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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

VICTOR PANIAGUA, Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF FRANKLIN COUNTY

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RESPONDENT'S BRIEF

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Respectfully submitted:  
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I. COUNTERSTATEMENT OF ISSUES

- 1) Was the trial court correct in finding any leading questions did not prejudice defendant?
- 2) Eyewitness testimony established that defendant shot the victim. DNA was collected from the areas of the gun that would be touched by a person firing it. Defendant contributed 82 percent of the DNA found on the gun. Is it reasonable inference that defendant fired the gun, rather than being a "super shredder" who momentarily handled the gun? In any event, did any prejudice result where the trial court sustained an objection and no further curative instruction was requested?
- 3) Where the defense argues that the State failed to call a particular witness, does it open the door for the State to respond that the defendant had an equal opportunity to call that witness? In any event, did any prejudice result where the trial court sustained an objection and no further curative instruction was requested?
- 4) Detective Aceves mentioned during his testimony that he obtained a DNA swab from defendant at jail six days after being arrested. Would a jury reasonably be expected to know that a defendant in a murder case was held in custody at some point? In any event, was any prejudice cured by sustaining an objection and twice instructing the jury to disregard the matter?
- 5) The State presented overwhelming uncontradicted evidence of the crimes of which defendant was convicted. The jury resolved the only issue that could be seriously disputed, that of premeditation, in defendant's favor. Accordingly, was any trial error harmless?

## II. CONUTERSTATEMENT OF THE CASE

Victor Alfonso Paniagua (hereinafter defendant) is appealing from his judgment and sentence entered in Franklin County Superior Court pursuant to guilty verdicts for murder in the second degree, unlawful possession of a firearm in the second degree, assault in the second degree and tampering with a witness. CP 514-27. Defendant's Statement of the Case is substantially correct. However, the State would made the following additions, corrections and amplifications.

At the outset of the case there was no dispute that defendant fired the shot that killed the victim; in the omnibus application, defense counsel listed his defenses as accident or self-defense. RP 32. However, after determining those defenses were not viable, the defense changed at time of trial to one of general denial. RP 34.

Efran Bueno-Gonzalez testified that on June 3, 2018, he was installing flooring at the home a man who sells ice cream in Pasco, Washington. RP 895. He identified defendant as being among those present. RP 898-99. An argument ensued between defendant and the victim. RP 902. Defendant pulled a gun out a small bag in his possession and put the gun by his waistband with the bag covering

the gun. RP 903. When the victim came back, defendant pointed the gun at the victim's forehead; the victim told defendant to pull the trigger is he was a man; and defendant then shot the victim. RP 903-04. Defendant and the victim were about five feet apart at the time of the shooting, RP 94-05. After shooting the victim, defendant pointed the gun at Mr. Bueno-Gonzalez and asked, "What about you?" RP 905. Mr. Bueno-Gonzalez thought defendant was angry and would continue shooting, and was afraid he would not see his daughter again. RP 907. He further testified:

Q. Mr. Bueno-Gonzalez, do you have any question in your mind as to who shot Abel Contreras?

A. No, none.

Q. Who was it?

A. Victor.

Q. The man that's seated at defense table?

A. Yes.

RP 912-13. Ariel Contreras testified that defendant and the victim were arguing when defendant "just pulled out a gun." RP 990. The victim then said, "If you are going to use it, you might as well shoot me right now if you have the balls." RP 993. "And then without hesitation Mr. Paniagua decides to shoot him and did in fact shoot him." RP 993.

The homeowner, Rosello Romero, testified that he was in the living room at the time of the shooting. RP 865. Dulce Moreno and Lucero Porcoyo were outside. RP 689. There was a man installing flooring at the location “before you get to the bedroom.” RP 685. Defendant, the victim and Ariel Contreras were in the bedroom. RP 685. He heard a shot, whereupon the victim screamed, walked a short distance, and fell on to the floor. RP 686-87. Everyone left except himself and Betsabe Quiones. RP 699. After the shooting, he remembered speaking to the police, “Not just about Victor (defendant) but also about the dead person that was there.” RP 692.

