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Division III  
State of Washington  
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No. 35565-9-III

IN THE COURT OF THE APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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THE STATE OF WASHINGTON, Respondent

v.

MELVIN R. O'ROURKE, Appellant.

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BRIEF OF RESPONDENT

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## PREFACE

The single most salient fact of this entire case is absolutely absent from the Appellant's version of the statement of the case. That fact is the Appellant, Melvin R. O'Rourke, confessed to killing his victim deliberately, and with premeditation. He described in comprehensive detail his actions, and even re-enacted the killing of his victim.

This confession was not the product of skullduggery, "trickery," coercion, or oppressive practices by police officers. This confession was not wrung from the Appellant by misconduct or sharp lawyering by the prosecutor. The Appellant's confession was voluntarily offered, at trial, during direct examination, in the form of sworn testimony from the Appellant himself. During cross-examination, the Appellant re-enacted his crime to the dismay of the jury. No evidence that this confession was "tainted" in any way exists in the record, nor does the Appellant so claim here on appeal.

The undeniable effect of the Appellant's voluntary and complete confession overshadows all of the claims raised here on appeal. Any of the slights, real or imagined, asserted here on appeal are rendered harmless when placed in the proper context. Having heard and watched the Appellant at trial, no jury could possibly have reached a verdict other than "guilty as charged."

## I. STATEMENT OF THE CASE

On July 30, 2015 the Appellant, Melvin R. O'Rourke, asked Duane Hettinger to come to his home. Report of Proceedings, page 647 (*hereinafter* RP, 647). Mr. Hettinger and the Appellant were friends, "drinking buddies," and had been roommates in the past. RP 272. The purpose of this meeting was that the Appellant believed that Mr. Hettinger had stolen from him. RP 649 - 650. The Appellant was upset about this (RP 283) and wanted Mr. Hettinger to sign off on some paperwork (RP 647) that apparently included a pay schedule. RP 649 - 650. The meeting initially took place in a patio-like area outside of the Appellant's home - an area he referred to as "the office." RP 648. Despite the Appellant's efforts to engage Mr. Hettinger in discussions, Mr. Hettinger "wasn't saying anything" and stared at the ground. RP 651 - 652. The Appellant went so far as to confront Mr. Hettinger about the prior thefts, but he still would not respond. RP 338 - 339. The Appellant became disgusted by Mr. Hettinger's failure to engage in the discussion of the matter. RP 669.

The Appellant stood up and walked from the "office" and walked down the stairs to his residence, leaving Mr. Hettinger. RP 652. The Appellant went into his residence, locked the door behind him, and sat in a large green chair in the apartment. *Id.* A short time later the Appellant heard his door handle being rattled so he got up

and went to the door. *Id.* He unlocked the door, opened it, and let Mr. Hettinger into the residence. *Id.* Once Mr. Hettinger had entered, the Appellant closed the door and locked it behind him. RP 653. The Appellant told the police that he “locked the door, so [the victim] couldn’t get out real quick.” RP 347. At trial, the Appellant confirmed that he locked the door once Mr. Hettinger was inside “to slow him down” and to stop Mr. Hettinger from leaving. RP 670.

Once inside the residence Mr. Hettinger sat in a chair across from the Appellant’s chair and, in the Appellant’s own words did “absolutely nothing.” RP 654. After perhaps twenty minutes of sitting and staring at the floor in front of his feet, Mr. Hettinger stood up. RP 654 - 655. The Appellant testified that Mr. Hettinger took a step in his direction and said that “it was obvious to me that he was going to take more steps.” RP 655. When Defense Counsel asked about this statement the Appellant stated: “When I was a kid, my dad raped me when I was four.” *Id.* The prosecutor objected and the Trial Court sustained the objection as “non-responsive.” *Id.* After further discussion as to the speculative nature of the Appellant’s response, Defense Counsel asked the Appellant “what did your eyes see” that led him to believe that Mr. Hettinger was coming toward him. RP 656. The Appellant responded: “His eyes had the look that I had seen many, many times before.” RP 656 - 657. It was the Defense that then stated “So, his eyes had a look, right?” RP 657.

The Appellant testified that when Mr. Hettinger “stood up slowly and took the step and I saw the look and I went for my gun.” *Id.* A witness testified that prior to the shooting, the Appellant had told him that he had the gun for the express purpose of shooting Mr. Hettinger “if he ever stole from him again.” RP 285. The Appellant described in detail his actions thereafter: he retrieved the gun from its hiding place, retrieved a magazine from another location, inserted the magazine into the pistol, and cocked the gun. *Id.* During this entire process Mr. Hettinger remained standing in front of his chair and did not say or do anything. RP 658. The Appellant described his thoughts and actions immediately prior to killing Mr. Hettinger with chilling detail:

I held the gun up and realized that I was not able to aim the gun and so I pointed the gun and I thought about an arm or a leg and I knew I'd miss and so I picked the biggest target and that was his chest. And I couldn't even point, so I had to move the gun up and down to try to stabilize, in what direction at least, the gun. And I had to hold it with both hands because I was not strong enough to lift it with either one of my hands alone. And I was also shaking very badly. It hadn't been a good day to start with and things were falling apart very fast.

