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

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STATE OF WASHINGTON,

Respondent,

v.

ANDREW RAYMOND FORREST,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 15-1-01324-4

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BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether defense counsel provided ineffective assistance by strategically avoid an intervening cause instruction and by not objecting to unobjectionable testimony?

2. Whether the prosecutor committed misconduct with the words “held accountable” in rebuttal closing when the prosecutor was responding to the defense argument, there was no objection, and the record does not reveal that the remark caused significant, if any, prejudice?

3. Whether there were errors in the case that cumulate into an unfair trial?

4. Whether the forfeiture provision in the judgment and sentence, which specifically cites statutes allowing forfeiture of guns and drugs, violates due process?

5. Whether the conviction on an alternative charge that was neither scored nor sentenced should be stricken from the judgment and sentence? (CONCESSION OF ERROR)

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Andrew Raymond Forrest was charged by information filed in

Kitsap County Superior Court with vehicular homicide by disregard for the safety of others. CP 1. Before trial, the information was amended adding a second count of vehicular homicide by operation of a motor vehicle in a reckless manner. CP 50.

A hearing was held under CrR 3.5. 1RP 13. After testimony, the trial court concluded that Forrest statements to two law enforcement officers were admissible. CP 55.

The jury returned verdicts of guilty as to each of the two permutations of vehicular homicide. CP 76. Forrest was sentenced under count one, reckless vehicular homicide, to 26 months confinement. CP 98. The conviction in count two under the disregard for the safety of others count is recited in the judgment and sentence and designated "SCC." CP 97. Count two was not sentenced or counted as an offender score point. CP 98.

Forrest timely appealed his conviction. CP 77.

## **B. FACTS**

Law enforcement responded to a report of a motorcyclist lying in lane two of two on State Route 3. RP 90-91. When the primary state trooper arrived, she found that the motorcycle rider, Mr. Knight, was already in an ambulance. RP 91-92. The roadway was dry and there was

a puddle of blood where Mr. Knight had been lying. RP 92. Debris, including pieces of Mr. Knight's helmet, was strewn about the roadway. Id. The helmet had been broken into two pieces by the collision. RP 94.

Forrest's car was located parked approximately a quarter mile down the highway. RP 97. Trooper Schob spoke to Forrest. Id. Forrest related that he was behind the motorcycle in the fast lane when another car quickly approached from behind. Id. He moved over to the slow lane, the other car passed him, the other car moved back into the slow lane, and then back into the fast lane in front of the motorcycle. RP 97-98. Forrest passed the motorcycle and moved back into the fast lane following the other car. RP 98. They approached a slower car. RP 99. Forrest guessed that his speed was 70 miles per hour. RP 100.

On the trooper's dash-cam recording, Forrest is heard describing what happened. RP 136. As Forrest and the other car were passing in the fast lane, another car approached from behind. Id. Apparently, Forrest passed a car, another car swerved, the motorcycle "moved"—"it sped up to get behind that car, and when I moved over he hit the rear of my car." RP 136-37.

Review of the damage to the vehicles revealed damage to the left driver's side rear of Forrest's car. RP 105. The left rear tire was damaged and there were rub marks on the left rear fender. Id. The tire had a missing piece of rubber "in a circular fashion." Id. A matching piece of

rubber was found on the exhaust of the motorcycle. *Id.* It appeared that the motorcycle exhaust pipe cover peeled the sidewall of the tire like a potatoe-peeler. RP 105-06.

The damage to the car was characterized as being in the left-rear corner of the car, not in the rear of the car. RP 139-40. The evidence did not indicate a rear-end collision. RP 140. The evidence suggested a side-glancing or side-swipe collision more than a rear-end collision. *Id.* In particular, the potatoe-peeler effect on the tire shows that that tire came into contact with the side of the motorcycle. RP 141.

A witness, Mr. Billings, was driving on the same stretch of highway that night. RP 150. He noticed a motorcycle approach from behind and slowly pass him. *Id.* The witness was going 64 mph and the motorcycle went by at about the pace of a walking person. RP 151. The motorcycle had moved away forward when Mr. Billings suddenly saw two cars quickly approach from the rear. *Id.* The two cars were following each other very closely, less than a car length, and were described as jockeying for position. RP 152. They passed at a very high rate of speed. *Id.* Forrest's car, described as the white car, was in the lead. *Id.* When the two cars passed, Mr. Billings could see the motorcycle some distance ahead. RP 152-53. There was also another car on the road a short distance ahead, which the witness named the "traffic car." RP 153. At that point, the the white car, Forrest, the black car, the mystery car, and the

traffic car were all in the right lane and the motorcycle and the witness were in the left lane. RP 154.

