

NO. 49024-2

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

STATE OF WASHINGTON, RESPONDENT

v.

SETH A. FULMER, APPELLANT

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

No. 16-1-00466-2

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Whether this Court may review defendant’s argument raised for the first time on appeal regarding the admissibility of hearsay statements when no argument was made in trial, and, when regardless of that, the trial court properly sustained the State’s objections to hearsay during defendant’s testimony for out-of-court statements made by other individuals that were offered for the truth of the matter asserted? 1

2. Did the trial court properly admit evidence of defendant lying to a police officer about his name when such showed consciousness of guilt? 1

3. Whether the State made a proper closing argument when it properly described the burden of proof and was asking the jury to draw inferences based on the evidence that had been presented? 1

B. STATEMENT OF THE CASE..... 1

1. Procedure..... 1

2. Facts..... 2

C. ARGUMENT..... 5

1. DEFENDANT MAY NOT RAISE ON APPEAL A NEW ARGUMENT ON THE ADMISSIBILITY OF EVIDENCE NOT ARGUED AT TRIAL. REGARDLESS, THE COURT PROPERLY SUSTAINED THE STATE’S HEARSAY OBJECTION TO DEFENDANT’S TESTIMONY AND DID NOT VIOLATE HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE..... 5

2.	THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE DEFENDANT GIVING A FALSE NAME TO OFFICER NORLING AS SUCH SHOWED CONSCIOUSNESS OF GUILT, AND EVEN IF THE EVIDENCE WAS ERRONEOUSLY ADMITTED, IT WAS HARMLESS WHEN COMPARED TO THE OVERWHELMING EVIDENCE OF DEFENDANT'S GUILT	12
3.	THE STATE'S CLOSING ARGUMENT WAS NOT IMPROPER AS IT CORRECTLY ARGUED THE BURDEN OF PROOF AND ARGUED ONLY INFERENCES WHICH COULD BE REASONABLY DEDUCED FROM ADMITTED EVIDENCE	16
D.	<u>CONCLUSION.</u>	21-22

Table of Authorities

State Cases

<i>State v. Baird</i> , 83 Wn. App. 477, 482, 922 P.2d 157 (1996)	7
<i>State v. Barry</i> 183 Wn.2d 297, 303, 352 P.3d 161 (2015).....	15
<i>State v. Binkin</i> , 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (overruled on other grounds by <i>State v. Kilgore</i> , 147 Wn.2d 288, 53 P.3d 974 (2002)	17
<i>State v. Bourgeois</i> 133 Wn.2d 389, 402, 945 P.2d 1120 (1997).....	15
<i>State v. Chase</i> , 59 Wn. App. 501, 507, 799 P.2d 272 (1990)	13, 15
<i>State v. Fisher</i> 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009).....	16
<i>State v. Franklin</i> , 180 Wn.2d 371, 383, 325 P.3d 159 (2014).....	10
<i>State v. Freeburg</i> , 105 Wn. App. 492, 20 P.3d 984 (2001)	12, 13, 14
<i>State v. Gentry</i> , 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995).....	20
<i>State v. Gould</i> , 58 Wn. App. 175, 186, 791 P.2d 569 (1990)	6
<i>State v. Graham</i> , 59 Wn. App. 418, 428, 798 P.2d 314 (1990).....	18
<i>State v. Grier</i> , 168 Wn. App. 635, 643, n.16, 278 P.3d 225 (2012).....	15
<i>State v. Hebert</i> , 33 Wn. App. 512, 515, 656 P.2d 1106 (1982)	12
<i>State v. Houvener</i> , 145 Wn. App. 408, 420, 186 P.3d 370 (2008)	5
<i>State v. Hudlow</i> , 99 Wn.2d 1, 14, 659 P.2d 514 (1983)	7
<i>State v. Huff</i> , 64 Wn. App. 641, 647, 826 P.2d 698 (1992).....	13, 14
<i>State v. Jones</i> , 168 Wn.2d 713, 724, 230 P.3d 576 (2010).....	10
<i>State v. Kindell</i> 181 Wn. App. 844, 853, 326 P.3d 876 (2014).....	15
<i>State v. Luvene</i> , 127 Wn.2d 690, 706-707, 903 P.2d 960 (1995).....	13