RP 658. As Mr. Hettinger stood there, motionless, the Appellant pointed the gun directly at him, Mr. Hettinger raised his arms in a defensive manner, in front of his body and finally spoke. RP 659. Mr. Hettinger said “No.” RP 660. The Appellant pulled the trigger and shot him to death. *Id.* The Appellant testified that after he shot him,

Mr. Hettinger “stood there for a minute” and then turned and walked toward the door of the residence. RP 661.

As Mr. Hettinger collapsed near the door, the Appellant watched and waited before approaching him and checking on him. RP 663. The Appellant testified Mr. Hettinger was “trying hard to breathe” at this point. *Id.* Although the Appellant repeatedly told the 911 operator (a recording the 911 call played for the jury at RP 147 - 156) that Mr. Hettinger was still breathing at the time of the call (RP 151, 152, 153) at trial he admitted, under oath, that he waited until Mr. Hettinger had stopped breathing, and only then called 911. RP 663. He even went so far as to check Mr. Hettinger’s mouth and nose while he waited for him to stop breathing prior to calling 911. *Id.*

During the recorded 911 call, the Appellant told the operator the man he had shot was “in my house robbing” him at the time of the shooting. RP 150. At trial, the Appellant admitted that was not true. RP 673. He also admitted he had told the investigating officers that he had killed Mr. Hettinger because he was “ripping him off” at the time of the shooting. According to the Appellant’s own testimony this was also false. Similarly the Appellant’s assertion to the officers that he had no contact for “months” prior to the shooting (RP 331) was untrue. His claim during his discussions with the police that he did not know how Mr. Hettinger got into the residence and that he “must have had a key” (RP 333) were directly refuted by the Appellant’s own

testimony. One notable statement the Appellant made during his police interview proved to be undeniably true. When he calmly explained the outcome of the fatal encounter he stated:

DETECTIVE DENNY: All right. So, I don't know if you know or not, I was the last person to get there, so I don't know a whole lot of what's going on, so how about you just start from the time this all happened and just walk me step on step through what happened.

MR. O'ROURKE: Okay. I know someone had been robbing my place and went in and sat down and he came in. The door was locked and I got him.

RP 329. The Appellant told a friend that he intended to shoot Mr. Hettinger if he stole from him again and on July 30, 2015, convinced that he had done so, the Appellant "got him."

The jury convicted the Appellant as charged and he filed a timely appeal and now asks this Court reverse his conviction and order a new trial.

## II. ISSUES

- A. DID THE PROSECUTOR ENGAGE IN FLAGRANT AND ILL INTENTIONED CONDUCT SUCH THAT THE APPELLANT DID NOT RECEIVE A FAIR TRIAL?
- B. WAS DEFENSE COUNSEL'S PERFORMANCE SUBSTANDARD AS MEASURED BY AN OBJECTIVE STANDARD SUCH THAT THE APPELLANT DID NOT RECEIVE A FAIR TRIAL?
- C. DID "CUMULATIVE ERROR" DEPRIVE THE APPELLANT OF A FAIR TRIAL?

## III. ARGUMENT

- A. THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT AT TRIAL.
- B. DEFENSE COUNSEL'S PERFORMANCE WAS NOT INEFFECTIVE BASED ON THE FACTS OF THIS CASE.
- C. THERE WAS NO CUMULATIVE ERROR IN THE TRIAL OF THIS CASE.

## DISCUSSION

- A. THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT AT TRIAL.

The Appellant's first assignment of error is the "prosecutor committed misconduct when he cross-examined [the Appellant] and in his closing argument...". Appellant's Opening Brief, (*hereinafter Brief*) at page 2. The Appellant argues that on four specific instances the prosecutor "inserted his own opinion" and made "inflammatory

statements.” Brief, page 10. The first instance where the Appellant asserts such misconduct occurred was when Defense Counsel tried to lead his client’s testimony by directing him to a series of documents or “notes” that the Appellant had brought to the stand. RP 645. At that time, the Appellant was testifying as to his various medical conditions and the prosecutor objected that Defense Counsel was leading the witness and that the line of questioning was irrelevant. *Id.* In so doing, the prosecutor stated that certain facts were not disputed, specifically that the Appellant had killed Mr. Hettinger.

Although the Appellant claims that this constituted prosecutorial misconduct it must be recalled that the Appellant **never** denied shooting Mr. Hettinger. He told the 911 operator that he did. He told the very first responding officer at the scene that he had shot Mr. Hettinger. During all three of the recorded police interviews he told the officers he shot him. In fact, during his opening statement Defense Counsel told the jury:

Nobody is disputing that Mr. Hettinger was shot, nobody —as [the prosecutor] said, nobody is disputing that [the Appellant] was the shooter. That’s a given. He said so right at the start.

RP 142. This was the very essence of the Defense case, and all of the evidence presented during the State’s case-in-chief confirmed this view of the case undisputed fact. The Appellant himself, during his direct testimony would confirm this.

