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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

AHRIA JAMES KELLEY, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John R. Hickman

No. 16-1-03500-2

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**Brief of Respondent**

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## Table of Contents

A.	ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....	1
1.	Whether defendant has failed to show prosecutorial misconduct occurred when the prosecutor's rebuttal argument was neither improper nor prejudicial? .....	1
2.	Whether the trial court properly exercised its discretion in admitting evidence from defendant's DOC officer regarding defendant's conditions of community custody, where the evidence explained defendant's motive in fleeing from police and stashing the firearm?.....	1
3.	Whether defendant has failed to show he is entitled to relief under the cumulative error doctrine when no error occurred much less an accumulation of errors? .....	1
B.	STATEMENT OF THE CASE.....	1
1.	PROCEDURE.....	1
2.	FACTS .....	6
C.	ARGUMENT.....	8
1.	DEFENDANT FAILS TO SHOW PROSECUTORIAL MISCONDUCT OCCURRED, WHERE THE PROSECUTOR'S REBUTTAL ARGUMENT WAS NEITHER IMPROPER NOR PREJUDICIAL.....	8
2.	THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE FROM DEFENDANT'S DOC OFFICER TO EXPLAIN DEFENDANT'S MOTIVE IN FLEEING FROM POLICE AND STASHING THE FIREARM. ....	14

3.	DEFENDANT HAS NOT MET HIS BURDEN OF PROOF AS TO CUMULATIVE ERROR WHERE THERE WAS NO ERROR IN THE INTRODUCTION OF EVIDENCE OR THE PROSECUTOR'S ARGUMENT.....	20
D.	CONCLUSION.....	21

## Table of Authorities

### State Cases

<i>State v. Baker</i> , 162 Wn. App. 468, 473, 259 P.3d 270 (2011).....	15
<i>State v. Brockob</i> , 159 Wn.2d 311, 351, 150 P.3d 59 (2006).....	18
<i>State v. Carleton</i> , 82 Wn. App. 680, 686, 919 P.2d 128 (1996) .....	16
<i>State v. Emery</i> , 174 Wn.2d 741, 761, 278 P.3d 653 (2012).....	10
<i>State v. Fisher</i> , 165 Wn.2d 727, 745, 202 P.3d 937 (2009).....	16
<i>State v. Gentry</i> , 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995) .....	10
<i>State v. Gogolin</i> , 45 Wn. App. 640, 645, 727 P.2d 683 (1986).....	16
<i>State v. Gresham</i> , 173 Wn.2d 405, 421, 269 P.3d 207 (2012).....	14-15
<i>State v. Hodges</i> , 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003).....	20
<i>State v. Jackson</i> , 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984).....	15-16
<i>State v. Jones</i> , 71 Wn. App. 798, 807-08, 863 P.2d 85 (1993).....	10
<i>State v. Lindsay</i> , 180 Wn.2d 423, 431, 326 P.3d 125 (2014).....	10
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	8
<i>State v. Monday</i> , 171 Wn.2d 667, 679, 257 P.3d 551 (2011) .....	11
<i>State v. Neal</i> , 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).....	18, 19
<i>State v. Pirtle</i> , 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995) .....	16, 18
<i>State v. Russell</i> , 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) .....	9, 10, 12
<i>State v. Russell</i> , 171 Wn.2d 118, 124, 249 P.3d 604 (2011).....	15, 18
<i>State v. Smiley</i> , 195 Wn. App. 185, 195, 379 P.3d 149 (2016).....	11

<i>State v. Stein</i> , 144 Wn.2d 236, 247, 27 P.3d 184 (2001) .....	14, 19
<i>State v. Stenson</i> , 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).....	9, 10
<i>State v. Swan</i> , 114 Wn.2d 613, 661, 790 P. 2d 610 (1990).....	10
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 455, 258 P.3d 43 (2011).....	10
<i>State v. Venegas</i> , 155 Wn. App. 507, 520, 228 P.3d 813 (2010).....	20
<i>State v. Vy Thang</i> , 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).....	15
<i>State v. Warren</i> , 165 Wn.2d 17, 30, 195 P.3d 940 (2008) <i>cert. denied</i> , 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).....	9
<i>State v. Weber</i> , 159 Wn.2d 252, 279, 149 P.3d 646 (2006) .....	20
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952).....	8
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 98, 210 P.3d 1029 (2009).....	20
Statutes	
RCW 9.41.010 .....	11
RCW 9.41.010(23).....	11
RCW 9.41.040(1)(a) .....	11
Rules and Regulations	
ER 404(b).....	2, 14, 15, 16, 17, 18

