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NO. 52733-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN LEVY ALDRETE,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello

No. 17-1-04022-5

BRIEF OF RESPONDENT

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I. INTRODUCTION

In the early morning of October 16, 2017, Sebastian Levy-Aldrete, hereinafter referred to as "defendant" violently bludgeoned his 78 year old mother, Maria Levy-Aldrete, in the head with a bourbon bottle. Defendant bashed the victim over the head with the bottle until it broke, causing blood to spatter all over her bedroom walls. After the defendant bashed his mother's head and face, he strangled where she lay in a pool of her own blood, glass scattered all around her. Defendant's two young sons slept in the bedroom nearby as their father violently murdered their beloved "abuela." After murdering his mother, defendant took steps to make it appear as if an intruder committed the murder. He cleaned up the apartment, changed his clothes, ran down through the building stairwell and disposed of his gloves before calling the police. The defendant concocted a story which he told police that an intruder broke into the safely secured building and apartment, murdered his mother, fought him without making a sound and completely vanished without a trace.

The State charged defendant with Premeditated Murder in the First Degree and Felony Murder in the Second Degree. During jury selection, defendant moved to excuse a potential juror for cause due to the juror's experience as a prosecutor back in the 1970s and the fact that his firm

represented the elected prosecutor Mark Lindquist. After a thorough and thoughtful private colloquy with the juror revealed that the juror was unbiased and could remain impartial, the court denied the defendant's motion. The defendant used a peremptory challenge to remove the juror from the panel, leaving him with an unbiased and impartial jury.

During closing arguments, the prosecutor argued that the evidence did not support the fantastic and absurd defense theory of a mysterious deranged psychopathic intruder committing the murder. In doing so, he pointed out that the defendant lied to the police in telling such an unbelievable story, labelling it as "ridiculous" and referring to the intruder as "the boogeyman". In doing so, he appropriately used the puzzle analogy to explain the evidence required for the State to meet its burden of proof. The defendant objected to the puzzle analogy and the court appropriately overruled the objection where the State did not quantify the amount of evidence needed in order to meet its burden of proof. A jury convicted defendant of Felony Murder in the Second Degree.

At sentencing, defense counsel claimed that she spoke with the jurors and at least one indicated that they assumed the defendant either hid his clothes or showered before the police arrived. The defense attorney did not make a motion for new trial as she understood there was not a basis for one. The defendant, without advice or assistance of counsel, proclaimed his

innocence and moved for a mistrial for a number of reasons. The court considered defendant's pro se motion, found that there was no basis for a mistrial and denied defendant's motion.

Defendant raises several claims in his appeal. He challenges the court's denial of his motion to excuse potential juror no. 8 for cause. The defendant is precluded from raising this claim where he used a peremptory challenge to remove the juror and the record reflects that the juror was not bias or impartial.

The defendant also claims that the prosecutor committed misconduct during closing argument. Defendant only objected to one claim of error. The prosecutor's arguments were appropriate in response to defendant's theory of the case and fully supported by the evidence. Thus, defendant fails to meet his heightened burden of proving that the statements to which he failed to object were improper, prejudicial or flagrant and ill-intentioned.

Defendant claims that the court erred when it denied his motion for a mistrial. However, the thoughts and mental processes at which the jurors reach their conclusions inhere in the verdict and cannot be used as a basis for a motion for mistrial and none of the alleged claims constitute misconduct.

Finally, defendant challenges the imposition of legal financial obligations. With the exception of striking the language regarding interest accrual, the trial court properly imposed legal financial obligations. Defendant's appeal is without merit.

II. RESTATEMENT OF THE ISSUES

A. Where defendant used a peremptory challenge to excuse potential juror no. 8 resulting in an unbiased, impartial jury, is the defendant precluded from challenging the court's denial of his motion to excuse the juror for cause?

B. Whether defendant has failed to show prosecutorial error occurred when the prosecutor's questions and arguments were neither improper, prejudicial, nor flagrant and ill-intentioned?

C. Whether the trial court properly denied the defendant's motion for mistrial where the court, in evaluating alleged instances of juror misconduct, considers only the facts stated in relation to juror misconduct and that in no way inhere in the verdict?

D. Whether remand is appropriate only to amend the interest accrual language in the judgment and sentence?

III. STATEMENT OF THE CASE

In the early morning of October 16, 2017, the defendant repeatedly bashed his 78 year old mother, Maria Levy-Aldrete in the head with a Maker's Mark bourbon bottle until it broke. RP 2190. He continued to smash the broken bottle into her causing the jagged edges to rip her face and head open and break her jaw. RP 2189. Blood and liquor spattered all

over the victim's bedroom as defendant violently bludgeoned her. RP 2056. After defendant beat the victim several times with the broken bottle, he strangled her to death in her bed where she laid severely bleeding and beaten. RP 2177. Defendant's two young sons slept in the second bedroom to the apartment while their father violently murdered their grandmother. RP 575, 1505-1507.

Defendant then attempted to dispose of the evidence of the murder he'd just committed. RP 1416-1442. He cleaned up the apartment using Clorox wipes. RP 1418-1436. He ran down the building stairwell to the parking garage, hid a Clorox wipe and pair of gloves in a recycling bin. RP 698. Defendant even ran down and up the stairwell to make it appear as if he chased after an intruder. RP 698. He changed his clothes and flipped his sweatshirt inside out before calling the police to report the murder. RP 2068.

Defendant murdered his mother to hide the fact that he'd spent nearly all of the money his mother gave him to purchase their home that day. RP 1969. On the day of the murder, defendant and his mother were supposed to purchase a home together. RP 1925. Before the murder, Ms. Levy-Aldrete gave defendant $20,000 to cover closing costs. RP 1943. Defendant spent nearly all of the $20,000 in the months leading up to October 17, 2017, leaving them unable to purchase the home. RP 1969. In addition to hiding the fact that he spent all of his mother's money for the

house, defendant murdered his mother because he stood to inherit $250,000 from her death as the beneficiary to her estate. RP 1986-1989.

Around 5:30 am after defendant bludgeoned and strangled his mother to death and attempted to clean up the evidence, he called 911. RP 650. The police responded and found the victim dead in her bed in a pool of her own blood with blood splattered all over the walls and shattered glass scattered around her and a broken bottle on the ground. RP 479-480, 565-572, 1592. Defendant was anxious, nervous and avoiding eye contact. RP 594-596. He even attempted to fake cry, but was unable to produce tears. RP 594-596. When asked what happened, defendant lied to investigators about an intruder breaking into the apartment and killing his mother. RP 651-659.

