, defense counsel repeatedly admitted to the jury that it was the defendant in the ATM photographs?

5. Whether the trial court abused its discretion when it declined to give the Defendant's proposed jury instruction on testimony from jailhouse informants, when the Washington Court of Appeals has specifically held that a trial court does not abuse its discretion by refusing to give such an instruction and when the trial court's instructions as given allowed the Defendant to argue his theory of the case and did not mislead the jury or misstate the law?

6. Whether the Defendant's claim of cumulative error is without merit when the Defendant failed to show the trial court erred?

II. STATEMENT OF THE CASE

The charges and convictions in the present case all arose out of the March 18, 2009 slayings of Patrick and Janice Yarr, whose charred bodies were found in the rubble of their burned out house after they were shot and killed in the kitchen of their home at 780 Boulton Road near Quilcene, in Jefferson County Washington.

A. PROCEDURAL HISTORY

On March 30, 2009, the State charged the Defendant in Jefferson County Superior Court with two counts of first degree murder and numerous other charges arising out of the March 18, 2009 murders of Patrick and Janice Yarr. CP 1. On March 26, 2010, a jury found the Defendant guilty of two counts of Murder in the first Degree, as well as Robbery in the First Degree, Burglary in the First Degree, Arson in the First Degree, Theft of a Firearm, Unlawful Possession of a Firearm, and Theft in the Second Degree. CP 30. The trial court imposed a sentence on May 24, 2010. *Id.*

On direct appeal this Court reversed the convictions, finding the trial court improperly admitted several statements the Defendant made after he requested an attorney and that the prosecutor made several improper statements in closing arguments. *State v. Pierce*, 169 Wn. App. 533, 537-38, 280 P.3d 1158 (2012). This Court thus remanded the case for retrial. *Pierce*, 169 Wn.App. at 560.

The retrial commenced on July 1, 2013. After the trial started, however, one of the jurors disclosed she may have been a witness to some of the events surrounding the murders. CP 690. The parties then filed an "Agreed Motion to Discharge Jury and Change Venue." CP 685. The trial court declared a mistrial and granted the request to change venue. RP (7/22/13) 2052-53; CP 689-92.

The case moved to Kitsap County, with Kitsap County Superior Court Judge Sally Olsen presiding. RP (9/20/13) 1. Trial began on February 24, 2014 with motions *in limine* and *voir dire*. RP (2/24/14) 3. Opening statements occurred on February 27, 2014 and testimony began that same day. RP (2/27/14) 88, 99. This trial, however, ended in a mistrial after the trial court found the Defendant was incompetent for one day of trial (March 10). RP (3/21/14) 1129-37; CP 971-73.

Trial began for a final time on October 20, 2014. A jury ultimately found the Defendant guilty of two counts of Murder in the First Degree, one count of Robbery in the First Degree, Burglary in the First Degree, Arson in the First Degree, Theft of a Firearm in the First Degree, Unlawful Possession of a Firearm, and Theft in the Second Degree. CP 1902-14. The trial court imposed an exceptional sentence of 1404 months. CP 1953. This appeal followed.

B. FACTS

March 2015 Mistrial

After venue was changed to Kitsap County, the first Kitsap County trial began on February 24, 2014 with motions *in limine* and *voir dire*. RP (2/24/14) 3. Opening statements occurred on February 27, 2014 and testimony began that same day. RP (2/27/14) 88, 99. On Monday, March 10, after a full day of testimony, defense counsel informed the trial court that the

Defendant had not been given his prescription medications at the jail for several days. RP (3/10/14) 1065-67; CP 968. The trial court recessed the trial and the Defendant was evaluated for competency. RP (3/11/14) 1085-86, RP (3/12/14) 1095, RP (3/14/14) 12-13; CP 969. The trial court ultimately found the Defendant was incompetent for one day of trial, March 10, and declared a mistrial. RP (3/21/14) 1129-37; CP 971-73.

Following this mistrial, the Defendant filed a CrR 8.3 motion to dismiss. CP 975. The trial court then held a multi-day evidentiary hearing on the motion. See, RP (9/11, 9/15, 9/16, 9/17) 1-319. At the conclusion of the hearing the trial court issued a detailed written Memorandum Opinion. CP 1450-75.

In its memorandum opinion the trial court explained that the Defendant had been transferred from the Jefferson County jail to the Kitsap County jail on February 1, 2014. CP 1451. The Kitsap County jail used an independent contractor, "Conmed Healthcare Management," to provide mental health services to inmates. *Id.* The Court further noted that the previous Jefferson County Judge had issued an order on June 15, 2009 that "The Jefferson County Jail shall not disseminate records regarding Mr. Pierce to anyone other than his attorneys." *Id.* Thus the prosecutor's office was not in "possession or control, or even had knowledge, of such records." *Id.*

The trial court further noted that when an inmate arrives at the Kitsap County jail, Conmed healthcare providers meet with the inmate and complete an initial intake. CP 1451. If the inmate has a prescription for psychiatric medications the intake nurse contacts a physician for authority to continue the medication for 14 days under what is known as a "bridge order," pending an evaluation by a psychiatrist. *Id.* This procedure was followed when the Defendant arrived at the Kitsap County Jail. CP 1452. During this period, Dr. Chopra from Conmed provided weekly psychiatric services to inmates at the jail. CP 1452-53. Dr. Chopra was scheduled to meet with the Defendant on March 4. *Id.* That meeting, however, did not occur as the Defendant was in court that day, and Dr. Chopra left the jail without meeting with the Defendant and without any knowledge the Defendant's "bridge order" was set to expire on March 7. CP 1453-54. The following day, one of the healthcare providers noted Dr. Chopra had not met with the Defendant and that a further "bridge order" would need to be telephonically approved, and she advised a nurse to contact Dr. Chopra for the order. *Id.* That nurse, however, failed to make the call. *Id.* Another nurse then administered the Defendant his last dose of medications on March 7th and similarly failed to take any steps to secure an additional "bridge order." *Id.* As a result, the Defendant was not given his medications on Saturday March 8th, Sunday March 9th and Monday March 10th. CP 1454-55. As stated previously, the

trial court found the Defendant was incompetent during the testimony that was heard on March 10. On Tuesday March 11th. Dr. Chopra again made his weekly rounds at the jail and ordered that the Defendant was to receive his medications. *Id.* at 1455. The medications were administered that day. *Id.*

With respect to the Defendant's CrR 8.3 motion to dismiss, the trial court first noted that "Dismissal under CrR 8.3 is an extraordinary remedy, one to which a trial court should turn only as a last resort." CP 1458, quoting *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). Although the trial court found that Conmed was negligent, the court held that "Nothing about these mistakes illustrates the egregious behavior that CrR 8.3(b) intended to deter. This is not a case involving prosecutorial mismanagement, nor do the nurses' mistakes shock the conscience of the court and the universal sense of fairness." CP 1460-61. The trial court further found that evidence of prejudice was lacking, and that "Dismissal remains an extraordinary remedy and is only available 'when there has been prejudice to the rights of the accused which materially affects the rights of the accused to a fair trial and that prejudice cannot be remedied by granting a new trial." CP 1463, *quoting State v. Whitney*, 96 Wn.2d 578, 580, 637 P.2d 956 (1981). Furthermore, the prejudice requirement was not satisfied "merely by expense, inconvenience, or additional delay within the speedy trial period." CP 1464, *quoting City of*

Kent v. Sandhu, 159 Wn.App. 836, 841, 247 P.3d 454 (2011). The Court also noted that at the time the mistrial was declared on March 21, there was a speedy trial waiver in place that ran through May 31, 2014. CP 1464, n.59.[1] The trial court thus held:

> Here, the Defendant was not prejudiced in his right to a fair trial because the court declared a mistrial based on manifest necessity and granted the defendant a new trial. Any prejudice to the Defendant's right to a fair trial that would have otherwise occurred due to the Defendant's condition was alleviated by the court granting a mistrial after finding manifest necessity. Thus, the defense was only inconvenienced (as noted in Sandhu), and any potential prejudice to the Defendant's right to a fair trial is relieved by the granting of a new trial, where the Defendant will have an opportunity to re-cross examine witnesses, assist his attorney in his defense, and refine his argument to the jury. Although a fourth retrial will cause further expense, inconvenience, and additional delay, this is not the type of 'prejudice' that CrR 8.3 contemplated.

CP 1464-65.

The trial court further explained that it could find no Washington case that dealt with a situation where a defendant had been deprived of psychotropic medications during trial and that such a deprivation warranted dismissal under CrR 8.3. CP 1469-70. The trial court did note that in *State v. Maryott*, 6 Wn.App. 96, 492 P.2d 239 (1971) the defendant claimed on

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[1] As there was considerable time remaining within the time for trial period and as it was the Defendant who chose to waive his speedy trial rights even further in order to immediately pursue the CrR 8.3 motion, the trial court found that the "defense's argument that Mr. Pierce's speedy trial right was violated is completely without merit." CP 1464, n. 59.

appeal that the State had administered tranquilizing drugs to the defendant to control his behavior and that the drugs diminished his competency. CP 1470. The Court of Appeals reversed and remanded for a new trial. *Id.* The trial court noted the negligence that occurred in the present case was nowhere near as egregious as the intentional acts in *Maryott* where a new trial, rather than a dismissal, was ordered. CP 1470-71. Finally, the trial court noted numerous other cases involving governmental mismanagement and the like where the conduct was more egregious, yet the remedy was found to be a new trial rather than a dismissal. See CP 1463[2], 1465[3], and 1471[4].