<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	17
<i>State v. McDaniel</i> , 155 Wn. App. 829, 853-853, 230 P.3d 245 (2010)....	12
<i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).....	5
<i>State v. Monday</i> , 171 Wn.2d 667, 679, 257 P.3d 551 (2011).....	17
<i>State v. Moser</i> , 37 Wn.2d 911, 915, 226 P.2d 867 (1951)	12
<i>State v. Price</i> , 126 Wn. App 617, 645, 109 P.3d 27 (2005).....	12
<i>State v. Russell</i> , 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)	18
<i>State v. Scott</i> , 110 Wn.2d 682, 688, 757 P.2d 492 (1988)	5
<i>State v. Stenson</i> , 132 Wn.2d 668, 709, 940 P.2d 1239 (1997)	5, 17, 19
<i>State v. Stone</i> , 165 Wn. App. 796, 810, 268 P.3d 226 (2012)	7
<i>State v. Sua</i> , 115 Wn. App. 29, 41, 60 P.3d 1234 (2003)	9
<i>State v. Swan</i> , 114 Wn.2d 613, 661, 790 P. 2d 610 (1990)	17
<i>State v. Wade</i> , 186 Wn. App. 749, 764, 346 P.3d 838 (2015)	7, 8
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952).....	17
Federal and Other Jurisdictions	
<i>Chapman v. California</i> , 386 U.S. 18, 24, 87 S. Ct 824, 17 L. Ed.2d 705 (1967).....	10
<i>Commonwealth v. Tedford</i> 598 Pa. 639, 960 A.2d 1 (Pa. 2008).....	16
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).....	5

<i>State v. Fauci</i> 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007)	16
<i>State v. Leutschaft</i> 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009).....	16
Constitutional Provisions	
Article I, § 22 of the Washington State Constitution	7
Sixth Amendment of the United States Constitution.....	7
Rules and Regulations	
ER 403	12, 13
ER 801(c).....	8
RAP 2.5	5
Other Authorities	
American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010)	16
National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10, 2010)	16

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

1. Whether this Court may review defendant's argument raised for the first time on appeal regarding the admissibility of hearsay statements when no argument was made in trial, and, when regardless of that, the trial court properly sustained the State's objections to hearsay during defendant's testimony for out-of-court statements made by other individuals that were offered for the truth of the matter asserted?
2. Did the trial court properly admit evidence of defendant lying to a police officer about his name when such showed consciousness of guilt?
3. Whether the State made a proper closing argument when it properly described the burden of proof and was asking the jury to draw inferences based on the evidence that had been presented?

B. STATEMENT OF THE CASE.

1. Procedure

On February 2, 2016, a bench warrant was issued for the arrest of Seth Aaron Fulmer, hereinafter "defendant," for Failure to Register as a Sex Offender – Third Offense (FTRSO) and Escape from Community Custody. CP 4. After being arrested, defendant proceeded to a jury trial on an Amended Information charging only the FTRSO. CP 17.

At trial, the jury was read a stipulation that the defendant had at least two prior FTRSO convictions prior to the charging period for this case. 3RP 162-163¹; CP 48-50. Defendant elected to take the stand in his own defense. 3RP 165. During his testimony, defendant attempted to testify as to out-of-court statements made by two other witnesses. 3RP 168-169. The State objected to the statements as hearsay and the trial court sustained the objection. *Id.* Defense counsel presented no argument to have the statements admitted for any purpose, including as being admissible not for the truth of the matter. Rather, counsel immediately proceeded to ask additional questions. *Id.* Following trial, the defendant was convicted as charged. CP 75-76. The court imposed a sentence of 50 months incarceration and 36 months of community custody. CP 87-102, 4RP 10. Defendant timely appealed. CP 103.

2. Facts

In October 2015, defendant moved into a residence at 10804 Broadway Avenue South in Tacoma. 2RP 70. The residence is a clean and sober facility that is used mainly by individuals coming out of prison, mental institutions, or off the streets with homeless advocacy groups. 2RP 68. The owner of the house, John Green, would spend roughly three to four hours per week at the house. 2RP 70. Prior to December 6, 2015, Green saw the defendant at the residence at least half of the time he was

¹ The Verbatim Reports of Proceedings are contained in four volumes with consecutive pagination.

there. 2RP 72. After hearing that the Sheriff's department had been looking for the defendant, Green emailed the defendant's Community Corrections Officer (CCO) on December 6, 2015. 2RP 72-73. Green stated he had not seen the defendant in "several days." 2RP 75. After emailing the defendant's CCO, Green continued to visit the house for three to four hours a week. 2RP 73. However, from December 6th onward, Green never saw the defendant again until he testified in court. *Id.*