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

1. Whether defendant has failed to show prosecutorial misconduct occurred when the prosecutor's rebuttal argument was neither improper nor prejudicial?
2. Whether the trial court properly exercised its discretion in admitting evidence from defendant's DOC officer regarding defendant's conditions of community custody, where the evidence explained defendant's motive in fleeing from police and stashing the firearm?
3. Whether defendant has failed to show he is entitled to relief under the cumulative error doctrine when no error occurred much less an accumulation of errors?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On September 1, 2016, the Pierce County Prosecuting Attorney's Office charged AHRIA JAMES KELLEY (hereinafter "defendant") with unlawful possession of a firearm in the first degree and obstructing a law enforcement officer. CP 3-4. The case proceeded to trial on July 20, 2017,

before the Honorable John R. Hickman. RP<sup>1</sup> 1, 3. During motions in limine, defendant moved to exclude testimony from defendant's Department of Corrections (DOC) Officer that defendant was under DOC supervision at the time of the offense and could not consume alcohol or possess firearms. RP 5-6, 12-13. Defense counsel argued, "So I'm asking the Court to exclude any testimony from the DOC officer in this case based on limited relevance, highly prejudicial, and it goes to his prior bad acts, which would be a violation under Evidence Rule 404(b)." RP 6.

The State responded that at the time of the incident, defendant was on a Residential Drug Offender Sentencing Alternative (DOSA) sentence and was aware that he could not consume alcohol or possess firearms. RP 8. The State argued,

[I]t's the State's theory of the case that the defendant knowing that, acted the way he did during this incident, which is when police contacted him, he was intoxicated, knowing that would be a violation of DOC and knowing that the firearm would be a violation of DOC.

As a result of it, the State alleges that he -- knowing he had a firearm, knowing he was intoxicated, he ran from the police in order to hide -- in order not to be caught. He knew that his residential DOSA was in danger of being revoked should he be arrested for having possession of a firearm or being intoxicated. That's the State's theory, is that this is why he acted the way he did.

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<sup>1</sup> The verbatim report of proceedings is contained in seven consecutively paginated volumes and will be referred to as "RP."

RP 9. The purpose of the DOC officer's testimony was to explain defendant's "motive as to why he ran from the police, why he discarded the firearm, and why he started fighting with the police officers at the scene in order to avoid apprehension." RP 10. The State further argued that the jury would hear testimony that defendant had previously been convicted of a serious felony offense, so the prejudice was "minimal at best." RP 9-10.

The court denied defendant's motion to exclude the DOC officer's testimony, ruling,

First of all, I am going to I allow the DOC officer to testify that he was on DOC supervision and the conditions would provide that he was not -- he was not supposed to have any alcohol or possession of any firearm and limit it to that subject matter, exactly the offer of proof that you made to the Court.

RP 13. The court later entered a written order memorializing its ruling. CP 8-9. The State subsequently called DOC Officer Dan Nguyen as a witness. RP 273-74. Officer Nguyen testified that defendant was on community custody on the incident date and could not consume alcohol or possess firearms. RP 275-80. The State also called a number of law enforcement officers and forensic investigators as witnesses. CP 79. Defendant called no witnesses during trial and elected not to testify. RP 499.

During trial, defendant stipulated that he had previously been convicted of a serious offense for purposes of the unlawful possession of a firearm charge. Exhibit 20; RP 497-98. The jury was instructed that they could only consider evidence that defendant had previously been convicted of a crime for the purpose of deciding whether he had been previously been convicted of a serious offense while in possession of a firearm. CP 11-32 (Instruction No. 4); Exhibit 20. During closing argument, when discussing the reasons why defendant ran when approached by police, the prosecutor stated,

And if that didn't do it, the fact that he knows he's been convicted of a *serious felony offense* should have told him that you cannot own a firearm, which it did. That's why he stipulated to that. He knows that he must not be caught with alcohol in him, in his system, or a gun on his person.

