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

STATE OF WASHINGTON, RESPONDENT

v.

GERMAN ROSAS ARENAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 17-1-00613-2

Brief of Respondent

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

1. Whether the best evidence rule, ER 1002, applied to Deputy Watts' testimony regarding the photograph when the State was not seeking to prove the contents of the photograph?
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. PROCEDURE

On February 9, 2017, the Pierce County Prosecutor's Office charged GERMAN ROSAS ARENAS (hereinafter "defendant") with one count of Unlawful Possession of a Stolen Vehicle. CP 3. The case proceeded to trial on April 18, 2017, before the Honorable Gretchen Leanderson. RP¹ 1. The State filed an amended information the morning of trial which amended the charge to Taking a Motor Vehicle Without Permission in the Second Degree. RP 17-20; CP 4. Defendant did not object to the amendment. RP 18.

Before selecting a jury, the parties discussed scheduling with the court. RP 1-3. Defendant informed the court that he did not intend on calling any witnesses. RP 2. The court informed the parties that it was unavailable Monday through Wednesday of the following week due to judicial conferences. RP 3. However, the court noted, "I think that we could probably then handle this matter this week." RP 3.

During voir dire, the court informed the jury panel, "This case is only expected to go this week... We should have testimony completed by Thursday, and it should come to the jury by Thursday... for deliberation."

¹ The verbatim report of proceedings is contained in two consecutively paginated volumes and will be referred to as "RP."

RP 27. A number of potential jurors noted their inability to serve the following week. *See* RP 30-31, 33, 35-39. The State proceeded to call Nicole Ocasio, Deputy Isaac Finch, Deputy Justin Watts, and Rebecca Rogge as witnesses. RP 128, 134, 154, 184, 188. At the conclusion of the first day of trial, defendant told the court, “[D]epending on availability – I don’t think it’s going to happen, but I may be calling a rebuttal witness depending on [my] investigator’s availability. I don’t think he’s currently available; but if he is, I would like to call him as a rebuttal witness.” RP 171-72.

The next day, the State informed the court that it wished to recall Deputy Finch as a witness. RP 178. Defendant responded,

I guess depending on what – if Deputy Finch clarifies the record when he testifies...I will be requesting a continuance for witness availability at the end of the State’s case in chief.

I have a rebuttal witness, my investigator, who I would like to call. It was not foreseeable that Deputy Finch’s testimony would change dramatically from witness interviews as it did.

RP 178-79. The court informed defendant that if his investigator could be made available the following day, then the court would allow the brief continuance. RP 179. Defendant responded that his investigator was on the east side of the state for the rest of the week. RP 180. The court reminded defendant that the court was unavailable the next week due to the judicial

conference, and some of the jurors were also unavailable the following week. RP 180. The court proposed ideas for securing the investigator's appearance at trial and granted defendant the opportunity to try and contact his investigator. RP 180-82, 196-97.

Defendant informed the court that his investigator was not available the next day, and he would not be able to produce him as a witness. RP 197. Defendant renewed his request for a continuance until after the judicial conferences the following week. RP 197. The court again reminded defendant that jurors had conflicts and denied the request for a continuance. RP 197-98, 202. Defendant called no witnesses and did not testify. RP 205.

The jury subsequently found defendant guilty of Taking a Motor Vehicle Without Permission in the Second Degree. RP 233; CP 59. The court imposed a standard range sentence of 14 months in the Department of Corrections. RP 242; CP 62-74. Defendant filed a timely notice of appeal. CP 75, 81.

2. FACTS

On February 7, 2017, Rebecca Rogge went out to lunch with her boyfriend in Tacoma and parked her older model white Honda Civic outside. RP 184-85. After lunch, Rogge noticed her vehicle was missing and called police. RP 185. A few hours later, Nicole Ocasio was at her

residence in Tacoma when she looked outside her window and observed two men taking the license plate from her older model Honda Civic. RP 128-32. She reported the matter to police. RP 132.

That night, at approximately 11:40 p.m., Pierce County Sheriff's Deputy Isaac Finch was on patrol in the 7600 block of Portland Avenue when he observed a Honda Civic that appeared to go through a stop sign. RP 134, 137-39, 192. The deputy followed the vehicle and ran the license plate. RP 140-41. The license plate – Nicole Ocasio's license plate – came back as stolen. RP 129, 141. Deputy Finch requested backup and continued to follow the vehicle. RP 141-42.

