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Division II  
State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

TOMMY COOK, SR.,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Superior Court No. 18-1-00265-05

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BRIEF OF RESPONDENT

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

1. Whether the trial court properly exercised discretion in granting the State's request for a continuance of trial because it considered multiple factors including possible prejudice to Cook and stated its reasons for granting the continuance in compliance with CrR 3.3(f)(2)?
2. Whether the trial court properly admitted expert testimony by Det. Grall because Det. Grall possessed specialized knowledge not typically available to laypersons and his testimony was helpful to a jury?
3. Whether the Det. Grall's to testify regarding the purpose of digital scales in the context of drug culture based on his training and experience in drug culture was not improper opinion testimony?
4. Whether the claim of prosecutorial misconduct fails because the Cook failed to object and fails to establish conduct so ill-intentioned and flagrant such that the prosecutor's comments could not be cured by instruction to the jury because prosecutor's arguments were reasonable inferences based upon the evidence,?
5. Whether the cumulative error doctrine is inapplicable because there was no evidence that the alleged errors, even considered together, had any impact on the outcome of the trial?

## II. STATEMENT OF THE CASE

Olympic Peninsula Narcotic Enforcement Team (OPNET) detectives enforced a search warrant to search for controlled substances at Appellant Tommy L. Cook's residence in Forks, WA, on June 28, 2018. CP 69. Items found included four baggies of brown substance suspected to be heroin weighing a total of 62.49 ounces, \$2750.00 cash in a closet next to the suspected heroin, and two containers of suspected heroin on a coffee table next to two sets of digital scales. CP 69. After a detective advised Cook of his *Miranda* rights, Cook admitted that he sold large amounts of heroin in the past but not as much anymore. CP 69. Cook Sr. also admitted that his son Tommy Cook Jr. sells heroin he obtains from Cook Sr. CP 69. At trial, Cook denied making those admissions. RP 381, 388. Cook Jr. lives in a motor home on Cook Sr.'s property. CP 69. Cook Jr.'s girlfriend, Cleopatra Matthews, resided in her own apartment but also stayed with Cook Jr. CP 69; RP 233, 235.

Cleopatra Matthews was listed as a State's witness and had provided the information to law enforcement which led to the search warrant of Cook's residence. RP 55.

The State filed an information charging Cook with Possession of a Controlled Substance with Intent to Manufacture or Deliver as a second or subsequent offense. CP 65. On July 27, 2018, Cook was present out of

custody for his arraignment hearing and the court set the trial date for Oct. 22, 2018 with an expiration of speedy trial on Oct. 25, 2018. CP 79, 80. The State filed its witness list and subpoenas for Cleopatra Mathews on Oct. 2, 2018. CP 77, 78. The State attempted to have Mathews personally served at her last known address in Forks, WA. CP 50, 55, 61, 63.

Continuance of the Trial to Nov. 26, 2018

Oct. 18, 2018, the State moved to continue the trial before the expiration of speedy trial after it learned that Mathews was out of state. RP 48. The deputy prosecutor stated that she found out a week prior to the Oct. 18 hearing that Mathews was not in Forks, WA and few days prior to the Oct. 18 hearing, she learned that Mathews was in Jerome, Idaho. RP 51, 52. More specifically, the deputy prosecutor stated that on Oct. 11 she received from the Sheriff's Office the return of service on the subpoena, signed and dated Oct. 11, stating: "Unable to effect personal service. Party to be served may now be living outside of Clallam County." RP 75.

The deputy prosecutor indicated that Mathews' testimony was important for the State's case because there was no guarantee that Cook's admissions to law enforcement were going to be admitted at trial because the court decided to wait until trial to make a ruling on that issue. RP 50–51. Further, it was pointed out during the CrR 3.5 hearing that the relevancy of Cook's statements might not become apparent until trial and

the State argued therefore, there was no basis to exclude them pretrial. RP 22. The prosecutor also pointed out that the other witness that could replace Matthews was a co-defendant, Mr. Cooks, Jr., (appellant's son) currently serving his time in prison. RP 63.

Cook was not being held in custody awaiting trial because he posted bail prior to his arraignment. CP 79, 81–82, 84; RP 65, 79. Defense counsel indicated that if trial were to be continued then she would not be available Oct. 31 through Nov. 2, 2018, and Nov. 9 through Nov. 21, 2018. RP 71, 72–73.

The trial court pointed out that failure to find out that Matthews was not in Forks was not the issue. RP 73. Rather, law enforcement knew she wasn't in Forks, but they didn't know where she was. RP 73. Law enforcement learned of Matthews' presence in Idaho and notified the prosecutor a few days prior to the Oct. 18 hearing. RP 51. The trial court opinioned that it would grant a short continuance of one, two, or three weeks if it could but it could not because of unavailability issues. RP 79–80. The court balanced the prejudice to all parties and did not see any prejudice to Cooks. RP 79–80. The trial court granted the continuance and moved the trial just over a month to Nov. 26, 2018. RP 86; CP 75.

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### III. ARGUMENT

#### A. THE COURT PROPERLY CONTINUED THE TRIAL UNDER CrR 3.3(f)(2).

On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. . . .

CrR 3.3(f)(2).