The driving of the two cars concerned Mr. Billings and he slowed down thinking “something bad was going to happen.” RP 154. As he slowed, the two cars merged to the left in front of him and passed the traffic car on the left. RP 155. The two cars were then in the left lane closing on the motorcycle at a high rate of speed. Id. The two cars then moved in front of the traffic car and moved to the right lane to pass the motorcycle. RP 156. Because of a curve in the freeway, Mr. Billings lost site of the three vehicles. RP 157. In a few moments, he heard a motorcycle engine revving. RP 158. As the witness rounded the bend, he saw sparks flying as the motorcycle was spinning across the roadway. RP 158-59. He pulled up to the scene and saw Mr. Knight lying in the roadway. RP 159.

Another civilian driving that highway that night was Linda Leibold. RP 198-99. She saw the motorcycle and the passenger cars that were involved. Id. First the motorcycle passed her and then the two little, sporty cars went by faster. RP 199. She judged that the two cars were going 70 mph and were very close to one another. RP 201. As she rounded a bend in the freeway, she saw sparks flying. RP 200. Ms. Leibold slowed, pulled over, and called 911. RP 200-01.

Another civilian, Greg House, is a professional truck driver. RP

222. The night of the collision, he was driving his personal car on Highway 3. RP 223. Traffic was light but he was passed by two cars travelling at a high rate of speed. Id. He had also seen the motorcycle, which had gradually passed him. RP 224. After the gradual pass of the motorcycle, Mr. House saw the headlights of the two small cars approaching from behind at a high rate of speed. RP 225. The two cars were in different lanes and the one in the slow lane aggressively changed lanes and got behind the other car as they passed him. RP 226. Mr. House guessed that the cars were going 80 mph. Id. The two cars were driving aggressively, moving in and out of lanes; like one was chasing the other. RP 227. He proceeded and came upon the scene where he saw Mr. Knight lying in the roadway. RP 229.

Forrest came running up to Mr. House. RP 231. Forrest said that the motorcycle had run into back of his car. Id. He identified himself as the driver of the white car and said that he stopped because he saw people stopping in his rearview mirror and knew he had to come back. Id. Forrest admitted that he was driving too fast. RP 232.

Jon Huntington is detective sergeant in the Washington State Patrol (WSP) Criminal Investigations Division. RP 244. He responded to the collision. RP 246. He had sent WSP Detective Green to the scene when he heard what it was about. Id. He had been told that a lane change had knocked a motorcycle down with serious injuries to

the rider. Id. Sergeant Huntington contacted Forrest and proceeded to interview him in the sergeant's car. RP 248. The interview was recorded. RP 249. The tape recording was played for the jury. Id. A transcript of that recording is in the record at Supplemental Clerk's Papers 88.

In examining Forrest's car, Sergeant Huntington saw damage around the left rear wheel. RP 252-53. He noted a unique gouge in the tire sidewall. Id. The sidewall was missing a chunk seven to ten inches long. RP 253-54. Then, between the wheel well and the rear bumper, the detective saw black marks that appeared to be rubbing from the motorcycle. Id. This damage did not appear to be consistent with Forrest's report that the motorcycle had hit him from behind. RP 255.

The sergeant also inspected the motorcycle. RP 255. The bike was all scraped up consistent with having gone down on the road. Id. There was a guard over one of the exhaust pipes that had peeled the rubber from Forrest's tire; inside the guard the sergeant found the missing seven inch piece of rubber that had been peeled off. RP 255-56. Another significant observation was that the bike's front shock absorber (the remaining one) was compressed, indicating that the bike was in full braking when it went down. RP 257.

Deputy Sheriff Andrew Aman had contact with Forrest at the scene. RP 333. Forrest admitted that his car had made contact with the bike. Id. Forrest said that he was following the motorcycle at around 70

mph. RP 334. He said that he went around the bike, pulled back in, and then the motorcycle struck him from the rear. *Id.* Deputy Aman had given Forrest a witness statement form. RP 336. Forrest wrote a statement about the collision that Deputy Aman read to the jury. RP 336-37; written statement in the record at CP 95. The statement concludes with Forrest alleging that the motorcycle sped up and hit the rear of his car. CP 95.