The prosecutor was merely using the Defense's own words when stating the reason for objecting to the relevance of the Appellant's medical history:

I don't think that's at issue here because it's clear he killed the man. The question is why and I don't think the medical issues — there's no argument that he is medically incapable of doing so.

RP 645. As our courts have often noted: "The admission of evidence on an uncontested matter is not prejudicial error." State v. Powell, 166 Wn. 2d 73, 84, 206 P.3d 321, 328 (2009). This statement was a reference to an undisputed matter. It was not inflammatory, it was not ill intentioned, it was not a comment on anyone's credibility, it does not contain an "opinion," nor did it impact the Appellant's ability to present his defense. In fact, the record reveals that the Defense was able to introduce the pertinent "medical history" despite the prosecutor's objection. None-the-less the Appellant now asserts that it was misconduct for the prosecutor to use the Defense's own words in his objection.

The clear dictates of "harmless error" doctrine renders this claim, and all of the other complaints raised by the Appellant, moot. Our Supreme Court has adopted the "overwhelming untainted evidence" analysis when considering an assertion of harmless error. Under this test, "the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming

that it necessarily leads to a finding of guilt.” State v. Guloy, 104 Wn. 2d 412, 426, 705 P.2d 1182, 1191 (1985). This Court should the consider that in the present case, the Appellant admitted his guilt under oath, at trial, to the jury, during his direct testimony. There is no question this detailed and comprehensive confession is “untainted” and dispositive. This fact alone would lead any reasonable fact finder to convict.

The State does not concede any error whatsoever, however, even if the Defense could convince anyone that some misconduct had occurred, they cannot show that this alleged “misconduct” had any real impact on the process. The definitive “untainted” evidence of the Appellant’s guilt, including his confession, is what turned this case.

The second instance cited as prosecutorial misconduct similarly arose during an objection while the Appellant was testifying. The Appellant testified, “It was obvious to me that [Mr. Hettinger] was going to take more steps.” RP 655. When Defense Counsel asked how it was obvious that Mr. Hettinger was going to take more steps, the Appellant responded, “When I was a kid, my dad raped me when I was four.” This statement was irrelevant to the line of questioning and non-responsive to the question posed. The prosecutor, while raising a proper legal objection to the response, did not disparage the Appellant’s childhood trauma, rather he recognized issue and gave deference:

I'm going to object, Your Honor — relevant, this is completely irrelevant. I don't know how a horrible experience that happened to this man when he was four years old has any bearing on what happened two years ago in this apartment.

RP 655. Again, this statement concerned an undisputed matter. The Defense asserted that the Appellant had been a victim of abuse as a child and the State accepted this. The recognition of this undisputed matter was not inflammatory, it was not ill intentioned, it was not a comment on anyone's credibility, it does not contain an "opinion," nor did it impact the Appellant's ability to present his defense. Had the prosecution made some negative or dismissive comment about the Appellant's experience perhaps his claim of misconduct would have some basis - but he did not. This is not misconduct.

The third instance, again during the Appellant's testimony, involved another objection raised by the prosecution. As the Defense again tried to have the Appellant describe why he believed that Mr. Hettinger was coming toward him, the Appellant stated "I was able throughout my early years to see before —." RP 656. This non-responsive, irrelevant, and speculative comment drew a proper objection from the prosecution. In the context of the objection the following exchange took place:

The Prosecutor: Your Honor, at this point, I'm going to object on the basis of speculation. [Defense Counsel] is asking [the Appellant] to speculate as to what was in Mr. Hettinger's mind and Mr. Hettinger isn't here to speak for himself.

THE COURT: If you could limit your client's response to his observations of Mr. Hettinger's physical movements.

Defense Counsel: That was the intent of my question.

THE COURT: I understood that. I'm trying to clarify it for the point — for [the Appellant].

Defense Counsel: Melvin, just let me explain — we can't look inside other people's heads.

Appellant: Right.

Defense Counsel: Okay? So, what I'm asking is what did you see that caused you to think that he was going to come forward to you? So, what did your eyes see or that what did you perceive would cause that he was coming toward you?

RP 656. The prosecutor's objection was proper as the law does not allow a lay witness to testify what is in the mind of another based upon speculation. State v. Olmedo, 112 Wn. App. 525, 531, 49 P.3d 960, 963 (Div. III, 2002). The prosecutor was simply making an appropriate objection based on the law. The comment was not inflammatory, it was not ill intentioned, it was not a comment on anyone's credibility, it does not contain an "opinion," nor did it impact the Appellant's ability to present his defense. The prosecutor's comment was in the very same vein as the comments made by the Court and by Defense Counsel as they tried to give the testifying Appellant guidelines on permissible in responses to the questions. This is not misconduct.