“[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court.” *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005) (quoting *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)). “The trial court’s decision will not be disturbed “unless the appellant or petitioner makes ‘a clear showing ... [that the trial court’s] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *Flinn*, 154 Wn.2d at 199 (quoting *Downing*, 151 Wn.2d at 272 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971))). “A court reviewing an exercise of discretion can find abuse only if no reasonable person would have taken the view adopted by the trial court.” *State v. Henderson*, 26 Wn. App. 187, 190, 611 P.2d 1365 (1980) (*State v. Blight*, 89 Wn.2d 38, 40-41, 569 P.2d 1129 (1977)).

“In exercising its discretion to grant or deny a continuance, the trial court is to consider all relevant factors.” *State v. Heredia-Juarez*, 119 Wn. App. 150, 155, 79 P.3d 987 (2003). Unavailability of a witness is a valid reason for a continuance where there is a valid reason for unavailability and reasonable reason to believe the witness will become available within a reasonable time and no substantial prejudice to the defendant. *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988) (citing *State v. Henderson*, 26 Wn. App. 187, 191–92, 611 P.2d 1365 (1980); *State v. Lee*, 13 Wn. App. 900, 904, 538 P.2d 538, *review denied*, 85 Wn.2d 1019 (1975); former CrR 3.2(h)(2)); *see also State v. Nguyen*, 68 Wn. App. 906, 914, 847 P.2d 936 (1993) (citing *State v. Day*, 51 Wn. App. at 549).

*State v. Henderson*, is instructive in this case. 26 Wn. App. 187, 191, 611 P.2d 1365 (1980). In *Henderson*, a pretrial hearing was set for Oct. 31, 1978, subpoenas were issued on Oct. 6, 26 days before the trial set for Nov. 1, 1978. *Id.* at 188. On Oct. 31, the day before trial, the Franklin County prosecutor informed the court that he was informed the day before that the sheriff’s office was not able to locate two key witnesses and that diligent efforts were made to do so and that recent information led the prosecutor to believe a witness was located in Yakima County. *Id.* 188–89. The prosecutor requested a continuance of 30 days and the court granted a 7 day continuance. *Id.* at 189. A second

continuance was granted setting trial out to Nov. 27 after the prosecutor demonstrated diligent efforts to locate the witness Mr. Noble. *Id.*

The *Henderson* Court upheld the trial court's decision to continue the trial and pointed out that subpoenas had promptly been issued for the witnesses and that there was a valid reason for witness Mr. Noble's unavailability as he was not located and that diligent efforts were made to find him. *Id.* at 190–91. The *Henderson* Court, pointed out that “[a]ppellate courts have repeatedly required trial courts to give legitimate reasons for extending the time of the trial limitation to CrR 3.3[.]” and “[w]hen trial courts comply with this mandate by exercising discretion and giving the reasons for their actions, appellate courts should give those reasons credence.” *Henderson*, 26 Wn. App. at 191 (citing *State v. Williams*, 87 Wn.2d 916, 920, 557 P.2d 1311 (1976); *State v. Jack*, 87 Wn.2d 467, 469, 553 P.2d 1347 (1976); *State v. Espeland*, 13 Wn. App. 849, 537 P.2d 1041 (1975)).

Here, the State had issued subpoenas about 23 days before the trial. This was more than sufficient time for the Clallam County Sheriff's Office (CCSO) to personally serve Matthews at her last known address in Forks. However, Matthews was not there. After the prosecutor learned on Oct. 11 that CCSO was not able to serve Matthews, the prosecutor continued efforts to find her. RP 97. This was accomplished a few days before Oct.

18 when Matthews was located in Jerome, Idaho, near the Nevada border.  
RP 51, 77.

Therefore, the State was not able to secure Matthews availability because she could not be served with her subpoena because she could not be located at her last known address. In light of the State's good faith effort to serve Matthews well in advance of trial, her absence from the State is a valid reason for unavailability.

Additionally, because the State continued its efforts and did locate Matthews in Idaho, there was reasonable reason to believe the State would continue its efforts and contact Matthews and have her served. Thus it was reasonable to believe that Matthews would become available within a reasonable amount of time.

Furthermore, in compliance with CrR 3.3(f)(2), the State moved to continue the trial on Oct. 18, before the expiration of speedy trial on Oct. 25, 2018. The court continued the trial only about one month out to Nov. 26, 2018. The court stated on the record that it would grant the continuance because the State had a basis to believe that Matthews was a material witness for the State. RP 79. Both parties had a stated interest in speaking to Matthews before trial. RP 78.

Additionally, the trial court pointed out that the State had tried to personally serve Mathews but found out a week prior to the hearing that

Mathews had relocated to Idaho. RP 79. The court pointed out that there had been no prior continuances and that Cook was not in custody and would not be otherwise prejudiced by a continuance. The court balanced the prejudice to all parties and did not find prejudice to Cook. RP 79–80.

It should be noted that the court stated that if Cook was in custody, it would have denied the continuance. RP 79. The trial court also stated that it would have granted a shorter continuance but for the unavailability of Ms. Unger. “Scheduling conflicts may be considered in granting continuances.” *Flinn*, 154 Wn.2d at 200 (citing *State v. Heredia–Juarez*, 119 Wn. App. at 153–55). Nov. 26, 2018, was the first reasonable date available for trial.