WSP Detective Green arrived at the scene at the same time as Detective Sergeant Huntington. RP 488. He then started to scan the scene with a Tribble mapping device. RP 489. Detective Green said that he had never seen such a long straight skid mark by a motorcycle before. RP 292. He opined that it would take an experienced rider to maintain such a straight, long skid without either going over the handle bars (by releasing the back brake) or slopping around (by releasing the front brake). RP 492-93. Thus the rider braked because he perceived a hazard, skidded for 61 feet, and then went over on the side. RP 494. The detective believed that if Forrest had not hit the motorcycle, the rider would have been able to stop in an upright position. RP 495.

Detective Green was asked why he did not arrest Forrest the night of the collision. RP 495. Detective Green answered that law enforcement “didn’t have enough there to totally understand what happened.” RP 496. Further investigation was necessary before they focused on the collision

being “a felony collision.” *Id.* Part of the further investigation was an attempt to find the mystery car. RP 510-11. That effort included reviewing the witness statements, looking at Facebook posts, and placing a news report in newspapers and on television, interviewing members of Forrest’s command (RP 515), checking for car types registered on the base (RP 515). *Id.* The detective even staked out the field at which Forrest played rugby. RP 515.

In this connection, finding the other car, Detective Green said he thought Forrest may know the driver of the mystery car. RP 511. Detective Green’s suspicion came from Forrest parking far down the freeway from the collision, Forrest claiming that it was just him and not the other car, and that people who drive the type of sporty car that Forrest drives, and that also described the mystery car, tend to be in the same car clubs—like hotrod or motorcycle clubs. RP 512. The detective was looking for clubs associated with “Fast-and-the-Furious-type cars.” *Id.* He was looking for the mystery car in a “souped up” car kind of culture. RP 513. Also, Forrest knew of such cars and had admitted to close proximity to, to being passed by, the mystery car. *Id.* Detective Green was suspicious that Forrest could not describe the color of the car or its silhouette (did it have a spoiler?). *Id.* But Detective Green admitted that Forrest might not know the other driver. RP 514.

The mystery car was never found. RP 516.

Detective Green completed his accident reconstruction investigation and concluded that

Jared Knight was reacting to the phantom ghost car that had cut him off, was braking for that. And Andrew Forrest had made an evasive lane steer and moved in his path of travel and collided with Jared Knight in his lane.

RP 571.

### **III. ARGUMENT**

#### **A. DEFENSE COUNSEL WAS NOT INEFFECTIVE BECAUSE HIS FAILURE TO REQUEST A PROXIMATE CAUSE JURY INSTRUCTION WAS STRATEGIC AND BECAUSE THE TESTIMONY THAT HE DID NOT OBJECT TO WAS ADMISSIBLE AND UNOBJECTIONABLE.**

Forrest argues that defense counsel was ineffective for not seeking an intervening cause instruction and for not objecting to certain testimony. This claim is without merit because the intervening cause argument was not Forrest's primary defense theory, because the intervening cause instruction foreclosed argument that Mr. Knight's bad driving was a defense, and because under all the circumstances Forrest was not prejudiced in that the result of trial would have been the same. The claim fails because the evidence that Forrest argues was objectionable was not and because Forrest opened the door to much of the testimony.

To show ineffective assistance of counsel, Forrest first must show that counsel provided deficient performance, that is, performance that falls below an objective standard of reasonableness. *State v. Gier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Second, it must be shown “there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different.” 171 Wn.2d at 34, quoting *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Forrest must overcome a strong presumption that counsel’s performance was reasonable. 171 Wn.2d at 33. Legitimate trial strategy or tactics do not equate to deficient performance. *Id.* Thus, Forrest must show that “there is no *conceivable* legitimate tactic explaining counsel's performance.” 171 Wn.2d at 33 (emphasis added), quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Ineffective assistance claims are reviewed de novo. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). On review, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Grier*, 171 Wn.2d at 34 (alteration by the court), quoting *Strickland v. Washington*, 466 U.S. 668,

689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

***I. Not requesting an intervening cause instruction was a strategic choice that did not prejudice the defense.***

The defendant is “entitled to have the jury instructed on his theory of the case if there is evidence to support it.” *See State v. Hansen*, 46 Wn. App. 292, 299, 730 P.2d 706 (1986). Failure to request a defense jury instruction is not per se ineffective assistance. *State v. Cienfuegos*, 144 Wn.2d, 228-29, 25 P.3d 1011 (2001) (diminished capacity instruction).