The final specific instance which the Appellant cites as prosecutorial misconduct transpired during the Appellant's testimony concerning Mr. Hettinger's last words. The Appellant testified that prior to the fatal shooting Mr. Hettinger had not spoken at all. He told the jury that when he took out his gun and pointed it at Mr. Hettinger, Mr. Hettinger uttered a single word: "No." RP 659. Defense Counsel pressed: "Did you understand what he meant by that no?" and the Appellant said that he did. Defense Counsel then asked, "What was your understanding?" *Id.* This drew the obvious objection from the prosecution: "I'm going to object, speculation. There's no way he could possibly know what Mr. Hettinger meant when he said no." *Id.* The Court sustained the objection. *Id.* As set forth above an objection based upon speculation is right and proper. The Trial Court agreed. The prosecutor's objection was not misconduct, it was a proper objection, and a proper objection cannot be construed as misconduct.

The next area that the Appellant attacks as prosecutorial misconduct involves the cross-examination of the Appellant at trial. The Appellant asserts that the prosecution introduced the subject of prior incidents between the Appellant and Mr. Hettinger and police investigations and reports concerning those incidents. The Appellant fails to note that this subject was first brought to the jury's attention

during the Defense opening statement. Defense Counsel at the very outset told the jury:

There's one other thing too. [The Appellant] and Mr. Hettinger had some history. In fact, [the Appellant] had been assaulted by him to the extent that criminal charges had been brought about. That there was a protection order keeping Mr. Hettinger from contacting [the Appellant]. Of course, you will see testimony or hear testimony that sometimes the no contact orders don't always be followed — aren't always followed. But nevertheless, there is that history.

[The Appellant] had been tossed downstairs by Duane Hettinger in the past, before this evening in July.

RP 141. Defense continued to reference prior incidents during his cross-examination of one of the investigating officers. The Defense Counsel produced a copy of a No-Contact order issued during the course of an investigation of a prior incident. RP 504. Over the prosecution's objection - on the basis of relevance - the Appellant was able to have this document concerning the prior incident admitted into evidence. RP 507.

Once the Defense opened the door to discussion of this prior incident, the prosecutor responded. During the testimony of another investigating officer, Sergeant Denny, the subject of prior incidents between the Appellant and Mr. Hettinger was also discussed. RP 628. The following exchange took place between the prosecutor and the officer:

Prosecutor: We've heard about a prior incident where law enforcement was involved with Mr. Hettinger and [the Appellant]. Are you familiar with that police report?

Officer: Yes.

Prosecutor: Who actually called the police?

Officer: In the first incident, it was Christopher Kahn.

Prosecutor: Not [the Appellant]?

Officer: Correct.

Prosecutor: And what did [the Appellant] report to the police that Mr. Hettinger had done to him?

Officer: He had pushed him, causing him to fall back into the stairwell.

Prosecutor: Did he say he was thrown down the stairs?

Officer: No, he did not.

Prosecutor: Did he say he fell down the stairs?

Officer: No, he did not.

Prosecutor: What did he tell you happened when he was pushed?

Officer: He fell back into the stairs and was able to catch himself on the handrail.

Prosecutor: According to the police report, did he have any injuries at all?

Officer: No, he did not.

Prosecutor: Was anyone injured?

Officer: Mr. Hettinger was.

Prosecutor: Mr. Hettinger was injured?

Officer: Correct.

Prosecutor: How was Mr. Hettinger injured during this incident?

Officer: He had redness on his face. He claimed he got assaulted or punched by [the Appellant].

Prosecutor: What did [the Appellant] say about punching Mr. Hettinger in the face?

Officer: I do not recall for sure. **I'd have to look at the report.** (*emphasis added*).<sup>1</sup>

Prosecutor: Go ahead.

Officer: The report says he did admit to punching Duane, but it was only because Duane was out of control and hitting and pushing everyone.

RP 628 - 630. Sergeant Denny went on to testify that he had personally searched the police database and could find no other reports of any violence by Mr. Hettinger on the Appellant in the any of those records. RP 630.

During cross-examination of Appellant, the prosecutor asked about this prior incident. RP 670. He pointed out that in the "incident on the stairs" report the Appellant had not been injured, and that he had in fact he had been the one who inflicted injury, when he punched Mr. Hettinger in the face. RP 670 - 671. On the stand, the Appellant conceded that he had not been injured in that incident and that he had struck Mr. Hettinger. RP 671. When he was confronted

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<sup>1</sup> The significance of this particular comment is that it demonstrates that the officer had this report in his possession when he was on the stand.

with the fact that there were no reports of Mr. Hettinger being violent toward him, the Appellant insisted there were such reports. *Id.* The prosecutor, referring back to the sworn testimony of Sergeant Denny regarding the search for prior reports, summarized that testimony:

No, there aren't, sir, we've checked. The only report that we could find was the staircase and you didn't get hurt, he did.

RP 671. This was an accurate statement of the prior testimony of the officer. (See: RP 630). The Appellant then interjected additional claims of violence into the "incident on the stairs" now claiming that he had been "pushed down the steps, through a table...". The prosecutor reminded the Appellant that this claim was not contained in the report the officers had testified about. The prosecutor's statements were not improper. They were not misrepresentations of the prior testimony. They were not, as the Appellant argues, references to facts not in evidence. The report had been referred to by the Defense. It had been used by an officer who testified at trial and was subject to confrontation by Defense. The statements contained in the reports were the Appellant's own statements and he repeated them at trial. The prosecutor's reference to the Appellant's prior statements was not misconduct.