The court stated its reasons for the continuance on the record and discussed all relevant factors and found the defendant would not be prejudiced by a continuance. Thus, the court complied with CrR 3.3(f)(2) and made a measured decision to continue the trial only for a reasonable period of time. Finally, Matthew’s relocation to Idaho prevented the State from serving her with a subpoena and was thus a valid reason for Matthew’s unavailability. In light of the State’s efforts to serve Matthews and continued effort to track her down out-of-state, it was reasonable to believe she would be made available in a reasonable amount of time. *See*

*Day*, 51 Wn. App. at 549. Therefore, the trial court did not abuse of discretion by continuing the trial.

Cook argues that the State did not prove it was diligent by ensuring that subpoenas were personally served before requesting a continuance. Br. of Appellant at 28. Cook cites to *State v. Roman* to support his position that the State has a duty of diligence. 94 Wn. App. 211, 217, 972 P.2d 511 (1999). *Roman* is not applicable because the *Roman* Court's analysis had nothing to do with a court's discretion to continue a trial under CrR 3.3(f)(2). *Id.* 215–16. Rather, *Roman* was about the State's duty of diligence to bring a defendant facing charges before the court for his or her first appearance to be arraigned. *Id.* 215–16. Further, the *Roman* Court pointed out that there is no duty of diligence if the defendant was at large in another state. *Id.* at 217 (citing *State v. Hudson*, 130 Wn.2d 48, 921 P.2d 538 (1996); *State v. Stewart*, 130 Wn.2d 351, 922 P.2d 1356 (1996)).

Here, the securing of Cook's presence for his preliminary hearing is not at issue and the State's witness, Matthews, was at large in another state. Therefore, *Roman* is not applicable.

Moreover, requiring due diligence by properly serving a witness before a continuance may be granted is not the applicable rule. *See State v. Bible*, 77 Wn. App. 470, 473, 892 P.2d 116 (1995) (stating that the holding in *State v. Adamski*, 111 Wn.2d 574, 761 P.2d 621 (1988) was not

applicable because it was based upon a Juvenile Criminal Rule requiring due diligence before a continuance could be granted where the adult criminal rule does not).

In *Bible*, the State was not able to find its witness believed to be out-of-state. 77 Wn. App. at 471. Rather than seek a continuance, the State moved for dismissal without prejudice 14 days before trial to allow for refiling. *Id.* *Bible* argued that the court erred in granting the State's motion because the State can't move to dismiss a case to avoid the application of the speedy trial rule. *Id.* at 471. *Bible*, citing *Adamski*, also argued that the State would not have been able to get a continuance because it had not subpoenaed the State's witnesses. *Id.* at 473.

The *Bible* Court held that the unavailability of a witness was sufficient reason aside from avoiding the speedy trial rule to allow for dismissal without prejudice. Furthermore, *Bible* Court pointed out that, “[former] CrR 3.3(h)(2), which describes the circumstances under which a continuance may be granted in an adult proceeding, only requires findings that a continuance is necessary for the administration of justice and will not substantially prejudice the defense.” *Bible*, 77 Wn. App. at 473; *But see State v. Nguyen*, 68 Wn. App. 906, 915, 847 P.2d 936 (1993) (quoting *Adamski*, 112 Wn.2d at 579) (noting that *Adamski* requires the State make

“‘timely use of the legal mechanisms available to compel the witness' presence in court’” to obtain a continuance under rule 3.3(h)(2))).

Therefore, Cook’s reliance upon *Adamski* is misplaced as well as *Duggins* for the same reasons. *See State v. Duggins*, 121 Wn.2d 523, 525, 852 P.2d 294 (1993) (citing to the *Adamski* Court’s interpretation of JuCR 7.8).

Further, Cook’s argument that the court erroneously found that the State was not tardy in securing witnesses is not supported by the record. Br. of Appellant at 26. Rather, the trial court found that the State was not tardy in bringing its motion to continue considering that it just found out a week prior that Matthews was not in Forks. RP 77–78. It should be pointed out that the prosecutor had only found out a few days prior to the motion to continue that Matthews had been located in Idaho. The State had issued its subpoenas about 23 days before trial and was diligent in finding out where Matthews was residing. This was plenty of time to serve Matthews at her last known address.

The unavailability of Matthews because she moved to a different State and could not be served at her last known address was a valid reason for her unavailability for trial on Oct. 22. Matthews was a material witness for the State which justified the continuance in the administration of

justice. The trial court stated its reasons for the continuance on record and found that Cook was not prejudiced by the one month delay.

Therefore, the court complied with CrR 3.3(f)(2) and did not abuse its discretion by continuing the trial to Nov. 26, 2018. This Court should affirm the conviction.

**B. THE COURT PROPERLY ADMITTED  
DETECTIVE GRALL'S EXPERT TESTIMONY  
BECAUSE HE POSSESSED SPECIALIZED  
KNOWLEDGE AND HIS TESTIMONY WAS  
HELPFUL TO THE JURY.**

Relevant Testimony

Cook testified during cross examination as follows:

Q How much do you use? You said you've been a heroin addict for about a couple of years, how much do you use?