The offense of vehicular homicide has as an element that the defendant’s driving must be a proximate cause of the death. RCW 46.61.520. Here, the jury was instructed

To constitute vehicular homicide, there must be a causal connection between the death of a human being and the driving of a defendant so that the act done or omitted was a proximate cause of the resulting.

The term “proximate cause” means a cause which, in a direct sequence produces death, and without which the death would not have happened.

CP 73 (instruction 14). This instruction is quoted from WPIC 90.07. Forrest argues that this instruction should have been met with a “conduct of another” instruction explaining intervening and superseding cause to the jury.

Forrest argues that the missing instruction is WPIC 25.03; however, the intervening cause instruction for vehicular homicide is found

in WPIC 90.08. The two have few differences but the bracket material in 90.08 allows use of the word “driving” in the place of “act.” 90.08 in its raw form provides

If you are satisfied beyond a reasonable doubt that the [[act] [or] [omission]] [driving] of the defendant was a proximate cause of [the death] [substantial bodily harm to another], it is not a defense that the [conduct] [driving] of [the deceased] [or] [another] may also have been a proximate cause of the [death] [substantial bodily harm].

[However, if a proximate cause of [the death] [substantial bodily harm] was a new independent intervening act of [the deceased] [the injured person] [or] [another] which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the [death] [substantial bodily harm]. An intervening cause is an action that actively operates to produce harm to another after the defendant's [act] [or] [omission] has been committed [or begun].]

[However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the [death] [substantial bodily harm] fall within the general field of danger which the defendant should have reasonably anticipated.]

WPIC 90.09, 11A Wash. Prac., Washington Pattern Jury Instruction—Criminal (4<sup>th</sup> Ed.; October, 2016 update). Even though defense counsel uttered the words “intervening cause” in closing, this instruction is not well suited to the defense case.

First, the instruction cuts against Forrest’s case. The first paragraph provides that as long as the jury finds that Forrest’s driving was

a proximate cause it is not a defense that Mr. Knight's driving may also have been a proximate cause. As WPIC 90.07 provides, there may be more than one proximate cause. See *State v. Roggenkamp*, 153 Wn.2d 614, 631, 106 P.3d 196 (2005). In this case the jury was unaware of either of these legal principles. In *State v. Jacobsen*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, No. 33743-0-III (April 12, 2018) (UNPUBLISHED AND UNBINDING), failure to request a proximate cause instruction in a manslaughter prosecution was argued to be ineffective assistance. It was held that the instruction was unnecessary because the jury had been instructed that the state had to prove that the defendant caused the death of the victim in any event and because, in that case, there was no other cause to point to. But the use of the proximate cause instruction in general was discussed

The instruction's warning that there might be multiple proximate causes is one that the prosecution might desire to use when appropriate. Since that aspect of the instruction actually cuts against the defendant, who typically is seeking to argue the other action as cause of death, it is unlikely that the defense will very often want this instruction in a criminal case.

*Jacobsen*, *supra*, footnote 3.

Here, the defense could argue its case and try to convince the jury that Mr. Knight was partially responsible in an attempt to establish reasonable doubt all the while avoiding the notion that contributory negligence is not a defense. In this light, counsel's avoidance of this issue

can be seen as trial strategy. As instructed, the jury could have found that contribution by Mr. Knight absolved Forrest. The instruction given allowed the defense argument. *See Cienfuegos*, 144 Wn.2d at 230 (defense counsel not ineffective for failing to request diminished capacity instruction where “counsel was able to argue his theory of the case”).

The record shows that intervening cause was not at all the primary strategy of the defense. The primary strategy was to assail the state for not proving its case because no one saw the accident and because the state’s witnesses did a bad job of investigation in general and accident reconstruction in particular. These were the repeated themes in the closing argument.

Moreover, the defense clearly stated its defense theory in the Defense Trial Brief. CP 42-45. In that brief, under the heading of “The Defense Theory,” the defense alleges that during the incident that “Mr. Knight suddenly punches his throttle and rapidly accelerates” but says nothing about intervening cause. The primary thrust of the defense is that “the government’s theory is theoretically, factually and scientifically flawed.” Further, the theory is based on the defense proving that “Trooper Green is manipulating evidence, mathematical formulas, and physical evidence/data.” CP 45. *See e.g., State v. Grohs*, 2 Wn. App.2d 1027, \_\_P.3d \_\_ (February 6, 2018) (UNPUBLISHED AND UNBINDING)

(defense had factual basis for unwitting possession instruction but defense counsel not ineffective for not offering instruction where it would have been contrary to defense theory).