Once the deputy and the suspect vehicle got onto Interstate 5, the suspect vehicle cut in front of a semi-truck without signaling and took an exit. RP 142. Deputy Finch activated his patrol vehicle's lights and siren to initiate a traffic stop, but the suspect vehicle kept driving. RP 142-43. The vehicle continued to evade the deputy, reaching speeds near 100 mph. RP 143. The suspect vehicle eventually took the River Road exit off of Interstate 5, but the vehicle lost control, hit a jersey barrier, and spun until it came to a stop. RP 144. Deputy Finch pulled up just as both occupants were exiting the suspect vehicle. RP 145. The driver ran westbound. RP 149. The passenger of the vehicle – identified as defendant – ran eastbound towards the Emerald Queen Casino. RP 146-48.

Pierce County Sheriff's Deputy Justin Watts and his partner, Deputy Oleole, responded to the scene. RP 154, 157-59. Deputy Watts observed an individual, who matched the description provided by Deputy Finch, running towards the casino. RP 146, 161. The deputy attempted to pursue the individual but lost sight of him in the parking lot. RP 161-62. Deputy Watts returned to Deputy Finch's location and prepared to set up containment. RP 162.

Tribal police approached the scene and showed Deputy Watts a photograph of a male caught on camera running into the casino. RP 164. Deputy Watts responded to the casino and contacted defendant, who was detained by security and tribal police. RP 165. The deputy recognized defendant from a prior contact. RP 165-66. Defendant was transported to jail. RP 166. The driver of the suspect vehicle was apprehended as well. 149.

Deputy Finch viewed the interior of the suspect vehicle and observed obvious damage to the vehicle's steering column. RP 151. The vehicle was later confirmed to be Rogge's stolen Honda. RP 184, 192. Rogge recovered her vehicle the next day and confirmed the existence of new damage to the vehicle's ignition area. RP 186. Defendant did not have permission to be inside of Rogge's vehicle on the incident date. RP 187.

C. ARGUMENT.

1. ER 1002 DID NOT APPLY TO DEPUTY WATTS' TESTIMONY REGARDING THE PHOTOGRAPH.

On appeal, the court reviews a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. Kinard*, 109 Wn. App. 428, 435, 36 P.3d 573 (2001). The best evidence rule generally dictates: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required," unless other rules or statutes provide otherwise. ER 1002. The rule does not apply, however, when a party seeks to prove an act, condition, or event. Tegland explains ER 1002 as follows:

[T]he rule requires production of the original writing, recording, or photograph *only* when seeking to prove *its contents*.

Various acts, events, and circumstances are memorialized in writing or in some other form of a record, and yet they also have an existence of their own. The best evidence rule applies only when it is the content of the record – *not the actual event* – that is sought to be proved.

In other words, when a party is seeking to prove an act or event, the best evidence rule does not require production of a record of the act or event.

5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 1002.2 (6th ed. 2016) (emphasis in original). *See, e.g., Rhyne v. Bates*, 35 Wn. App. 529, 667 P.2d 1131 (1983) (oral testimony regarding

compliance with section of Contractor's Registration Act did not violate ER 1002 where concern of statute was not contents of certificate of registration but rather its existence).

Here, the State was not required to produce the original photograph of the male "running into the casino," because the State was not trying to prove the contents of the photograph. RP 164; ER 1002. Rather, the State was seeking to prove an act or event – i.e., defendant as the passenger of the stolen vehicle. At most, the photograph referenced by Deputy Watts was merely a record of the act or event in question.² The actual contents of the photograph were immaterial to the question of whether defendant was the passenger in the stolen vehicle. Thus, the trial court properly exercised its discretion in allowing Deputy Watts' testimony regarding the photograph.