A I was down to a couple grams a day.

Q So, two grams a day?

A Roughly, some days more, some days less.

Q And, the scales that were on -- these scales were found on the coffee table by what you call your personal use, supply, right?

A Yeah, on the coffee table.

Q Okay, so you're saying that you weigh out what you take?

A Yeah and then check weights, what I buy and make sure they were right. One time somebody sold me so much and it was not even half of what they said it was.

Q Okay. Would you say based upon your own experience as an addict, that someone who is a seller of heroin is not ever gonna be a user as well?

A Um, let me see. One, the person I dealt with before uses and a couple of them didn't, so it goes both ways.

Q Yeah, so someone could be a heroin addict themselves and still sell to others?

A Yeah, it'd be a lot harder, but.

Q But, it happens?

A Yeah, there was one dealer.

Q So, you said that China White is what you were buying recently, more recently your supplier had changed?

A Yeah, at the last there.

Q Okay, but you didn't think it was as good quality heroin as black tar?

A It was harder to smoke.

Q Okay, so you personally would use both the China White and the black tar?

A Yeah, I had a little bit of both.

Q Okay, so you had no recollection of telling Detective Pickrell that you used to sell large amounts of heroin, you just don't sell as much anymore?

A No.

RP 387-88.

On State's rebuttal, the prosecutor asked Det. Grall, "Okay, how often do drug users and addicts weigh and measure out their own dose prior to consumption?" RP 392. Defense objected stating, "It's a comment on the evidence. It's giving an opinion as to the credibility of this witness. This is not a scientific test and again, it's a foundational objection, it's a comment on the evidence, it's going into the purview of the jury." RP 392-93. The court overruled the objection. RP 393.

Grall testified on rebuttal:

In my experience, I have not interviewed anyone that has stated that as an addict or a user, none of those conversations in my personal experience has anyone told me that they use digital scales to weigh out the dosage of controlled substances that they consume.

RP 393.

The prosecutor continued:

Q Based upon your training and experience, what are digital scales used for in connection with controlled substances?

A In my experience these digital scales are to weigh out quantities of controlled substances for distribution.

RP 393.

On cross examination of Grall by the defense, Grall testified that his experience was based on routine questioning of addicts and people at all levels of illicit drug culture in order to stay abreast of trends. RP 395–96.

- 1. The court properly qualified Detective Grall to testify as an expert on illicit drug culture due to his specialized knowledge, training, and experience.**

Cook argues that the court abused its discretion in allowing Detective Grall to testify as an expert on grounds that his testimony would be helpful to a jury because Detective Grall’s testimony did not encompass “the unique level of expertise envisioned by ER 702 that is

necessary in areas of technical or scientific expertise.” Br. of Appellant at 36.

“The decision whether to admit expert testimony is within the discretion of the trial court . . . as is the determination of whether a witness is qualified to testify as an expert.” *State v. Rodriguez*, 163 Wn. App. 215, 231–32, 259 P.3d 1145 (2011) (citing *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992); *State v. Quigg*, 72 Wn. App. 828, 837, 866 P.2d 655 (1994)).

“Practical experience is sufficient to qualify a witness as an expert and the practical knowledge need not be acquired through personal experience.” *Rodriguez*, 163 Wn. App. at 232 (citing *State v. Yates*, 161 Wn.2d 714, 765, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922, 128 S.Ct. 2964, 171 L.Ed.2d 893 (2008)).

The trial court’s admission of expert testimony is reviewed for abuse of discretion. *Id.* at 232 (citing *Yates*, 161 Wn.2d at 762). “If the reasons for admitting or excluding the opinion evidence are ‘fairly debatable,’ the trial court’s exercise of discretion will not be reversed on appeal.” *Id.* (quoting *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979)).

ER 702 does not require that a witness have some sort of technical or scientific expertise to be deemed an expert.

If scientific, technical, or *other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702 (emphasis added).

*State v. Campbell* is one such example where a trial court qualified law enforcement officers as experts based upon specialized knowledge which was deemed helpful to a jury. *See* 78 Wn. App. 813, 823 901 P.2d 1050 (1995). Campbell argued on appeal that the trial court erred in allowing three officers to testify as experts on gang culture because they “were not ‘from the same neighborhood, city or county’ as the gangs about which they testified.” *Id.* at 823.

The *Campbell* Court upheld the admission of three officers’ expert testimony on gang culture stating “[t]he expert testimony on gang terminology and gang symbols assisted the trier of fact understand the State’s theory of the case and was relevant to show Campbell’s premeditation, intent, and motive.” *Id.*

Similarly, other jurisdictions have admitted law enforcement officers to testify as experts on the subject of drug culture. *See, e.g., United States v. Dunn*, 846 F.2d 761, 762 (D.C. Cir. 1988) (holding officer’s expert testimony that quantities of drugs, drug packaging material, drug paraphernalia and weapons located in town house indicated

retail drug operation did not violate Rule 704(b)); *U.S. v. Foster*, 939 F.2d 445, 454 (7th Cir. 1991) (finding detective qualified as an expert on drug culture and his testimony was helpful to a jury on the issue of whether Foster had knowledge he was carrying narcotics).