The Appellant next complains that the prosecutor committed misconduct by apologizing. Following a rather heated exchange with the Appellant the prosecutor said "I'm sorry if I got a little bit upset."

RP 674. This was not a ploy, an attempt to shift sympathy, nor an appeal to the emotions of the jury. It was civility. It was mannerly. It was appropriate. As the Rules of Professional Conduct provide in their preamble, civility and mannerly conduct is required for lawyers, not discouraged:

These principles include the lawyer's obligation conscientiously and ardently to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Washington Rules of Professional Conduct, Preamble. A polite and civil apology is not misconduct, it is required conduct to maintain a “professional, courteous and civil attitude” toward the Appellant.

The Appellant takes issue with the prosecutor’s closing argument asserting that it, like the cross-examination, contained misconduct. Counsel here on appeal does not have the benefit of witnessing the actual trial and so the misperceptions regarding those proceedings can be explained. The prosecutor did not ask the jury to reenact the shooting. Brief, page 15. The prosecutor was referring to the fact that the Appellant had himself reenacted the shooting for the jury. (See: RP 666 - 667). This was not misconduct, nor was it an invitation for the jury to place themselves in the shoes of the victim. It was a statement regarding what the jury had seen with their own eyes during the trial in that very courtroom. As has been often stated, “In closing argument a prosecuting attorney has wide latitude in

drawing and expressing reasonable inferences from the evidence.”  
State v. Brown, 132 Wn. 2d 529, 565, 940 P.2d 546, 566 (1997), as amended (Aug. 13, 1997). It is not error to remind a jury of the evidence that they had observed during a trial. This is the very purpose and essence of closing argument. As the trial Court instructed the jury:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

RP 685 - 686 (*quoting* Washington Pattern Jury Instructions, Criminal, 1.02. The prosecutor's comments were an effort to highlight for the jury certain facts admitted into evidence during the trial. This is not misconduct it was proper and effective closing argument.

Similarly, the prosecutor's reference to the Appellant's facial expression during the reenactment of the crime was not an invitation for the jury to speculate. It was a reference to what they had seen in shocked silence when the Appellant reenacted the shooting. The Appellant's pantomime of bringing the toy pistol to bear on the prosecutor, his discussion of how he deliberated as to where to shoot his victim for maximum impact, and his act of coolly pulling the trigger "shooting" the prosecutor and intoning "bang," was properly admitted

evidence presented to the jury at trial.<sup>2</sup> The prosecutor acted within the law when he reminded the jury of this.

Before leaving the issue of prosecutorial misconduct, the Appellant urges this Court to adopt a *post hoc ergo propter hoc* approach to the crucial test of prosecutorial misconduct. Well established law views a claim of prosecutorial misconduct as subject to significant scrutiny:

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. If he failed to object at the time the misconduct occurred, he must establish that no curative instruction would have obviated any prejudicial effect on the jury and he must establish that prejudice resulted that had a substantial likelihood of affecting the jury verdict.

State v. Thorgerson, 172 Wn. 2d 438, 455, 258 P.3d 43, 52 (2011) (*emphasis added*). In the current case, no objection was raised to any of the prosecutor's statements now assailed on appeal as improper. No curative instruction was requested. The Appellant does not offer any discussion as to why a curative instruction could not have obviated any perceived error. The Appellant does not even attempt to establish the likelihood that the complained of statements had any impact on the verdict. Rather, he proposes the unreasonable

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<sup>2</sup> Although the record here on appeal does not contain photographs taken of the trial, if one searches Google images using the Appellant's name "Melvin O'Rourke" the striking image of the Appellant's reenactment of the shooting can be seen. The facial expression is most notable.

rule that the “misconduct” must have occurred because he says that it did; that it could not have been cured by an instruction because none was requested; and finally that the impact must have been significant because the “misconduct” would not have occurred if it did not have a significant impact. Brief, page 16 - 17. In an effort to support this rather tautological approach, the Appellant cites to case some 22 years ago where the appellate court made a passing reference to an argument contained in an appellant’s brief:

We agree with the comment of defendant Lee's counsel in his brief that “trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.”

State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076, 1079 (1996).

In the 22 years since Fleming was published, no other Court has accepted the invitation to follow that Court down the rabbit hole. Rather the requirement of proof of misconduct, proof of the ineffectuality of curative measures, and actual evidence of significant impact remains the law:

If a defendant fails to object, he must show the prosecutor’s misconduct was so flagrant and ill intentioned that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the resulting prejudice had a substantial likelihood of affecting the jury verdict.

State v. Scherf, \_\_\_ Wn.2d. \_\_\_, 429 P.3d 776, 800 (November 8, 2018).

The Appellant has failed to show that any prosecutorial misconduct took place. The Appellant has failed to demonstrate that a properly raised objection and a curative instruction would not have obviated any perceived misconduct. And finally, the Appellant cannot show, by acceptable standards, that this perceived misconduct had any impact whatsoever on the verdict. The Appellant confessed to all of the essential aspects of the charged crime and reenacted the killing in the jury's presence. This is untainted evidence of such compelling nature as to render all other arguments moot. This is why the jury found the Appellant guilty.