RP 516-17 (emphasis added). Defendant did not object to this argument.

During defendant's closing argument, defense counsel stated,

All the testimony that came out is Mr. Kelley was heavily intoxicated. He could not even maintain balance, okay. No testimony came out that any kind of a holster was found on Mr. Kelley. So we are to believe that without any holster -- you know, there's only a couple places -- the gun is a -- you saw it. It's a rather decent-sized gun. It's not a full size, but it's still a decent-sized gun. You can either tuck it in, you know, your -- this area or pocket or maybe in the back. There's only a few places.

RP 543. In response to this argument, the prosecutor argued during rebuttal:

Counsel says, well, if he was -- look at the way the defendant was carrying the gun. Well, I don't know how he was carrying the gun, but if you're convicted of a serious offense so you know you can't have a gun, and if you know that you're on community custody and you can't have a gun, are you going to carry a gun in a holster? Here's my gun, ladies and gentlemen. Is that how you're going to carry it? If you know you're a *convicted felon* and can't have a gun, you're probably going to carry it in your pocket.

RP 568 (emphasis added). After the prosecutor concluded rebuttal argument, defense counsel moved for a mistrial based on the prosecutor's used of the term "felon." RP 572-73. Defense counsel argued,

I have to move for a mistrial. The prosecutor in their rebuttal made a statement, if you're a convicted felon, you'll be hiding the gun. We had stipulated to the fact that Mr. Kelley has a prior serious violent felony offense, serious offense on his record...I think in his argument when [the prosecutor] refers to Mr. Kelley as a convicted felon, that is something that's going to his prior bad acts, and the jury is going to give that undue weight. That is not something that they've been instructed on, that he's a convicted felon.

RP 572-73. The State responded that the jury had already been instructed that defendant was convicted of a serious offense and there was no prejudice.<sup>2</sup> RP 574, 577. The court denied defendant's motion for a mistrial, finding the prosecutor's statement was an accurate statement of

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<sup>2</sup> The prosecutor argued, "I guess how is that language in any way, shape or form prejudicial when they hear that he's actually been convicted of a serious offense. Do they expect a serious offense to be a misdemeanor offense and is that how it's prejudicial? That's where I'm having a hard time understanding, Your Honor." RP 577.

the law, and the jury had already received a limiting instruction. RP 575-76, 578.

The jury subsequently found defendant guilty as charged. RP 584-85; CP 33-34. The court ordered that defendant be taken into custody pending sentencing, and in response defendant fled the courtroom. RP 590-92. Defendant was eventually apprehended. RP 595-96. The court imposed a standard range sentence of 67 months in the Department of Corrections.<sup>3</sup> RP 611-12; CP 37-50. Defendant filed a timely notice of appeal. CP 58.

## 2. FACTS

On August 31, 2016, at approximately 3:00 a.m., police responded to a report of a male with a gun at an apartment complex located in the 8400 block of McKinley Avenue in Pierce County, Washington. RP 286-89, 381-82, 386. Multiple officers responded due to the complex's history of being "not law enforcement friendly." RP 352. Pierce County Sheriff's Deputies LaTour and Hirschi arrived at the location and heard loud voices and cursing along the north side of the complex. RP 352. The deputies observed a male, later identified as defendant, stagger his way between two apartments. RP 353, 387. The deputies approached and observed

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<sup>3</sup> The court imposed 364 days on the obstructing charge to run concurrently with the unlawful possession of a firearm charge. CP 51-55.

defendant “leaning with his arm against the building and his pants down[,] [a]nd he was urinating on the side of the building.” RP 353. Defendant appeared to be intoxicated. RP 364, 388-89. *See also*, RP 427.

Deputy LaTour contacted defendant and identified himself, and defendant “held onto his pants and scurried off south between the buildings and the shadows.” RP 353-54. The deputy did not pursue defendant but rather continued to walk towards the sound of voices and cursing and attempted to speak with a group of individuals. RP 354-55, 390.