The defendant told the following story to detectives:

He woke up at 5:30 am on October 16, 2017 to the sound of his mother screaming. RP 651-661. He walked out into the dark hallway and saw an intruder. RP 651-661. The intruder fought with him in the hallway and cut him in the face with the bourbon bottle and left without a trace. RP 651-661. He found his mother alive in her bedroom gurgling on her own blood. RP 651-661. His mother grabbed his arm and dug in so hard that she scratched him. RP 651-661. He saw blood gushing from her neck so he got towels from his bathroom, bypassing the one in her room, and jammed it

under her chin to stop the bleeding. RP 651-661. Only then did he decide to chase after the intruder so he ran out of the apartment into the hallway, down one stairwell and ran into the parking garage. RP 651-661. He didn't find the intruder so he went back upstairs and called 911. RP 651-661. He claimed his hands were so bloody he had to use a Clorox wipe to clean the blood off of his phone in order to dial 911. RP 651-661.

Defendant's story didn't add up to detectives for a number of reasons. His demeanor was completely inconsistent with that of someone who lost their mother in such a violent manner. RP 1134. The apartment was recently cleaned and detectives found a trash can full of Clorox wipes and the odor of a cleaning agent. RP 1429.

There were no signs of forced entry to the building or the apartment. RP 589. One St. Helens is a secured apartment building with two parking garages below. RP 793-794. Both parking garages have doors that allow people to exit, but not enter. RP 1614-1628. The front lobby of the building requires a key pad code to enter. RP 1624. The victim lived on the top floor of the building and locked the front door at most times. RP 589. There were no reports of break ins to the building or apartments in the time frame surrounding the murder. RP 1628. Investigators determined through surveillance cameras and speaking with residents in the area that there was no suspicious activity at the time of the murder. RP 1213, 1364.

There was no evidence of a burglary or reason for the intruder to have come in the apartment. RP 591. Nothing was taken or even disturbed in the victim's apartment despite several valuable items being out in the apartment. RP 1439. There were no signs of sexual assault on the victim. RP 1806.

There were no signs of a struggle between defendant and the supposed intruder. RP 591. The defendant's injuries were self-inflicted and there were no signs of a struggle having taken place in the hallway. RP 529-530, 731, 1438. The boys, despite being asleep in the bedroom next door, did not wake up to any sounds of a struggle. RP 692.

Defendant's Clorox wipe was found in the parking garage, despite his story that he only used the Clorox wipe in the apartment. RP 697. His gloves with both his and the victim's DNA was found in the recycling bin in the parking garage. RP 1768-1769. There was a trail of defendant's blood going down one stairwell to the parking garage where the glove and wipe were found. RP 1774-1781. The victim's blood was also on defendant's clothing. RP 1830.

On October 19, 2017, the State charged defendant with one count of Murder in the Second Degree. CP 1-2. On June 19, 2018, the State amended charges to one count of Premeditated Murder in the First Degree and felony Murder in the Second Degree. CP 15-16.

On October 2018, trial was held before the Honorable Jerry Costello. RP 4. A jury found the defendant guilty beyond a reasonable doubt of one count of Felony Murder in the Second Degree. CP 134.

Sentencing was held on December 7, 2018. 12-7-18 RP 3. The court sentenced the defendant to a total of 244 months in custody. CP 141-154. The Court also imposed a total of $600 in legal financial obligations; $500 to the crime victim penalty assessment and $100 to the DNA database fee. CP 141-154.

The defendant timely filed a Notice of Appeal. CP 155.

IV. ARGUMENT

A. THE DEFENDANT RECEIVED A TRIAL BY AN IMPARTIAL JURY.

a. The defendant's claim is precluded pursuant to *Fire* because he exercised his peremptory challenge to excuse potential Juror No. 8.

A defendant has a right to trial by an impartial jury under both the Sixth Amendment to the United States Constitution and Article 1, section 22 of the Washington State Constitution. *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). That right is protected when a defendant exercises a peremptory challenge to remove a biased juror from the panel. *State v. Fire*, 145 Wn.2d 152, 165, 34 P.3d 1218 (2001). Therefore, even if a trial

court errs by failing to excuse a juror for cause, the error does not require reversal if the defendant exercises a peremptory challenge on that juror. *Id.*

Fire adopted the Supreme Court's reasoning in *State v. Martinez-Salazar*, which held that a defendant is not "deprived of any rule-based or constitutional rights" if he exercises a peremptory challenge on a juror whom he unsuccessfully challenged for cause. *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 145 L.Ed.2d. 792 (2000). Although a defendant is guaranteed a right to an impartial jury, the United States Constitution does not guarantee peremptory challenges as a means of achieving that results. *Id.* at 311-312. Therefore, a defendant is not deprived of any right when he exercises a peremptory challenge to achieve an impartial jury. *Id.* at 312-316. In that situation, his challenge is entirely consistent with the principal objective of peremptory challenges. *Id.* at 315-316.

In *Fire*, our Supreme Court confirmed that exercising a peremptory challenge to cure a wrongfully denied challenge for cause does not violate any constitutional right, state or federal. *Fire*, 145 Wn.2d at 154, 163-164; *Fire*, 145 Wn.2d at 167-168 (Alexander, C.J., concurring). Federal and state constitutional provisions are usually interpreted similarly if they have similar language. *Dutil v. State*, 92 Wn.2d 84, 606 P.2d 269 (1980). There is no significant textual difference between Article 1, section 22, which

guarantees the right to a "speedy trial by an impartial jury," and the Sixth Amendment, which guarantees the right to a "speedy and public trial, by an impartial jury." *State v. Rivera*, 108 Wn. App. 645, 648, 32 P.3d 292 (2001). Accordingly, "Washington law does not recognize that article 1, section 22 of the Washington State Constitution provides more protection than does the Sixth Amendment to the United States Constitution." *Fire*, 145 Wn.2d at 163. Because the federal constitution and the Washington constitution establish the same right to an impartial jury, Washington law follows federal law when defining the scope of that right. *Id.* at 163-165.

The defendant's conviction should be affirmed where he exercised a peremptory challenge to remove the juror that he unsuccessfully challenged for cause.

The defendant asserts that the Washington Constitution provides greater protections for peremptory challenges than does the federal constitution. His cited cases are inapposite. They all address when the right to a jury trial under Article 1, section 21 requires certain factual findings to be made by the jury. *See State v. Williams- Walker*, 167 Wn.2d 889, 896-900, 225 P.3d 913 (2010) (firearm enhancement imposed without a jury trial); *State v. Smith*, 150 Wn.2d 135, 156, 75, P.3d 934 (2003) (sentence imposed under Washington's "three strikes" law without a jury trial); *City of Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982) (right to a jury trial

for violations of a municipal code); *State v. Clark-El*, 196 Wn. App. 614, 621, 384 P.3d 627 (2016) (omission of an essential element from a "to-convict" jury instruction). In *Fire*, a majority of our Supreme Court determined that peremptory challenges were not constitutionally based at all. *Fire*, 145 Wn.2d at 167.