B. DEFENSE COUNSEL'S PERFORMANCE WAS NOT INEFFECTIVE BASED ON THE FACTS OF THIS CASE.

Having failed to establish that any prosecutorial misconduct occurred, the Appellant then turns his attack on his own Trial Counsel. The Appellant claims that his trial counsel was ineffective. First, the Appellant asserts that his attorney should have objected to four statements made by the first officer to respond to the scene and one statement by the EMT. Brief, page 20.

The officer's statements were not inflammatory, as the Appellant suggests; they were offered to provide the necessary foundation for his observations. The Appellant does not provide any logical or legal support for his claim of the impropriety of these

statements. Instead, he cites to a decision in which held the Court held that prosecutorial misconduct had deprived the defendant of a fair trial: Brief, at 20 *citing In re Glasmann*, 175 Wn. 2d 696, 286 P.3d 673 (2012). In that case the prosecution used highly inflammatory slides in a powerpoint presentation during closing argument. Glasmann, at 701. Nothing remotely like this occurred in the present case. No case is cited wherein an officer's discussion of his background and experience constitutes an "opinion" let alone an improper opinion.

Defense Counsel did not object in our case because the statements were proper. Similarly, the EMT's statement that he had been to "worse calls" in his experience was proper and not inflammatory. Defense counsel was not ineffective in not raising an unsupported objection to admissible evidence. The Appellant cannot show that Counsel's performance "fell below an objective standard of reasonableness given the circumstances" as is required. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). When a claim of ineffective assistance is leveled at an attorney based on failure to object the standard is demanding:

To prove that failure to object rendered counsel ineffective, Petitioner must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted.

In re Davis, 152 Wn. 2d 647, 714, 101 P.3d 1, 37 (2004). No such showing can be made as to these statements. The objections which the Appellant now suggests would not have been sustained and even had they been, no one can legitimately argue the jury would not still have found him guilty based on his in-court confession.

The Appellant next complains that his trial attorney failed him when he did not object to testifying officers “interpreting statements made by others.” Brief, page 21. The five occasions cited by the Appellant all involve Officer Foss, the first officer on scene. During Officer Foss’ testimony the 911 tape was admitted. The quality of the tape was not the best at times and there were at least thirty places where the trial transcript indicates “indiscernible.” RP 147 - 156. One such instance occurred when the Appellant was describing Mr. Hettinger’s condition to the 911 operator. RP 149. The officer testified that it sounded like the Appellant was saying that Mr. Hettinger was “still alive” at the time. Id. This is consistent with the with Appellant’s other statements which were made to the officer during his personal contact with the Appellant. RP 181. Defense Counsel did not object because there was no legitimate basis for objection.

In order to try and construct a basis for objection here on appeal, the Appellant pronounces: “A witness may relate first-hand observations, but may not interpret evidence unless it cannot be

determined by the jury.” Brief, page 21. The Appellant offers as support for this proposition two Rules of Evidence dealing with opinion testimony (ER 701, and 704) and State v. George, 150 Wn. App. 110, 206 P.3d 697 (2009). The problem with these authorities is that they actually support the propriety of the officer’s testimony. Even if one could view the officer’s comment that the Appellant had told the 911 operator that Mr. Hettinger was “still alive,” as an opinion, it was based on the officer’s personal, first-hand observations. He listened to the 911 tape, he heard the Appellant make similar statements to him and in his presence. The transcript here on review indicates that the specific portion of the tape was “indiscernible.” To have the officer who first responded, who had reviewed the tape, and had heard the Appellant make consistent contemporaneous statements, clarify for the jury was not error. The case cited by the Appellant supports this:

A witness must testify based on personal knowledge, and a lay witness may give opinion testimony if it is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the testimony or the fact in issue. ER 602, 701; see State v. Hardy, 76 Wn.App. 188, 190, 884 P.2d 8 (1994), *aff’d*, State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996).

State v. George, 150 Wn. App. 110, 117, 206 P.3d 697, 701 (2009).

Similarly, the Appellant’s “chuckle” at RP 151 was “indiscernible” on the tape. The officer’s comment was based on first-hand observation and was intended to clarify the Appellant’s “indiscernible” reaction for

the benefit of the jury. No objections were raised because this was admissible evidence.

The Appellant takes issue with his Trial Counsel's failure to object to the officer's statement that the original call came in as a "burglary." Brief, page 22. This testimony was proper and the suggested objection would have been summarily dismissed:

When a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible.

State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799, 802 (2005).

Officer Foss testified concerning his own statements which were captured on recordings that were played for the jury. This testimony was offered to clarify what the officers were discussing and doing, and they too were admissible. Trial counsel cannot be criticized for failing to raise a spurious objection. The remaining testimony which the Appellant now asserts was objectionable, is not.