However, even if the trial court improperly admitted the testimony, then any error was harmless. An erroneous evidentiary ruling that is not of constitutional magnitude is not prejudicial unless, within reasonable probabilities, the trial's outcome would have been different had the error not occurred. *State v. Brockob*, 159 Wn.2d 311, 351, 150 P.3d 59 (2006);

² Moreover, Deputy Watts testified that the photograph was of "a male" who he recognized from a prior contact. RP 164-65. The deputy did not specifically identify defendant as the person in the photograph. The purpose of Deputy Watts' testimony regarding the photograph was to explain the course of his investigation.

State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). “Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole.” *Neal*, 144 Wn.2d at 611.

Here, evidence of the photograph was of minor significance in reference to the evidence as a whole. Deputy Finch identified defendant in open court as the passenger of the stolen vehicle who ran towards the Emerald Queen Casino. RP 141, 146-48, 189-90, 194. Deputy Watts observed an individual matching the description of defendant jump over a fence and run towards the casino. RP 161. The deputy identified defendant in open court as the individual he later contacted on the incident date in front of the casino. RP 163, 165. Police observed obvious damage to the vehicle’s ignition and steering column. RP 151. *See also*, RP 186-87. There is no reasonable probability that the trial’s outcome would have been different had the error not occurred. Thus, any error was harmless, and this Court should affirm defendant’s conviction.

2. DEFENDANT FAILS TO SHOW MANIFEST CONSTITUTIONAL ERROR WARRANTING REVIEW OF HIS CONFRONTATION CLAUSE CLAIM, AS THE CHALLENGED STATEMENT WAS NEITHER TESTIMONIAL NOR OFFERED FOR THE TRUTH OF THE MATTER ASSERTED, AND DEFENDANT FAILS TO SHOW ACTUAL PREJUDICE.

“In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” U.S. Const. amend. VI.

The confrontation clause bars the admission of “testimonial” hearsay in criminal trials unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. U.S. Const. amend. VI; Const. art. I, § 22; *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *State v. O’Cain*, 169 Wn. App. 228, 235, 279 P.3d 926 (2012). Statements are testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *State v. Mason*, 160 Wn.2d 910, 918-19, 162 P.3d 396 (2007) (citing *Davis v. Washington*, 574 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)). Alleged violations of the confrontation clause are reviewed de novo. *State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009); *State v. Price*, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006).

- a. Defendant fails to show he can raise this claim for the first time on appeal under RAP 2.5(a)(3).

Appellate courts generally will not consider an issue that a party raises for the first time on appeal unless it is a manifest error affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); RAP 2.5(a)(3). Courts use a three-part analysis to determine whether an issue raised for the first time on appeal may qualify for RAP 2.5(a)(3)'s manifest constitutional error exception. *State v. Fehr*, 185 Wn. App. 505, 511, 341 P.3d 363 (2015); *State v. Grimes*, 165 Wn. App. 172, 185, 267 P.3d 454 (2011). "The defendant has the initial burden of showing that (1) the error was "truly of constitutional dimension" and (2) the error was "manifest." *Grimes*, 165 Wn. App. at 185-86 (quoting *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). Only if a defendant proves an error that is both constitutional and manifest does the burden shift to the State to show harmless error (part three of the analysis). *O'Hara*, 167 Wn.2d at 98; *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *McFarland*, 127 Wn.2d at 333.

Here, defendant did not raise a confrontation clause objection during trial. Therefore, he must demonstrate manifest constitutional error for this Court to review his claim. RAP 2.5(a)(3). For the reasons set forth below, because defendant fails to show that any error in admitting Deputy

Watts' testimony regarding his contact with tribal police infringed on his right to confrontation or that it caused actual prejudice, he cannot raise this issue for the first time on appeal under RAP 2.5(a)(3). See *State v. Hart*, 195 Wn. App. 449, 460, 381 P.3d 142 (2016).

i. The Alleged Error is Not "Constitutional."