Here, defendant used a peremptory challenge to remove the juror whom he unsuccessfully challenged for cause. RP 436-437. Thus, even if the trial court erred in denying his challenge for cause, defendant cured that error when he removed the juror through a peremptory challenge. *State v. Roberts*, 142 Wn.2d 471 at 517, 14 P.3d 713 (2000) (*citing Martinez-Salazar*, 528 U.S. at 308-314). He was convicted by an impartial, unbiased and unanimous jury. Defendant has not demonstrated that any of the sitting jurors should have been removed for cause and therefore cannot show a violation of his right to an impartial jury. Under binding precedent, the defendant cannot claim error from the denial of his for-cause challenges.

b. The trial court properly denied defense counsel's motion to excuse potential juror no. 8 for cause after it reasonably determined that he was not biased.

During jury selection, the jurors were asked to fill out a juror questionnaire. One of the questions was "Is there anything in your history or background that would interfere with your ability to be fair and impartial?" CP 176-570. In response to that question, potential Juror No. 8

checked "yes" and wrote "deputy P.C. prosecutor (1970's)". CP 176-570. In a separate question, the jurors were asked "Do you have an insurmountable problem or hardship that would prohibit you from serving as a juror in this case?" In response to that question, potential Juror No. 8 checked "yes" and wrote "private practice attorney". CP 176-570.

In response to these answers, the court engaged in the following colloquy with potential juror no. 8 outside the presence of the other jurors:

> THE COURT: Looking at your questionnaire and your green slip, you've got a busy private practice going on. You're an attorney actively practicing, right?
>
> PROSPECTIVE JUROR NO. 8: Correct.
>
> THE COURT: You mentioned some deadlines. Could you tell us a little bit more about that?
>
> PROSPECTIVE JUROR NO. 8: You know, actually there are a couple of discovery deadlines that are coming up that need attention and then a mediation that I didn't list on November 1. There is nothing overwhelmingly urgent, just that it's time away from practice.
>
> THE COURT: Okay. Are the cases that you mentioned cases that you're working on solo or do you have another attorney working with you?
>
> PROSPECTIVE JUROR NO. 8: You know, I'm in a firm, but two of the cases I'm handling solely but with a legal assistant to help, and then the mediation, I will probably be the lead, but there is another legal counsel.
>
> THE COURT: All right. Would I be correct in inferring that although it would be challenging for you, do you think you could make this work if you ended up on this jury?

PROSPECTIVE JUROR NO. 8: There is little that can't be made to work. **It is challenging, but is it possible? Yes**. By the way, I should mention that I listed that I was a prosecutor years ago, but the firm has represented prosecutor – Pierce County Prosecutor Lindquist the last three years.

THE COURT: All right. Have you personally been involved with any of those issues or do you have specific information about it that could influence your view of deputy prosecutors or the State's case?

PROSPECTIVE JUROR NO. 8: **Representing Mr. Lindquist would not create any issues**. I think I've always had kind of a prosecutorial mindset, is all I would say.

THE COURT: Well, that's the next question because you mentioned that you were a deputy prosecutor. Of course, it was a long time ago, in the 1970s, I think, you indicated. Well, please tell us candidly if you feel that your past experiences representing the State of Washington might cloud your ability to be impartial.

PROSPECTIVE JUROR NO. 8: You know, Judge, I don't know. I've been called for jury duty three or four times in the last five years. I've yet to sit on a jury, and while I would find it fascinating, it looks like there are no other jurors present, so I can say, you know, I know what it takes before you bring a case to trial, would be pretty positive that the evidence is strongly in favor of a guilty verdict. Can I put that out of my mind? I don't know.

THE COURT: Well, you've been a trial attorney and, of course, you recognize that a jury has a duty to follow the Court's instruction on the law, and in a criminal case, as you know, an instruction is presumption of innocent and proof beyond a reasonable doubt. Do you think you can follow those instructions?

PROSPECTIVE JUROR NO. 8: Judge, as I say, honestly, I can't answer that. You know, you come in with a mindset. Even though I believe in the presumption of innocent until proven guilty, I have a little trouble with balancing those two out. I know that before you get to trial there's pretty heavy evidence of guilt. **Could I ignore it? All I can say is I'll do my best.**

THE COURT: Well, your comment leaves me to ask, do you feel that you could concentrate only on the evidence properly admitted and actually admit it?

PROSPECTIVE JUROR NO. 8: **I believe I could**. Again, you were asking mind questions. One would hope so.

RP 151-155 (emphasis added)

The court then invited defense counsel to conduct her own inquiry.

She engaged in the following colloquy with potential juror no. 8:

MS. KO: All right. Thank you, I have little more concern about a comment that you've made that you have, sitting here without hearing any evidence and you've just heard what the charge is in this case, but you believe that there is pretty heavy evidence of guilty at this time. Is that a fair statement?

PROSPECTIVE JUROR NO. 8: I believe that is correct.

MS. KO: And that's because, as you put it, you have a prosecutorial mindset?

PROSPECTIVE JUROR NO. 8: I think that is an accurate – one, I said it, and, two, I think it's accurate.

MS. KO: When I hear words like "prosecutorial mindset," what I hear is that you believe just the fact that he, Mr. Levy, is sitting at counsel table and is the defendant in this case, that you believe that he must be guilty of something.

PROSPECTIVE JUROR NO. 8: **I believe it's likely. Now, having said that, I understand there's a presumption of innocence and would try to put that out of the mind and just listen to the evidence, but the fact is, yes.**

MS. KO: And though you may try to put that out of your mind, you can't tell us for sure that you will be able to; is that right?

> PROSPECTIVE JUROR NO. 8: **That's an impossible question to answer. All I can say is I will do my best.**
>
> MS. KO: When there's a presumption of innocence, you're supposed to, sitting here right now, feel as though this person here is absolutely innocent because you have heard no evidence, but you're telling us that although you've heard nothing, you believe that Mr. Levy is guilty?
>
> PROSPECTIVE JUROR NO. 8: **I believe it is probable. Whether or not it's provable beyond a reasonable doubt is a very different question.**

RP 158 (emphasis added)

Defense counsel moved to excuse the juror for cause, stating "I understand him having a prosecutorial mindset, but he did agree that to him what that means is he must be guilty of something or otherwise he wouldn't be here. He's also represented the elected prosecutor in this case…". RP 159. The State objected to the motion stating the following:

> Well, first of all, Your Honor, I didn't hear anything about the representation of the elected prosecutor that would rise to a level of a conflict that would preclude him from being a suitable juror in the case, so I don't think that should be a basis to exclude him for cause. The way I heard him answering the questions were quite thoughtful. He answered them much the way that you would expect anybody who has any experience with the criminal justice system. He indicated that he recognized the presumption of innocent and his comments about recognizing that there would need to be evidence that led up to a charging decision is based on his historical experience, but nothing that he said indicated that he could be unfair or could not follow the law as instructed, so I would ask the Court to deny the defense motion to excuse him for cause.