The Appellant next turns to Trial Counsel's failure to redact or object to recordings of the various police interviews of the Appellant as proof of ineffective assistance. Recalling that a reviewing court must give "great deference" to trial counsel's performance and must begin the analysis with a "strong presumption" counsel performed effectively. State v. West, 185 Wn. App. 625, 638, 344 P.3d 1233 (2015). It has been noted that counsel's "failure to object to evidence

is a classic example of trial tactics” and only “in egregious circumstances will it constitute deficient performance.” State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). As Division

Three explained in detail:

The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective. State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). Similarly, our case law recognizes that the decision to decline a limiting instruction for ER 404(b) evidence likewise is a tactical decision not to highlight damaging evidence. *E.g.*, State v. Yarbrough, 151 Wn.App. 66, 210 P.3d 1029 (2009) (*failure to propose a limiting instruction presumed to be a legitimate trial tactic not to reemphasize damaging evidence*); State v. Price, 126 Wn.App. 617, 649, 109 P.3d 27 (2005) (“*We can presume that counsel did not request a limiting instruction for ER 404(b) evidence to avoid reemphasizing damaging evidence*”); State v. Barragan, 102 Wn.App. 754, 762, 9 P.3d 942 (2000) (*failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence*).

The decision to not object to or seek a cure for damaging evidence is a classic tactical decision.

State v. Kloepper, 179 Wn. App. 343, 355–56, 317 P.3d 1088, 1094 (Div. III, 2014). By allowing the recordings to be played in full, Defense Counsel could demonstrate to the jury that they had nothing to hide. By letting the jury hear with their own ears that the police had accused the Appellant of being deceptive, while they were themselves being deceptive the Defense gained a tactical edge and could claim

the moral high ground. This was sound legal tactics and not a failure on Defense Counsel's part.

A final and damning argument refutes the Appellant's claim that Trial Counsel should have kept the officers' accusations from the jury. When the officers accused the Appellant of not telling the truth this was not highly objectionable, it was actually helpful to the proffered defense. The Appellant testified at trial that he had acted with premeditation. He told the jury that he had drawn Mr. Hettinger to the residence. He told them he let Mr. Hettinger in and then locked the door behind him to prevent him from escaping. He said he became "disgusted" when Mr. Hettinger would not engage in the planned negotiation. He testified that when Mr. Hettinger stood up, he drew his gun from its hiding place, loaded it, cocked it and pointed it at Mr. Hettinger. The Appellant told the jury he calmly decided where to shoot Mr. Hettinger and when Mr. Hettinger said "No," he killed him. In this exceptional circumstance, it would actually inure to the Appellant's benefit to have his veracity questioned. The sole tactical avenue left to Trial Counsel to undercut the Appellant's in-court confession was to cast doubt on his account. Trial Counsel can not be found ineffective for playing the poor cards left to him.

The Appellant also makes a great deal of certain statements he characterizes as "hearsay" and Trial Counsel's failure to object to the same. Brief, page 31 - 33. These statements are, for the most

part, not hearsay, and the few that technically meet the definition are so trivial as to hardly require objection. The Appellant's own statements are not hearsay: "A statement is not hearsay if it is an admission by a party opponent." ER 801(d)(2). To state that the clock "said" a given time is not hearsay as the Appellant claims. Statements made by the dispatcher were not offered for the proof of the matter asserted but rather to explain why the responding officer reacted, and so do not fall within the definition of hearsay. "A statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statement. State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631, 632 (Div. III, 2006). Any objection raised to the statements the Appellant now labels as "hearsay" would have not only failed, they may have drawn unwanted attention to the content to the Defense's disadvantage.

Counsel here on appeal claims that Trial Counsel was ineffective in not seeking to limit the number of photos admitted at trial. In regards to the autopsy photos, the record confirms that prior to taking testimony from the medical examiner, the subject of these photos was discussed. RP 580 - 581. It was not the prosecutor who requested that all of the photos be used, but the medical examiner who had made the request. She asked that the photos all be admitted so that she could use them to explain her scientific examination and extensive findings.

The photos of the scene taken by the investigating officers were not so “gruesome” as to distract from their import in the case either. For the most part the photos from the scene absolutely could not be called “gruesome.” They included pictures of the exterior of the residence, the entry way, blood spots, personal property, pictures of the interior of the residence, furniture. Only eight pictures of Mr. Hettinger (two of those being small blood spots on his knees).<sup>3</sup> This is not overly repetitious or more than was required to show the jury what the investigating officers had observed. The Appellant’s complaint against Trial Counsel regarding the photos will not stand when the facts are considered.

The Appellant does provide the Court with a good discussion of “coerced statements” but does not offer any explanation why the statements in this case should have been kept from the jury. As discussed above the Defense in this case was not denial of the shooting, but justification of the shooting. None of the statements made by the Appellant and played for the jury undercut this defense. There is no logical reason for the Trial Attorney to object to the admission of the Appellant’s own prior statements that he believed

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<sup>3</sup> Lists of the photos introduced at trial can be found at RP 17, 204, 239, and 488 - 489. At RP 17 a list of 18 pictures is provided. Of those, only “P8” is described as “Picture of Mr. Hettinger’s body.” The two photos at RP 204 are pictures of the exterior of the residence. The picture listed at RP 239 is of a bullet hole in the chair. At RP 488 - 489 of all of the pictures listed, only seven are of Mr. Hettinger.

that he was justified in shooting Mr. Hettinger. In the same vein, a dubious attack on the statements as violations of the “privacy act” does not make sense, nor was it sound legal strategy in light of the defense offered at trial.