Other jurisdictions have also opined that it is *error* to allow *lay* opinion testimony on issues relating to drug culture that fall in the realm of expert testimony, but that it may be harmless where the record demonstrates a foundation for expert testimony. *See, e.g., State v. Hyman*, 451 N.J. Super. Ct. 429, 459, 168 A.3d 1194 (App. Div. 2017) (finding error in allowing detective to testify as a layperson but finding detective’s testimony showed “that he possessed sufficient education, training, and experience to qualify as an expert in the field of drug trafficking and street slang.”); *United States v. Griffith*, 118 F.3d 318, 322–23 (5th Cir. 1997) (sufficient evidence to find that DEA agent qualified as an expert although he testified as a lay person regarding wiretapped conversations involving drug dealers).

Here also, the court allowed Det. Grall to testify as an expert on illicit drug culture because Grall’s extensive 19 years’ experience and training was sufficient to establish that he had specialized knowledge above and beyond a lay person on the subject of illicit drug culture. The trial court pointed this out as a basis for its decision overruling the defense

objection. RP 354. The court stated “I think there is some specialized knowledge associated with the world of the drug culture that might assist the trier of the facts, so I’m going to allow this witness to testify, as he has previously testified I believe in Clallam County Superior Court as an expert.” RP 354.

The weight of authority allows for Det. Grall to testify as an expert on illicit drug culture in this case despite the issue not being of a technical or scientific nature. Therefore, the trial court did not abuse its discretion by allowing Grall to testify as an expert. RP 354.

**2. Detective Grall’s testimony on rebuttal was properly admitted because it was helpful to the jury to determine Cook’s intent and it was based on Grall’s training and extensive experience rather than his personal opinion of Cook’s guilt or innocence.**

The trial court has considerable discretion when admitting or excluding evidence. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Witness opinion testimony is typically limited because it invades the jury's exclusive province. *Id.* at 759. The trial court's admission or rejection of testimony if reviewed for an abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).

Courts look at numerous factors to determine whether witness statements are impermissible opinion testimony, including the “type of witness involved, the specific nature of the testimony, the nature of the

charges, the type of defense, and the other evidence before the trier of fact.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). “[T]estimony that is not a direct comment on the defendant’s guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.” *Id.* at 578; *see also State v. McPherson*, 111 Wn. App. 747, 763, 46 P.3d 284 (2002) (citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (“It is well settled that no witness, expert or lay, may utter an opinion as to the guilt or innocence of a criminal defendant, whether the opinion is a direct statement or an inference.”)).

Cook argues that Grall’s testimony regarding the purpose of digital scales in the illicit drug world prejudiced his right to a fair trial because the jury may give undue weight to the expert’s aura of special reliability thereby giving his factual testimony undue weight. Br. of Appellant at 38. Additionally, the jury could have the perception that the expert was privy to facts not in evidence and the mixture of fact and expert testimony could come close to an expert commenting on the ultimate issue in a criminal matter. *Id.* at 38–39.

A similar argument was addressed in *United States v. Foster*, where the defendant argued that Detective Kinsella’s expert’s opinion regarding the tools of the trade of narcotics trafficking offered to help a

jury determine whether Foster knew what he was carrying was “impermissible merely because the jury could use it to infer that Foster had the requisite mental state.” 939 F.2d 445, 454 (7th Cir. 1991).

In *Foster*, Det. Kinsella’s expert testimony about the various tools of the trade of narcotics trafficking was deemed “helpful to the jury in determining whether Foster knew what he was carrying.” *Id.* at 452. The *Foster* Court, citing to *United States v. Dunn*, addressed Foster’s argument as follows:

As the D.C. Circuit has persuasively noted, however, acceptance of Foster's logic “would swallow the permissive aspects of Rule 704.”<sup>1</sup> . . .

All expert evidence assists jurors in analyzing and drawing inferences from other evidence; in so doing it may support inferences as to ultimate intent.... Suppose, for example, that an expert testifies at a homicide trial that the victim died of a poison administered daily in small doses over a long period. The evidence goes not only to what happened, but suggests extreme premeditation on the part of whomever doled out the poison. It is only as to the last step in the inferential process—a conclusion as to the defendant's actual mental state—that Rule 704(b) commands the expert to be silent.

*U.S. v. Foster*, 939 F.2d at 454 (quoting *United States v. Dunn*, 846 F.2d 761, 762 (D.C.Cir.1988)).

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<sup>1</sup> “In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.” FRE Rule 704.

“Kinsella's testimony thus fell within permissible bounds. It merely assisted the jury in coming to a conclusion as to Foster's mental state; it did not make that conclusion for them.” *Id.*

Similarly, Det. Grall's testimony on rebuttal served as evidence which was helpful to a jury by offering an explanation for the purpose of digital scales as an alternative to Cook's explanation that he only possessed it to weight heroin before personally using or to make sure he received what he paid for. *See Foster*, 939 F.2d at 452 (“It may be innocent behavior to purchase a one-way train ticket, for cash, on the same day as departure from a source city for illegal drugs, under a false name, and carrying a beeper, but it is a fair use of expert testimony to offer another explanation for such behavior. The same rationale holds true for the remainder of Kinsella's testimony.”)