RP 159-160

The court denied defense counsel's motion to excuse Juror No. 8 for cause stating,

> I think this potential juror is in a unique position of understanding that probable cause is necessary, that there's going to be evidence at least passing that threshold before a case is going to get in front of a jury. I did not understand his comment about there being, quote, heavy evidence or likelihood of evidence proving guilt to mean in the juror's mind that he presumed the defendant guilty at this point in time. He's also in a unique position to understand, and I believe he does fully understand what the presumption of innocent means and the duty to follow the Court's instructions on the law. I don't believe that it's been demonstrated that he's biased at this point in time such that he cannot serve on this jury, that there's good cause to excuse him, so I'm going to deny the challenge for cause.

RP 160-161

Defendant subsequently removed potential juror no. 8 by use of a peremptory challenge. RP 436-437.

On the merits, the trial court properly denied the defendant's challenge to excuse potential juror no. 8 for cause. The trial court's decision on excusing jurors for cause is reviewed for a manifest abuse of discretion. *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). The appellate court defers to the trial court's evaluation of juror bias because the trial court is in the best position to consider the juror's "tone of voice, facial expressions, body language, and other forms of nonverbal communication" that are not apparent from a transcript. *State v. Lawler*, 194 Wn. App. 275, 287, 374 P.3d 278 (2016).

To show error, a defendant must prove that a challenged juror was actually biased. *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). Actual bias is "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). Actual *bias is not established by a juror's preconceived opinions*, but rather by the juror's inability to "disregard such opinion and try the issue impartially." RCW 4.44.190 (emphasis added); *Noltie*, 116 Wn.2d at 839 (framing the appropriate inquiry as "whether a juror with preconceived ideas can set them aside" and decide the case impartially). A mere possibility of juror bias is not enough to show that he trial court erred. *Noltie*, 116 Wn.2d at 840. Similarly, a juror's equivocal answers alone do not justify removal for cause. *Id.* at 839; *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987); *State v. Irby*, 187 Wn. App. 183, 196, 347 P.3d 1103 (2015) (holding that it was within the court's discretion to view a juror's answer that she would "try" to be fair as "an adequate assurance of impartiality").

Here, the trial court's careful and thorough inquiry into the juror's impartiality is entitled to deference. The court had the opportunity to observe potential juror no. 8's verbal and non-verbal communication during its own individual inquiry with the juror and through defense counsel's

questioning. This is not a case in which the trial court was not paying attention to voir dire or performed merely perfunctory inquiries.

Potential juror no. 8 did not express an "unqualified statement expressing actual bias." *Irby*, 187 Wn. App. at 188, 196 (holding that the statement "I would like to say he's guilty" without an assurance that the juror could keep an open mind was evidence of actual bias); *State v. Gonzales,* 111 Wn. App. 276, 282, 45 P.3d 205 (2002) (finding actual bias when a juror never expressed an ability to be impartial or follow the judge's instructions). When asked whether his firm's representation of Mr. Lindquist would affect his ability to be fair and impartial, potential juror no. 8 expressly stated that "Representing Mr. Lindquist would not create any issues." RP 153. Additionally, potential juror no. 8 indicated that his experience of being a prosecutor back in the 1970s would not affect his ability to be fair and impartial. When asked if he "could concentrate only on the evidence properly admitted and actually admit it" he answered "I'll do by best" and "I believe I could." RP 154. Moreover, when defense counsel further inquired as to whether his "prosecutorial mindset" would affect his ability to be fair and impartial, potential juror no. 8 clarified that he would do his best do put that aside. RP 156-158. He reiterated that the defendant has a presumption of innocence and that there was a difference between probable cause and beyond a reasonable doubt. RP 157-158. He

never unequivocally stated that his prosecutorial background would affect his ability to be fair and impartial.

At most, potential juror no. 8 expressed sentiments that are common among jurors in criminal cases. Many jurors suspect that some evidence and investigation led to a person being charged with a crime. These common sentiments are not evidence of actual bias if a juror believes they can set those ideas aside, try the case impartially by listening to the evidence and following the court's instructions. It is important for jurors to invest themselves in the process of openly identifying potential biases and setting those biases aside, as potential juror no. 8 willingly did in this case. As in *Noltie*, the court "was in the best position to judge whether the juror's answers merely reflected honest caution based on her lack of prior jury experience or whether they manifested a likelihood of actual bias." 116 Wn.2d at 839-840. The trial court properly exercised its discretion when it denied defendant's motion to excuse this juror for cause.

B. DEFENDANT FAILS TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT OR THAT ANY UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED.

To prove that a prosecutor's actions constitute error, 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)). A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (*citing State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009)).

The defendant has the burden of establishing that the alleged error is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the error does not constitute prejudice unless the appellate court determines there is a substantial likelihood the error affected the jury's verdict. *Id.* at 718-19. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Juries are presumed to follow the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

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. An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *Warren*, 165 Wn.2d at 30. 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). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87. And, a prosecutor may also argue credibility of witnesses. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (a prosecutor may

draw an inference from the evidence as to why the jury would want to believe a witness).

In this case, defendant claims that the prosecutor committed prosecutorial misconduct during closing argument for the following reasons: (1) using the puzzle analogy, (2) expressing his own personal opinions about the case, (3) making arguments outside the evidence, and (4) arguing the jury's verdict should reflect or speak the truth. Defendant failed to object to all but one of the alleged errors during trial. For the reasons set forth below, defendant fails to demonstrate that the prosecutor's actions were improper, prejudicial, or flagrant and ill-intentioned. Defendant's claim of prosecutorial error accordingly fails.

a. The prosecutor properly used the jigsaw puzzle analogy.

The jigsaw puzzle analogy has been used by attorneys, and discussed by appellate courts, for several years. *See State v. Lindsay*, 180 Wn. 2d 423, 435-436, 326 P. 3d 125 (2014); *State v. Fuller*, 169 Wn. App. 797, 282 P.3d 126 (2012). As the Court pointed out in Lindsay, the jigsaw puzzle analogy may be properly used to discuss how different and many pieces of evidence come together in a trial for the jury to consider and what the overall "picture" that evidence shows, despite some missing "pieces". 180 Wn. 2d at 435, *citing and discussing State v. Curtiss*, 161 Wn. App. 673, 250 P.3d 496 (2011). The analogy cannot be used to quantify the

number or percent of the "pieces" are enough to meet the beyond a reasonable doubt standard. *Lindsay*, 180 Wn. 2d at 436; *citing and discussing State v. Johnson*, 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

In the instant case, the prosecutor properly used the puzzle analogy.