The trial court thus ultimately denied the Defendant's CrR 8.3 motion. CP 1473-74.

October 2014 Trial

At the October 2014 trial, testimony was elicited that Patrick and Janice Yarr lived on a farm located at 780 Boulton Road in Quilcene. RP 65. The farm was located near Highway 101 and could be seen from the highway. RP 72. Mr. Yarr made a living by owning and operating a self-loading logging truck and by raising beef on the farm in Quilcene. RP 64-67. Mrs. Yarr worked full time as a bookkeeper for a construction company in Port

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[2] *Citing State v. Coleman*, 54 Wn. App. 742, 749, 775 P.2d 986 (1989).

[3] *Citing State v. Garza*, 150 Wn.2d 360, 77 P.3d 347 (2003); *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011); and *State v. Anene*, 149 Wn. App. 944, 205 P.3d 992 (2009).

Townsend. RP 67-68.

The Yarr's home had two floors: an upstairs or main floor; and a daylight basement below. RP 72-73. Mr. Yarr owned several firearms and he always kept a rifle in the upstairs of the house near the sliding glass door that was next to the dining room and kitchen. RP 74-75, 111. Mr. Yarr kept the rifle in that location because he had had issues with coyotes and a cougar attacking his livestock, so he kept the rifle near the sliding glass door for easy access. RP 75.

On March 18, 2009, Patty Waters (another daughter of Mr. and Mrs. Yarr) called her mother and spoke with her a little after 6:00 p.m. RP 105, 115. Ms. Waters believed that Mrs. Yarr was cooking dinner during the conversation, and at the end of the conversation Mrs. Yarr put Mr. Yarr on the phone. RP 114. Ms. Waters spoke to her father for a bit, and then they ended the phone call so that Mr. Yarr could eat dinner. RP 115. Phone records indicated this phone call started at 6:09 p.m. and lasted 14 minutes. RP 115-16.

DeEtte Broderson also called and spoke to Mr. Yarr on the evening of March 18th about getting a truck to haul some logs. RP 177. Mr. Broderson was not sure of the exact time of this call, but he believed it was around 7:00

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[4] *Citing State v. Maryott*, 6 Wn.App. 96, 492 P.2d 239 (1971).

to 7:30. RP 179. Mr. Broderson testified that the phone conversation ended because it sounded like "something come up or somebody else was on and wanting to come on the phone or something." RP 178.

At approximately 6:50 to 7:10 that evening, a neighbor named Gregory Brooks stopped by the Yarr's home. RP 150, 153. Mr. Brooks went to the door near the kitchen which he described as an old wooded door with "picture frame glass in it." RP 153. As he knocked on the door, Mr. Brooks looked into the house and did not see anything unusual, and did not see any indication that anybody was upstairs. RP 154. After no one answered the door, Mr. Brooks got back in his car and left the farm. RP 154, 164. Mr. Brooks then went home, and a short time later (at approximately 7:20 to 7:25) he drove by the farm on his way to Port Hadlock and he looked up at the Yarr's home but didn't see any lights on so he continued on his way. RP 165-66.

At 8:11 p.m. Merle Frantz drove past the Yarr's farm and saw a small fire at the farm. RP 189-90. He considered calling it in, but decided he didn't want to call in a false alarm, as the fire wasn't very large, so he did not report the fire. RP 190.

Sometime after 8:00 p.m., possibly around 8:20 p.m., John McConaghy drove past the Yarr's farm and saw a "structure fire" which

appeared to be a house on fire. RP 239-40. Mr.'s McConaghy's passenger called 911 and Mr. McConaghy turned around and drove up Boulton Road towards the fire. RP 240. Upon arriving at the house Mr. McConaghy and his passenger ran up to the house and started banging on doors and windows to see if anyone was in the house, but they got no response. RP 240, 242.

At approximately 8:20 p.m. Willie Knoepfle, Assistant Chief of the Discovery Bay Fire Department, received a page concerning the fire, and numerous firefighters then began to head to the scene. RP 252, 254-55. Assistant Chief Knoepfle was the first to arrive. RP 256, 270. Numerous additional fire engines responded as well. *Id.* After the fire was put out firefighters entered and searched the house. RP 276-77. They located two bodies inside in the kitchen. RP 278 – 79, 315 – 17. Law enforcement was then called to the scene. *Id.*

Investigators detected gasoline in the home and subsequent investigation revealed that the fire likely started in the Yarr's kitchen. RP 287-88, 353-54. Samples were collected at the scene from the kitchen and the dining room carpet, and these samples tested positive for the presence of gasoline. RP 477. Bullet holes and bullets were found under the heads of the two bodies. RP 368. The bullets recovered from the floor underneath the bodies were later analyzed and found to be ".25 rifle caliber class" bullets which was consistent with a .25-06 round. RP 1520.

The Yarr's home was searched by law enforcement and all the firearms that were found were carefully documented. RP 479. Several antique rifles and shotguns were found in the daylight basement, and two rifles (one chambered in .300 Winchester Magnum rounds and one chambered in .300 Savage rounds) were found in an upstairs bedroom. RP 484-85, 488-89. These were the only firearms found in the upstairs portion of the home. RP 530.

When the family of Mr. and Mrs. Yarr later went through the house and inventoried it they found .25-06 caliber ammunition in the downstairs of the home. RP 1723.

Special Agent Dane Whetsel of the "arson explosive unit" of the Seattle office of the Bureau of Alcohol, Tobacco, and Firearms is a Certified Fire Investigator and has investigated fires for approximately 25 years. RP 533, 536-38, 542. Based on the evidence available, Special Agent Whetsel determined the fire likely started at approximately 7:30 p.m. RP 643. He also formed the opinion that the fire was intentionally set by use of an accelerant in the kitchen. RP 651.

The two bodies were taken to the King County Medical Examiner's Office and autopsies were conducted. RP 433, 1584. The charred bodies were identified via dental records as Mr. and Mrs. Yarr. RP 1585. X-rays

revealed that both of the victims both had the tops of their heads missing, and the skull fractures were consistent with gunshot wounds from a high energy, high velocity, bullet. RP 1591, 1597. A sample from Mrs. Yarr's clothing tested positive for gasoline. RP 477. There was no evidence that either victim had been alive during the fire, as there was no soot in their lungs and no carbon monoxide present in their blood. RP 1595-96. The medical examiner thus found that the cause of death was severe head trauma. RP 1595-96.

Cathy Hamilton, a manager of the Bank of America branch in Port Hadlock, knew the Yarr's and at the request of law enforcement she looked at the Yarr's bank records after the murders. RP 682-85. Ms. Hamilton noticed that an ATM had been used to access the Yarr's account, which she found odd since the Yarr's did not use their ATM cards. RP 685.[5] The banking records, however, showed that the Yarr's ATM card was used on March 18 at the US Bank in Quilcene at 8:10 p.m. RP 689. The records showed that there were attempts to withdraw $500 and one attempt to withdraw $400, but these transactions were denied as the maximum allowed for a cash withdrawal was $300. RP 688-91. At 8:11 p.m. the card was used again, and

[5] Mrs. Yarr, in fact, had tried to return the ATM cards to the bank when she received them as she didn't want them. RP 685. Ms. Hamilton, however, had suggested to Mrs. Yarr that she might want to keep them in case she traveling in the future, and Mrs. Yarr eventually decided to keep the cards. RP 685.

this time the transaction was successful and $300 was dispensed. RP 691.

Sergeant Mark Apeland of the Jefferson County Sheriff's Office obtained a search warrant for US Bank and obtained video from the ATM machine at the bank at the time the Yarr's ATM card was used. RP 703-04. The video showed a large, heavy-set, male with short hair wearing a hat and covering part of his face with his shirt, which was pulled up over his nose. RP 705, 715. The distance from the Yarr's farm to US bank in Quilcene is 7.1 miles. RP 208.

Sergeant Apeland, had had numerous contacts with the Defendant, Michael Pierce, including face to face contact and conversation, the most recent of which had occurred in 2008. RP 715-16. When Sergeant Apeland reviewed the video footage he was confident the person in the images was the Defendant based on his previous contacts with him. RP 715-16. Numerous photos taken from the ATM video were admitted at trial. See, RP 707-715.

Faith McLaughlin was working at the Department of Licensing several days before the murders (March 12, 2009) when the Defendant came in to renew his license. RP 924-26. The Defendant wore a hat with a "starburst" on the front and a Peninsula College coat. RP 925-28. Ms. McLaughlin examined the photos taken from the ATM machine and recognized the coat and hat and said the man in the photos was consistent

with the Defendant in that he had the same body shape and size and the same hat. RP 928- 32.

