

FILED
AUG 05 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

28677-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY R. COVERT, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

- (1) The trial court erred in denying defendant's CrR 3.6 and CrR 3.5 motions to suppress statements and evidence.
- (2) The trial court erred in instructing the jury regarding the second degree assault of Shane Hagedorn.
- (3) The trial court erred in instructing the jury regarding the second degree assault of Joseph Castagna.
- (4) The trial court erred in admitting hearsay evidence that the defendant was the participant who fired the handgun during the incident.

II.

ISSUES PRESENTED

- (1) Did the trial court properly exercise its discretion in denying defendant's motion to suppress evidence?
- (2) Did the trial court properly instruct the jury regarding the charges of second degree assault?
- (3) Did the trial court properly exercise its discretion in admitting testimony regarding statements made during investigative interviews?

III.

STATEMENT OF THE CASE

The Respondent accepts the Appellant's statement of the case with the following additions. Defendant/appellant Anthony Covert was charged in the Spokane County Superior Court with two counts of first degree assault, possession of a stolen firearm, and second degree unlawful possession of a firearm. CP 1-2. Before trial, the information was amended to charge the defendant with one count of attempted first degree murder, two counts of first degree assault, two counts of second degree assault, possession of a stolen firearm, and second degree unlawful possession of a firearm. CP 169-170. The charges arose out of a shooting incident on November 7, 2008, near the West Wynn Motel in Spokane, Washington as described in the Summary of Facts filed in support of the original Information. CP 3-6.

On October 8, 2008, the trial court conducted CrR 3.6 and CrR 3.5 suppression hearings on motions by defendant. Report of Proceedings ("RP") 1 *et seq.* Law enforcement officers testified at the hearings. Thereafter the matter was tried to a jury with the Honorable Tari S. Eitzen presiding October 14-22, 2008. RP 208 *et seq.* The jury acquitted the defendant of the charge of the first degree assault on Joseph Castagna (count III). CP 222. The jury found the defendant guilty of: attempted

first degree murder; one count of first degree assault for the shooting at the motel; two counts of second degree assault for the confrontation at the Rosauers lot; possession of a stolen firearm, and unlawful possession of a firearm. The jury also returned special verdicts finding defendant had been armed with a firearm during the commission of the attempted murder, first degree assault, and two second degree assault charges. CP 219, 221, 225, and 227. Defendant was sentenced on the verdicts. Defendant filed this appeal.

IV.

ARGUMENT

A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS.

Defendant claims that the trial court committed error when it denied his motions to suppress evidence brought pursuant to Criminal Rule of Court ("CrR") 3.6 and 3.5. Generally, a trial court's denial of a CrR 3.6 suppression is reviewed to determine whether substantial evidence supports the challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law. *State v. Mendez*,

137 Wn.2d 208, 214, 970 P.2d 722 (1999). A trial court's conclusions of law are reviewed *de novo*. *Id.*, at 214.

Here, defendant does not challenge the trial court's factual findings with regard to the CrR 3.6 motion. "We accept unchallenged findings of fact following a CrR 3.6 suppression hearing as verities on appeal and will not review them. *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994). The State submits that the trial court's findings are verities. Hence, this court is tasked with reviewing the trial court's legal conclusions using a *de novo* standard.

Defendant contends that the investigatory stop leading to his arrest was unlawful. Typically, warrantless searches and seizures are unreasonable as violations of the Fourth Amendment and article I, § 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002). However, there are some exceptions to the general rule. Specifically, the exception promulgated by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) and adopted in *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445(1986). "[A]n officer may briefly stop an individual based upon reasonable suspicion of criminal activity if necessary to maintain the status quo while obtaining more information." *Duncan, supra* at 172, quoting *State v. Miller*, 91 Wn. App 181, 184, 955 P.2d 810, 961 P.2d 973

(1998). “To justify a seizure on less than probable cause, Terry requires a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime. Terry, 392 U.S. at 21, 88 S.Ct. 1868.” *Duncan, supra* at 172.

At the CrR 3.6 hearing, law enforcement officers presented evidence that they responded to the West Wynn Motel, W. 2701 Sunset Blvd., Spokane, Washington, regarding a report of multiple gunshots, screaming, and a badly bleeding victim who was not breathing on November 7, 2008 at 11:46 p.m. RP 13-14. Responding officers Lyons and McVay arrived at 11:51 p.m. contacted witnesses who advised that a man had been shot and was in room #231. RP 17. The officers followed a significant blood trail from the parking lot, upstairs to room #231. RP 17-21. The officers found a man on the floor in a pool of blood and bleeding from multiple gunshot wounds. The man occasionally stopped breathing and his eyes would roll back in his head. RP 21-22. The man was identified as Shane Hagedorn. RP 21.