> We have jurors who come in and say you have to prove it beyond a shadow of a doubt. That's not true. That State has to prove these charges to you beyond a reasonable doubt, and what that means is you look at the evidence, you have a doubt related to an element of the crime, and that doubt persists in light of all the evidence in the case. That's how you know it's reasonable. It's not looking at a doubt or an issue in isolation, but assessing that issue or that question as to an element in light of everything you know in the case.
>
> When you think about the proof or the burden of proof in this case, consider it in the way you would a puzzle. If you've ever taken a ferry in this state, you may sit down –
>
> MS. KO: Objection to the puzzle analogy.
>
> THE COURT: Overruled.
>
> THE STATE: You may sit down at the table and you may find a pile of puzzle pieces, and maybe the box isn't there so you don't know what the image is, and with enough time you're able to put the pieces into place that you know beyond a reasonable doubt as to what the image is.
>
> You may reach that – and it's subjective for each of you – you may reach that conclusion even though there are pieces of the puzzle you don't ever have; they were lost before you even sat down. You may reach that point even though there are pieces of the puzzle that you just don't know what to make of. You can't seem to find a spot for them and so you set them aside. You may reach that point even though pieces of the puzzle are broken, torn, ripped, or frayed. But there's going to be a point at which you have enough pieces that you have an image that you are confident of.

> Consider a trial in much the same way. The State has the burden of presenting you evidence, enough pieces of evidence that tell you the defendant is guilty beyond a reasonable doubt, and you may reach that conclusion even though there are pieces of evidence, like pieces of the puzzle, that were never presented. They're out there somewhere in the ether; they were gone before you even sat down. You may reach that conclusion even though there are pieces of evidence that you just don't know what to make of, and so you set that piece of evidence aside. You may reach that conclusion even though there are pieces of evidence like pieces of the puzzle that have warts and flaws.
>
> The point is, when you view all the evidence in total, warts and all, if what you have in place tells you beyond a reasonable doubt that the defendant is guilty of the crime, warts and all, holes and all, then the defendant is guilty and your verdict reflects that.

RP 2572-2574

In response to defense counsel's closing arguments, the prosecutor used the analogy in rebuttal:

> There is this issue of the missing hair. I will not for a moment make any excuse about the fact that there's a missing hair. In all likelihood, something happened. Wish it could be explained. A hair was collected, presumably at the medical examiner's office, was supposedly put in an envelope and at some point disappeared. You will hear no excuse from the State about that.
>
> If you go back to my discussion about proof beyond a reasonable doubt and the idea of the puzzle, remember, when you sit down to do the puzzle, sometimes pieces are just gone before you even got there and yet the question is what you have in front of you, is that enough to create the image. This is a missing puzzle piece, a missing piece of evidence that you never had at the start.
>
> The question isn't whether there's going to be a missing piece of evidence. The question isn't whether with the benefit of hindsight

things could have been done. The question is what you have in front of you, what image does that paint for you.

RP 2688-2689

Here, the prosecutor used the jigsaw puzzle analogy correctly. He used the analogy to explain how the jury could consider the evidence; that despite some pieces that did not fit, or pieces that were missing, that they still could find the defendant guilty beyond a reasonable doubt so long as the State met its burden of proof by providing enough pieces altogether. He did not speculate or quantify the amount necessary as the prosecutors in *Lindsay* and *Johnson* did. *Id.* The prosecutor even acknowledged that each juror had to come to their own conclusion of how much evidence or "pieces of the puzzle" were enough to be convinced beyond a reasonable doubt, stating "it's subjective for each of you." RP 2572. As the prosecutor properly used the puzzle analogy, defendant's claim of prosecutorial misconduct fails.

b. Defendant waived his other claims of prosecutorial misconduct by failing to object.

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 Thorgerson*, 172 Wn.2d at 455).

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 [error] 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).

The defendant claims that the prosecutor made several statements that amounted to misconduct during closing arguments. However, he failed to object to each of these alleged instances. The prosecutor's arguments were properly made and supported by the evidence. As such, defendant is unable to meet his heightened standard of showing that the statements were flagrant or ill-intentioned. His claims fail for the following reasons.

i. Prosecutor did not express his personal belief about the credibility of the defendant's theory of the case.

It is improper for a prosecutor to personally vouch for the credibility of a witness. *Warren*, 165 Wn.2d at 30; *Brett*, 126 Wn.2d at 175. Vouching occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony. *State v. Smith*, 162 Wn. App. 833, 849, 262 P.3d 72 (2011). It is also generally improper for prosecutors to bolster a police witness's good character, even if the record supports such argument. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). However, on appeal, the court will not find prejudicial error "unless it is clear and unmistakable that counsel is expressing a personal opinion." *Warren*, 165 Wn.2d at 30. *See, e.g., State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985) (prosecutor improperly stated personal belief by telling the jury, "I believe [the witness]. I believe him").

"When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

While it is improper for a prosecutor to disparagingly comment on defense counsel's role or challenge defense counsel's integrity, the State is provided significant latitude in closing arguments, including arguing inferences as to witness credibility, and disparaging opposing counsel's argument is not a prohibited attack. *See Warren*, 165 Wn.2d at 29-30. A prosecutor is allowed to argue that the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87; *Lindsay*, 180 Wn.2d at 431. And, where a prosecutor shows that other evidence contradicts a defendant's testimony, the prosecutor may argue that the defendant is lying. *State v. Copeland*, 130 Wn.2d 244, 291-92, 922 P.2d 1304 (1996). An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *Warren*, 165 Wn.2d at 30.

The prosecutor argued the following during closing argument:

> Now, with that said, I want to talk to you about the evidence in the case. It starts, first and foremost, with the defendant's story. No bogeyman did this. No bogeyman killed Maria. He killed Maria and he had to hurt her. As I said to you before, this was not well orchestrated. He was under a time crunch. His boys were getting up. People in the building were going to be getting up and leaving. He was expected at work. He had to hurry. He had to explain this and had to cover it up, and he did the best he could under those circumstances and he invented a story that's ridiculous. By any objective measure, it's ridiculous.
>
> Understand what he's saying: A bogeyman, maybe a thief, maybe a burglar, maybe a deranged psychopath breaks into the building. Not

here to tell you this building is Fort Knox. It's not. You could certainly get into the building at points, but, unlike what Ms. Ko would suggest to you, this is not a referendum on the homeless, or is One St. Helens the nexus of crime in the City of Tacoma. It is still a very safe, gentrified community.

This building is still far safer than most homes and buildings in the city, and it's worth noting that in the two years where you were provided data how many actual incidents did you hear about people coming in, about people breaking in. Don't mean to suggest it doesn't happen, but it's still a very safe building. It's also worth noting that when the officers arrived on scene, every access point was locked and secured.

So, you're lead to believe that a bogeyman breaks into the building; he flees after the crime down the stairwell with the recycle bin. Presumably he went up that same stairwell since he doesn't know the layout of the building, so he goes in through one of the parking garage levels, doesn't take anything, doesn't break into any cars, walks up into the main living areas of the building, doesn't break into the main living areas of the building, doesn't break into anyone else's apartment. No one else's apartment is unlocked to gain entry.

This person makes his way up to the fifth floor. It just happens to be that one-in-a-blue-moon chance where the defendant has left the door unlocked. This person comes in Monday morning at 5:00 in the morning when he knows people are going to be there. This isn't Saturday at 11:00 in the morning to Tuesday at 3:00 in the afternoon. He knows people are going to be there.