On January 11, 2016, Detective Ray Shaviri of the Pierce County Sheriff's Department, went to conduct a standard records check at the defendant's registered address of 10804 Broadway Avenue South in Tacoma. 2RP 119. Prior to attempting to verify that address as defendant's residence on January 11, the detective had made multiple attempts on other dates to contact the defendant at the residence. *Id.* In order to have an increased chance of contacting the defendant, Detective Shaviri went as early as 7:00 A.M. and would also go late in the evenings. 2RP 119-120. At no time was the detective able to contact the defendant at the residence. 2RP 120. After seeing the defendant was not at the residence again on January 11, Detective Shaviri interviewed two residents of the same household, Paul Brown and Kendrick Smith. 2RP 121.

In the statement provided by Brown, he informed the detective the defendant could not possibly be living at the residence as he had moved into the room defendant had vacated. 2RP 89-90. Brown declared the defendant had not been present in the residence since November. 2RP 92.

Smith also indicated in his statement that the defendant had not been seen at the residence since around mid-November. 2RP 104. Based upon the statements provided by Brown and Smith and the multiple attempts without success to contact the defendant, Detective Shaviri wrote a report indicating he believed the defendant had absconded. *Id.*

On February 9, 2016, Officer Eric Norling of the City of Fircrest pulled over a vehicle for a defective left brake light and no license plate light. 2RP 61. Upon contacting the driver, Officer Norling was told by the driver he did not have any identification on him. *Id.* The driver then identified himself as Shelton Fulmer. 2RP 62. The driver did, however, provide Officer Norling with the registration for the vehicle. 2RP 61. The driver further informed the officer that the vehicle belonged to a friend of his. 2RP 62. Defendant claimed the friend lived at 2909 South Adams in Tacoma and he was staying there. *Id.*

Based upon the information provided by the driver, Officer Norling ran a records check on the computer in his vehicle. 2RP 62. The computer returned the records check which showed a driver's status for Shelton Fulmer, but also showed a Department of Licensing photo for the defendant. *Id.* Based upon the photo, the officer was able to determine that the driver of the vehicle was the defendant, not Shelton Fulmer. 2RP 63.

After calling for backup and reading defendant his *Miranda*² Warnings, the officer began to question the defendant. 2RP 63. Defendant admitted to Officer Norling he was Seth, not Shelton. 2RP 64. He stated he lied because he “wasn’t ready to leave his daughters yet.” *Id.* Defendant was subsequently arrested.

C. ARGUMENT.

1. DEFENDANT MAY NOT RAISE ON APPEAL A NEW ARGUMENT ON THE ADMISSIBILITY OF EVIDENCE NOT ARGUED AT TRIAL. REGARDLESS, THE COURT PROPERLY SUSTAINED THE STATE’S HEARSAY OBJECTION TO DEFENDANT’S TESTIMONY AND DID NOT VIOLATE HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

- a. Defendant may not raise for the first time on appeal a new argument not raised at trial.

A party generally may not raise a new argument on appeal which the party did not present to the trial court. RAP 2.5; *State v. Houvener*, 145 Wn. App. 408, 420, 186 P.3d 370 (2008). There is a narrow exception to the general rule when the asserted error is (1) manifest and (2) “truly of constitutional magnitude.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). An evidentiary error is not of constitutional magnitude. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). As such, a

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

nonconstitutional error may not be raised for the first time on appeal. *State v. Gould*, 58 Wn. App. 175, 186, 791 P.2d 569 (1990).

Here, defendant attempted to testify about out-of-court statements that other residents in his home made to him regarding rent payments and about how Detective Shaviri told them he wanted to speak with the defendant. 3RP 168-169, 171. The State objected to hearsay and the trial court sustained the objections. *Id.* Defense counsel made no argument regarding the admissibility of the statements nor did he ask the court to admit them under an exception to the hearsay rule. *Id.* Rather, counsel simply continued to question the defendant. *Id.*

On appeal, defendant now argues for the first time that the excluded statements were admissible as they did not constitute hearsay and were highly relevant. Brf. of App. at 10-20. Defendant did not make this argument below and thus he cannot raise it for the first time on appeal.