In closing argument, the defense uses the given proximate cause instruction offensively. RP 781-82. Counsel effectively argues that Mr. Knight's sudden acceleration is the proximate cause in the case. RP 782. This argument would fall flat if the jury had been instructed that there may be multiple proximate causes and that Forrest is guilty if his actions were one such cause.

At bottom, defense counsel could do nothing with the fact that Forrest was in fact changing lanes and made contact with the motorcycle and that that lane change would constitute one proximate cause of Mr. Knight's death. Forrest admitted the contact. See RP 333 (Deputy Aman asked if he had impacted the motorcycle and Forrest said "yes"). He needed to get past the jury being told that Mr. Knight's possible contributory negligence was not a defense—and he did. See *State v. Gonzalez-Hernandez*, \_\_Wn. App. \_\_, \_\_ P.3d \_\_, No. 34478-9-III (March 20, 2018) (counsel not ineffective for not seeking proper limiting instruction on ER 404 (b) evidence when that instruction "arguably would have further reminded the jury of this harmful evidence").

By avoiding those rules, defense counsel gave Forrest a shot at

acquittal that he might not otherwise have had. On this record, it is likely that assertion of the intervening cause instruction would have increased the likelihood of conviction. As it went, the jury rejected Forrest's 'the police did a bad job' defense. The jury would have been likely to reject that argument even if instructed on intervening cause. On this record, it is not reasonably probable that the result of the trial would have been different had the instruction been requested. Thus the failure to request the instruction did not prejudice Forrest.

2. ***Counsel was not ineffective for failing to object to certain testimony because the testimony both explained the investigation and responded to a defense allegation of fabrication of evidence and was for those purposes unobjectionable.***

Next, Forrest alleges misconduct by his attorney in failing to object to various parts of the testimony of state's witness WSP Detective Green. Forrest alleges that counsel should have objected to Detective Green's opinions as to Forrest's credibility and guilt and the credibility of the witnesses.

Where a claim of ineffective assistance of counsel is based on defense counsel's failure to object, the defendant must show that the objection likely would have been sustained. *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). Further, the "decision whether to object is a classic example of trial tactics, and only in egregious

circumstances will the failure to object constitute ineffective assistance of counsel.” *State v. Kolesnik*, 146 Wn. App. 790, 801, 192 P.3d 937 (2008). In the context of failure to object, it is well settled that it is legitimate trial strategy to withhold a valid objection if it would draw attention to damaging evidence—especially where the evidence is fleeting. *See e.g.*, *State v. Gladden*, 116 Wn. App. 561, 568, 66 P.3d 1095 (2003) (counsel may have decided that an objection would draw attention to the information he sought to exclude).

The context of the detective’s remarks is important. The detective was asked about investigative efforts to find the phantom car. RP 510. The detective related that he did look for the other car. *Id.* In this connection, the detective reviewed Forrest’s statements. *Id.* Detective Green met with Mr. Knight’s family and was advised of some Facebook posts on Mr. Knight’s page. RP 510-11. Five people stationed on the same submarine as Forrest were interviewed. RP 514-15. The detective met with command and requested any lists showing members who play rugby or listing members who own similar cars. RP 515. He received no such lists from command. *Id.*

The detective ran checks of base cars and found some “Subaru-type WRX cars.” RP 515. He even spent time on a stake out at the field where the rugby is played to see whether such a car would show up;

without success. Id.

Trooper Green arranged for TV and newspaper stories describing the phantom car. RP 511. The trooper testified that he had a “strong suspicion” that Forrest knew who the other driver was. Id. The reasons for that suspicion were, first, that the trooper found it odd that Forrest had stopped his car a long distance down the highway from the scene of the accident. RP 511. Second, he thought it was odd that Forrest had said at the scene that it was just him when there was clearly another car involved. RP 512. It is not opinion when a witness comments on the defendant’s demeanor. *See State v. Barry*, 183 Wn.2d 297, 310, 352 P.3d 161 (2015); *State v. Day*, 51 Wn. App. 544, 552, 754 P.2d 1021 (1988).

Further investigation had led to the discovery that Forrest belonged to a car club. RP 512. The detective elaborated that the club involved a certain kind of cars which he described as “Fast-and-the-Furious-type cars.” Id. The phantom car had been described as one of these type of cars—like a Subaru WRX. RP 513. The detective knew that Forrest had said that the car had been following him closely and had passed him. Id. But Forrest had claimed that he could not even give the color of the car. Id. Forrest provided no description of the car after having been “that close and personal with it during the collision.” RP 514. This from an individual who knows something about those kind of cars. Id.