Around 12:00 a.m., K-9 Officer Kendall arrived on scene with his K-9 partner, Stryder. RP 32, 46. Witnesses advised that two suspects had fled the shooting scene eastbound on the south side of Sunset Blvd. RP 34. K-9 Stryder picked up a scent at the last known location of the suspects and began tracking that direction along the sidewalk toward the bridge.

RP 33-34. Around 12:04 a.m., the tracking team was about 20 yards from the bridge when the defendant came out from a hiding spot. RP 34, 46. The defendant was crying. RP 34, 36. The defendant was contacted, secured with handcuffs and left with Deputy Rohde while the K-9 Stryder continued tracking the scent. RP 47-48. Shortly thereafter, K-9 Stryder tracked defendant's scent to a Smith & Wesson .40 caliber handgun, a white pullover and a belt in the same general area. RP 53-60. At 12:18 a.m., the defendant voluntarily stated to Deputy Rohde that he had been shot at by a "19 year old Mexican male, 6 feet tall with a heavy build and long braided hair." RP 74-76.

Detective Hill contacted Ms. Varnell and Mr. Castagna who were also being detained by law enforcement. RP 96. Ms. Varnell, Mr. Castagna and the defendant all agreed to be interviewed at the Public Safety Building. RP 97.

The defendant arrived at the Public Safety Building at 1:04 a.m., his handcuffs were removed, and he was placed in an interview room, provided drinks and access to a bathroom. RP 83-86. Detective Hill remained at the shooting scene for approximately another hour awaiting another detective to process the scene. RP 98. Detective Hill interviewed Ms. Varnell at 1:45 a.m. and was initially advised of the involvement of Ricky Grubbs in the incident. RP 99-103. She related the argument

between Mr. Hagedorn and Mr. Grubbs that led up to the confrontation and shooting. RP 99-103. At 2:09 a.m., Detective Hill interviewed Mr. Castagna who also advised of Mr. Grubbs' involvement. RP 104-108.

At 3:06 a.m., detectives Hill and Gallion interviewed defendant after he was advised of, and waived, his rights. RP 109-123. This time, defendant described the shooter as "Zach", a white male about 19 years old, around 6 feet tall, 130-159 lbs. RP 123. The defendant also mentioned that his friend Ricky Grubbs had been at the scene. Defendant then complied with the detective's request that he call Mr. Grubb. RP 123-24.

At 4:50 a.m., Mr. Grubb arrived at the Public Safety Building, was advised of his rights which he acknowledged and waived, then provided the same basic details of the incident as the other witnesses. RP 125-129. Mr. Grubb identified the defendant as the shooter. RP 129. Mr. Grubb advised that Michael Davis was also present during the shooting and provided detectives with a contact number. RP 130-31.

At 5:39 a.m., Mr. Davis was advised of his rights which he acknowledged and waived, then provided the same basic details of the incident as the other witnesses. RP 132. Mr. Davis identified the defendant as the shooter during the incident. RP 135.

At 6:12 a.m., detective Hill again contacted the defendant and indicated that the defendant had not been truthful with the detective. Detective Hill asked the defendant no questions, merely made the statement. RP 145. Defendant then admitted trying to shoot Mr. Hagedorn and Mr. Castagna when they drove through the parking lot at Rosauers. RP 145-46. Defendant admitted bringing the stolen handgun to the later arranged fistfight at the motel. RP 145-46. Defendant admitted that he fired ten total shots at Mr. Castagna and Mr. Hagedorn. RP 146. Defendant admitted fleeing the scene, hiding under the bridge and discarding clothing articles and the handgun. RP 147. Finally, defendant admitted that he kept the gun at his apartment and that ammunition for the gun was in his apartment, then he signed a search consent card for his apartment. RP 148-50.

Law enforcement arrived on the scene knowing that a shooting had occurred, yet without knowledge of who the victims or the suspects were respectively. Almost simultaneously, officers contacted witnesses and potential victims while searching for additional witnesses, victims, and possible suspects. Officers knew that there was a distinct possibility that the perpetrator was still loose and armed. The circumstance mandates caution to establish community safety, officer safety, and scene security. There are a number of possible innocent explanations, but such

explanations do not vitiate the officer's stop of the defendant when he is exposed by K-9 Stryder on a track that began at the situs of the shooting.