"A defendant cannot simply assert that an error occurred at trial and label the error "constitutional"; instead, he must identify an error of constitutional magnitude and show how the alleged error actually affects his rights at trial." *Grimes*, 165 Wn. App. at 186. Appellate courts look to the asserted claim and determine, if the claim is correct, whether it implicates a constitutional interest as opposed to some other form of trial error. *Id.*

Here, defendant fails to present a constitutional issue. As argued in the following section, the confrontation clause applies only to testimonial statements offered to prove the truth of the matter asserted. *Crawford*, 541 U.S. at 59 n. 9; *State v. Fraser*, 170 Wn. App. 13, 23, 282 P.3d 152 (2012). The challenged statement here was neither testimonial nor offered for its truth and therefore does not implicate defendant's right to confrontation. Because defendant fails to present a constitutional issue, his claim is not reviewable under RAP 2.5(a)(3).

ii. *The Alleged Error is Not “Manifest.”*

If, however, the appellate court determines that the alleged error is of constitutional magnitude, then the court must determine if the error is manifest. *Grimes*, 165 Wn. App. at 186. “Manifest” in the context of RAP 2.5(a)(3) requires a showing of actual prejudice. *O’Hara*, 167 Wn.2d at 99; *Kirkman*, 159 Wn.2d at 935. To show actual prejudice, the defendant must show how the alleged error actually affected his rights at trial. *Kirkman*, 159 Wn.2d at 935; *McFarland*, 127 Wn.2d at 333; *Grimes* 165 Wn. App. at 186-87 (defendant must show that alleged error had “practical and identifiable consequences at trial”). *See, e.g., State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992) (even when the alleged error affects the defendant’s Sixth Amendment confrontation clause right, the alleged error must be “evident, unmistakable, or indisputable” to be raised for the first time on appeal).

Here, defendant fails to show or even argue actual prejudice. Defendant cannot meet his burden of showing manifest error if he fails to discuss or argue actual prejudice in his brief. *See O’Hara*, 167 Wn.2d at

99-100 (discussing analysis of actual prejudice versus harmless error).³

Nevertheless, any argument regarding actual prejudice would fail.

Defendant cannot make a plausible showing that the claimed error had practical and identifiable consequences in his trial, because he cannot show that he was actually prejudiced by the claimed error.

In *State v. Kronich*, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007),⁴ the Washington Supreme Court held that a confrontation clause violation was “manifest” because, had it been raised at trial, the challenged statement would have been excluded, thus fatally undermining the State’s case. Here, on the other hand, the evidence against defendant at trial was overwhelming. Deputy Finch identified defendant in open court as the passenger of the stolen vehicle. RP 146-47. Defendant ran towards the casino. RP 147-48, 194. Deputy Watts identified defendant in open court as the individual he personally contacted outside of the casino. RP 163-65. Suppression of the challenged statement would not be fatal to the State’s case. Rather, exclusion of Deputy Watts’ challenged testimony

³ “The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal. In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.” *Id.* Here, defendant only addresses harmless error in his opening brief. *See* Brf. of App. at 9.

⁴ *Overruled on other grounds by State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012).

would have no effect on the outcome of the trial. Defendant cannot show actual prejudice.

Defendant has not demonstrated that his claim of error is of constitutional dimension or manifest. Because the claim was not properly preserved below, and the exception to RAP 2.5(a) does not apply, this Court should decline to review defendant's claim of error.

- b. There is no confrontation clause violation, because the challenged statement was neither testimonial nor offered for the truth of the matter asserted.

The confrontation clause applies only to statements offered to prove the truth of the matter asserted. *Crawford*, 541 U.S. at 59 n. 9 (confrontation clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted”); *Williams v. Illinois*, 567 U.S. 50, 57, 70, 104, 125, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012). Washington courts have applied this principle. “If a witness is unavailable and there has been no prior opportunity to cross-examine, a testimonial statement must be *excluded* under the confrontation clause if it is offered for the truth of the matter asserted.” *State v. Fraser*, 170 Wn. App. 13, 23, 282 P.3d 152 (2012) (emphasis in original) (citing *Crawford*, 541 U.S. at 59). As stated by the Washington Supreme Court in *State v. Davis*, 154 Wn.2d 291, 301, 111 P.3d 844 (2005), *affirmed*, *Davis*, 547 U.S. 813, 834:

Crawford allows that “not all hearsay implicates the Sixth Amendment’s core concerns.” An offhand, overheard remark, although perhaps objectionable under hearsay rules, “bears little resemblance to the civil-law abuses the Confrontation Clause targeted.” Further, even testimonial statements may be admitted if offered for purposes other than to prove the truth of the matter asserted.