Karen House works at a Henry's Hardware store in Port Townsend and was working on March 18 at approximately 6:30 p.m. when a man came in and inquired about a pellet gun. RP 907-08. Ms. House showed the man the pellet guns and handed him a box containing the pellet gun he selected. RP 909 – 10. The man then went to another part of the store. *Id.* Ms. House returned to the cash register up front while the man continued shopping. RP 910. The man then came to the register and handed the pellet gun box to Ms. House and said he had to go to his car to get his wallet. RP 911. Ms. House noticed that the pellet gun box felt empty so she followed the man outside. RP 911. The man went over to a white "Honda-looking" car. RP 912. He stopped, turned around, and looked at Ms. House then got into the car and drove away. *Id.* Ms. House testified the man had been wearing a baseball cap that had a "starburst" pattern on the front and had also been wearing a coat that had writing on the back of it. *Id.* The store had surveillance cameras and video footage of the incident was played at trial. RP 913-14.

Mike Hansen, an instructor at Peninsula College, testified the Defendant was one of his students. RP 932 - 41. He was asked to examine the Henry's Hardware video footage. *Id.* Mr. Hansen testified the coat worn

by the man in the video footage had a Peninsula College logo and he recognized the man in the footage as his student - the Defendant. RP 944.

Todd Reeves, a technical surveillance specialist with the ATF also examined the ATM photos. Agent Reeves compared the images in the ATM photos with images of the Defendant taken by the FBI. RP 1440. In particular, Agent Reeves examined every visible body part in the ATM photos and compared them to the pictures of the Defendant. RP 1442. Agent Reeves found that the shape of the hands and fingers were consistent and "very remarkable." RP 1443. The commonalities in the thickness of the forearm and the hand and wrist were also "striking." RP 1443. Agent Reeves also carefully examined the ear of the person in the ATM video and the Defendant's ear. RP 1447. Just in the ear alone he found 15 points of identification that matched the Defendant to the person in the ATM photos. RP 1448. Agent Reeves thus concluded with a high degree of confidence that the person in the ATM photos was the Defendant. RP 1448-49.

Several witnesses also testified they saw a very large man walking on the road near the Yarr's farm. For instance, Pamela Roberts testified that on March 18 she was driving on Hwy. 101 near the Yarr's farm when she saw a man walking on the side of the road. RP 1080-81. Ms. Roberts found this unusual as she sated she almost never saw pedestrians on that road. RP 1081. The man walking on the road was one of the largest men that Ms. Roberts

had ever seen, and she described him as having a "huge back." RP 1083. Ms. Roberts slowed down as she passed the man and she saw he was a Caucasian male wearing a black jacket. RP 1083. As she passed him the man pulled a hood over his face. *Id.* Ms. Roberts testified she saw the man at about 7:45 p.m., was able to estimate the time because she had been coming from a computer class that ended at 7:00 p.m. and she recalled the events of that evenings quite clearly. RP 1079-83. Ms. Roberts heard about the fire the next day and called the Jefferson County Sheriff's Office to report what she had seen. RP 1088-89.

Similarly, Laura Meynberg testified she was driving from Quilcene to Port Townsend and saw a person walking North on the side of the road. RP 1038-39. The person was walking quickly and was a large person with their head covered. RP 1039 . As Ms. Meynberg passed, the man had his hand up and pulled a hood or something similar over his face with his hand. RP 1040. Further up the road was a "farm turnout" and Ms. Meynberg noticed a white Honda parked there on the side of the road. RP 1041. Ms. Meynberg, however, was uncertain of the date of this event. RP 1052.

The Defendant's girlfriend at the time of the murders, Tiffany Rondeau, also testified. Ms. Rondeau testified that at the time of the murders she was living with the Defendant in Sequim, as they were both taking classes at Peninsula College. RP 1121-23. The Defendant typically spent the

weekends with his mother in Quilcene and had previously lived with Ms. Rondeau on Boulton Road near the Yarr's farm. RP 1124, 1132. The Defendant knew the Yarrs and worked for them on occasion feeding their cows and doing odd jobs. RP 1132. The Yarrs typically paid the Defendant in cash and it was her impression that the Yarrs were not poor and that they had cash on hand. RP 1174.

Ms. Rondeau confirmed the Defendant often wore a "Miami Ink" baseball hat that was black with a "starburst" pattern on it. RP 1176. After classes on March 18 the Defendant told Ms. Rondeau that he was going to go to his mother's house to fix a flat tire on his mother's car. RP 1137. The Defendant then took Ms. Rondeau's car, a white Honda, and left. RP 1138. Ms. Rondeau believed the Defendant returned home around 8:30 p.m., although she was not certain of the exact time. RP 1138.

Ila Rettig, the Defendant's mother, testified that on March 18 the Defendant came to her house to fix a tire for her and the two of them went to Les Schwab and the QFC in Port Townsend in the late afternoon. RP 1206-08. The two then returned to Ms. Rettig's home where the Defendant put the repaired tire on her car and then came in for dinner. RP 1208-09. After dinner Ms. Rettig and the Defendant watched television. RP 1209 – 10. The Defendant then left Ms. Rettig's home between 6:30 and 7:30 p.m. *Id.* Ms. Rettig said the Defendant was wearing jeans and a light blue t-shirt. RP

1219. Ms. Roberts also testified that the hat depicted in Exhibit 212 (one of the ATM photos) looked like the Defendant's hat. RP 714, 1215.

Bill Dickie was a neighbor of the Defendant's and lived in the trailer park in Sequim where the Defendant and Ms. Rondeau lived. RP 763-64. Mr. Dickie recalled an incident where he saw the Defendant place two large heavy trash bags into a dumpster at the trailer park. RP 766-67. Mr. Dickie didn't think anything of it at the time, but later when Mr. Dickie saw the police at the Defendant's residence Mr. Dickie mentioned the trash bags to the police, as he thought it might be useful. RP 766-67. A detective retrieved the trash bags from the dumpster. RP 769, 815. Inside the bags the police founds items with the Defendant's name and a very large light blue men's t-shirt and a pair of socks. RP 817. Both the t-shirt and the socks were soaking wet, although other items in the bag were not wet. RP 817. The t-shirt and socks also did not appear to be damaged and were "clearly still wearable." RP 818.

Law enforcement also searched the white Honda that belonged to Ms. Rondeau (which she said the Defendant had driven on March 18). RP 841. They found a copy of the Peninsula Daily News that contained an article on the Yarr homicide and fire in a plastic bag along with some of the Defendant's mail. *Id.* Officers also found a butcher block and knife set in the car. RP 835.

Both Patty Waters and Michelle Ham testified that the knife block found in the white Honda had belonged to their mother, Janice Yarr. RP 1379, 1388-89.

Finally, several inmates who had been housed with the Defendant at various times testified regarding incriminating statements the Defendant made regarding the murders. For instance, Bradley Reynolds testified he met the Defendant in the Jefferson County jail and he and the Defendant became "chummy." RP 1237-40. The two men got to know each other and often talked about their legal situations. RP 1241, 1250. The Defendant admitted to Mr. Reynolds that he had committed the murders. RP 1313. The Defendant also said he had gone to the Yarr's home to collect a debt and said he took a knife block from the home and put it in the trunk of the car. RP 1310-1312.

Similarly, Richard Dhaenens explained that he had been an inmate in the Jefferson County jail in 2013, and was in the jail with the Defendant for approximately 70 days. RP 1605-07. During their time in the jail together, Mr. Dhaenens and the Defendant had several conversations about the Yarr murders. RP 1607-08. The Defendant told Mr. Dhaenens he had gone to the Yarr's home to collect a debt. RP 1609-10. The Defendant also told Mr. Dhaenens that he was nervous about his ear and asked Mr. Dhaenens if the FBI could identify ear lobes. RP 1611-12. With respect to the ATM photos,

the Defendant told Mr. Dhaenens that the State did not get a picture of his face but they got a picture of his ear. RP 1612-13.

Another inmate, Jay Dodaro, was briefly housed in the Kitsap County Jail with the Defendant. RP 1633-36. While they were together in the jail the Defendant told Mr. Dodaro he was in jail for "the people I killed down in Quilcene." RP 1633.

III. ARGUMENT

A. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE CRR 8.3 MOTION TO DISMISS IS WITHOUT MERIT BECAUSE THE TRIAL COURT ACTED WELL WITHIN ITS BROAD DISCRETION IN DECLINING TO IMPOSE THE EXTRAORDINARY REMEDY OF DISMISSAL.

The Defendant first claims the trial court erred in denying his CrR 8.3 motion to dismiss. App.'s Br. at 25. This claim is without merit because under Washington law a dismissal is an extraordinary remedy that is to be granted only when there has been prejudice that cannot be remedied by granting a new trial. In the present case the trial court acted well within its broad discretion in declining to order a dismissal when the prejudice to the Defendant could be remedied by granting a new trial.