As noted, defendant has accepted the trial court's factual findings as verities on appeal. The issue is whether the trial court erred in denying defendant's suppression motion based upon its conclusion that the officers had the reasonable, articulable suspicion required for a valid investigatory stop.

Also as noted, an officer must have a suspicion of a particular crime connected to the particular person. *State v. Martinez*, 135 Wn. App. 174, 181-82, 143 P.3d 855 (2006). The officer must have an "articulable suspicion," meaning a "substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d at 6. The officer must possess "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21.

Courts look to the totality of the circumstances to determine whether the officer's suspicion was reasonable. *State v. Randall*, 73 Wn. App. 225, 868 P.2d 207 (1994). Additional factors that may be considered in determining whether a stop was reasonable include the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of the time the suspect is detained.

State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984). The standard for determining the validity of an investigatory stop is objective, so the existence of a reasonable suspicion necessary to support an investigatory stop does not depend upon on an officer's subjective beliefs. *State v. Mitchell*, 80 Wn. App. 143, 147, 906 P.2d 1013 (1995). Nevertheless, the facts within the officer's knowledge must support a basis for a reasonable suspicion to believe that a suspect is engaged in criminal activity. *Id.*, at 148.

Here, at the time of the contact with defendant, officers had information that just before midnight on a day in February, a shooting with a seriously wounded victim had occurred in the dark near a dimly lit motel. Officers arrived on the scene on the look out for witnesses, victims, and possible suspects with respect to that shooting. They found a significant blood trail which was followed while a K-9 unit developed a track in the direction that witnesses had indicated two, not one, but two of the individuals involved in the shooting had fled. K-9 Stryder followed the track right to the defendant hiding in the bushes near the bridge as well as his white pullover hoodie, his belt, and the stolen handgun used in the shooting. The defendant, along with other potential witnesses, victims, and suspects, was detained only long enough for law enforcement to complete the search of the immediate area for the other individual

witnesses indicated fled the scene. Law enforcement had an articulable suspicion, based upon objective facts, that a person had been involved in the commission of a crime.

Defendant argues that the decision in *State v. Gatewood*, 163 Wn.2d 534, 182 P.3d 426 (2008) controls this case. Nevertheless, *Gatewood* is distinguishable from this case. In *Gatewood*, officers driving by a bus shelter observed Mr. Gatewood visibly react to their presence. He twisted as if to hide something, then arose and walked away from the shelter, crossing the street mid-block. The Supreme Court held that there was no articulable suspicion of wrongdoing in that circumstance. In contrast, here there was ample, articulated suspicion that justified detaining the defendant.

A trial court's denial of a motion to suppress evidence is reviewed for an abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Here, the trial court did not abuse its discretion in denying defendant's suppression motion, there was no error.

B. DEFENDANT SHOULD NOT BE PERMITTED TO RAISE HIS INSTRUCTIONAL ARGUMENTS FOR THE FIRST TIME ON APPEAL PURSUANT TO RAP 2.5.

Defendant contends that the essential elements instructions for the charges of second degree assault involving Mr. Hagedorn and Mr.

Castagna are deficient. Defendant claims that the instruction did not articulate the basis for the charges. Specifically, defendant argues that the trial court should have included in the second degree assault essential elements instructions a reference that those charges were based upon the defendant's actions in the Rosauers parking lot rather than at the motel. However, defendant did not challenge in the trial court the subject instructions with which he now takes issue. His arguments are precluded by the failure to raise them before the trial court to afford that court the opportunity to correct the now alleged error.

It is well settled that an argument not raised in the trial court can not be raised on appeal. RAP 2.5. Appellate courts have permissive authority to consider some issues of manifest constitutional magnitude, at least when an appropriate record exists to determine that a true constitutional error exists. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988). As was explained in *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995):

. . . RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be "manifest" - i.e., it must be "truly of constitutional magnitude" *The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual*

prejudice that makes the error “manifest”, allowing appellate review.

State v. McFarland, 127 Wn.2d at 333 (internal citation deleted; emphasis added). Once prejudicial constitutional error is established with respect to the defendant’s particular case, the appeal can proceed.

Here, defendant has failed to carry that burden. Defendant alleges that the trial court erred in crafting its essential elements instructions for the second degree assault charges; however, his failure to object to those same instructions should preclude consideration of those claims at this point.

C. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE CHARGES OF SECOND DEGREE ASSAULT.