Deputy Redding arrived at the apartment complex around that time and observed a male in dark clothing – defendant – running around the side of the complex towards the parking lot. RP 291-92, 390-91. The deputy yelled at defendant and told him to stop, but defendant ignored the deputy and started running faster. RP 292. The deputy observed defendant disappear through a breezeway between two apartment complexes. RP 293. As Deputy Redding pursued defendant and approached the breezeway, he heard a loud, metal, hollow noise and then observed defendant “running out of an alcove on the east side of one of the apartment buildings.” RP 294, 302-03. The deputy yelled for assistance and defendant was subsequently detained by officers. RP 294-95, 356-57, 391-94. Other deputies heard the same loud, metal sound. RP 356, 394.

Deputy Redding observed a barbecue that appeared to be the only metal object in the area that could have made the sound he heard. RP 302-03. *See also*, RP 395-96. The deputy opened the lid of the barbecue and found a loaded firearm.<sup>4</sup> RP 304, 306, 308. The firearm looked as though it had been placed there recently. RP 400.

Multiple officers had to assist in detaining defendant. RP 295. Defendant was uncooperative and had to be physically restrained. RP 296, 357-63, 398-99, 427. At least four officers were involved in trying to place defendant under arrest. RP 363. Defendant appeared to be intoxicated. RP 364, 427.

C. ARGUMENT.

1. DEFENDANT FAILS TO SHOW PROSECUTORIAL MISCONDUCT OCCURRED, WHERE THE PROSECUTOR'S REBUTTAL ARGUMENT WAS NEITHER IMPROPER NOR PREJUDICIAL.

To prove that a prosecutor's actions constitute misconduct, a 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, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged

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<sup>4</sup> The firearm was later tested and found to be operable. RP 491-92.

misconduct is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

When reviewing an argument that 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). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Russell*, 125 Wn.2d at 86. The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Id.* at 87.

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); *Stenson*, 132 Wn.2d at

727. A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 807-08, 863 P.2d 85 (1993). A prosecutor is, however, allowed to argue that the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87; *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014).

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.” *Stenson*, 132 Wn.2d at 719 (citing *State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the [error] resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

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). “Accordingly, reviewing courts focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured by an instruction.” *State v. Smiley*, 195 Wn. App. 185, 195, 379 P.3d 149 (2016).

In this case, defendant claims the State committed reversible misconduct during rebuttal by “arguing to the jury that Mr. Kelley was a ‘convicted felon.’” *See* Brief of Appellant at 7, 11. Defendant argues the prosecutor “exceeded the scope of the stipulation and used the fact of Mr. Kelley’s prior conviction as evidence of a prior bad act.” Brf. of App. at 11. Defendant’s argument fails for several reasons. First, as noted by the trial court, the prosecutor’s statement was an accurate statement of the law. RP 575. Pursuant to RCW 9.41.040(1)(a), “A person...is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his...possession, or has in his...control any firearm after having previously been convicted...in this state or elsewhere of any serious offense.” The term “serious offense” is further defined in RCW 9.41.010 and contemplates only *felony* offenses. *See* current RCW 9.41.010(23). Therefore, under the law, for defendant to have previously been convicted of a “serious offense,” he necessarily would have been a convicted felon. The prosecutor’s argument was proper.

Second, as argued by the prosecutor (and conceded by defense counsel below), it is a reasonable inference that a “serious offense” is a felony offense as opposed to a gross or simple misdemeanor. *See* RP 577 (prosecutor argues, “Do they expect a serious offense to be a misdemeanor offense[?]”); RP 572-73 (defense counsel acknowledges, “It may be common sense that if you have a serious offense on your record, you have a felony...”). *See also*, RP 12 (defense counsel argues, “I mean, the State can certainly prove motive or intent that Mr. Kelley does not want to be caught with a firearm because he is a convicted felon.”). The prosecutor properly argued this reasonable inference to the jury.

Third, the prosecutor’s argument was in response to defense counsel’s argument that “[n]o testimony came out that any kind of a holster was found on Mr. Kelley,” and based on the gun’s size there were only a few places defendant could carry it. RP 543. In response to this argument, the prosecutor stated, “If you know you’re a convicted felon and can’t have a gun, you’re probably going to carry it in your pocket.” RP 568. The prosecutor was entitled to make a fair response to defense counsel’s argument. *See Russell*, 125 Wn.2d at 86-87.