Defendant attempts to argue that this may be raised for the first time on appeal by claiming that it is a manifest constitutional error as it violated his constitutional right to testify and present a defense. It is not, however, a manifest constitutional error or a violation of the defendant's constitutional rights as the record reflects defendant was fully able to present a defense and he had no constitutional right to the introduction of irrelevant and inadmissible evidence.

The Sixth Amendment of the United States Constitution and Article I, § 22 of the Washington State Constitution provide that a defendant has the right to testify in his own defense. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). The defendant's right to testify is not absolute, but rather is limited by procedural and evidentiary rules which control presentation of evidence. *State v. Baird*, 83 Wn. App. 477, 482, 922 P.2d 157 (1996). Hence, the right to present a defense does not extend to irrelevant or inadmissible evidence. *State v. Wade*, 186 Wn. App. 749, 764, 346 P.3d 838 (2015). A claim of the denial of a constitutional right is reviewed *de novo*. *State v. Stone*, 165 Wn. App. 796, 810, 268 P.3d 226 (2012).

Defendant's statements were hearsay and therefore, inadmissible evidence. He had no right to present inadmissible hearsay evidence and thus, there was no violation of his constitutional right to present a defense. Furthermore, defendant was able to testify and present a full defense. Defendant claims that by not allowing him to testify as to statements Brown made, he was not able to establish his defense that he was in fact living at his registered address in January 2016. Brf. of App. at 14. However, during his testimony, defendant himself testified that he was living at his registered address. 3RP 169. Defendant further testified he was never told he could not stay at the residence, even though he could not pay rent. *Id.* This is exactly the testimony defendant wanted to solicit in the hearsay statements from Brown. Thus, that information was redundant

and already before the jury by way of defendant's own testimony. The court did not prevent defendant from testifying or infringe on his constitutional rights.

Defendant also attempted to elicit statements made by other unnamed residents that Detective Shaviri had attempted to speak with him. 3RP 171; Brf. of App. at 18. These statements were hearsay and the defendant did not argue otherwise or offer any exception for their admissibility. Once more, defendant has no constitutional right to present evidence which is inadmissible. *Wade, supra* 186 Wn. App. at 764. Again, the substance of this argument came through in testimony as defendant was still able to testify as to his awareness Detective Shaviri wanted to speak to him and he made an attempt to contact the detective. 3RP 171-172. As such, defendant's right to testify was not infringed upon. Defendant has failed to show there was any error, let alone one of constitutional magnitude, which may be raised for the first time on appeal. He has waived any claim of error and this Court should decline to review it.

- b. Regardless, the trial court properly excluded the hearsay evidence as it was offered for the truth of the matter asserted.

Hearsay is a statement, other than one made by the declarant when testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). An out-of-court statement is hearsay when

offered to prove the truth of the matter asserted, even when it was made by someone who is now under oath, observable by the trier of fact, and subject to cross-examination. *State v. Sua*, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003).

Even if this Court were to reach this issue, the trial court properly excluded the statements. Defendant attempted to have the statements admitted at trial for the truth of the matter, that Brown did in fact allow him to live at the house rent free and Detective Shaviri wanted to speak with him. 3RP 168-169, 171. Nothing in the record indicates otherwise. Defendant offered no exceptions to the hearsay rule which would allow for the admissibility of the evidence. As such, because the defendant only attempted to have the statements admitted for the truth of the matter, the trial court properly exercised its discretion and sustained the State's objections.

- c. Even if the evidence excluded was in error, such was harmless as this Court cannot reasonably doubt that the jury would have arrived at a different verdict if the evidence was admitted.

An error of constitutional magnitude³ is harmless if it is proved to be harmless beyond a reasonable doubt. *State v. Jones*, 168 Wn.2d 713,

³ Defendant claims this was an error of constitutional magnitude as it violated his constitutional right to present a defense. As such, although the State disagrees, the State argues that even if this court were to accept that argument, any error was harmless.

724, 230 P.3d 576 (2010) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct 824, 17 L. Ed.2d 705 (1967)). The error is harmless when an appellate court cannot reasonably doubt the jury would have arrived at the same verdict in its absence. *State v. Franklin*, 180 Wn.2d 371, 383, 325 P.3d 159 (2014).

Even if the excluded statements were admitted, this Court cannot reasonably doubt that the jury still would have arrived at the same verdict. As previously mentioned, all that the statements would have elicited was the defendant's claim that Brown allowed him to live at the home rent-free in January, and Detective Shaviri was looking for him. This was the same evidence that was already before the jury by the defendant's own testimony. As such any error in excluding the statements is harmless.