Assuming, arguendo, that the Court permits defendant’s appeal of the trial court’s jury instructions, the State offers the following argument in opposition thereof. The Information charged the defendant with crimes arising out of two distinctly different incidents: the first at the Rosauers parking lot (Counts IV and V) and the second at the motel (Counts I, II, III, VI and VII). The evidence distinguished the two incidents by both time and location. The evidence further distinguished the two incidents because one incident involved discharge of the firearm while the other resulted in great bodily injury from multiple gunshot wounds. On appeal,

defendant contends that the trial court improperly instructed the jury with regard to the two second degree assault charges (Counts IV and V).

RCW 9A.36.021(1), provides, in pertinent part, that:

A person is guilty of assault in the second degree if he...
(c) assaults another with a deadly weapon...

RCW 9A.36.021(1).

The trial court utilized the approved Washington Pattern Jury Instructions Criminal (“WPIC”) 35.19 when instructing a jury regarding the crime of second degree assault by the use of a deadly weapon. The trial court specifically delineated for the jury that the essential elements instructions regarding the second degree assault charges pertained to Counts IV and V. The trial court used Washington Pattern Jury Instruction Criminal (“WPIC”) 35.19 to instruct the jury on the essential elements of counts IV and V (second degree assault) which provides, in pertinent part:

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That..., the defendant assaulted _____ with a deadly weapon; and (2) that the acts occurred in the State of Washington...

CP 174-214 (instruction 25 and 26). WPIC 35.50 defines assault, and the trial court instructed the jury, utilizing the following parts of the pattern instruction:

An assault is an intentional shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 174-214 (instruction 18).

The critical elements are an assault committed with a deadly weapon. CP 174-214 (instruction 10). The jury was instructed that the State had to prove beyond a reasonable doubt that the defendant assaulted the respective victims with a deadly weapon. CP 174-214 (instructions 25 and 26). Defendant now argues that the trial court's elements instruction for the second degree assault permitted the jury to convict him of the charged crimes based upon his actions at the motel instead of the Rosauers lot. However, the evidence clearly established two distinctly different interactions between the victims and the defendant. The incident at the Rosauers lot involved the defendant pointing the weapon at the victims without a shot being fired. The incident at the motel involved the defendant firing multiple shots at Mr. Hagedorn and Mr. Castagna with

Mr. Hagedorn being severely wounded, hospitalized, and permanently disabled. The deputy prosecuting attorney's closing remarks to the jury clarified further, clearly distinguished which of defendant's actions constituted the basis for the second degree assault charges (counts IV and V). RP 800-804. Here, there was distinctly independent evidence of the actual shooting at the motel upon which the jury could find defendant guilty of the first degree assault on Mr. Hagedorn (count II), yet acquit defendant of the first degree assault on Mr. Castgna (count III). Neither the statute defining the crime of second degree assault by the use of a deadly weapon nor the WPIC-approved instructions require the trial court to set out in its essential elements instruction the basis upon which the jury may find that the crime has been committed. In fact, any attempt by the trial court to provide the sufficient distinction suggested here by the defendant would very likely have constituted a comment on the evidence. Clearly, the trial court properly instructed the jury with regard to the second degree assault charges, there was no error.

1. If There Was Any Instructional Error, It Was Harmless.

Even assuming, arguendo, that the instructional arguments could be raised for the first time on appeal, defendant should not be granted the

relief sought. Under the facts of this case, the “errors” he claims resulted in no harm.

Error without prejudice is harmless. An error of constitutional magnitude does not require reversal if the error is shown to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Wall*, 52 Wn. App. 665, 763 P.2d 462 (1988); *State v. Hoffman*, 116 Wn.2d 51, 96-97, 804 P.2d 577 (1991). Error of less than constitutional magnitude only requires reversal if, within reasonable probabilities, it affected the verdict. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986). Under either standard defendant’s claimed errors were harmless.

The primary reason is the nature of the defense. Defendant confessed to drawing and pointing a stolen firearm at Mr. Castagna and Mr. Hagedorn as they quickly fled the Rosauers parking lot. RP 146. Defendant admitted that he did not fire the gun during that incident because he had left the safety on the weapon activated. RP 146. Castagna testified to seeing a member of the group draw and aim a gun at his car as they drove away. RP 545. Castagna exclaimed to Hagedorn that he saw a gun and both ducked down in the car for further protection from being shot. RP 545. Defendant admitted to then accompanying Mr. Grubb, Mr. Davis and “Zack” the several blocks from the Rosauers lot down to and