He walks in, shuts the door behind him. It's pitch-black in there. He finds the defendant's gloves. He finds the defendant's liquor bottle. He doesn't take anything that's out there, wallets, purses, keys, musical instruments, electronics, et cetera. He doesn't rifle though any drawers. He then walks into Maria's bedroom knowing she should be there.

He's not a burglar, apparently. Apparently he's just a deranged psychopath, a deranged psychopath who didn't bring his own gloves, wo didn't bring his own murder weapon, who then walks in there to find Maria. If he's a burglar, he doesn't just run away or if

> in a panic strike her once and run away. He engages in a vicious, hateful, angry murder.
>
> The defendant hears none of it. Maria lets out a scream. There's this brief confrontation in the hallway. The defendant, a black belt in the martial arts, is quickly disabled, and this killer runs away never to be seen from again, leaving no trace of his existence in the hallways, in the stairwells, or anywhere outside of Maria's bedroom.
>
> That's the story you're being sold, and it is by any objective measure a hard pill to swallow. I'm not saying it's not possible. Anything is possible. What I'm telling you is it's not reasonable to believe that happened. It's not plausible. When I say anything is possible, it's possible that when you walk out of this building today, you'll be struck by lightning, but it's not plausible to believe that happened and it's not reasonable to believe that's going to occur.
>
> You look at this story and, again, it is not a story that you should believe on its face. But the thing about this case is it's more than just an incredible story. He's selling you a story that if it's going to be true, you should expect at every step of the way to line up with the evidence at the scene. You should expect that every step of the way for that story to check out with your common sense. As you break apart the story, you wouldn't be asked to leave your common sense at the door. And what you find is a story that constantly doesn't pass the straight-face test.

RP 2574-2683

Defendant did not object to any of these statements. Now, however, defendant argues that the statements were an improper personal opinion on guilt. The prosecutor's argument contains no expression of personal belief. Defendant's assertion otherwise should be rejected. The prosecutor argued that the defendant's theory was ridiculous and used the word "boogeyman" to refer to the intruder that defendant made up. This was an appropriate

argument given the ludicrous nature of the defense theory. The defendant claimed that a deranged psychopathic burglar somehow broke into the secured building, into their locked penthouse apartment leaving no signs of forced entry, stole and disturbed no items of value, violently bludgeoned his mother to death for no reason, fought with him in complete darkness and vanished without a trace; all in complete silence allowing the two boys sleeping in the next room to sleep through the entire incident. The State properly exploited defendant's weak and unbelievable defense as evidence of his guilt. Here, the prosecutor properly argued that the evidence did not support the defense theory. *Russell*, 125 Wn.2d at 87; *Lindsay*, 180 Wn.2d at 431. The prosecutor properly argued that what the defendant told the police were lies where the evidence overwhelmingly contradicted his story. *Copeland*, 130 Wn.2d at 291-92.

Defendant did not object to the prosecutor's arguments. Therefore, even if the comments were improper, defendant waived any error unless the comments were so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Since the prosecutor's brief remarks could not possibly give rise to an enduring and resulting prejudice incurable by a jury instruction, this Court should affirm defendant's convictions.

ii. The prosecutor's arguments were supported by the evidence.

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). However, the State is allowed to draw reasonable inferences from the evidence. *Stenson*, 132 Wn.2d at 727. The State is also allowed to argue that evidence does not support the defense theory. *Thorgerson*, 172 Wn.2d at 449 (*citing Russell*, 125 Wn.2d at 87). And, "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *Russell*, 125 Wn.2d at 87. A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Yates*, 161 Wn.2d, 714, 774, 168 P.3d 359 (2007).

Defendant claims the following arguments made by the prosecutor during closing argument were not supported by the evidence:

> Understand what he's saying: A bogeyman, maybe a thief, maybe a burglar, maybe a deranged psychopath breaks into the building. Not here to tell you this building is Fort Knox. It's not. You could certainly get into the building at points, but, unlike what Ms. Ko would suggest to you, this is not a referendum on the homeless, or is One St. Helens the nexus of crime in the City of Tacoma. It is still a very safe, gentrified community.
>
> This building is still far safer than most homes and buildings in the city, and it's worth noting that in the two years where you were

> provided data how many actual incidents did you hear about people coming in, about people breaking in. Don't mean to suggest it doesn't happen, but it's still a very safe building. It's also worth noting that when the officers arrived on scene, every access point was locked and secured.

RP 2574-2575

The record reflects that these statements were supported by the evidence. Several witnesses testified that the building was secured at the time of the incident. RP 475, 477-478, 558, 1624. Jeri Kay Lerew, the on-site manager for the apartment building testified that One St. Helens was a secured access building which required a code or key to enter building. RP 1624. He also testified that the garage doors lock upon exiting, so no one may enter from the garage. RP 1625. Mr. Lerew and Detective Ryan Larson both testified that there were no break ins to the building or apartment units during the time of the homicide. RP 1628, 2256.

Defendant also claims that the prosecutor's argument that defendant's injuries were self-inflicted was not supported by the evidence. Brief of Appellant at 59. This argument was also supported by the evidence. Defendant told officers that he fought the intruder and that his face was cut by the Maker's Mark bottle during the struggle. RP 585. However, the cuts were not consistent with being cut with a broken bottle. Matthew Weinman of the Tacoma Fire Department testified that the defendant had very light

vertical superficial cuts on his face that did not require medical treatment. RP 530. The cuts were not bleeding and barely punctured the skin. RP 530.

Finally, defendant claims that the prosecutor's arguments that defendant spent all of his mother's money given to him for the house was outside of the evidence. Brief of Appellant at 59-60. This claim also fails where this argument was supported by the evidence. Elizabeth Schieferdecker of the Tacoma Police Department testified that defendant spent all of the money needed for the purchase of the house by October 17, 2017. RP 1969. She testified that the victim would be unable to pay for closing costs on her own and that defendant was unable to afford the mortgage payments. RP 1985-1986. Defendant further claims that the prosecutor committed misconduct by creating a fictionalized narrative between the defendant and his mother when he briefly stated "Well that's fine son" during this same argument. Brief of Appellant at 59. This claim fails because it is not misconduct for a prosecutor, during closing argument, to present the jury with hypothetical dialogue that can be rationally inferred from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 55, 134 P.3d 221 (2006). It was proper for the prosecutor to argue based off the properly admitted evidence that defendant's motive to kill his mother was spurned by the fact that he'd spent all of her money to purchase the home that day.