Det. Grall did not make the “final step” by offering any opinion, direct or by inference, about whether Cook intended to distribute the heroin which was found in his residence. *See United States v. Dunn*, 846 F.2d 761, 762 (D.C.Cir.1988). That was left to the jury. Rather, Grall simply pointed out that, based on his training and experience, digital scales were a tool used for weighing out drugs for distribution. Additionally, through his numerous interviews of drug addicts and dealers and though he couldn't speak for other detectives, Grall had never heard

of drug addicts only using the scales to weigh drugs for their own use or to make sure they got the amount they paid for. RP 397. The jury was left to consider the witness's testimony, weigh their credibility in light of the other evidence, and determine whether the State proved Cook possessed the heroin with intent to distribute.

Grall's testimony was not a direct comment, opinion, or inference of Cook's guilt or innocence or his veracity and it was helpful to the jury and therefore not improper opinion testimony. *Heatley*, 70 Wn. App. at 578. Therefore, the court did not err by allowing it and this Court should affirm the conviction.

**C. THE PROSECUTOR'S ARGUMENTS WERE REASONABLE INFERENCES BASED ON THE EVIDENCE AND NOT IMPROPER OR PREJUDICIAL.**

"Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986)).

"Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *Russell*, 125

Wn.2d at 85 (citing *Hoffman*, 116 Wn.2d at 93; *State v. York*, 50 Wn. App. 446, 458, 749 P.2d 683 (1987), *review denied*, 110 Wn.2d 1009 (1988)).

“Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *Russell*, 125 Wn.2d at 85–86 (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990); *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986)).

The State is entitled to argue its theory of the case and argue the evidence against the defense theory. “The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Anderson*, 153 Wn. App. 417, 427–28, 220 P.3d 1273 (2009) (citing *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006)). “The State is entitled to comment upon the quality and quantity of evidence the defense presents.” *Anderson*, 153 Wn. App. at 427–28.

“It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory.” *Russell*, 125 Wn.2d at 87 (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990); *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014, 797 P.2d 514 (1990)). “Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense

counsel.” *Russell*, 125 Wn.2d at 87 *Id.* (citing *United States v. Hiatt*, 581 F.2d 1199, 1204 (5th Cir.1978)).

In the instant case, defense counsel did not object to any of the prosecutor’s comments which Cook alleges are misconduct. Therefore, Cook waived the alleged errors unless he establishes the prosecutor’s arguments were “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Id.* at 86 (citing *Hoffman*, 116 Wn.2d at 93; *State v. York*, 50 Wn. App. 446, 458–59, 749 P.2d 683 (1987)).

#### Prosecutor’s Closing Argument

The prosecutor argued that Cook admitted that Det. Pickrell’s testimony was truthful on many details. RP 484. The prosecutor argued that Cook admitted the truth of Pickrell’s testimony that he and Cook discussed logging equipment, an upcoming auction, that he advised Cook of his constitutional rights, that Cook told him he understood his rights, and that they discussed his drug activity. RP 485. Cook confirmed Pickrell’s testimony that Cook lives alone in the main house, he recently changed his drug supplier and now obtains China White rather than black tar heroin, that Cook said that his opinion was that China White was poor quality and that he was spending about \$600 for half an ounce of heroin. RP 485. Cook also confirmed Pickrell’s testimony in that Cook admitted

he knows his son, Cook Jr., sells heroin and that Jr. lives in the motor home in Cook Sr.'s front yard. RP 485.

The prosecutor then pointed out that after Cook admitted that all this testimony from Pickrell was correct, Cook denied just two things. Cook denied that he ever told Pickrell that he used to sell large amounts of heroin, but that he just doesn't sell as much anymore. RP 486. Cook also denied that he told Pickrell he knew Cook Jr. was selling the heroin that Cook Sr. is giving Cook Jr. RP 486. The prosecutor argued that of all the details that Cook confirmed about Pickrell's testimony as accurate, he only denied those two incriminating statements. RP 486. The prosecutor pointed out that because Cook agreed that Pickrell's testimony was mostly accurate except for those two things, the jury should consider that when weighing Pickrell's credibility. RP 486. The prosecutor then referred to Cook's testimony to compare. RP 486.

The prosecutor argued that Cook testified that when OPNET arrived they banged on his door and two officers forcibly yanked him out of his house. RP 486–87, *see* RP 378, 387. Yet, Cook hung around and engaged in chit chat with Det. Pickrell after such rough handling. RP 487; *see* RP 255–56. The prosecutor argued that Cook's story of forcible intrusion was contradicted by Det. Grall's testimony that OPNET politely knocked on Cook's door and told him why they were there and told Cook

to stay away from the motor home but he was welcome to stay in his house. RP 487; *see* RP 357, 378.

The prosecutor also argued that the physical evidence also did not support Cook's credibility. RP 487. Cook admitted to having two digital scales on his coffee table, one with brown residue on it. RP 487. Cook claimed he only used it to weigh out his own usage. RP 487. However Det. Grall testified in his 19 years' experience, drug addicts do not use digital scales to measure out their own doses and the scales are associated with measuring controlled substances for distribution. RP 488. Cook admitted himself that he was a heroin addict for over two years. RP 488; *see also* RP 377.