CrR 8.3

In order to succeed on a CrR 8.3(b) motion, the defendant must prove both governmental misconduct and prejudice to his right to a fair trial by a preponderance of the evidence. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The denial of a motion made under CrR 8.3 is reviewed for abuse of discretion and will be overturned only if the trial court's decision was manifestly unreasonable or based on untenable grounds. *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Rohrich*, 149 Wn.2d at 655, *citing State v. Rundquist*, 79 Wn.App. 786, 793, 905 P.2d 922 (1995). A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take," and arrives at a decision "outside the range of acceptable choices." *Rohrich*, 149 Wn.2d at 657, *quoting State v. Lewis*, 115 Wn.2d 294, 298–99, 797 P.2d 1141 (1990) and *Rundquist*, 79 Wn. App. at 793.

Prevailing on a motion under CrR 8.3(b) requires a showing of actual prejudice; the mere possibility or speculation of prejudice will not suffice. *Rohrich*, 149 Wn.2d at 657–58; *State v. Norby*, 122 Wn.2d 258, 264, 858 P.2d 210 (1993). Furthermore, the dismissal of charges pursuant to CrR

8.3(b) is an extraordinary remedy. *Rohrich*, 149 Wn.2d at 653, citing *State v. Baker*, 78 Wn.2d 327, 332–33, 474 P.2d 254 (1970). A trial court may also abuse its discretion where it ignores reasonable intermediate remedial steps. *Koerber*, 85 Wn. App. at 4; *See also State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003) (dismissal under CrR 8.3(b) is improper absent material prejudice to the rights of the accused).

Similarly, Washington courts have explained that dismissal of a case is an extraordinary remedy of last resort and the trial court's authority to dismiss under CrR 8.3(b) is limited to "truly egregious cases of mismanagement or misconduct." *State v. Koerber*, 85 Wn. App. 1, 4–5, 931 P.2d 904 (1996), *quoting State v. Duggins,* 68 Wn. App. 396, 401, 844 P.2d 441, aff'd, 121 Wn.2d 524, 852 P.2d 294 (1993). As dismissal is considered an extraordinary remedy, it will be granted only when there has been prejudice to the rights of the accused that materially affects his right to a fair trial "and cannot be remedied by granting a new trial." *State v. Quaale*, 177 Wn. App. 603, 619, 312 P.3d 726 (2013), *citing State v. Whitney*, 96 Wn.2d 578, 580, 637 P.2d 956 (1981), *quoting State v. Baker*, 78 Wn.2d 327, 332–33, 474 P.2d 254 (1970).

<u>The Present Case</u>

In the present appeal the Defendant argues he was prejudiced because the trial court was forced to declare a mistrial and the trial had to start over.

The Defendant, however, does not claim that the Defendant did not ultimately receive a fair trial. Rather, the Defendant argues that "The question is not, as the trial court stated, whether Pierce could receive a new trial following the mistrial." App.'s Br. at 48.

Contrary to the Defendant's assertion, however, whether the Defendant could ultimately receive a fair trial was exactly the question before the trial court. CrR 8.3(b) specifically states that dismissal can only be granted when "there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." Similarly, Washington courts have explained that a dismissal can only be granted when the misconduct "cannot be remedied by granting a new trial." *Quaale*, 177 Wn.App. at 619, *citing Whitney*, 96 Wash.2d at 580, *quoting Baker*, 78 Wn.2d at 332–33. In short, whether a new trial can cure the error is exactly the issue under Washington law, and the trial court did use the wrong legal standard.

The Defendant's argument in the present appeal is essentially that anytime the State makes an error that causes a trial court to declare a mistrial or causes a reviewing court to overturn a conviction, there should be an automatic dismissal under CrR 8.3 because the Defendant has been prejudiced by the very fact that there has to be a new trial. This, however, is not the law. Rather, trial courts and appellate courts routinely grant new trials

(and not dismissals) due to these types of errors.

For example, in *State v, Cochran*, 51 Wn. App. 116, 117, 751 P.2d 1194 (1988) the defendant was convicted and in a subsequent Personal Restraint Petition Cochran argued the State suppressed exculpatory evidence. The Court of Appeals remanded the PRP back to the trial court for a decision on the merits. *Id* at 117. On remand the parties stipulated that the prosecution had knowingly and intentionally withheld exculpatory evidence. *Id* at 118. Based on this fact the superior court vacated the judgment and sentence and granted a new trial. *Id.*

The defendant then moved for dismissal pursuant to CrR 8.3(b). *Cochran*, 51 Wn.App. at 123. The trial court denied his motion and the defendant appealed. On appeal the Court of Appeals held that,

> Although the State did not act in a fair manner when it withheld information from Cochran and the Court of Appeals, Cochran does not dispute that his ability to receive a fair trial on remand is in no way impaired.
>
> Because dismissal is an extraordinary remedy and because the prejudice in this case can be remedied by granting a new trial, we find no abuse of discretion in the trial court's denial of the motion to dismiss pursuant to CrR 8.3(b).

Cochran, 51 Wn.App. at 124.

Furthermore, in *State v. Granacki*, 90 Wn.App. 598, 959 P.2d 667 (1998) a detective deliberately read the defense counsel's notes, including

communications with his client, which were left sitting at counsel table during a trial recess. *Id* at 600. The detective also engaged in a conversation with a juror despite the trial court's order that witnesses were to have no contact with the jurors. *Id* at 601. The trial court granted the defense request for a mistrial based on the detective's misconduct. *Id.* The trial court then requested briefing on the question of whether a dismissal was warranted, and ultimately the trial court dismissed the case. *Id.* The State appealed and did not contest the mistrial, but argued that the dismissal was not warranted pursuant to CrR 8.3(b). *Id* at 601-02. The Court of Appeals ultimately upheld the dismissal, but with the following caveat,

> We recognize this case is unusual. Normally misconduct does not require dismissal absent actual prejudice to the defendant. See, e.g., State v. Koerber, 85 Wash.App. 1, 931 P.2d 904 (1996). Even then, the trial court may properly choose to impose a lesser sanction because this is a classic example of trial court discretion. Had the court chosen to ban Detective Kelly from the courtroom, exclude his testimony and prohibit him from discussing the case with anyone, we would not find an abuse of its discretion. But, based on the trial judge's evaluation of all the circumstances and Detective Kelly's credibility, the sanction he imposed was also within his discretion.

Granacki, 90 Wn.App. at 604. Thus even when faced with the egregious facts of *Granacki* which clearly required a mistrial, the Court of Appeals held that a lesser sanction than dismissal would have been well within the trial court's discretion.

It is true that Washington Courts have on occasion found that granting a new trial would not be a sufficient remedy under CrR 8.3. These cases, however, involve truly egregious instances of prosecutorial gamesmanship and misconduct or otherwise involve situations that cannot be remedied by a new trial.

For example, the Defendant in the present appeal argues that dismissal is required pursuant to *State v. Martinez*, 121 Wn. App. 21, 86 P.3d 1210 (2004). *See* App.'s Br. at 47-48. In *Martinez*, the victim was robbed at gunpoint in his home by two men who were later identified as the Calderas brothers. *Martinez*, 121 Wn. App at 24. The Calderas brothers stole money and a number of items and drove away in the victim's car, but they were arrested a short time later as the police were able to track the car by means of its "OnStar" feature. *Id.* The Calderas brothers told the police that the defendant was the "mastermind" behind the robbery and that he had planned and organized the robbery and had given them two handguns, a black one and a silver one, to use in the robbery. *Id* at 24. The guns themselves were confiscated from the Calderas brothers, and on the same day as the robbery an officer traced the serial number of one of the guns and found its owner reported it had been stolen 6 months earlier on October 31, 2000. *Id* at 25.

Approximately ten days later the police interviewed a woman who worked with the Defendant and she claimed that the Defendant had once tried

to sell two handguns – one that was silver and one that was black. *Martinez*, 121 Wn.App at 25. This witness later attended a "gun lineup" where she picked out the silver and black guns recovered from the Calderas brothers as the ones the Defendant had showed her. *Id.* At a later pre-trial hearing this witness was firm in her belief that the Defendant had showed her the guns around December of 1999. *Id.* This created a problem for the State, since the State was aware that one of the guns had not been stolen until October 31, 2000, and thus could not have been in the Defendant's possession in 1999. *Id* at 25. The State, however, never informed defense counsel that one of the guns had been stolen on October 31, 2000, and the defense was completely unaware of this critical fact until two weeks into trial on the same day the State rested its case. *Id* at 26-27. As the Court of appeals noted,

> Incredibly, even after the revelation that the gun identified by [the coworker] could not have been the same gun used in the robbery, the State again tried to suggest a connection between them. During cross-examination of Mr. Martinez, [the prosecutor] referred to the two guns showed to [the coworker]:
>
> Q Okay. Now you showed her a black gun and a silver gun, right?
>
> A Correct, sir.
>
> Q Noe Caldera says you gave them a black gun and a silver gun, correct?
>
> A That's what he says, sir.
>
> Q And he was—they were—the brothers were arrested with a black gun and a silver gun, correct?

A Yes, they were, sir.

Q Just a terrible coincidence; isn't it?

A For me it is, sir.

Martinez, 121 Wn. App. at 28.

Ultimately the jury was unable to reach a unanimous verdict and the trial court declared a mistrial. *Martinez*, 121 Wn. App. at 29. The Defendant then brought a motion to dismiss, based in part upon CrR 8.3(b), the court granted the motion and dismissed on the basis of CrR 8.3(b), and the State appealed. *Martinez*, 121 Wn. App. at 29.