Defendant did not object to any of the above statements during trial, nor did he request a curative instruction. The absence of an objection to the remarks to which error has been assigned here suggests that defense counsel saw nothing wrong with them or that they were not prejudicial. *See Swan*, 114 Wn.2d at 661. Indeed, as argued above, the arguments were proper. Defendant waived the issue because he failed to object. He does not show that these remarks are improper, let alone flagrantly so. Moreover, the court properly instructed the jury that the lawyers' statements are not evidence and they must "disregard any remark, statement, or argument that is not supported by the evidence or the law." CP 106 (Instruction No. 1). *See Stein*, 144 Wn.2d at 247. Since none of the prosecutor's arguments could possibly give rise to an enduring and resulting prejudice incurable by a jury instruction, this Court should affirm defendant's convictions.

iii. <u>The prosecutor did not improperly argue that the jury's verdict should "speak the truth".</u>

The defendant challenges the following statements made by the prosecutor during closing argument:

> There was no bogeyman. This evidence cannot be explained by a bogeyman. You look at this evidence in total and it tells you that he did it. For whatever reason on that morning a rage and a hate and an anger flowed from him, and in the aftermath of trying to cover it up, he made a series of mistakes and he offered a story that is contrived and not to be believed.

> We wish we knew why, but at the end of the day we don't care why because all that the State is obligated to prove is that he did it, and through this evidence you know that he did it, and it is time that your verdict reflects the truth. Thank you, ladies and gentlemen.

RP 2619

> At the end of the day, ladies and gentlemen, there was no psychopathic killer looking to do Maria in that night. Whatever happened between the two of them we'll never know, but the evidence before you tells you in no uncertain terms that the defendant murdered him mom, and the time has come for your verdict to speak that truth. Thank you.

RP 2693-2694

It would have been improper for the prosecutor to suggest that the jury must declare the truth through its verdict. *State v. Emery*, 174 Wn. 2d. at 760 ("The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth. . . Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt."), *citing State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), and *In re: Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The prosecutor made no such argument and thus did not commit error.

In regard to the challenged statements, the prosecutor did not tell the jury that it must "declare the truth" in returning their verdict. Rather, he argued that the verdict should reflect the truth where the defense theory was based solely on the defendant's contrived lies and made up story about the

mysterious intruder. The prosecutor in the above example used the word truth but not in an impermissible way. To utter the word truth or any derivative of it in closing argument is not prosecutorial error. This was no more improper than the contrasting defense argument that the evidence was not sufficient proof beyond a reasonable doubt. Throughout the argument the prosecutor focused on the primary issues, namely the incredulous nature of the defense theory. His arguments using the word truth were appropriate given that defense, and just as permissible as the arguments offered by the defense attorney. The defendant cannot demonstrate prosecutorial error.

Defense counsel did not object to any of these arguments. The absence of an objection to the remarks to which error has been assigned here suggests that defense counsel saw nothing wrong with them or that they were not prejudicial. *See State v. Swan*, 114 Wn. 2d 613, 790 P. 2d 610 (1990). Indeed, as argued above, the argument was proper. The defendant waived the issue because he failed to object. He does not show that these remarks are improper, let alone flagrantly so.

c. <u>The defendant fails to show cumulative error where no prejudicial error occurred.</u>

In sum, defendant argues that the prosecutor's conduct throughout trial constitutes cumulative error depriving the defendant of a fair trial. Brief of Appellant at 61. "The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of circumstances

substantially prejudiced the defendant and denied him a fair trial." *In re Per. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014). "Cumulative 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, 660 (2006) (*citing State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)). Defendant bears the burden of showing multiple trial errors and the accumulation of prejudice that affected the outcome of the trial. *In re Cross*, 180 Wn.2d at 690.

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"). Moreover, "[t]here is no prejudicial error under the cumulative error rule if the evidence is overwhelming against a defendant." *In re Cross*, 180 Wn.2d at 691.

The doctrine of cumulative error does not apply where the defendant fails to establish how claimed instances of prosecutorial error affected the outcome of the trial or how combined instances affected the outcome of trial. *Thorgerson*, 172 Wn.2d at 454 (*citing Weber*, 159 Wn.2d at 279)).

Here, defendant fails to establish how the claimed instances of alleged error affected the outcome of the trial or how the combined instances of alleged error affected the outcome of the trial. The prosecutor's conduct here was proper, there was no prejudice, and the evidence against defendant was overwhelming. Accordingly, the cumulative error doctrine does not apply.

C. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR MISTRIAL WHERE THE ALLEGED MISCONDUCT INHERES IN THE VERDICT.

Despite defendant's assertion, without authority, that the court can consider any form of juror misconduct, case law has placed limits on what the court may consider. While jury misconduct may be grounds for granting a new trial, not all jury misconduct can be considered by a court on a motion, and not all jury misconduct will be grounds for a new trial. Generally, a jury commits misconduct that may be grounds for a new trial only when it considers extrinsic evidence. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Extrinsic evidence is "information that is outside all the evidence admitted at trial, either orally or by document." *Balisok*, 123 Wn.2d 114, 118 (internal quotation marks and citation omitted). A jury is not allowed to consider extrinsic evidence because such evidence is not subject to objection, cross-examination, explanation, or rebuttal. *Balisok*, 123 Wn.2d at 118.

The party alleging juror misconduct has the burden to show that misconduct occurred. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). Generally, heated jury deliberation, raised voices, or personal remarks do not necessarily amount to juror misconduct. *See, e.g., Earl*, 142 Wn. App. 768, 774-776. Juror affidavits may not be used to show that a juror assented to a jury verdict because of intimidation by other jurors. *State v. Aker*, 54 Wash. 342, 345-346, 103 P. 420 (1909)(emphasis added). Appellate courts are generally reluctant to inquire into how a jury arrived at its verdict. *Balisok*, 123 Wn.2d at 117.

In evaluating evidence of alleged juror misconduct, a court considers only the facts that are stated in relation to juror misconduct and that in no way inhere in the verdict itself. *State v. Jackman*, 113 Wn.2d 772, 777-78, 783 P.2d580 (1989). All of the following factors and averments that inhere in the jury's processes in arriving at its verdict - and therefore, inhere in the verdict itself - are inadmissible to impeach the verdict: (1) the mental processes by which individual jurors reached their respective conclusions; (2) their motives in arriving at their verdicts; (3) the effect the evidence may have had upon the jurors, or the weight particular jurors may have given to particular evidence; or (4) the jurors' intentions and beliefs. *Jackman*, 113 Wn.2d at 777-78 (internal citation omitted); *see also Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962) (if facts

alleged are linked to the juror's motive, intent, or belief, or describe their effect upon the juror, the statements cannot be considered because they inhere in the verdict and impeach it).

Defendant claims that the trial court erred in denying his motion for a mistrial. Brief of Appellant at 62. At sentencing, defense counsel stated that she'd contacted the jurors and learned the following:

> It was so troubling to me that I did what I never did in the past. I asked the jurors if they would give me their phone numbers so that I could speak to them, and a number of the jurors did. And I spoke to several of those jurors and I met with one in person. And what I learned from speaking to the jurors both shocked and dismayed me to my core. And one of the things I learned was that to explain why he didn't have this bloody clothing, they concluded that he must have ran around the entire block to hide his clothes because Detective Quilio had testified that she had looked around the building carefully three times to look for evidence related to this crime.
>
> They decided that he must have showered, though there was no evidence that he had showered, to get rid of the odor of alcohol, which the defense argued would have been present if he had committed this crime. And the jury also decided that no on, no intruder, would go around people's houses and look to see if there was a door that was unlocked, that happened to be unlocked. They just couldn't conceive that that is something that would occur.