Additionally, the prosecutor argued the evidence that Cook had unused clean baggies for packaging. RP 499. The prosecutor argued that Cook's testimony that he did not know there was over \$2000 of heroin in his closet next to over \$2,350 of his cash did not make sense. RP 489. The prosecutor argued that it did not make sense that an admitted drug addict such as Cook would flush \$2000 worth of his own heroin down the toilet as Cook said he would have done had he known the heroin was in his closet. RP 488.

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**1. The prosecutor argued inferences from the evidence and did not express a personal opinion on any witness's credibility and therefore did not vouch for a witness's credibility.**

“It is improper for a prosecutor to personally vouch for a witness's credibility.” *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553, 557, (2009) (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996)).

“ ‘Prosecutors may, however, argue an inference from the evidence’ and this court will not find prejudicial error ‘unless it is ‘clear and unmistakable’ that counsel is expressing a personal opinion.’ ” *Id.* at 883 (quoting *Brett*, 126 Wn.2d at 175 (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985))).

Cook argues that the prosecutor's argument pitting the credibility of Det. Pickrell against the credibility of Cook bolstered the credibility of Det. Pickrell. Br. of Appellant at 40. Cook also suggests that the prosecutor took the issue of witness credibility from the province of the jury by improperly vouching for Det. Pickrell's credibility. Br. of Appellant at 41. These arguments fail because rather than providing her own opinion on the credibility of the witnesses, the record shows that the prosecutor argued that Pickrell's credibility was supported by the evidence and Cook's was not. *See* RP 500.

In *State v. Anderson*, the defendant argued that the “prosecutor's comments characterizing his testimony as ‘*made up on the fly*,’ ‘*ridiculous*,’ and ‘*utterly and completely preposterous*,’ constituted ‘serious’ and ‘prejudicial’ conduct” and also claimed as improper “the prosecutor's statement that the State's witnesses were ‘*just telling the truth*.’” 153 Wn. App. 417, 430, 220 P.3d 1273 (2009) (emphasis added).

The *Anderson* Court looked at the statements in the context of the argument and determined that, “It is clear that the prosecutor in this case did not express personal opinions about either Anderson's guilt or the witnesses' credibility. Viewed in context, the prosecutor's statements were intended to clarify the law and argue inferences from the evidence. They were not, as Anderson argues, statements conveying personal opinions about the case.” *Id.* at 431.

Here, the prosecutor outlined evidence which supported Pickrell’s credibility. This included Cook’s own admissions corroborating and confirming all of Pickrell’s testimony except for two incriminating statements that he used to sell large amounts but not as much anymore. The prosecutor also pointed out that the clear plastic baggies corroborate Pickrell’s testimony that Cook told him he delivers to his son Cook Jr. who then sells the heroin and that OPNET had two controlled buys from Cook Jr. RP 500.

The prosecutor's arguments are clearly permissible as they are based on the evidence. None of prosecutor's arguments clearly state her personal belief on Cook's credibility. The prosecutor's statements in this case do not come close to the proper statements pointed out in *Anderson* attacking the defendant's testimony as " 'made up on the fly,' 'ridiculous,' and 'utterly and completely preposterous,'" or "that the State's witnesses were 'just telling the truth.'" *Id.* at 430.

The prosecutor's arguments do not constitute a clear and unmistakable expression of person opinion. *Jackson*, 150 Wn. App. at 883. Therefore, the prosecutor's arguments were not improper.

**2. The prosecutor's argument did not shift or misstate the burden of proof because the prosecutor did not suggest the jury must find the State's witness lied in order to acquit.**

Detective Pickrell testified as follows:

Q Okay and what did he tell you, what were some of the things he told you about his heroin activity?

A He told me that he used to sell on a larger scale and he didn't sell as much anymore.

RP 256.

Q Okay and half an ounce, okay. Did he mention his son at all to you?

A He mentioned that he helps his son out and that he was, his son was selling heroin who was provided by him.

Q That he what?

A He provided the heroin that his son was selling.

Q Whose he?

A Senior is providing the heroin that Junior is selling.

RP 258.

On direct testimony Cook testified as follows:

Q Okay. Do you recall telling Detective Pickrell that you knew that your son, Cook Junior, sells heroin?

A No, I don't remember telling them. I'm pretty sure I told them I was pretty sure he did.

Q Okay, so you don't recall telling Detective Pickrell that you knew the heroin Junior was selling, was the heroin you were giving him?

A No, I did not tell him that.

Q And you don't recall telling him about how you used to sell large amounts of heroin, but just not as much anymore, do you recall telling him that?

A No.

RP 386.

Cook points to the following argument by the prosecutor during closing as shifting the burden of proof:

Because basically the meaning of the defense case that Detective Pickrell was making up those two statements, he either hallucinated it because he's crazy or he made it up and that's what you need to decide when you go into the jury room, because *if you believe* Detective Pickrell and find him credible, the defendant is guilty.

RP 486.

Statements that a jury must find the State's witness lied in order to acquit are improper because it misstates the burden of proof that the jury

*must* acquit unless it had an abiding belief in the truth of the charge. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (emphasis added).