As Trial Counsel explained in his opening, the subject of prior incidents or “history” between the Appellant and Mr. Hettinger was a central tenet of the defense. How then could it be error for the Defense to allow testimony about this to be introduced? The Appellant claims that his Trial Counsel should have fought to keep this out, and that his failure to do so rendered the defense ineffective. Brief, page 40 - 43. However, the law provides that if counsel’s actions or failure to act can be characterized as a “conceivable legitimate tactic” they cannot support an assertion of deficient performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). One need not go so far as to search for a conceivable tactical reason, one need only look at the Defense’s opening statement for the reason: his defense lay in the history cited by his attorney during opening argument.

The Appellant’s assertion that his right of confrontation was violated with impunity is similarly flawed. Contrary to the assertion that the reports of the prior incidents painted him as “a dangerous man who deserved to be incarcerated” (Brief, page 45), these prior incidents go to motive and were introduced by the Defense to explain

why he killed his friend. The Appellant offers no legal support for the assertion that the prosecutor's inquiry into the facts advanced initially by the Defense should have been excluded.

C. THERE WAS NO CUMULATIVE ERROR IN THE TRIAL OF THIS CASE.

The Appellant finally argues that all of the error asserted above constitute cumulative error and that he was thus deprived of a fair trial. Although repetitive, it bears repeating: The Appellant confessed from the stand. He admitted to shooting Mr. Hettinger. He admitted that he did so because of "a look." He reenacted the killing for the jury. This is why they found him guilty. Trial Counsel made every conceivable effort to ameliorate the Appellant's words and actions but in the face of the undisputed facts, could not do so. There was no error in the prosecutor's actions. They were appropriate, allowable, and even commendable (in the case of the candid apology to the Appellant). The Trial Counsel's efforts were legitimate trial strategy based upon the difficult facts of the defense case. That Counsel was unable to shake the damning impact of the Appellant's own words and actions at trial is not evidence of ineffective assistance, it is the harsh reality of the case.

There was no error, let alone cumulative error, and the doctrine of cumulative error is inapplicable to the present case:

The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *Id.* As discussed above, Weber has failed to prove how each alleged instance of misconduct affected the outcome of his trial. Similarly, Weber has not indicated how these combined instances of misconduct affected the outcome of his trial. As a result, we hold that Weber's cumulative error doctrine claim fails in this case and that the prosecuting attorney did not commit misconduct that constituted reversible error.

State v. Weber, 159 Wn. 2d 252, 279, 149 P.3d 646, 660 (2006). It was not the actions of the police, attorneys, or the Trial Court that sealed the Appellant's fate. He did so himself.

#### **IV. CONCLUSION**

The Appellant asserts that prosecutorial misconduct and ineffective assistance of counsel produced his conviction. He cannot overcome tsunaminal effect of his voluntary and complete confession so as to avoid the application of "harmless error" to dispose of all of his complaints. He has failed to demonstrate that any of the actions cited rise to the recognized level "prosecutorial misconduct." There is no evidence that, even were the facts and circumstances of this case to be stretched to their breaking point and some misconduct be found, that this overcame the mountain of untainted evidence provided by the Appellant himself. All of the actions assailed herein as ineffective assistance must be viewed as Trial Counsel doing the best with what he had. The stated defense required the admission of

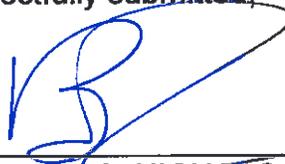
the evidence which the Appellant now takes his attorney to task for allowing in at trial. This defense failed, not because the attorney did not do his job. It failed because the Appellant gutted the attorney's efforts when he took the stand. There was no error, cumulative or in any of the cited instances.

Having told and showed the jury exactly how he shot and killed Mr. Hettinger to death, they took him at his word and found him guilty. No reasonable finder of fact could have reached a verdict other than "guilty as charged."

Based upon the foregoing the Court should reject all of the Appellant's claims and affirm the Judgment and Sentence entered in this matter.

Dated this 8<sup>th</sup> day of January, 2019.

Respectfully submitted,



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**COURT OF APPEALS OF THE STATE OF  
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

Respondent,

v.

MELVIN R. O'ROURKE,

Appellant.

Court of Appeals No: 35565-9

**DECLARATION OF SERVICE**

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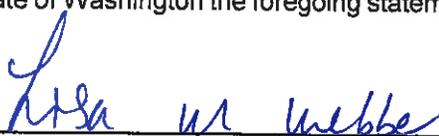
**DECLARATION**

On January 8, 2019 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

GREGORY CHARLES LINK  
greg@washapp.org  
wapofficemail@washapp.org

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on January 8, 2019.

  
\_\_\_\_\_  
LISA M. WEBBER  
Office Manager

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**DECLARATION  
OF SERVICE**

**ASOTIN COUNTY PROSECUTOR'S OFFICE**

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