Further, there was overwhelming evidence the defendant was not living at the house. The jury was able to hear from multiple witnesses that the defendant was not living at his registered address. Three witnesses provided the same basic facts that defendant had not lived at the residence during the charging period. Brown and Smith both testified defendant had not lived in the residence since November 2015. 2RP 92, 104. Brown even testified that he was living in the defendant's vacated room. 2RP 89-90. Green, the owner of the house who was physically at the house for up to four hours per week, also testified he did not see the defendant at the

residence from December 6, 2015, until the day he testified in court. 2RP 73. Finally, Detective Shaviri also testified how he could not find the defendant at his registered address. Detective Shaviri testified he went to the defendant's registered address multiple times and at different hours between 7:00 A.M. and late in the evenings in an attempt to find the defendant at his registered address. 2RP 119-120. Yet, he was never able to do so. *Id.*

Defendant though testified that he was living in his registered address in January 2016. 3RP 169. This was the only evidence presented suggesting defendant was living at his registered address. The conflicting testimony about his living situation allowed for the jury to weigh the defendant's testimony compared with the overwhelming evidence of the defendant not living at his registered address. Because the jury was able to hear from multiple witnesses and determine for themselves that the defendant was not living at his registered address based upon the weight of each witness's testimony and their credibility, any improperly excluded testimony on what others said to him about his living situation is harmless.

2. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE DEFENDANT GIVING A FALSE NAME TO OFFICER NORLING AS SUCH SHOWED CONSCIOUSNESS OF GUILT, AND EVEN IF THE EVIDENCE WAS ERRONEOUSLY ADMITTED, IT WAS HARMLESS WHEN COMPARED TO THE OVERWHELMING EVIDENCE OF DEFENDANT'S GUILT.

A trial court must determine if evidence of flight is admissible under ER 403, requiring the court to determine if the probative value of the evidence is substantially outweighed by its prejudicial effect. ER 403; *State v. Hebert*, 33 Wn. App. 512, 515, 656 P.2d 1106 (1982). Evidence of flight is generally admissible as it tends to show that after commission of a crime, there is consciousness of guilt. *State v. Price*, 126 Wn. App. 617, 645, 109 P.3d 27 (2005). Evidence of flight is admissible if it creates a reasonable and substantive inference that defendant's flight was a reaction to his consciousness of guilt or a deliberate effort to evade arrest and prosecution. *State v. McDaniel*, 155 Wn. App. 829, 853-853, 230 P.3d 245 (2010) (quoting *State v. Freeburg*, 105 Wn. App. 492, 497 20 P.3d 984 (2001)). Flight, including by one who *may be charged* with a criminal act is a circumstance which can be considered with all other circumstances shown by the testimony in determining the guilt or innocence of the defendant. *State v. Moser*, 37 Wn.2d 911, 915, 226 P.2d 867 (1951) (emphasis added).

The standard of review for evidence admitted under ER 403 is a manifest abuse of discretion. *State v. Luvene*, 127 Wn.2d 690, 706-707, 903 P.2d 960 (1995).

- a. The trial court properly admitted evidence of the defendant providing a false name to Officer Norling as such demonstrated consciousness of guilt.

Evidence a defendant gave a false name when first contacted by police is relevant to show consciousness of guilt. *State v. Chase*, 59 Wn. App. 501, 507, 799 P.2d 272 (1990). The probative value of a false name given by defendant to law enforcement can outweigh any prejudicial effect to show bad character. *Id.* Assumption of a false name and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime. *State v. Freeburg*, 105 Wn. App. at 497-498. Lying to law enforcement officials is further evidence of consciousness of guilt. *State v. Huff*, 64 Wn. App. 641, 647, 826 P.2d 698 (1992).

When first approached by Officer Norling, defendant lied to the officer and gave his name as “Shelton Fulmer.” 2RP 62. After running a records check on his vehicle’s computer, the officer was able to deduce from a Department of Licensing photo that the computer returned with the records check, that the defendant was Seth Fulmer, not his brother Shelton. When approached by Officer Norling and asked why he lied, defendant replied he was not “ready to leave his daughters yet.” 2RP 64.