This testimony is not more than a recounting of Detective Green's investigation. It is unremarkable that authorities would be very interested in speaking to the driver of the other car involved in the incident. It is similarly unremarkable that the facts collected in this effort led Detective Green to be suspicious that Forrest knew the other driver. In the end, that proposition was never proven. But it is not improper for the witness to tell the jury about the things that guided his investigation. For instances, the detective staked out of the rugby field. If the missing driver was found there, it would be clear that Forrest, one of the rugby players, would know the other rugby players. In fact, the detective was investigating all possible angles in an attempt to find this other driver, including his suspicion that Forrest knew that person.

Similarly, Forrest's argument that Detective Green gave an opinion on guilt is misplaced. Here, once again, it can be seen that the detective was explaining the investigation to the jury. There was unobjectionable testimony that the two vehicles had impacted each other. RP 529-30. Then, the question asked was "When you do the reconstruction, are you trying to figure out how they got positioned in a way that that would happen?" RP 530. The answer was essentially that Forrest was not arrested at the scene but about a month later after the authorities completed their investigation. *Id.* One problem was that at the scene,

“We didn’t know all the speeds yet.” Id.

The investigation had included the fact that the witnesses had provide consistent stories. RP 530. This consistency allowed the investigators to infer that the vehicles were traveling at high speed. RP 531. Further, the witness statements were consistent with regard to the vehicles changing lanes together. Id. The detective never broached the question of witness credibility. The detective never quoted any of the witnesses. If the testimony does not directly comment on the defendant's guilt or veracity, helps the jury, and is based on inferences from the evidence, it is not improper opinion testimony. *State v. Johnson*, 152 Wn. App. 924, 930–31, 219 P.3d 958 (2009).

Detective Green’s remarks were that the consistency of the witness statements aided in his investigation. That consistency led the investigators to infer that the speeding demonstrated disregard for the safety of others and that erratic lane changes demonstrated recklessness. RP 531. Moreover, hard on the heels of this testimony, the detective said that the one of the reasons for the accident reconstruction work is to compare that work with the statements of both the witnesses and Forrest. RP 532.

Moreover, Detective Green’s remarks about the investigation of the collision and the conclusions drawn therefrom directly answered

defense accusations of official malfeasance. The defense had directly attacked the police by alleging that the theories they used in accident reconstruction were intended “To somehow theoretically make that Mr. Forrest is guilty.” RP 286. The response was “No, they made contact,” referring to the car and the motorcycle. *Id.* The defense persisted: “So the fact that there’s contact makes Mr. Forrest guilty?” *Id.* The response: “The totality of all the things that came up to that point is what we recommended forward.” *Id.* These questions were thrown at Detective Huntington as the defense attempted to impeach Detective Green’s accident reconstruction. *See* RP 291 (Huntington saying that the conclusions being discussed are Detective Green’s conclusions, not Detective Huntington’s conclusion). And these question are consistent with the above discussion of the defense theory that the police screwed up this investigation.

Further, during Detective Huntington’s testimony, the defense challenged the witness to “Give the jury your theory, the conclusions of your report.” RP 268. It was Detective Green’s report, not Detective Huntington’s report. *See* RP 276 (Detective Huntington to defense counsel: “I didn’t do the reconstruction.”). Further on, the defense lodges an accusation that the police are creating a drag coefficient “out of thin

air.”<sup>1</sup> The defense accused Detective Huntington of having “numerous factual errors” in his report with regard to what Forrest had told him. RP 280.

Before Detective Green testified, the defense had made an issue out of the police opinion as to Forrest’s guilt. The defense essentially accused the police of fabrication. The defense tried to convince the jury that it was in fact the police opinion of guilt that drove the investigation and caused the police to fudge on or outright fabricate the numbers and principles involved in the accident reconstruction. Detective Green’s testimony regarding the investigation and the particular pieces of evidence that went into the police conclusions were directly responsive to the defense allegations of malfeasance. Green’s testimony merely rebuts the defense by explaining the pieces of the investigation. The police opinion about the incident followed investigation; that opinion was not driven by an unsupported *a priori* conclusion of guilt.

Under the doctrine of curative admissibility or door opening, questioning that may create a false impression may, in the trial court’s discretion, be answered, rebutted, or explained by otherwise inadmissible evidence. *State v. Wafford*, 199 Wn. App. 32, 36-37, 397 P.3d 926, *review denied* 189 Wn.2d 1014 (2017); *see U.S. v. Whitworth*, 856 F.2d 1268,

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<sup>1</sup> An objection as argumentative was sustained.