After police arrived, they conducted a sweep of the residence and found Bestabe Quiones hiding in a closet. RP 150, 235, 256. She appeared shocked and scared. RP 151, 236, 257. Ms. Quiones testified she was asleep when she heard gunshots. RP 302. She became frightened and hid in the closet, where the police found her. RP 305-08.

Mariam Martinez is a neighbor of the house where the shooting occurred. RP 447. She saw defendant, a female, and a male who had a physical handicap running across her lawn to defendant’s house at 514 South 22<sup>nd</sup>. RP 499-50. Shortly thereafter,

Mr. Ramirez came outside saying, "Someone help me. He killed him." RP 438. 911 was called. RP 448.

Dulce Moreno was outside and saw defendant and Lucero Porcayo heading in the direction of defendant's house after the shooting. RP 721.

Detective Jon Davis testified that the first two witnesses interviewed were Rosello Romero and Bestabe Quinones. RP 531. Others interviewed included Ariel Contreras, Efran Bueno-Gonzalez, Dulce Moreno and Griselda Contreras. RP 532. Based on the interviews and investigation, Victor Paniagua was identified as a suspect. RP 532. The officers proceeded to attempt to locate Victor Paniagua. RP 533. Defendant was arrested coming out the shower in room 215 of the Tahitian Inn. RP 271-72. A .357 Magnum handgun and three spent and three unspent cartridges were found concealed in a combination of backpacks in the room. RP 338, 341.

Officer Justin Greenhalgh responded to the initial call of the shooting. RP 469-70. Upon determining that the scene was secured, he learned that the house of a named person was just to the south at 514 South 22<sup>nd</sup>. RP 470. About 20 to 30 minutes after arriving, he had contact with Juan Villa, who was helpful and gave a

statement. RP 470-71. The officer identified a photo of the orange colored vehicle Mr. Villa was driving. RP 472.

Juan Villa testified that on June 3, 2018, he was driving an orange Chevy Aveco. RP 486. He was residing with defendant at 514 South 22<sup>nd</sup>. RP 486-87. They shared the green bedroom. RP 494-95. Firearms found in the search of the residence did not belong to Mr. Villa. RP 501. Mr. Villa had seen defendant with a rifle at the house. RP 504. On the afternoon of June 3, 2018, defendant walked into the home and asked him for a ride. RP 489. Mr. Villa asked why he needed a ride, but he didn't really give a reason. RP 489. The only thing he said was that something bad had happened. RP 490. Defendant told Mr. Villa to meet him around the corner and he would get into the car. RP 496. This required defendant getting around a fence. RP 497. Defendant told Mr. Villa, "If anyone asks you anything, just say you haven't seen me." RP 497. He saw Lucero Porcoyo arrive on a bike at the Tahitian Inn, where defendant was taken into custody. RP 491-92. Mr. Villa identified a 9-millimeter round that was found in the center console of his car. RP 492. Defendant had given the 9-millimeter bullets to Mr. Villa. RP 493. Mr. Villa drove back home back home after dropping defendant at the hotel. RP 489.

Detective Jeb Abastias obtained and observed video surveillance from several establishment between the crime scene and the Tahitian Inn. RP 397. They showed an orange vehicle occupied by two persons leaving South 22<sup>nd</sup> and arriving at the Tahitian Inn. RP 399. The orange vehicle drove through the alley behind Room 152, made a U-turn, and stopped for a short period of time. RP 399. An individual exited. RP 407. The vehicle drove off in the same direction it had entered the alley. RP 407. A female identified as Lucero Porcayo arrived on a bike and entered the hotel room just ahead of defendant. RP 398, 407. They were both carrying black drawstring backpacks. RP 398-99.