Defendant lying to Officer Norling, assuming a fake name, and stating he was not ready to leave his daughters, is all indicative of a guilty conscious. If defendant did not believe he had a warrant out for his arrest, he would not have been concerned about leaving his daughters. All of this shows that the defendant was concerned about being arrested. Evidence of a guilty conscious is admissible. See *State v. Freeburg*, 105 Wn. App. at 497-498; *State v. Huff*, 64 Wn. App. at 647.

The trial court reasoned as much. 1RP 17; CP 77-80. In its oral ruling admitting the evidence, the court stated, “[the evidence] may also serve as some evidence of guilty knowledge that, he, in fact, wasn’t who he said he was and was trying to avoid arrest for a variety of reasons.” 1RP 17. Even if defendant’s argument that he did not know about the warrant for this case when he provided the officer with a fake name is true, the fact that he lied is relevant because defendant still would have known he could be arrested for not living at his registered address. Defendant provided his address as one other than where he was registered. 1RP 6, 2RP 66. Such is evidence of a guilty conscious at the time of his arrest as he knew he could be incarcerated for not living at his registered address.

- b. Even if the evidence admitted was in error, such was harmless as it did not materially affect the outcome of the trial.

Evidentiary errors are generally not of constitutional magnitude. *State v. Grier*, 168 Wn. App. 635, 643, n.16, 278 P.3d 225 (2012) (citing *State v. Chase*, 59 Wn. App. 501, 508, 799 P.2d 272 (1990)). A nonconstitutional error requires reversal only if there is a reasonable probability the error materially affected the outcome of the trial. *State v. Kindell* 181 Wn. App. 844, 853, 326 P.3d 876 (2014). In determining whether an error by the trial court was harmless, an appellate court must measure the admissible evidence of the defendant's guilt against the prejudice, if any, caused by the inadmissible evidence. *State v. Barry* 183 Wn.2d 297, 303, 352 P.3d 161 (2015). Additionally, such evidence is harmless if it is of minor significance compared to the overwhelming evidence taken as a whole. *State v. Bourgeois* 133 Wn.2d 389, 402, 945 P.2d 1120 (1997).

The evidence presented was overwhelming that defendant did not live at his registered address. As previously mentioned, Brown and Smith testified they had not seen defendant since November as Brown had moved into defendant's vacated room. 2RP 89-90, 92, 104. Green testified he had not seen defendant since early December, even though he visited the house for three to four hours per week. 2RP 72-73. Detective Shaviri testified he had attempted to find defendant at the residence multiple times and had been unsuccessful each time he checked the residence with the

latest attempt being two days prior to the end of the charging period. 2RP 119. The testimony of the four individuals who would have seen defendant at the house was overwhelming evidence, even without the properly admitted flight evidence, that defendant absconded. As such, any error in admitting the evidence of defendant providing a fake name was harmless in light of the overwhelming evidence of his guilt.

3. THE STATE'S CLOSING ARGUMENT WAS NOT IMPROPER AS IT CORRECTLY ARGUED THE BURDEN OF PROOF AND ARGUED ONLY INFERENCES WHICH COULD BE REASONABLY DEDUCED FROM ADMITTED EVIDENCE.

To prove a prosecutor's actions constitute misconduct⁴, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815,

⁴ “‘Prosecutorial misconduct’ is a term of art, but is really a misnomer when applied to mistakes made by the prosecutor during trial.” *State v. Fisher* 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase “Prosecutorial misconduct” for intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b_authcheckdam.pdf (last visited January 3, 2017); National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10, 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited January 3, 2017). A number of appellate courts agree that the term “prosecutorial misconduct” is an unfair phrase which should be retired. See, e.g., *State v. Fauci* 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft* 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford* 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase “prosecutorial error.” The State urges this court to use the same phrase in its opinions.

820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). For the defendant to prevail on a claim of prosecutorial error, the defendant has the burden of establishing the alleged error is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves the conduct of the prosecutor was improper, the error does not constitute prejudice unless the appellate court determines there is a substantial likelihood the error affected the jury's verdict. *Id.* at 718-19.

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (*overruled on other grounds* by *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002)).

Failure to object or move for mistrial at the time of the argument “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); *see also State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011).

When reviewing an argument which has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-86, 882

P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)).