1285 (9<sup>th</sup> Cir. 1988). As a Washington court tersely put it “it is not an abuse of discretion to allow the State to clarify or rebut a false impression created by the defense.” *State v. Fry*, 115 Wn. App. 1046, \_\_\_ P.2d \_\_\_, (2003) (UNPUBLISHED AND UNBINDING), *citing U.S. v. Beason*, 220 F.3d 964, 968 (8<sup>th</sup> Cir. 2000).

Defense counsel strategically decided not proffer a jury instruction that might have undermined the defense. Defense counsel did not object to police testimony that was unobjectionable as merely recounting efforts to find the mystery car. Defense counsel did not object to police testimony that responded to the defense allegation that the police fabricated the case against Forrest. There was no deficient performance.

### ***3. Counsel’s acts caused no prejudice***

Further, since there is a “conceivable” reason not to seek the proximate cause instruction, it is difficult to say that Forrest is prejudiced by its omission. Confidence in the jury’s verdict is not undermined.

Similarly, counsel’s objections to Detective Green’s testimony would not have been sustained. It is unobjectionable to outline the police investigation to the jury. Even less objectionable when in direct response to a defense assertion that the case was made up. It is unobjectionable that part of the investigation included the consistency of the witnesses. No

comment was made about the credibility of any witness. It was merely observed that they said the same things about the incident (consistency). Perhaps none of the evidence was good for Forrest, but that of course does not make it objectionable or cause improper prejudice. Nothing in counsel's behavior undermines confidence in the verdict.

**B. THE PROSECUTOR'S FLEETING REMARK APPROPRIATELY MET THE DEFENSE ARGUMENT AND WAS NOT FLAGRANT OR ILL-INTENTIONED.**

Forrest next claims that the prosecutor committed misconduct in closing argument. This claim is without merit because the remark was narrow, met the defense argument, and was, in the context made, clearly not flagrant or ill-intentioned.

To prevail on a claim of prosecutorial misconduct, a defendant must show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (internal quotation omitted). The prosecutor's conduct is reviewed "by examining that conduct in the full trial context, including the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the

jury.’ ” *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011).

A failure to object to alleged misconduct in closing waives the issue unless the prosecutor’s statements are so flagrant and ill-intentioned that the resulting prejudice could not be cured by a jury instruction. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). There must be a showing that no curative instruction could have cured the prejudice and that the resulting prejudice had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 756, 278 P.3d 653 (2012). When evaluating whether misconduct is flagrant and ill intentioned, “we focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012)

“The prosecutor’s remarks in rebuttal are considered in light of the defense’s closing argument.” *State v. Gentry*, 125 Wn.2d 570, 643–44, 888 P.2d 1105 (1995) (reference to David and Goliath in response to defense counsel’s biblical references). “When defense counsel, without support in the record, casts innuendoes upon the good faith and fairness of police and prosecuting officials, the provocation may excuse statements by the prosecuting attorney which would not otherwise be permissible.” *State v. Brown*, 35 Wn.2d 379, 387, 213 P.2d 305 (1949).

The defense closing begins with the sentiment that the state is

viewing the evidence with an “evil eye.” RP 772. The defense asserts that the police are lying about what Forrest said at the scene—the police imagined what Forrest said with their evil eyes. RP 774. The evidence of the driving of Forrest and the mystery car is “pure fantasy.” RP 774. The defense accused the state of creating evidence and ignoring other evidence. RP 780. The defense attacks the police opinions about the collision as “crazy” and “nuts.” RP 791. Finally, the defense offensively used the given proximate cause instruction to lay the blame on Mr. Knight’s alleged sudden acceleration. RP 781-82.

In rebuttal argument, the prosecutor spoke for eleven pages of transcript rather strictly rebutting the defense argument. RP 793-804. In direct response to Forrest offensive use of the proximate cause instruction, the state argued that it was “outrages” to blame Mr. Knight. RP 803. She then says

He has to be held accountable for the choices that he made. The choice he made to completely ignore the risk to Mr. Knight on the road that night. To completely ignore the fact that there was a motorcycle just there, but I can't see it now, so I'm going to go anyway. It is unacceptable. And we're asking you to find him guilty. Thank you.