(quoting *Crawford*, 541 U.S. at 51, 59 n. 9). See also, *State v.*

Mondragon, No. 75538-2-I, 2018 WL 827166 (Wash. Ct. App. February 12, 2018) (unpublished).⁵ But see, *Mason*, 160 Wn.2d at 922 (“we are not convinced a trial court’s ruling that a statement is offered for a purpose other than to prove the truth of the matter asserted immunized the statement from confrontation clause analysis”).⁶

Here, Deputy Watts testified: “Tribal police came over to where the scene was and had a picture and showed us the picture of a male that they had said that they had caught on camera running into the casino.” RP 164. Deputy Watts then testified that he recognized the individual in the photograph, informed other officers, and then personally contacted defendant in front of the casino, where defendant was detained by security and tribal police. RP 165.

⁵ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

⁶ Despite the *Mason* court’s remark, the Washington Supreme Court has affirmed, “We have consistently rejected arguments that the state confrontation clause provides greater protection than the federal confrontation clause.” *State v. Lui*, 179 Wn.2d 457, 469, 315 P.3d 493 (2014).

The challenged statement from tribal police was not offered for the truth of the matter asserted and therefore is not subject to a confrontation clause challenge.⁷ Rather, the statement to Deputy Watts regarding the individual in the photograph was offered to show why the deputy conducted his subsequent investigation and contacted defendant in front of the casino. “When a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible.” *State v. Iverson*, 126 Wn. App. 329, 337, 108 P.3d 799 (2005). *See also, State v. Williams*, 85 Wn. App. 271, 280, 932 P.2d 665 (1997) (holding that guard’s statement to officer that defendant smelled of alcohol was not offered to prove the truth of the matter, but to show why the officer detained defendant for further investigation of his intoxication, and was not inadmissible hearsay).

Whether defendant was actually the individual depicted in the photograph or whether the photograph actually showed an individual running into the casino was irrelevant and not at issue in the case. Thus, tribal police’s statement to Deputy Watts was not offered for the truth of the matter asserted. Under *Crawford* and *Williams*, the statement at issue

⁷ It is undisputed that the tribal police officer(s) did not testify at trial.

did not violate the confrontation clause. *Crawford*, 541 U.S. at 59 n. 9; *Williams*, 567 U.S. at 57, 70, 104, 125.

However, should this Court disagree, then defendant's argument still fails, as the challenged statement was nontestimonial. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis*, 547 U.S. at 822. On the other hand, statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*

In *State v. Ohlson*, 162 Wn.2d 1, 168 P.3d 1273 (2007), the Washington Supreme Court adopted the "primary purpose" test announced by the United States Supreme Court in *Davis* and identified four factors to determine whether an out-of-court statement is testimonial: "(1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation." *Id.* at 12. See also, *State v. Koslowski*, 166 Wn.2d 409, 418-19, 209 P.3d 479 (2009).

Here, the statement from tribal police was nontestimonial, because it was made by police to assist other police in meeting an ongoing emergency. *Davis*, 547 U.S. at 822. The statement appears to have been made soon after the passenger fled the scene and while police were in “hot pursuit” of the suspect; the threat of harm posed by the situation was great, as the individual (i.e., defendant) was involved with a stolen vehicle that led police on a high speed chase and resulted in a crash; police needed the information to find and apprehend the suspect; and the “interrogation” – if it can even be called interrogation – was informal, as the statement was made from one or more police officers to another. *See* RP 138-51 (testimony of Deputy Finch); RP 158-65 (testimony of Deputy Watts).

The four factors show that the conversation had the primary purpose of enabling police to meet an ongoing emergency. *Ohlson*, 162 Wn.2d at 12; *Koslowski*, 166 Wn.2d at 418-19. *See Mungo v. Duncan*, 393 F.3d 327, 336 n. 9 (2d Cir. 2004) (initial questioning at scene, during pursuit, and immediately after apprehension of suspects not “interrogation”). The challenged statement was nontestimonial, and defendant’s right to confrontation was not violated.

c. Any error was harmless.