Here, defendant claims that two separate arguments made by the State in closing argument amount to prosecutorial error. *See* Brf. of App. at 32. Both arguments occurred during the State's rebuttal argument. The first argument made was:

Mr. Fulmer knows that he has to register. He has been doing it a long time. He knows this is serious stuff. He leaves a number. He knows where to go. He could come down here if he was really that concerned, but he doesn't, right? There is no evidence that he came down here to follow-up with Detective Shaviri.

3RP 222-223. The evidence the State argued was based directly on the evidence presented during testimony. Detective Shaviri testified that while he left his card at defendant's registered address on a visit prior to January 11, 2016, defendant never called him. 2RP 125. He could not recall hearing back from defendant at all. *Id.* The argument by the State was a direct response to defendant's testimony where he claimed he called Detective Shaviri and left a voicemail. 3RP 172.

Defendant objected to burden shifting and the court overruled the objection, finding that the State was arguing the evidence presented. 3RP 223. The court specifically stated, in the presence of the jury, "The burden still remains on the state [sic] to prove the case beyond a reasonable

doubt.” *Id.* The court properly exercised their discretion in overruling defendant’s objection and at the same time, made it clear the burden was still on the State. Hence, the State was making a reasonable inference and an argument based upon the evidence presented. As such, there is not a substantial likelihood any error, if it did exist, affected the jury’s verdict.

The second argument defendant challenges immediately followed the court overruling defendant’s objection. The second argument stated:

The evidence as presented, there is no indication that Mr. Fulmer ever came in to say, “Hey, Detective Shaviri, I’m there. Let’s figure something out.” Okay. *That is not his burden* to get up there and tell you that. But also there is a dearth of information. All of this is proving a negative, right? He wasn’t there. If he was there, then we wouldn’t be here. If there was direct evidence that he was living there, nobody would be here today. But there is [no direct evidence]. Failure to register itself is about proving a negative. (emphasis added).

3RP 223. Defendant did not object to this argument. Immediately following this argument, the State began to discuss the credibility of all of the witnesses and their level of trustworthiness. 3RP 224-225.

Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Stenson*, 132 Wn.2d at 719 (citing *State v. Gentry*, 125 Wn.2d 570, 593-

594, 888 P.2d 1105 (1995)). Here, defendant failed to object to the now challenged statement.

The argument by the State does not rise to the level of flagrant and ill-intentioned. Rather, the argument by the State correctly summarized the burden of proof: that there was no burden on defendant to prove anything. Further, the State correctly argued that the only way to prove a failure to register is by proving the defendant did not live at their registered address. Proving an individual did not do something or was not present somewhere is proving a negative.

The State also did not invoke the privilege of their office in this argument. The State did not argue that if there was any evidence defendant lived at his registered address the case would not have been brought to trial. Rather the State argued there was no *direct* evidence connecting defendant to his registered address. The jury was asked to draw the inference that the lack of direct evidence that the defendant was living at his registered address supported the circumstantial evidence presented which proved that he was not living at his registered address. Such an argument is not flagrant and ill-intentioned warranting reversal.

If there had been an objection the trial court could have admonished the jury to only consider the evidence presented and the statements of counsel are not evidence. The court had previously reiterated

instructions on the burden of proof and as such, it is likely the court would have reiterated other instructions if the court found it was warranted. As the statements were not flagrant and ill-intentioned and an admonishment could have corrected any prejudice, reversal is not required and this Court should affirm defendant's conviction.

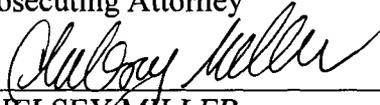
D. CONCLUSION.

This Court should affirm defendant's conviction for Failure to Register as a Sex Offender - Third Offense. Defendant cannot bring a new argument for the first time on appeal, and, even if he is allowed to, the trial court properly excluded hearsay statements offered by the defendant to prove the truth of the matter asserted. Further, the exclusion of the testimony did not infringe on defendant's right to present a defense as he has no right to present inadmissible and irrelevant evidence and he was still able to testify as to his ultimate point on the statements. Additionally, the trial court properly exercised their discretion in admitting flight evidence showing consciousness of guilty. Finally, the State did not commit any prosecutorial error in closing argument as the State properly

argued the burden of proof and only argued reasonable inferences based upon the evidence presented at trial.

DATED: January 30, 2017.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

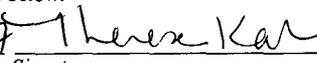


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Rule 9 Legal Intern

Certificate of Service:

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

1-30-17 
Date Signature

PIERCE COUNTY PROSECUTOR

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