On appeal the Court of Appeals noted that the prosecutor's claim that he did not recognize the significance of the 2000 reported theft of the gun until the middle of trial was "ludicrous" and the evidence "suggests that the State withheld the information in the hope that the [coworker] would remember differently and remove the exculpatory effect of the report." *Martinez*, 121 Wn. App. at 232-33. The Court of Appeals also noted the State never mentioned the report regarding the 2000 theft of the gun at a crucial pretrial hearing and that the State's silence was "particularly troubling." *Id.* at 33. At that pretrial hearing the State had argued that the results of the gun lineup were "damning" when in reality the relevance of this testimony was severely limited by the fact that one of the guns could not have been in the Defendant's possession in 1999. *Id.* Recognizing this fact the trial court concluded:

> [The prosecutor's] omission misled the trial judge into making a ruling that never questioned the materiality or relevancy of the gun identification.... In fact, the chrome gun could not have been the same gun used by the Calderas. Had the court known this, the evidence would have been inadmissible pursuant to Evidence Rule 402, which provides that evidence ... which is not relevant is not admissible.

Martinez, 121 Wn. App. at 33. The Court of Appeals found the trial court's conclusions in this regard were supported by the evidence. *Id.*

With respect to the appropriate remedy, the Court of Appeals noted that "Government conduct may be so outrageous that it exceeds the bounds of fundamental fairness, violates due process, and bars a subsequent prosecution." *Martinez*, 121 Wn. App. at 35. Furthermore, "The State prosecutor's withholding of exculpatory evidence until the middle of a criminal jury trial is likewise so repugnant to principles of fundamental fairness that it constitutes a violation of due process." *Id.* The Court of Appeals finally noted that the trial court decided that there was no appropriate lesser sanction than dismissal, and the Court of Appeals held that this ruling was not an abuse of discretion. *Id.* at 36. Rather the Court of Appeals stated, "We find the State's withholding of exculpatory evidence was misconduct so egregious that it violated principles of fundamental fairness, and affirm." *Id.* at 24.

The facts of the present case, however, are nothing like the egregious prosecutorial gamesmanship and dishonesty that were present in *Martinez*.

While the prosecutor in *Martinez* committed egregious acts and omissions in order to benefit his chances at trial, the prosecutor in the present case had absolutely no control over the jail's administration of medications, nor did the prosecutor benefit in any way. To the contrary, the mistrial caused the State to start the trial over with absolutely no discernable benefit to the State.

The trial court in the present case carefully reviewed the situation and noted that in such situations the court "should evaluate the conduct based on the 'totality of the circumstances.'" CP 1459, *quoting State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996). The trial court held that while the nurse was negligent in not seeking a bridge order, "no intentional omission of administering the defendant's medications was done with the specific intent of attempting to disrupt the defendant's medication." CP 1460. In addition, the court held that "Nothing about these mistakes illustrates the egregious behavior that CrR 8.3(b) intended to deter. This is not a case involving prosecutorial mismanagement, nor do the nurses's mistakes shock the conscience of the court and the universal sense of fairness." CP 1460-61.

Given all of the facts of the present case, the Defendant has failed to show the trial court's ultimate decision was a conclusion that no reasonable person would make. Thus, the Defendant has failed to show the trial court abused its discretion.

The Defendant also briefly argues that the mistrial forced the Defendant to waive his speedy trial rights. App.'s Br. at 49. The trial court, however, correctly noted that the Defendant's argument that his speedy trial right was violated was "completely without merit." CP 1464, n.59. At the time the mistrial was granted on March 21, there was already a speedy trial waiver in place through May 31, 2014. CP 1464; see also RP (3/21/14) 28-29. The defense, however, sought a lengthy continuance in order to prepare its CrR 8.3 motion. RP (3/21/14) 25-28. While the Defendant was certainly free to choose this path, it was not required and the new trial certainly could have restarted well with the then existing speedy trial period (as both parties were obviously ready for trial as it had just begun). In short the mistrial itself did not present a situation where the Defendant was unprepared for trial and was forced to waive his speedy trial rights in order to prepare for trial, as had occurred in *State v. Michielli*, 73 Wn.2d 229, 937 P.2d 587 (1997) (the other case cited by the Defendant in support of his claim of prejudice). See App.'s Br. at 49-50).

In conclusion, the Defendant has failed to show that his ability to receive a fair trial in the October 2014 trial was in any way prejudiced by the medication issue that occurred in March. Rather, the Defendant essentially invites this Court to hold that prejudice under CrR 8.3 is shown by the mere fact that a mistrial had to be declared or that a retrial had to occur. This Court

should decline that invitation, as accepting the Defendant's invitation would transform every trial court decision imposing a mistrial as a remedy for an error attributable to the State into an abuse of discretion. Similarly, the Defendant's proposed analysis would similarly mean that an outright dismissal would be the remedy, rather than a new trial, whenever a conviction was reversed on appeal following an error attributable to the State. Such a result, however, would conflict with the broad discretion given to trial courts to fashion the appropriate remedy once an error is found.

Although Washington courts have on rare occasions found that in some cases, such as *Martinez*, that the governmental misconduct was so outrageous that the granting of a new trial was insufficient and that a dismissal was warranted, the present case falls far short of the sort of egregious facts that would warrant dismissal, which is an extraordinary remedy of last resort. Rather, the plain language of CrR 8.3(b) requires a trial court to not dismiss if the misconduct can be cured by a new trial, and that is exactly what the trial court did in this case. The Defendant has failed to show that this was an abuse of discretion, and his CrR 8.3(b) claim, therefore, must fail.

The Defendant also briefly argues that medication issue constituted a due process violation that warranted a dismissal. App.'s Br. at 44-46, *citing State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). The Defendant's

argument, however, is without merit because even under a due process analysis the trial court acted well within its discretion in concluding that the proper remedy was a new trial, and not a dismissal.

As the Court of Appeals has explained, CrR 8.3(b) "codifies, in part, the due process requirement that a prosecution be dismissed upon outrageous conduct of law enforcement." *State v. Markwart*, 182 Wn. App. 335, 349, 329 P.3d 108 (2014). Thus, a due process claim is clearly intertwined with a CrR 8.3(b) motion to dismiss.

In *Lively*, however, the Supreme Court addressed the due process based "outrageous conduct" doctrine without addressing its interplay or overlap with CrR 8.3(b); in fact, *Lively* never mentions CrR 8.3(b) at all. Nevertheless, the "outrageous conduct" doctrine is based on the principle that the governmental conduct may be so outrageous that due process principles "would bar the government from invoking judicial processes to obtain a conviction." *Markwart*, 182 Wn. App. at 348, *citing*, *United States v. Russell*, 411 U.S. 423, 431–32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); *Lively*, 130 Wn.2d at 19. "But such conduct must be so outrageous that it violates the concept of fundamental fairness inherent in due process and shocks the sense of universal justice mandated by the due process clause." *Markwart*, 182 Wn. App. at 348, *citing, Dodge City Saloon, Inc. v. Wash. State Liquor Control Bd.*, 168 Wn. App. 388, 402, 288 P.3d 343, *review denied*, 176

Wn.2d 1009, 290 P.3d 994 (2012); *State v. Rundquist*, 79 Wn. App. 786, 794, 905 P.2d 922 (1995); *State v. Pleasant*, 38 Wn. App. 78, 82, 684 P.2d 761 (1984).

Furthermore, the Court of Appeals explained the doctrine of outrageous conduct must be sparingly applied and used only in the most egregious situations. *Markwart*, 182 Wn. App. at 349, *citing Rundquist*, 79 Wn. App. at 793. In fact, *Lively* is the only Washington case that has "dismissed a prosecution for outrageous conduct by government agents." *Markwart*, 182 Wn. App. at 349. In the present case the trial court noted that the *Lively* case was the only example of the outrageous conduct doctrine in Washington, and that the facts of the present case were easily distinguishable from *Lively*. CP 1461-62. The trial court further noted that even when there has been a constitutional violation that does not mean that a dismissal is the only remedy. Rather, most cases find that the remedy for a constitutional violation is a new trial. CP 1465, *citing, State v. Garza*, 150 Wn.2d 360, 77 P.3d 347 (2003) (holding that defendant has constitutional right to be present at trial, and vacating conviction and remanding for new trial); *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011) (an email exchange between trial court and prosecutor and defense counsel that resulted in dismissal of seven potential jurors constituted a part of jury selection process which the defendant had a right to be present for, and thus reversed conviction and

remanded for new trial due to due process violation); *State v. Anene*, 149 Wn. App. 944, 205 P.3d 992 (2009) reversed conviction and remanded for new trial where defendant's due process rights were violated when trial continued while defendant was in comatose state following a suicide attempt).

The trial court in the present case thus concluded that although the Defendant had a right to be present and competent during his trial, and this right was violated when he was incompetent for one day of trial, the remedy was the granting of a new trial. CP 1466.