Both the trial court and defense counsel acknowledged that this was not information that the court may consider for the purposes of a motion for mistrial based on juror misconduct.

> THE COURT: Ms. Ko, your comments about what some of the jurors had to say to you, is that something you believe I can lawfully consider at this sentencing hearing?
>
> MS KO: **What is lawfully admissible for purposes of a motion after a verdict, certainly what the jurors have said to me I don't believe rises to that level.**

12-7-18 RP 15-16

> MS. KO: Your Honor, judges do get to hear and consider what jurors have said, and when the jurors say things that are so egregious, oftentimes defense counsel brings a motion for a new trial and they have 10 days to do that, **and I told the court that I did not feel that what they said rose to the level of me bringing that type of motion. I know the case law on what would constitute a motion for a new trial.**

12-7-18 RP 20-21 (emphasis added)

During his allocution, defendant repeatedly proclaimed his innocence and made his own motion for mistrial for a variety of different reasons including but not limited to what the juror allegedly told defense counsel. RP 35-37. The court denied defendant's motion stating the following:

> Mr. Levy-Aldrete's attorney has not made a motion for a retrial or a mistrial, as the defendant characterized it. The defendant has asked me to enter such an order. Stating, at the least, quite irregular for a defendant who was represented by counsel to make sure a request with no notice to the plaintiff, no notice to the Court.
>
> Mr. Levy-Aldrete, as I'll be explaining in comments that I am about to make about your trial, I do not see that irregularities, the flaws, the failure of the jury to follow the Court's instructions on the law as you are now perceiving it. I see no basis to declare a mistrial at

> this point. The trial is over, but I'm not going to order a new trial, which is what I hear you asking me, so your motion is denied.

12-7-18 RP 41

Here, the trial court properly denied defendant's motion for new trial based on juror misconduct.

a. The statements defendant claims the jurors made do not constitute juror misconduct where their alleged beliefs and comments are firmly supported by the evidence.

Defendant claims that the jurors committed misconduct by considering extrinsic evidence that he changed or hid his clothes. Brief of Appellant at 62. This claim fails where the alleged beliefs and thought processes of the jurors were supported by the evidence. Whether the jurors believed defendant changed his clothes or showered does not constitute juror misconduct. The evidence showed defendant had the opportunity to and likely did change or hide is clothes. There was evidence that defendant flipped his sweatshirt inside out before the police arrived. RP 2068. The evidence also showed that defendant went to great lengths to cover up the crime scene before police arrived such as cleaning up the scene with Clorox wipes, running up and down the stairwell to dispose of evidence, hiding his bloody gloves in the parking garage, etc. The jurors could reasonably infer from the evidence that he also changed or hid his clothes in an additional effort to sanitize the crime scene.

At sentencing, defendant claimed that defense counsel told him that the jurors considered his phone having an emergency swipe function. 12-7-18 RP 29-30. He now claims that this was also extrinsic evidence that constituted juror misconduct. Brief of Appellant at 65. There is nothing to support defendant's claim that defense counsel told him this information. Defense counsel claimed that the jurors considered defendant hiding or changing his clothes, but specifically left information about the cell phone out. Regardless, this information does not amount to juror misconduct warranting a hearing. This was information that the jurors could reasonably infer from properly admitted evidence. There was evidence that defendant needed to use a Clorox wipe to clean the blood off of the screen of his cell phone before calling 911. RP 1604. It is a logical inference that a touch screen cell phone has an emergency swipe function. Defendant's claim that the jurors committed misconduct by considering extrinsic evidence fails where each of the alleged beliefs were supported by properly admitted evidence.

b. The jurors mental processes inhere in the verdict and may not be considered for the purposes of a motion for new trial.

The trial court is prohibited from considering the juror's mental thought processes and beliefs for defendant's motion for mistrial. Whether the jurors believed defendant hid or changed his clothes before calling the

police inheres in the verdict and goes directly to how the verdict was reached and what their motives, intent and beliefs were in reaching a verdict. The court, state and defense counsel each recognized that these are the mental processes that inheres in the verdict and cannot be considered by the court. *Jackman*, 113 Wn.2d at 777.

D. THIS COURT SHOULD REMAND ONLY TO STRIKE THE INTEREST ACCRUAL LANGUAGE FROM THE JUDGMENT AND SENTENCE.

a. The trial court properly imposed community supervision fees.

RCW 10.01.160(3) provides that the trial court shall not order a defendant to pay costs if a defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). Similarly, RCW 9.94A.760 now provides that the trial court cannot order "costs as described in RCW 10.01.160 if the defendant is indigent as defined in RCW 10.101.010(3)(a) though (c). RCW 10.01.160(2) limits costs "to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision."

Defendant's supervision assessment was imposed under RCW 9.94A.703(2)(d), which states, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to... [p]ay

supervision fees as determined by the [Department of Corrections]." The supervision assessment is a discretionary LFO. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018).

However the supervision assessment is not a discretionary "cost" merely because it is a discretionary LFO. The supervision assessment fails to meet the RCW 10.01.160(2) definition of a "cost" because it is not an expense specially incurred by the State to prosecute the defendant, administer a deferred prosecution program, or to administer pretrial supervision. Because the supervision assessment is not a *cost* under RCW 10.01.160, the trial court was not obligated to waive it.

b. <u>The interest accrual language should be stricken.</u>

The State concedes that the language in the defendant's judgment and sentence involving interest accrual should be amended to reflect a recent change in the law. Restitution imposed in a judgment and sentence shall bear interest from the date of judgment until payment. RCW 10.82.090(1). But as of June 7, 2018, "no interest shall accrue on non-restitution legal financial obligations." RCW 10.82.090(1). Although the trial court sentenced the defendant after this effective date, his judgment and sentence includes boilerplate language indicating that the "financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full."

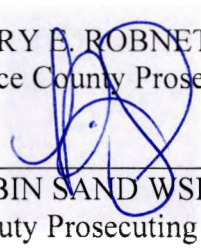
The State agrees that the recent change in law provides that interest shall not accrue for non-restitution legal financial obligations. Thus, remand is appropriate for the trial court to amend the judgment and sentence to reflect the following: "The restitution obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. No interest shall accrue on non-restitution obligations imposed in this judgment. RCW 10.82.090."

V. CONCLUSION

For the foregoing reasons, this Court should dismiss defendant's claims and affirm his conviction.

RESPECTFULLY SUBMITTED this 13th day of March, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



ROBIN SAND WSB# 47838/OID 91121
Deputy Prosecuting Attorney

Certificate of Service:
The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her 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.

3-13-20

Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

March 13, 2020 - 1:48 PM

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