Defendant's residence was located three parcels south of the crime scene. RP 275, 324. During a search of defendant's residence, a .22 caliber rifle was found behind a couch. RP 258-59. A holster was found in one bedroom and ammunition in another. RP 325-27. A certificate with defendant's name was on the bedroom wall where the ammunition was found. RP 327.

While it was impossible to make a positive match between the bullet and the firearm seized from the Tahitian Inn, firearms examiner Brett Bromberg-Martin testified there was some agreement between

the two. RP 611. DNA expert Brittany Wright recovered DNA from the grip, trigger area and slide of the firearm. RP 870. Defendant was identified as contributing 82 percent of the DNA mixture. RP 871. Lucero Porcayo contributed nine percent. RP 871. Two unknown persons contributed six and three percent, respectively. RP 871. Abel Contreras and Yvette Zamarripa were excluded as contributors. RP 870.

### III. RESPONSE TO ARGUMENT

#### 1. *There was no prosecutorial misconduct.*

Defendant first claims he is entitled to a new trial based on prosecutorial misconduct. In a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Misconduct is to be judged "not so much by what was said or done as by what effect is likely to flow therefrom." *Id.* at 762 (citation omitted). "If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's conduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-

61. The State will address the claimed instances of prosecutorial misconduct individually.

*a. The prosecutor did not shift the burden of proof during closing argument.*

Prior to closing argument, the parties addressed power points that were proposed to be used by counsel. The State objected to a slide referring to the State's failure to call the defendant's girlfriend, Lucero Porcoyo, as a witness. RP 1176. The slide read, "Why the State did not call her as a witness." The prosecutor explained that she was not called because her attorney, Danielle Purcell, advised that she was going to invoke her Fifth Amendment right against self-incrimination. RP 1176. Consequently, the prosecutor argued that it was not appropriate to reference her. RP 1176. The trial court stated: "Certainly the State could indicate, well, Defense had the opportunity if they wanted to call her as well." RP 1078. The trial court further stated: "The court is going to deny the objection with regard to the statement: Why didn't the State call her to testify. The Defense will be able to indicate that if they want."

In closing argument, defense counsel argued:

Lucero, Lucy Porcayo. Why didn't the State call her to testify? Yet another individual in the room. Beyond a reasonable doubt comes from evidence

and/or lack of evidence and there is a serious lack of evidence in this case.

RP 1141. The prosecutor responded in rebuttal:

So why didn't the State call Lucero? Defense brought that up.

Well, why didn't the Defense call Lucero? They could have used the subpoena powers of the court to testify but they didn't and they don't have to.

RP 1149. At this point, defendant objected. Despite having earlier stated, "Certainly the State court indicate, well, Defense had the opportunity if they wanted to call her as well," (RP 1078), the trial court reversed itself and sustained the objection. RP 1150.

With all due respect to the trial court, it continues to be the State's position that there should have been no mention of the failure to call Lucero Porcayo as a witness. The State prudently declined to call her once her attorney gave notice of her intent to take the Fifth Amendment privilege against self-incrimination. "It is forbidden for a prosecutor to call a witness, knowing that the witness will invoke the privilege, for the purpose of having the jury see the witness exercise his constitutional right." *State v. Smith*, 74 Wn.2d 744, 758, 446 P.2d 571 (1968). "If a witness is equally available to both parties or

unavailable to either party, the trial court should not permit counsel to argue to the jury during closing argument that an adverse inference arises from the State's failure to call the witness." *State v. Anderson*, 867 S.W.2d 571, 576 (Mo. App. 1993). The fact that a witness's testimony is privileged may make the witness unavailable to a party. See *State v. Cheatam*, 150 Wn.2d 626, 653, 81 P.3d 830 (2003). Indeed, if Ms. Porcoyo had asserted her Fifth Amendment privilege in the jury's presence, the trial court would have given WASHINGTON PATTERN JURY INSTRUCTION – CRIMINAL (WPIC) 4.79, as follows:

I have decided that the witness will not answer the previous question. You should disregard the question. Do not make any assumptions about what the witness would have said or speculate about whether the testimony would have been favorable to a particular party.