In the present appeal, the Defendant cites to *Wakefield v. Thompson*, 177 F.3d 1160 (9th Cit. 1999), but that case is not relevant. Rather, *Wakefield* was a § 1983 action and had nothing to do with the outright dismissal of a criminal case. Furthermore, the sole Washington case finding outrageous government conduct that warranted dismissal under an apparently independent due process analysis is *Lively*. *Lively*, however, is easily distinguishable. The defendant in *Lively* was a recovering drug addict who had no prior convictions for selling drugs. *Lively*, 130 Wn.2d at 6. A government informant met the defendant while "trolling for targets" at an Alcoholics Anonymous/Narcotics Anonymous meeting. *Id.* The informant and Lively became involved in a romantic relationship and Lively moved in with the informant. *Id* at 7. According to Lively, over the course of a two-week period, the informant repeatedly asked her to get cocaine for a friend of

his. *Id.* Lively testified she only agreed to do so because she relied on the informant emotionally. *Id* at 7. Considering the totality of the circumstances, the Washington State Supreme Court concluded that the governmental informant's conduct warranted dismissal because the government engaged in conduct that was repugnant to a sense of justice primarily because the informant lured a mentally fragile recovering drug addict into selling drugs to him after establishing a romantic relationship with her. *Id* at 27.

Here, unlike in *Lively*, the totality of the circumstances did not amount to outrageous conduct that warranted a dismissal. Most notably, of course, is the fact that the conduct in *Lively* could not have been remedied by a new trial, as the essence of the outrageous conduct was that an emotionally fragile person was lured in to selling drugs by a government agent. In the present case, the conduct at issue was negligence, which resulted in the Defendant being incompetent for one day of trial. CP 1469. This result, while unfortunate, was not nearly as outrageous as the conduct in *Lively*. In addition, the trial court in the present case noted repeatedly that the prejudice to the Defendant in the present case could be remedied by a new trial. CP 1467, 1471, 1473.

In short, the Defendant has failed to show that the trial court abused its discretion in denying the Defendant's motion to dismiss under either CrR 8.3(b) or under a due process "outrageous conduct" claim.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL (BASED ON A WITNESS'S BRIEF MENTION OF THE WORD "APPEAL") BECAUSE THE BRIEF COMMENT WAS NOT THE SORT OF IRREGULARITY THAT WAS SO SEVERE THAT NOTHING SHORT OF A NEW TRIAL COULD ENSURE THE DEFENDANT WOULD RECEIVE A FAIR TRIAL, AND THE TRIAL COURT WAS IN THE BEST POSITION TO WEIGH THE POTENTIAL PREJUDICE CAUSED BY THE IRREGULARITY.

The Defendant next claims the trial court erred in denying the Defendant's motion for a mistrial. App.'s Br. at 50. This claim is without merit because the trial court did not abuse its discretion, as the trial court was in the best position to weigh the potential prejudice from the irregularity and because the trial court instructed the jury to disregard the comment and juries are presumed to follow the court's instruction.

In the present case, Bradley Reynolds (one of the inmates who had been housed with the Defendant) testified that while he was in jail with the Defendant they talked about their legal situations and the Defendant asked him for legal advice. RP 1241, 1250-52. The prosecutor then asked:

> Q. Okay. Now why would he think that he could get legal advice from you?
> A. Because I spoke some legalese to him.
> Q. Okay.
> A. And he talked to me about his appeal and prosecutorial misconduct.

RP 1252. Defense counsel objected and moved for a mistrial. RP 1252 CP 1639. The trial court ultimately instructed the jury to disregard and to strike the last statement by the witness. RP 1308.

The trial court also denied the motion for mistrial, citing *State v. Hopson*, 113 Wn.2d 273, 778 P.2d 1014 (1989). RP 1273-74. The trial court stated that it had examined the witness's use of the word "appeal" in its context and noted there was nothing said about what appeal or prosecutorial misconduct the witness was referring to. RP 1274. The court then found that the mention of the word "appeal," without more, did not warrant a mistrial. RP 1275.

An appellate court reviews a denial of a motion for a mistrial for abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court's decision is "'manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take." *Mayer*, 156 Wn.2d at 684, *quoting State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (*quoting State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

A trial court properly declares a mistrial only when the defendant has been so prejudiced that nothing short of a new trial will ensure that the defendant will be fairly tried. *Rodriguez*, 146 Wn.2d at 270, 45 P.3d 541. An appellate court is to overturn a denial of a motion for mistrial only when there is a "substantial likelihood" that the error prompting the request for a mistrial affected the jury's verdict. *Rodriguez*, 146 Wn.2d at 269, 45 P.3d 541 (*quoting State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)) (internal quotation marks omitted). The mere possibility of prejudice is insufficient to warrant a new trial. *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). "Only errors affecting the outcome of the trial will be deemed prejudicial." *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

Furthermore, Washington courts have recognized that the trial court is best suited to assess the prejudice of a statement. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). In addition, the trial court has broad discretion in determining whether an instruction can cure an error. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996), *State v. Ecklund*, 30 Wn. App. 313, 316, 633 P.2d 933 (1981). In addition, "the law presumes, and must presume, that the jury finds that facts from the evidence the court permits them to consider. Any other rule would render the administration of the law impractical." *State v. Johnson*, 60 Wn.2d 21, 29, 371 P.2d 611 (1962), *citing, State v. Priest*, 132 Wash. 580, 584, 232 P. 353, 354 (1925).

Furthermore, the Washington Supreme Court has held that "to maintain a contrary rule is to impeach the intelligence of the jury; it is to say that they will return a verdict on evidence which the court tells them they must not consider-a verdict they would not have returned had the inadmissible evidence been kept entirely from their knowledge." *Johnson*, 60 Wn.2d at 29, *citing, Priest*, 132 Wash. at 584. Finally, a reviewing court will reverse the trial court only if there is a substantial likelihood the trial irregularity prompting the mistrial motion affected the jury's verdict. *State v. Rodriguez*, 146 Wn.2d 260, 269–70, 45 P.3d 541 (2002).

Washington courts have previously addressed situations where a witness improperly mentions the fact that a defendant has a prior conviction or something similar. In *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989), for instance, a witness stated the victim had known the defendant "three years before he went to the penitentiary the last time." The trial court concluded the statement was not "earth-shaking" and was "not of such significance as to affect the fair trial . . ." *Hopson*, 113 Wn.2d at 284. The Washington Supreme Court affirmed, finding that "the irregularity was not serious enough to materially affect the outcome of the trial." *Id.* at 286. The Court also noted there was no information concerning the nature or number of prior convictions and the jury had overwhelming evidence favoring conviction. *Id.*

Similarly, in *State v. Clemons*, 56 Wn. App. 57, 62, 782 P.2d 219 (1989) a police officer testified he knew the defendant from "prior contacts" in violation of an order *in limine*. The Court of Appeals held the trial court did not abuse its discretion in denying a mistrial. *Id.* The Court explained that great weight is placed on the sound discretion of the trial court and noted that the record showed that the remark was not solicited and was not expanded upon. *Id.* The Court of Appeals concluded by stating, "While being known to a police officer may be suggestive of bad acts, it is certainly not conclusive. Against the backdrop of all the evidence, this incident is insignificant. We find no abuse of discretion." *Id.* at 62.

In the present case the remark of the witness that is at issue is his mention of the word "appeal." The trial court ultimately instructed the jury to disregard the comment, and a jury is presumed to follow a trial court's instructions. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). In addition, the jury heard no remarks regarding what "appeal" the witness was referring to. While counsel and the court were aware there had been a prior conviction and appeal, nothing in the witness' brief statement alluded to this fact. Rather, there was no reference to whether the witness was discussing a past appeal or a potential future appeal, or even whether the appeal related to the present case. Furthermore, there was nothing in the witness' brief statement indicating there had been a prior guilty finding.

In addition, based on the record below, there is nothing about the brief mention of the word "appeal" that would demonstrate a "substantial likelihood" that the error affected the jury's verdict. To the contrary, the evidence in the present case was virtually overwhelming. There was overwhelming evidence tying the Defendant to the murders and the Defendant was on caught on surveillance footage using the victim's ATM card shortly after the murders. This evidence, even without the multiple admission made after the murders, was overwhelming. The Defendant, therefore, simply cannot show that the brief mention of the word "appeal," without any further context or background, warranted a mistrial.

Given the brief and ambiguous nature of the statement and the fact that the court instructed the jury to disregard the comment, the Defendant has failed to show that the trial court ruling adopted a view "that no reasonable person would take." Thus, the Defendant cannot show the trial court's ruling was "manifestly unreasonably" or that the trial court abused its discretion in finding this was not a situation where nothing short of a new trial would ensure that the defendant would receive a fair trial. The Defendant's claim, therefore, is without merit.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT THE DEFENDANT SHOPLIFTED A PELLET GUN HOURS BEFORE THE MURDERS; RATHER, THE EVIDENCE WAS PROPERLY ADMITTED UNDER ER 404(B) TO EXPLAIN THE *RES GESTAE* OF THE CRIME AND AS EVIDENCE OF THE DEFENDANT'S PLANNING AND PREPARATION.