However, should this Court disagree and find that defendant’s right to confrontation was violated, then any error was harmless. Constitutional

errors may be harmless. *State v. Moses*, 129 Wn. App. 718, 732, 119 P.3d 906 (2005); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). A constitutional error does not require reversal if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable juror would have reached the same result in the absence of the error. *State v. Quaale*, 182 Wn.2d 191, 202, 340 P.3d 213 (2014); *Guloy*, 104 Wn.2d at 425-26.

Here, any error was harmless. Again, the jury heard eyewitness testimony that defendant was the passenger of the stolen vehicle. Deputy Finch identified defendant in open court as the individual he saw exit the stolen vehicle from the passenger side after the vehicle crashed into the jersey barrier. RP 144-47. Deputy Finch saw defendant run towards the casino, and Deputy Watts later contacted defendant outside of the casino. RP 147-48; 165; 194. The untainted evidence was so overwhelming that a reasonable juror would have reached the same result in the absence of the error. Accordingly, this Court should affirm defendant's conviction.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S MID-TRIAL CONTINUANCE MOTION DUE TO JUROR AND COURT UNAVAILABILITY, AND DEFENDANT FAILS TO SHOW PREJUDICE.

In criminal cases, “the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (citing *State v. Miles*, 77 Wn.2d 593, 597, 464 P.2d 723 (1970)). On appeal, the court reviews the denial of a continuance motion for an abuse of discretion. *Downing*, 151 Wn.2d at 272. The trial court’s decision will not be disturbed unless it is clear that the decision was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.* at 272.

A criminal defendant is not entitled to a trial continuance as a matter of right. *State v. Early*, 70 Wn. App. 452, 457, 853 P.2d 964 (1993). “In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.” *Downing*, 151 Wn.2d at 273 (citing *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); RCW 10.46.080; CrR 3.3(f)). The existence of some factors does not require reversal. *Id.* at 274.

Moreover, “even where the denial of a motion for continuance is alleged to have deprived a criminal defendant of his or her constitutional

right to compulsory process, the decision to deny a continuance will be reversed only on a showing that the accused was prejudiced by the denial and/or that the result of the trial would likely have been different had the continuance not been denied.” *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994) (citing *Eller*, 84 Wn.2d at 95-96).

Under these facts, the trial court did not abuse its discretion. Prior to jury selection, defense counsel informed the State and the trial court that the defense did not plan to call any witnesses beyond potentially the defendant. RP 2; CP 84. The trial court informed the parties that it was unavailable for trial Monday through Wednesday the following week due to judicial conferences. RP 1, 3. During voir dire, the court informed the venire that trial would only last that week, and jurors expressed their unavailability to serve the following week. RP 27, 30-31, 33, 35-39. It was not until the conclusion of the first day of trial, after the jury had been sworn and after the State had called three witnesses, that defense counsel notified the court that he *may* be calling his investigator as a rebuttal witness. RP 171-72 (emphasis added). Counsel also acknowledged, “I don’t think he’s currently available; but if he is, I would like to call him as a rebuttal witness.” RP 172.

The next day, defense counsel confirmed that his investigator was unavailable that week to testify and requested a continuance until after

judicial conferences the following week. RP 179-82, 197. The court indicated its willingness to work with defense so that his investigator could testify the next day and suggested ways defense could secure his investigator's appearance, but the court also reminded defense that jurors were unavailable the following week. RP 179-81, 197. Defense could not secure his investigator's appearance and renewed his request for a continuance, claiming "substantial prejudice" to his client. RP 197.

The trial court here properly denied defendant's mid-trial continuance motion based on maintenance of orderly procedure (i.e., courtroom and juror unavailability). *Downing*, 151 Wn.2d at 273. The trial court's need to adhere to its trial schedule is a legitimate factor to be considered when deciding whether to grant or deny a continuance. *See State v. Chichester*, 141 Wn. App. 446, 454, 170 P.3d 583 (2007) (denial of continuance was not abuse of discretion as court could consider "orderly procedure in the setting of trials" and prefer maintaining a confirmed trial setting over prosecutor's scheduling conflicts); *see also State v. Edwards*, 68 Wn.2d 246, 257, 412 P.2d 747 (1966). It would make little sense to grant a continuance motion to a date where the court and/or jury would be unable to hear the case. *See* RP 197-98 (defense counsel requests continuance until after judicial conference but does not address juror unavailability).