The official comments to WPIC 4.79 explain: "The general rule in Washington is that a witness's claim of privilege is not evidence and may not be considered by a jury for any purpose." The comments further state:

This instruction will not be needed frequently. Privilege issues should be resolved out the presence of the jurors and without their knowledge.

That is precisely what occurred here. Once a record was made that the witness would not be called because she was asserting her Fifth Amendment privilege, there should have been no mention made of the failure to call her.

Nonetheless, the fact remains that the argument was made and the State was entitled to respond in rebuttal. Remarks of the prosecuting attorney which ordinarily would be improper are not grounds for reversal if they are provoked by defendant's counsel and are in reply to his or her statements. *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984) (citing *State v. Wright*, 97 Wash. 304, 166 P. 645 (1917)). *Accord*, *State v. Swan*, 114 Wn.2d 613, 663, 790 P.2d 610 (1990).

In *Fortner v. State*, 835 P.2d 1155 (Wyo. 1992), "Appellant's trial counsel had commented in his closing argument on the State's failure to call certain witnesses." *Id.* at 1157. One of the witnesses in question was the defendant's wife, whom the State could not call because of marital privilege. *Id.* In rebuttal closing, the prosecutor stated:

Let's take a look at some things and put things back into perspective. First of all, as far as why wasn't – why

this witness wasn't called or why wasn't that witness called, Mr. O'Neil (defense counsel) has equal access to those witnesses. Those witnesses are as well known to Mr. O'Neil.

*Id.* At that point, defense counsel made an objection which the trial court overruled. The prosecutor continued:

Mr. O'Neil could have subpoenaed those witnesses. I mean, Eva Riddle Fortner was the defendant's wife. So don't get sidetracked there.

*Id.* It was argued on appeal that the prosecutor's arguments shifted the burden of proof to the defendant. However, the court stated:

In any case, the prosecutor made the statements about appellant's failure to call witnesses in response to appellant's argument that the *State* had not called those same witnesses. The inference was that the witnesses have been unfavorable to the State. Once appellant 'opened the door' by commenting on the State's failure to call the witnesses, he allowed the prosecution to close that same door. See *Sanville v. State*, 593 P.2d 140 (Wyo. 1979) (discussing the 'opening the door' rule). The State merely pointed out that the witnesses were equally available to appellant and that he could have called them if they were unfavorable to the State. We hold that the trial court did not impermissibly shift the burden of proof or deride the presumption of innocence by allowing the State to make the challenged comments.

*Id.* at 1158.

In *State v. Fair*, 699 S.W.2d 14 (Mo. App. 1985), victim Andrew Bullock identified defendant as being the man who shot him. The

identification was made in the presence of two police officers and three ambulance attendants. Defense counsel in closing argument questioned the State's failure to call the ambulance attendants as witnesses:

If Andrew Bullock said those things that Officer Allen said he did, then where are the other witnesses, the ambulance attendants, to verify it? They are not here. [The prosecution] didn't bring them in here to verify that . . .

*Id.* at 15. In rebuttal, the prosecutor argued:

The ambulance drivers aren't here. True. [Defense counsel] brought witnesses in – she's a good attorney and don't you think if those ambulance drivers contradicted the State's case the she'd have them sitting right there?

*Id.* Defendant objected, claiming the State was attempting to argue an improper adverse inference. The trial court overruled the objection, stating that the prosecutor's remarks were proper rebuttal to defendant's arguments. The appellate court affirmed, noting:

While it is true . . . that a prosecutor cannot complain of defense counsel's failure to call a witness available to both parties, that rule is subject to an exception where, as here, the argument is made by way of retaliation in answering arguments made in the defendant's closing argument.

*Id.* at 15-16 (citations omitted).