Here, the prosecutor's argument was not a statement to the jury that they must find Pickrell lied in order to acquit. The prosecutor never argued or implied that the jury could only acquit if it found that Pickrell was lying or mistaken. Rather, in the context of the prosecutor's whole argument, the statement is argument that if Pickrell is credible then the defendant's statements combined with the large amount of heroin Cook admitted to possessing (unknowingly), scales, and baggies, and the large amount of cash found by the heroin amounted to evidence supporting a guilty verdict.

The prosecutor's argument is similar to the statement at issue in *State v. Thorgerson*, whereby Thorgerson argued that the prosecuting attorney committed misconduct by "informing the jury that there was no credible basis for doubting what D.T. said, and 'if you believe her, you must find him guilty unless there is a reason to doubt her based on the evidence in the case.'" 172 Wn.2d 438, 454, 258 P.3d 43 (2011).

The *Thorgerson* Court held that this statement in context with the rest of the prosecutor's argument was not misconduct because "the prosecutor did not tell the jury there was a presumption that D.T. was

telling the truth, but rather argued that the jurors should believe her testimony and if they did, then they should find Thorgerson guilty.” *Id.* at 454. The *Thorgerson* Court held this was not misconduct, “particularly given the latitude that a prosecutor has in arguing from the evidence during closing argument.” *Id.*

Here, as in *Thorgerson*, the prosecutor did not tell the jury that the truth of Pickrell’s testimony was presumed such that they would have to find Pickrell lied in order to acquit. Rather, the prosecutor argued that the jurors should believe Pickrell based on the evidence *and if* they did, they should find Cook guilty: “what you need to decide when you go into the jury room, because *if* you believe Detective Pickrell and find him credible, the defendant is guilty.” RP 486.

Here, the prosecutor made no such statements that the jury must find Pickrell lied in order to acquit. Moreover, the jury was instructed on the State’s burden of proof and that they are the sole judges of the credibility of the witnesses and that the lawyer’s remarks are not evidence. CP 24 27; *See Anderson*, 153 Wn. App. at 431. Jurors are presumed to have followed the court’s instructions. *Id.* at 428 (citing *State v. Hopson*, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989)).

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### Conclusion

The prosecutor did not express a personal opinion on the credibility of any witness and did not misstate the burden of proof. Thus Cook did not establish that the prosecutor's argument was ill-intentioned and flagrant such that it could not be cured with an instruction to the jury. Therefore, this Court should hold that there was no prosecutorial misconduct that prejudiced the defendant's right to a fair trial. This Court should affirm.

**D. THERE WAS NO CUMULATIVE ERROR BECAUSE THE COURT PROPERLY GRANTED A TRIAL CONTINUANCE AND PROPERLY QUALIFIED DETECTIVE GRALL AS AN EXPERT AND COOK WAIVED HIS CLAIM OF PROSECUTORIAL MISCONDUCT.**

“The application of [the cumulative error] doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citations omitted); *see also State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010) (citing *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Hodges*, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003)) (“Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors *during trial* effectively denied the defendant her right to a fair trial, even if each error

standing alone would be harmless.”) (emphasis added). “The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome.” *Venegas*, 155 Wn. App. at 520.

Here, the alleged errors combined were few and there is no evidence they had any effect on the outcome of the trial. First, the trial continuance to Nov. 26, 2018 cannot be part of a cumulative error analysis because it was not a trial error and it had no impact on the result of the outcome of the trial.

Second, the court’s decision to qualify Detective Grall to testify about drug culture as an expert was not unfairly prejudicial because his testimony was relevant to the State’s case and Grall did not provide his opinion as to Cook’s guilt or innocence. Det. Grall only testified, based upon his training and experience, as to the purpose that particular drug paraphernalia are possessed. This is permissible.

Finally, there has been no showing that the prosecutor’s argument was flagrant or ill-intentioned so any alleged misconduct was waived. Defense counsel objected throughout trial to many things and vigorously argued as to those objections. However, defense counsel never objected to the prosecutor’s arguments.

Therefore, the cumulative error doctrine does not apply to this case and this Court should affirm the conviction.

#### IV. CONCLUSION

The trial court properly exercised its discretion in compliance with CrR 3.3(f)(2) when it granted a continuance of the trial to Nov. 26, 2018. The trial court also properly exercised its discretion by qualifying Det. Grall as an expert and allowing him to testify about drug culture on the relevant issue of the purpose of digital scales in the context of illicit drug culture.

Finally, the defendant waived his claim of prosecutorial misconduct because he cannot establish that the prosecutor's arguments were "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Russell*, 125 Wn.2d at 87 *Id.* at 86 (citing *Hoffman*, 116 Wn.2d at 93; *State v. York*, 50 Wn. App. 446, 458–59, 749 P.2d 683 (1987)).

Therefore, this Court should affirm the conviction.

Respectfully submitted this 7th day of February, 2020.

MARK B. NICHOLS  
Prosecuting Attorney



JESSE ESPINOZA  
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**CERTIFICATE OF DELIVERY**

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to David L. Donnan on February 7, 2020.

MARK B. NICHOLS, Prosecutor

  
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Jesse Espinoza

**CLALLAM COUNTY DEPUTY PROSECUTING ATTORN**

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