Finally, defendant did not object to the State’s initial closing argument in which the prosecutor stated, “[T]he fact that [defendant] knows he’s been convicted of a *serious felony offense* should have told

him that you cannot own a firearm, which it did. That's why he stipulated to that. He knows that he must not be caught with...a gun on his person." RP 516-17 (emphasis added). Defendant did not object to this statement below and does not assign error to this statement on appeal. Therefore, the prosecutor could not have committed misconduct by referring to defendant as a "convicted felon" during rebuttal when it was not improper to refer to defendant's previous conviction as a "serious felony offense." A person previously convicted of a serious felony offense is necessarily a convicted felon.

Not only does defendant fail to show the prosecutor's argument was improper, but he also fails to show prejudice. The jury was already instructed,

You may consider evidence that the defendant has been previously convicted of a crime *solely* for the purpose of deciding whether the State has proved that, while in possession of a firearm, the defendant had been previously convicted of a serious offense. *Such evidence may be considered for no other purpose.*

CP 11-32 (Instruction No. 4) (emphasis added). *See also*, Exhibit 20.

Thus, even if it was improper for the prosecutor to refer to defendant as a "convicted felon," the jury was instructed to *only* consider such evidence for the purpose of deciding whether defendant had previously been convicted of a serious offense (something defendant had stipulated to

during trial) as required by the unlawful possession of a firearm charge. And, the jury was further instructed that “the lawyers’ statements are not evidence” and to “disregard any remark, statement, or argument...not supported by the evidence.” CP 11-32 (Instruction No. 1). *See also*, RP 508 (court reminds jury that closing argument is not evidence). Juries are presumed to follow the court’s instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Defendant’s claim that “the prosecutor encouraged the jury should ignore the limiting instruction and use the fact of the prior conviction to find Mr. Kelley guilty” is not supported by the record. *See* Brf. of App. at 11. Accordingly, there was no prejudice.

Defendant fails to show prosecutorial misconduct occurred. The prosecutor’s rebuttal argument was proper and there was no prejudice. This Court should therefore affirm defendant’s convictions.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE FROM DEFENDANT’S DOC OFFICER TO EXPLAIN DEFENDANT’S MOTIVE IN FLEEING FROM POLICE AND STASHING THE FIREARM.

ER 404(b) generally prohibits admitting evidence of “other crimes, wrongs, or acts” to “prove the character of a person in order to show action in conformity therewith.” Evidence of prior misconduct is presumptively inadmissible. *State v. Gresham*, 173 Wn.2d 405, 421, 269

P.3d 207 (2012). However, the rule does allow admission of such evidence for other purposes, including “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). “This list of other purposes for which such evidence of other crimes, wrongs, or acts may be introduced is not exclusive.” *State v. Baker*, 162 Wn. App. 468, 473, 259 P.3d 270 (2011).

Before the trial court admits evidence under ER 404(b), it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *Gresham*, 173 Wn.2d at 421 (quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). The proponent of the evidence has the burden demonstrating that the evidence has a proper purpose.

*Gresham*, 173 Wn.2d at 420. If the trial court admits the evidence, it must give upon request an appropriate limiting instruction to the jury. *Id.* at 420. However, “[a] trial court is not required to sua sponte give a limiting instruction for ER 404(b) evidence, absent a request for such a limiting instruction.” *State v. Russell*, 171 Wn.2d 118, 124, 249 P.3d 604 (2011).

A trial court must state its reasoning on the record when admitting ER 404(b) evidence. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d

76 (1984). Failure, however, to balance the potential prejudice against the probative value of the evidence is harmless when the record is sufficient for the reviewing court to determine that the trial court, had it considered the relative weight of probative value and prejudice, would still have admitted the evidence. *State v. Carleton*, 82 Wn. App. 680, 686, 919 P.2d 128 (1996); *State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986). And, if the record shows that the trial court adopted one of the parties' express arguments as to the purpose of the evidence and that the party's weighing of probative and prejudicial value, then the trial court's failure to conduct its full analysis on the record is not reversible error. *State v. Pirtle*, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995).