In *United States v. Hernandez*, 145 F.3d 1433 (11<sup>th</sup> Cir. 1998), defense counsel emphasized in closing argument the failure of the prosecution to call a confidential informant as a witness. The prosecutor responded in rebuttal that the informant was present in the courthouse and defense counsel had met him before. While the trial court sustained an objection and struck the prosecutor's statement that defense counsel had previously met the informant, defendant argued on appeal that the prosecutor engaged in misconduct by shifting the burden of proof. The appellate court disagreed, noting: "[W]hile a prosecutor may not comment about the absence of witnesses or otherwise attempt to shift the burden of proof, it is not improper for a prosecutor to note that the defendant has the same subpoena power as the government, particularly when done in response to a defendant's argument about the prosecutor's failure to call a specific witness." *Id.* at 1439 (citations and quotes omitted).

The rationale of these cases applies here. The relevant portion of the prosecutor's argument was made solely in response to defense

counsel arguing, “Why didn’t the State call [Lucero Porcoyo] as a witness?” RP 1149. Accordingly, it was appropriate to note that the defendant had the same subpoena power as the State.

Even if the State’s argument was somehow improper, it would not be grounds for reversal. In *Hernandez*, the court stated that prosecutorial misconduct requires a new trial only if the remarks (1) were improper and (2) prejudiced the defendant’s substantive rights. *Hernandez*, 145 F.3d at 1438. The court noted that the trial court had sustained an objection to the remarks out of an abundance of caution and struck one of the statements. *Id.* at 1439. Additionally, any potential prejudice regarding burden-shifting was diminished by the prosecution’s statement in their closing argument the burden of proof was theirs to carry and by the trial court’s explicit instruction to the same effect. *Id.* Accordingly, even if the remarks at issue could be said to be improper, they were not prejudicial to the defendant’s substantive rights. *Id.*

Here, while the prosecutor argued that the defense could have used the subpoena power of the court to bring Lucero Porcoyo in to be a witness, he also emphasized “they don’t have to.” RP 1143. The prosecutor also argued that the correct conclusion would be to find

that the defendant “is guilty beyond a reasonable doubt on the charged counts and I ask that you find him guilty.” Out of an abundance of caution, the trial court sustained defendant’s objection to the comment at issue. RP 1142-1143. Defendant did not request a curative instruction. RP 1143. The trial court instructed the jury that the State had the burden of proving every element of every crime beyond a reasonable doubt, and the defendant had no burden of proving that a reasonable doubt existed as to those elements. RP 1098. The jury was also instructed that the statements and arguments of counsel are not evidence. RP 1096. Even if the prosecutor’s argument was improper, the defendant’s substantive rights were not violated.

*State v. Dixon*, 150 Wn. App. 46, 207 P.3d 459 (2009), cited by defendant, is clearly not on point. In *Dixon*, the arresting officer did not write down the name of a passenger in the automobile. Defense never asked why the prosecutor did not call the passenger as a witness. Rather, defense counsel argued:

And so, ladies and gentlemen, I would say that you cannot find beyond a reasonable doubt that she is guilty of the crime of possession of a controlled substance methamphetamine. There is doubt there. I just told you what it is. There was an unknown person in the car. We don’t know enough about that person

because, like the officer said, he was still learning and he did not get enough information about this person to tell us what the reason was for his presence and what he was doing while Ms. Dixon was being arrested.

The prosecutor responded that the defendant knew the identity of the passenger and could have called him as a witness. The court found the comments were not invited or provoked by defense counsel, as no mention had been made of the State not calling the passenger as a witness. *Id.* at 56-57. In contrast, in the instant case, defense counsel specifically argued, “Why didn’t the State call her to testify?” RP 1141. This opened the door to the prosecutor asking the same question of defendant.

*b. The prosecutor’s questions were not misconduct and were not prejudicial. The trial court properly denied a mistrial.*

Defendant next argues he was prejudiced the leading questions asked by the prosecutor. However, this was already addressed by trial court when defendant made a motion for mistrial near the close of all the evidence based in part on leading questions throughout the trial. RP 875. The trial court ruled:

[A]s far as the leading questions, the court has sustained the objections to the leading questions on all of them and any - - struck any items that were instructed to be struck, as far as I recall, as far as any testimony that was given during the leading questions.