across the Sunset Blvd Bridge to again confront Hagedorn and Castagna at the motel. RP 618-619. Grubb and Davis corroborated defendant's admissions that defendant pointed the gun at Hagedorn and Castagna in the Rosauers lot, then later fired the gun at Hagedorn and Castagna at the motel. RP 464-482, 493-521. Nevertheless, defendant argued to the jury that the identifications were mistaken. RP 814-35. Defendant argued that Mr. Grubb better fit the descriptions provided by Ms. Varnell and Mr. Castagna. RP 814-20. There was sufficient evidence that there were two separate and distinct incidents. The evidence regarding the Rosauers parking lot incident was sufficient to support instructing the jury regarding two counts of second degree assault independent of the later incident at the motel. The evidence regarding the West Wynn Motel incident was sufficient to support instructing the jury regarding the attempted murder and first degree assault charges independent of the earlier incident at the Rosauers lot. Thus, whether the jury was specifically instructed that it could only consider the evidence pertaining to the Rosauers lot incident to resolve the second degree assault charges was harmless beyond a reasonable doubt. The presence or absence of specific acts or locations in the elements instruction for the second degree assault charges would not have altered the outcome in this case. The evidence before the jury was quite extensive, and undisputed except for defense counsel's closing

arguments. The error, if existent, was harmless beyond a reasonable doubt. Defendant's convictions should be affirmed.

D. THE TRIAL COURT PROPERLY ADMITTED
TESTIMONY REGARDING STATEMENTS
MADE DURING INVESTIGATIVE INTERVIEWS.

Defendant claims that the trial court committed reversible error when it admitted testimony by the investigating detective regarding two witnesses having identified defendant as "the shooter." Two witnesses testified that defendant was "the shooter" at trial. RP 475; 503-504. Thereafter, the detective whose investigation led him to interview those two witnesses testified regarding his interviews of the witnesses. The detective testified that the two witnesses identified defendant as "the shooter." RP 622-23. Defendant objected to the testimony as hearsay. The trial court overruled the objection and the trial continued.

The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned absent a manifest abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). If the trial court has exercised its discretion in a way that is "manifestly unreasonable or based upon untenable grounds or reasons," it has abused its discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

It is inadmissible hearsay for a witness to quote the words of another person. However, an officer does not necessarily introduce hearsay in his testimony simply because he testifies he spoke with witnesses. It is appropriate for an officer to describe the context and background of an investigation. *State v. Lillard*, 122 Wn. App. 422, 437, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002, 113 P.3d 482 (2005). It has long been held that an officer can discuss the substance of an investigation without violating the prohibition against hearsay testimony. *State v. Aaron*, 57 Wn. App. 277, 281, 787 P.2d 949 (1990).

The detective testified about his investigation, including descriptions of the crime scene, the firearm used, the progression of his investigation through witnesses, and his consultations with other detectives. He testified that his investigation led him to two witnesses who identified the defendant as “the shooter.” Those two witnesses had already identified the defendant as “the shooter” during their own testimony under oath and subject to cross-examination before the jury.

The defense argues that Detective Hill should not have been able to testify as to whom the two witnesses identified; however, there should be no debate that it would be proper for the detective to testify that the two witnesses identified “the shooter.” The objection is that he testified

regarding who the witnesses identified as “the shooter,” not that they identified someone as “the shooter.”

1. There Was Sufficient Evidence, Without The Contested Testimony, For The Finder Of Fact To Convict The Defendant.

Assuming, arguendo, the trial court’s evidentiary ruling was in error, it was harmless. In evaluating whether an evidentiary error is harmless, the reviewing court applies the “overwhelming untainted evidence” test. Under that test, if the properly admitted evidence is so overwhelming that it necessarily leads to a guilty finding, the error is harmless. *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005). An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

If this court determines that any evidence was admitted in error, it then decides whether the error was harmless by measuring the admissible evidence against the prejudice, if any, caused by any inadmissible testimony.

The defense argues that defendant’s right to a fair trial was prejudiced by Detective Hill’s testimony because Mr. Grubb and Mr. Davis had already testified that defendant was “the shooter.” The defense

argued to the jury that the testimony of these witnesses was not credible and therefore was insufficient. Nevertheless, questions of witness credibility, the weight to be given evidence, and the settlement of disputed questions of fact are the province of the jury. *State v. Snider*, 70 Wn.2d 326, 327, 422 P.2d 816 (1967). Defendant's arguments ring hollow when the challenged evidence merely corroborated his own confession that he was "the shooter." In this case, the jury had sufficient evidence, even without the objected to testimony, to find the defendant guilty.

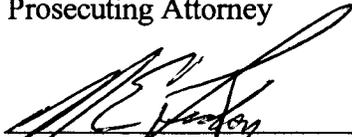
V.

CONCLUSION

For the reasons stated, the convictions should be affirmed.

Respectfully submitted this 5th day of August, 2010.

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