The Defendant next claims the trial court erred in admitting evidence that he stole a pellet gun in the hours before the murders. App.'s Br. at 56. This claim is without merit because the trial court did not abuse its discretion in holding the evidence was admissible pursuant to ER 404(b) as *res gestae* evidence and as evidence of planning and preparation.

A trial court's ER 404(b) determination is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Under ER 404(b), evidence of prior bad acts is inadmissible to prove character in order to show conformity with them. ER 404(b); *State v. Kilgore*, 147 Wn.2d 288, 291-92, 53 P.3d 974 (2002). But such evidence may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. ER 404 (b); *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995); *Kilgore*, 147 Wn.2d at 292, 53 P.3d 974.

In order to admit evidence of previous bad acts, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence, (2) identify the purpose for admitting the evidence, (3) find the evidence materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect. *Kilgore*, 147 Wn.2d at 292, 53 P.3d 974.

In addition, Washington courts also have found that there is a *res gestae* exception to ER 404(b).[6] Testimony may be admissible as *res gestae* evidence "if it is so connected in time, place, circumstances, or means employed that proof of such other misconduct is necessary for a complete description of the crime charged, or constitutes proof of the history of the crime charged." *State v. Schaffer*, 63 Wn.App. 761, 769, 822 P.2d 292 (1991) (quoting 5 Karl B. Tegland, *Washington Practice: Evidence* § 115, at 398 (3d ed.1989)), aff'd, 120 Wn.2d 616, 845 P.2d 281 (1993); *State v. Brown,* 132 Wn.2d 529, 571, 940 P.2d 546 (1997) (Evidence that "constitutes a 'link in the chain' of an unbroken sequence of events surrounding the

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[6] There is some debate, however, about whether *res gestae* evidence should be analyzed as an exception to ER 404(b)'s prohibition against admitting evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith, or whether it is simply subject to the same relevance and prejudice limitations applicable to all evidence under ER 402 and ER 403. *See, e.g., State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (recognizing a "*res gestae*" or "same transaction" exception to ER 404(b)); *State v. Grier*, 168 Wn.App. 635, 644, 278 P.3d 225 (2012) (rejecting the notion that *res gestae* evidence should be analyzed as an exception to ER 404(b), and holding that *res gestae* evidence was relevant and admissible under ER 401 and 402 as part of the events leading up to and culminating in the murder).

charged offense, ... is admissible [as res gestae evidence] 'in order that a complete picture be depicted for the jury.'").

In the present case the trial court ruled that the evidence that the Defendant had shoplifted a pellet gun approximately an hour before the murders was admissible under several of the ER 404(b) exceptions. Specifically, the trial court held that the evidence was admissible to show identity, res gestae, as well as planning and preparation. CP 754. The trial court also found by a preponderance of the evidence that the shoplifting had occurred, and that there was little prejudice from this evidence. CP 754-55.

In the present appeal the Defendant appears to concede that the Defendant's presence in the hardware store was admissible to show identity. App.'s Br. at 59. The Defendant, however, claims that the fact that the Defendant shoplifted a pellet gun should have been excluded.

The trial court, however, did not abuse its discretion in ruling that the fact that the Defendant had shoplifted a realistic looking pellet gun was highly probative. First, the fact that the Defendant had obtained the pellet gun approximately an hour before the murders was highly probative of planning and preparation and provided critical "res gestae" evidence as the event constituted a link in the chain of an unbroken sequence of events surrounding the charged offense. In addition, the fact that the Defendant had

obtained such a weapon was circumstantial evidence that explained how the Defendant could have entered the Yarr's home and gained control over the victims despite the fact that Mr. Yarr owned multiple firearms.

The trial court also noted there was little prejudicial effect of a theft in the third degree when the Defendant was on trial for murder and arson. CP 755. The Defendant, however, argues there was a danger of prejudice because the Defendant was also charged with theft in the second degree. This argument, however, overlooks the fact that the defense admitted that the Defendant had committed theft in the second degree. Thus there was simply no danger of unfair prejudice relating to the shoplifting of the pellet gun.

Given the record in the present case, the Defendant has failed to show that the trial court abused its discretion in admitting the evidence regarding the shoplifting of the pellet gun. The Defendant's claim, therefore, is without merit.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING SERGEANT APELAND TO TESTIFY HE RECOGNIZED THE DEFENDANT IN THE ATM PHOTOGRAPHS, AS SERGEANT APELAND HAD HAD SEVERAL PRIOR CONTACTS WITH THE DEFENDANT AND THUS THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION IN RULING THAT THE TESTIMONY WAS ADMISSIBLE UNDER WASHINGTON LAW. IN ADDITION, EVEN IF THE TRIAL COURT ERRED IN THIS REGARD, THE ERROR WAS CLEARLY HARMLESS AS SEVERAL OTHER WITNESSES ALSO IDENTIFIED THE DEFENDANT IN THE ATM FOOTAGE AND DEFENSE COUNSEL REPEATEDLY ADMITTED TO THE JURY THAT IT WAS THE DEFENDANT IN THE ATM PHOTOGRAPHS.

The Defendant next claims the trial erred in admitting evidence from Sergeant Apeland that he recognized the Defendant from the ATM surveillance photographs. App.'s Br. at 62. This claim is without merit because the trial court did not abuse its discretion in holding that the evidence was admissible. In addition, any error in this regard was clearly harmless error as several witnesses identified the Defendant in the ATM footage and defense counsel repeatedly admitted to the jury that it was the Defendant who was depicted in the ATM footage and the Defendant was thus guilty of the crime of Theft in the Second Degree.

Under Washington law the admission of opinion evidence lies within the discretion of the trial court. *State v. Weygandt*, 20 Wn. App. 599, 606,

581 P.2d 1376 (1978). ER 701 permits lay opinion testimony when rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. *State v. Hardy*, 76 Wn. App. 188, 190, 884 P.2d 8 (1994). A lay witness may give an opinion as to the identity of a person in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury. *Hardy*, 76 Wn. App. at 190 (*citing United States v. Farnsworth*, 729 F.2d 1158, 1160 (8th Cir.1984)).

In *Hardy*, Division One held that because a police officer had known the defendant for several years, he was in a better position than the jury to identify Hardy in the "somewhat grainy" videotape. *Hardy*, 76 Wn. App. at 191. The court disagreed that the officer's opinion regarding the identity of the man in the videotape invaded the province of the jury, as "The jury was free to disbelieve the officer, thus "the ultimate issue of identification was left to the jury." *Id.* at 191.

In the present case the trial court found that Sergeant Apeland had been involved in two separate arrests of the Defendant and that, approximately a year before the murders, Sgt. Apeland sat across a small table in the Sheriff's office and had a conversation with the Defendant. CP 758. The trial court also noted the Defendant had gained weight after the ATM footage was taken and the Defendant had disguised himself somewhat

in the footage by pulling his t-shirt over his nose. CP 760. The court thus held that "Sgt. Apeland had sufficient prior personal contacts with Pierce, and may testify that it is Pierce in the ATM video." CP 760.

Given this record, the trial court did not abuse its discretion in concluding that Sergeant Apeland was more likely to correctly identify the Defendant from the surveillance photographs than was the jury, the trial court acted well within its discretion in admitting his identification testimony.

Furthermore, even if one were to assume for the sake of argument that the trial court erred in allowing this testimony, any error in this regard was clearly harmless. Under Washington law an appellate court reviews potentially erroneous rulings of admissibility under the nonconstitutional harmless error standard. *State v. Morales*, 173 Wn.2d 560, 582, 269 P.3d 263 (2012). An erroneous ruling of admissibility will not amount to reversible error unless the court determines that "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997), *quoting State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). The outcome of a trial is materially affected if the jury would have reached a different verdict had the error not occurred. *State v. Hardy*, 133 Wn.2d 701, 712, 946 P.2d 1175 (1997).

In the present case, even if the trial court could be said to have erred, any error was harmless for several reasons. First, several other witnesses identified the Defendant as the person depicted in the ATM video. Specifically, Ms. McLaughlin examined the photos taken from the ATM machine and recognized the coat and hat and said the man in the photos was consistent with the Defendant in that he had the same body shape and size and the same hat. RP 928- 32. In addition, ATF Agent Reeves reviewed the ATM footage and examined photographs of the Defendant's hands, fingers, forearm, wrist, and ears and concluded with a high degree of confidence that the person in the ATM photos was the Defendant. RP 1440-49.[7] This testimony has not been challenged on appeal.

Given this testimony, the identification by Sergeant Apeland was somewhat cumulative and thus any error was harmless. More importantly, however, the defense never argued below that it was not the Defendant who was depicted in the ATM footage. Rather, defense counsel conceded the Defendant was guilty of the charge of Theft in the Second Degree based on the use of the Yarr's ATM card in both the opening statement and closing argument. Specifically, in closing argument defense counsel stated, "Mr. Pierce isn't disputing that that is him at the ATM machine." RP 2189.

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[7] The Defendant did not object to ATF Agent Reeves testimony below. *See* RP (6/18/2013) at 186.