The trial court also noted, “We never know exactly what our witnesses are going to say so we always need to be ready for all contingent circumstances.” RP 199. The court thus seemed to indicate that defense counsel’s claim of surprise was unconvincing. *See* RP 198-99 (defense counsel argues “unforeseeable” that investigator would be a necessary witness). Defense counsel was aware that his investigator was unavailable before the trial commenced and elected to proceed anyway. *See* RP 201-02 (State informs court that defense selected date for trial and defense was aware of investigator’s unavailability). Counsel’s failure to plan accordingly indicated a lack of diligence. *See*, RP 198 (court tells defense counsel, “I am sorry that he is unavailable. Those are issues that should have been taken care of prior to the start of trial and any other arrangements made in order to get his testimony.”).

The trial court properly exercised its discretion in denying defendant’s motion for a continuance. Moreover, defendant fails to show he was prejudiced by the denial and/or that the result of the trial would likely have been different had court granted his motion. *See Tatum*, 74 Wn. App. at 86. Defense counsel argued Deputy Finch’s testimony changed “dramatically” from the pretrial interviews and claimed “substantial prejudice” to his client. RP 179-80, 197. Defense did not

explain how specifically his client was prejudiced by the court's denial of his continuance motion.

First, the deputy prosecutor made a record that she was present during Deputy Finch's interview, and she disagreed with defense counsel's assessment of the contents of the interview. RP 199-201. The deputy was never asked specifically about identification. RP 200. At the time of the incident, Deputy Finch did not know who defendant was. RP 200. The first time anyone asked the deputy to identify the passenger was during trial. RP 200. *See also*, RP 147. Defense counsel's offer of proof – that Deputy Finch said during the interview that he would only be able to recognize defendant from seeing booking photographs – did not undermine the deputy's ability to recognize and identify defendant in open court. *See* RP 202. Defense counsel failed to show the deputy's statements during his interview were in fact different from his testimony at trial.

Additionally, the interview was not recorded. *See* RP 200, 202. Therefore, defendant had nothing with which to impeach Deputy Finch except for the word of his investigator. This would result in a battle of "he said" versus "he said." As the court indicated, "Well...there was not a court reporter present at those interviews so everybody has had the opportunity now to speak their piece on the issue." RP 202. Defendant could not, and does not, show that the result of the trial would likely have

been different had the continuance not been denied. *Tatum*, 74 Wn. App. at 86. The court properly denied defense's request for a continuance as defense failed to show (1) that the deputy's testimony was in fact inconsistent during trial or (2) prejudice.

Defendant has not clearly demonstrated that the trial court's denial of his continuance motion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Downing*, 151 Wn.2d at 272-73 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Moreover, defendant has demonstrated neither prejudice nor that the result of the trial would likely have been different. For these reasons, defendant's conviction should be affirmed.

4. DEFENDANT HAS NOT MET HIS BURDEN OF PROOF AS TO CUMULATIVE ERROR WHERE THERE WAS NO ERROR IN THE INTRODUCTION OF EVIDENCE OR IN THE DENIAL OF DEFENDANT'S CONTINUANCE MOTION.

Under the cumulative error doctrine, a defendant may be entitled to relief if a trial court were to commit multiple, separate harmless errors. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). In such cases, each individual error might be deemed harmless, whereas the combined effect could be said to infringe on the right to a fair trial. *Id.* (citing *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), and *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003)). "The

defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary.” *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009).

The cumulative error 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. Errors that individually are not prejudicial can never add up to cumulative error that mandates reversal. This is because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred”).

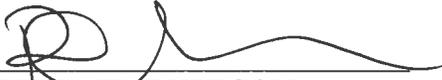
The first requirement for cumulative error is multiple, separate errors. Defendant has not sustained his burden as to this requirement. In the instant case, for the reasons set forth above, defendant has failed to establish that any prejudicial error occurred at his trial, much less that there was an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's conviction.

DATED: March 5, 2018.

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Pierce County
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Certificate of Service:

The undersigned certifies that on this day she delivered by US 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.

3.5.18 Therese Kar
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

March 05, 2018 - 1:59 PM

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