The trial court's interpretation of ER 404(b) is reviewed de novo as a matter of law. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court interprets ER 404(b) correctly, then the appellate court reviews the ruling to admit or exclude evidence of misconduct for an abuse of discretion. *Id.*

Here, the State sought to admit evidence from defendant's DOC officer regarding his conditions of supervision for the purpose of explaining defendant's motive in running from police, discarding the firearm, and fighting with officers to avoid apprehension. *See* RP 8-12. Defense counsel opposed the admission of the evidence, arguing the jury

would give the evidence “undue weight,” and “any minor relevance” was outweighed by the prejudicial effect of the jury hearing that defendant was on “active probation[] at the time of the incident.” RP 5-6, 12-13. The trial court disagreed with defense and denied its motion to exclude the DOC officer’s testimony, finding the probative value of the proffered evidence outweighed any potential prejudicial effect. CP 8-9; RP 13.

The trial court properly admitted the DOC officer’s testimony. The purpose of the testimony was to show the motivation for defendant’s behavior on the incident date. Motive is an admissible purpose for evidence of other crimes, wrongs, or acts under ER 404(b). The evidence was relevant to prove defendant knowingly possessed a firearm (an element of the crime charged). The State’s offer of proof established by a preponderance of the evidence that the misconduct occurred.<sup>5</sup> *See* RP 8-10. *See also*, RP 13 (court allows “exactly the offer of proof that [the State] made to the Court.”). And, the court found that the probative value of the evidence outweighed any prejudicial effect. CP 8-9. Therefore, the

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<sup>5</sup> The State’s offer of proof was consistent with DOC Officer Nguyen’s testimony at trial. *See* RP 273-80.

evidence was admissible under ER 404(b), and the trial properly exercised its discretion in admitting the evidence.<sup>6</sup>

Defendant claims the trial court “failed to conduct the required ER 404(b) inquiry” before admitting the DOC officer’s testimony. Brf. of App. at 16. However, the record establishes that the court adopted the express arguments of the State. *See* RP 8-10, 13. And, again, the court balanced the potential prejudice against the probative value of the evidence. *See*, CP 8-9. The trial court’s failure to conduct its full analysis on the record is not reversible error. *Pirtle*, 127 Wn.2d at 650-51.

However, even if the trial court improperly admitted the evidence regarding defendant’s restrictions and status on community custody, 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); *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

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<sup>6</sup> Defendant did not propose or request a limiting instruction. *See* RP 435-36 (defense counsel indicates to court he is “still thinking” about whether to propose a limiting instruction regarding the DOC officer’s testimony); RP 445-54, 502-03 (no limiting instruction requested). The court was not required to sua sponte give a limiting instruction absent a request. *Russell*, 171 Wn.2d at 124.

minor significance in reference to the evidence as a whole.” *Neal*, 144 Wn.2d at 611.

Here, defendant stipulated that he had previously been convicted of a serious offense and therefore could not lawfully possess a firearm. *See* Exhibit 20. The jury therefore already heard that defendant had a criminal conviction. The DOC officer’s testimony that defendant was on DOC supervision (resulting from a conviction) was therefore redundant and of minor significance in reference to the evidence as a whole.

Moreover, the jury was instructed that they could only consider evidence of defendant’s criminal conviction for a limited purpose (i.e., to determine whether the State had proved that defendant had previously been convicted of a serious offense while in possession of a firearm). CP 11-32 (Instruction No. 4); Exhibit 20. The jury is presumed to have followed the court’s instructions. *Stein*, 144 Wn.2d at 247. Thus, any error in admitting the DOC officer’s testimony was harmless. This Court should affirm defendant’s convictions.

3. DEFENDANT HAS NOT MET HIS BURDEN OF PROOF AS TO CUMULATIVE ERROR WHERE THERE WAS NO ERROR IN THE INTRODUCTION OF EVIDENCE OR THE PROSECUTOR'S ARGUMENT.

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 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. “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 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 convictions.

DATED: May 10, 2018

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Pierce County  
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BRITTA ANN HALVERSON  
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WSB # 44108

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.

5/10/18 [Signature]  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**May 10, 2018 - 2:06 PM**

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