Defense counsel later stated,

> At the beginning of the trial, I asked you to find Mr. Pierce not guilty of all the charges except one. Why just one? It's because it's the only charge that the State could prove without putting Mr. Pierce in their home that night, and it's Theft of an Access Device.
>
> Look at the instructions, it's instructions 43 and 44, two ways you can commit the crime of theft of an access device. One is wrongfully obtain it. That would be stealing it from somebody. The other is unauthorized use, and that is what is happening here. They have proved beyond a reasonable doubt this Michael Pierce used an ATM card that night.
>
> How? His girlfriend testified that is him. Sergeant Apeland recognized him. I think the woman at the DOL recognized him. His teacher recognized him. We had testimony from ATF Agent Reid [sic] who did all sorts of analyses and said, that's him. They proved that charge beyond a reasonable doubt. He is taking money that doesn't belong to him. It's Mr. and Mrs. Yarr's card.

RP 2193-94.[8]

As defense counsel had argued to the jury from the beginning of the case that it was the Defendant in the ATM footage and that the Defendant was thus guilty of the crime of theft of an access device since he improperly

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[8] *See also*, RP 2180, where defense counsel is discussing the Defendant's movements of the day of the murder and after mentioning Henry's Hardward, states,

> "Where do we see him next? We see him at the bank machine at 8:11. All right. What does he have on? He has got the same hat, and he has got the same t-shirt on. Why doesn't he have his jacket on to make an effort to obscure his identity? Although, as we have heard, it wasn't very effective because there are plenty of people that could identify him.
>
> Why doesn't he have his jacket on? He doesn't have his jacket on because he has his name on the front left lapel that says "Mike." It says "Peninsula Automotive." So the jacket is not pictured because he has taken it off so as not to clue people in that the fellow using the Yarr's ATM card is Mike."

used the Yarr's ATM card, there could have been no prejudice whatsoever from the trial court's admission of Sergeant Apeland's testimony regarding his identification of the Defendant in the ATM footage.

The Defendant has failed to show that the trial court abused its discretion in admitting the testimony at issue. Furthermore, even if the trial court erred, any error was clearly harmless as the defense conceded at trial that it was the Defendant who was depicted in the ATM footage. The Defendant's claim, therefore, is without merit.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO GIVE THE DEFENDANT'S PROPOSED JURY INSTRUCTION ON TESTIMONY FROM JAILHOUSE INFORMANTS, BECAUSE THE WASHINGTON COURT OF APPEALS HAS SPECIFICALLY HELD THAT A TRIAL COURT DOES NOT ABUSE ITS DISCRETION BY REFUSING TO GIVE SUCH AN INSTRUCTION AND BECAUSE THE TRIAL COURT'S INSTRUCTIONS AS GIVEN ALLOWED THE DEFENDANT TO ARGUE HIS THEORY OF THE CASE AND DID NOT MISLEAD THE JURY OR MISSTATE THE LAW.

The Defendant next argues that the trial court abused its discretion by not giving a jury instruction regarding jailhouse informants. App.'s Br. at 66. This claim is without merit because Washington law does not require such an

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RP 2180-81.

instruction and the Court of Appeals has specifically held that a trial court does not abuse its discretion when it declines to give an instruction regarding testimony from a jailhouse informant. Furthermore, the actual instructions that were given in the present case allowed the Defendant to argue his theory of the case and did not mislead the jury or misstate the law. Thus, the Defendant can show neither an error nor any abuse of discretion.

In the present case the Defendant proposed the following instruction regarding testimony from a jailhouse informant:

> You have heard testimony of Bradley Reynolds and Richmond Dhaenens, witnesses who received a beneficial plea bargain from the government in connection with this case. For this reason, in evaluating the testimony of Bradley Reynolds and Richmond Dhaenens, you should consider the extent to which or whether their testimony may have been influenced by this benefit. In addition, you should examine the testimony of Bradley Reynolds and Richmond Dhaenens with greater caution than that of other witnesses.

CP 1721. The trial court declined to give this instruction, noting that there was no Washington law cited in favor of the instruction, and the trial court further noted that Jury Instruction Number 1, based on WPIC 1.02, included language that allowed defense counsel to make its arguments about the credibility of the witnesses. RP 2092-93.

A trial court's refusal to give a proposed instruction is reviewed on appeal for an abuse of discretion. *State v. Hummel*, 165 Wn. App. 749, 777,

266 P.3d 269 (2012), *citing State v. Picard*, 90 Wn. App. 890, 954 P.2d 336 (1998). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. *Hummel*, 165 Wn. App. at 777, *citing In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009). Instructions are adequate if they allow a party to argue its theory of the case and do not mislead the jury or misstate the law. *Hummel*, 165 Wn. App. at 777, *citing State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). "[A] specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case." *State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), *quoting State v. Rice*, 110 Wash.2d 577, 603, 757 P.2d 889 (1988).

In *Hummel*, the defendant proposed several instructions regarding the testimony of a prison informant and relied on Federal and out-of-state cases to support his argument, just as the Defendant has done in the present case. *Hummel*, 165 Wn. App. at 777; App.'s Br. at 67-70. In *Hummel*, the Court of Appeals noted that in a similar instance regarding the issue of a cross-racial eyewitness testimony the Court had noted that an instruction on such an issue "risks violating the constitutional prohibition against comments on the evidence." *Id* at 778, *citing State v. Allen*, 161 Wn. App. 727, 255 P.3d 784

(2011).[9] The *Hummel* court thus concluded that the trial court did not abuse its discretion when it declined to give the Defendant's proposed instructions regarding testimony from jailhouse informants. *Hummel*, 165 Wn. App. at 777-79.

Given the clear holding in *Hummel*, there can be no dispute that the trial court was not required to give the Defendant's proposed instruction. Furthermore, the relevant law in Washington remains as it has long been: namely, that instructions are adequate if they allow a party to argue its theory of the case and do not mislead the jury or misstate the law. *Hummel*, 165 Wn. App. at 777, *citing Barnes*, 153 Wn.2d at 382.

As there is no Washington authority that requires or even authorizes an instruction such as the one proposed by the Defendant in the present case, and as the sole Washington case on point held that such an instruction was not required, it is clear that the trial court in the present case did not abuse its discretion in declining to give the Defendant's proposed instruction. Under these circumstances, the Defendant has failed to show that the trial court abused its discretion in declining to give the Defendant's novel jury instruction.

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[9] The *Allen* case ultimately went before the Washington Supreme Court, which affirmed and declined to find an abuse of discretion and declined to adopt a general rule requiring a cross-racial instruction. *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 670 (2013).

In addition, the trial court in the present case properly instructed the jury on the law regarding the evaluation of the credibility of the witnesses, as Jury Instruction Number 1 provided, in part, that,

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 1851-52.

This general instruction on evaluating witness credibility was sufficient to instruct the jury on the proper consideration of Mr. Reynolds' and Mr. Dhaenens' testimony, and a more specific instruction was not required under Washington law. In addition, the Defendant was able to argue his theory that the testimony from the informants was not credible under the instruction given, as the above mentioned instruction specifically instructs juries to consider the witness's credibility in "any personal interest that the witness might have in the outcome or the issues" or "the reasonableness of the witness's statements in the context of all of the other evidence." CP at

1851-52.

In short, the Defendant's proposed jury instruction was not required under Washington law and it was unnecessary because the general jury instruction was sufficient to permit the Defendant to argue his theory of the case. Nothing more is required. The Defendant, therefore, has failed to show that the trial court abused its discretion when it refused to give the Defendant's proposed jury instruction.

F. THE DEFENDANT'S CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT BECAUSE THE DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT ERRED.

Finally, the Defendant argues that a reversal is warranted due to cumulative error. App.'s Br. at 75. This claim is without merit, as the trial court did not err.

Cumulative error applies when several errors occurred at the trial court level but none alone is sufficient to warrant reversal. Where the combined errors effectively denied the defendant a fair trial, the cumulative error requires reversal. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). But where there was no "prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial." *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 1194 (2004). The defendant bears the

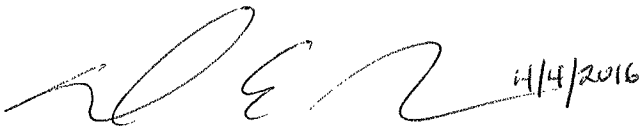
burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified by* 123 Wn.2d 737, 870 P.2d 964 (1994).

In the present case the Defendant has failed to show any error or prejudice. Furthermore, even if this Court were to find that the trial court erred in allowing Sergeant Apeland to testify that he recognized the Defendant in the ATM footage, that error was clearly harmless, and a single finding of error (especially harmless error) would not warrant a finding of cumulative error. The Defendant's cumulative error argument, therefore, should be rejected.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

Respectfully submitted this 1st day of April, 2016.



4/4/2016

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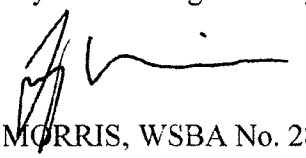

JEREMY A. MORRIS, WSBA No. 28722
Special Deputy Prosecuting Attorney

JEFFERSON DISTRICT COURT

April 04, 2016 - 2:59 PM

Transmittal Letter

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Case Name: State of Washington v. Michael PIERCE
Court of Appeals Case Number: 47011-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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