RP 804. First, a fine point to be made is that the offensive “held accountable” remark is directed at the bad choices Forrest made; it does not directly say as a general statement that Forrest should be held accountable and therefore found guilty. Moreover, the remark not only

rebutts the defense argument on proximate cause, it aptly sums-up the case: Forrest choose to drive recklessly and thereby killed another driver. Finally, the remark refers to a particularly reckless decision process—if you cannot see the motorcycle it is alright to proceed with a lane change.

The prosecutor’s argument fairly met the defense argument. In context, the remark was neither flagrant nor ill-intentioned. The supposition that this fleeting remark overwhelmed the jury’s ability to properly decide the case is simply not manifest in this record. Forrest cannot establish sufficient prejudice, absent speculation, because the fleeting remark was an extremely small piece of this rather large case. There was no “send a message” theme to the state’s argument. This issue fails as not flagrant or ill-intentioned and as not causing substantial prejudice to Forrest’s case.

**C. THERE WERE NO ERRORS IN THE CASE THAT COULD CUMULATE; FORREST RECEIVED A FAIR TRIAL.**

Forrest next claims that cumulative error deprived him of a fair trial. This claim is without merit because there simply were not errors in the case sufficient to cumulate into circumstances showing lack of a fair trial.

Where a trial contains multiple errors, “[c]umulative error may

warrant reversal, even if each error standing alone would otherwise be considered harmless.” *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). However, this “doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial.” *Weber*, 159 Wn.2d at 279.

Counsel’s strategic choices and state’s counsel’s passing remark, if erroneous, are not sufficient to undermine confidence in this verdict. Forrest received a fair trial. This issue fails.

**D. THE TRIAL COURT’S FORFEITURE ORDER WAS SPECIFICALLY AND PROPERLY LIMITED TO THE STATUTORILY AUTHORIZED FORFEITURE OF DRUGS AND GUNS.**

Forrest next claims that the trial court erred in ordering the forfeiture of seized property. This claim is without merit because the trial court provided appropriate statutory citation in the order.

Curiously, nowhere in his brief does Forrest quote the actual forfeiture provision found in the judgment and sentence. The provision provides for “Forfeiture all seized property *subject to forfeiture under RCW 9.41.098 or RCW 69.50.505* to the originating law enforcement agency unless otherwise noted.” CP (Supp.) 103-04 (emphasis added). RCW 9.41.098 deals with the forfeiture of firearms for various violations

of the law of possessing firearms or use in various criminal scenarios. RCW 69.50.505 provides that controlled substances are contraband (“not property right exists in them”) and are subject to seizure and forfeiture. That statute provides a long and comprehensive breakdown of what paraphernalia or instrumentalities related to drug possession may or may not be forfeited.

Thus the provision about which Forrest complains only addresses specific instances of statutorily authorized forfeiture of drugs and guns. And Forrest begins this argument by asserting that the court cannot order forfeiture without statutory authorization. Brief at 28.

Forrest argues further that the trial court cannot order forfeiture merely because an instrumentality may have been used in a crime; which is correct. But Forrest does not point to anything in this record that was forfeited without discussion. He asserts that the trial court ordered forfeiture of all seized property without limitation. Brief at 29. But this argument clearly ignores the actual limiting nature of the actual provision in the judgment and sentence.

Curious again is the fact that Forrest cites to RCW 69.50.505 as an example of a provision that the legislature “carefully crafted” to afford the appropriate level of due process. Brief at 30. The trial court’s order properly referred to the forfeiture of contraband items or improperly used

or possessed firearms. And, as Forrest argues, the statutes in question provide appropriate due process if those items are to be forfeited. And, finally, the record has no indication that drugs, guns, or any other seized property was forfeited. There is no error here.

**E. THE STATE CONCEEDS THAT THE JUDGEMENT AND SENTENCE SHOULD BE CORRECTED BY STRIKING THE SECOND CONVICTION ON AN ALTERNATIVE CHARGE FROM THE JUDGMENT AND SENTENCE.**

Forrest next claims that the trial court erred in entering on the judgment and sentence both of the convictions that were charged in the alternative. This claim is correct. The state concedes that the conviction on the alternative charge of vehicular homicide by disregard for the safety of others should be stricken.

As noted however that conviction was not scored and Forrest was not sentenced thereunder. This Court should order that that provision be stricken as a scrivener's error and that the error can be corrected without returning Forrest to the trial court from prison.

**IV. CONCLUSION**

For the foregoing reasons, Forrest's conviction and sentence

should be affirmed.

DATED May 1, 2018.

Respectfully submitted,

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**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

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