The court is of the opinion that although the questions were leading based on the nature of the witness that was testifying and the material that was coming out that it was not the proper way to ask the question; that it does not believe it was eliciting responses that would have otherwise not been given, in any event, if the question had been asked without a leading nature to it. The court does not find the defendant suffered any prejudice as a result of that.

RP 878. As stated in *State v. Rodriguez*, 146 Wn.2d 260, 45 P.3d 541 (2002):

This court applies an abuse of discretion standard in reviewing the trial court's denial of a mistrial. A reviewing court will find abuse of discretion only when no reasonable judge would have reached the same conclusion. A trial court's denial of a motion for mistrial will be overturned only when there is a substantial likelihood the error prompting the request for a mistrial affected the jury's verdict. Further, this court has held that trial courts should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.

*Id.* at 269-70 (citations omitted).

The trial court certainly did not abuse its discretion in its ruling on the motion for mistrial. As a leading commentator states:

Ordinarily, an objection [to a leading question] can be eliminated by rephrasing the question. Theoretically prejudice might result because the examiner has already made a suggestion to the witness before the question is reframed. Practically, unless there is some unusual abuse such as the continued use of leading questions, no basis for reversal or claim of prejudicial error exists.

KARL B. TEGLAND, WASHINGTON PRACTICE: EVDIENCE

§ 611.17. ER 611(c) proves that leading questions “should not” be used on direct examination “except as may be necessary to develop the witness’s testimony.” Trial court have broad discretion with regard to leading questions. TEGLAND § 611.17. Leading questions are ordinarily permitted on direct examination to refresh the recollection of the witness. TEGLAND § § 611.17, 612.10.

A review of the points in the record cited at pages 27-28 of defendant's brief show the lack of prejudice:

At RP 378, the prosecutor began his redirect of Sgt. Parramore by asking whether defendant responded right away when asked to come out of the shower. The prosecutor then asked, “In fact, you had to call several times; is that right?” RP 378. An objection was sustained to the question being leading. RP 378. However, Sgt.

Parramore had earlier testified on direct examination, "So I was advised that the defendant was in the bathroom. He responded. However, he did not come out immediately as ordered." RP 366-67. Asked how many times he had to announce, Sgt. Parramore replied, "Several, several times." RP 367. The prosecutor on redirect was merely asking him to repeat what he had already testified to on direct.

At RP 394, Officer Cobb testified that the defendant was unable to stand still. The prosecutor then asked, "Was he passing back and forth?" RP 394. After an objection was sustained, the prosecutor eliminated the objection by rephrasing the question: "What did you observe of the defendant?" RP 395. Officer Cobb answered, "He wasn't able to really stay in one place. He was shifting back and forth. He was pacing back and forth." RP 395.

At 492, Juan Villa testified he had given a statement to the police. The prosecutor then asked, "Do you remember telling law enforcement - - " RP 492. An objection to the question as being leading was sustained. RP 492. Before any suggestion was made of the anticipated answer, the prosecutor then eliminated the objection by rephrasing the question, "What did you tell them about

those 9-millimeter bullets?" RP 493. The witnesses answered, "That Victor had gifted me them." RP 493.

At RP 716, Dulce Moreno testified that once she heard the gunshot, she tried to "get out of there" which was natural when hearing a gunshot. The prosecutor asked, "You were thinking about your kids?" RP 716. After an objection was sustained as leading, the prosecutor rephrased the question to, "What were you thinking about when you heard the gunshot?" RP 716. She replied, "I was just trying to get out of there. I didn't want to be a part of anything that happened." RP 716. The witness was obviously not influenced by the question, as her answer did not mention her children. Moreover, it was hardly surprising to the jury to suggest a mother might think of her children under such circumstances.

At RP 449, the prosecutor asked witness Mariam Martinez if the female she observed was "wearing a white shirt." After an objection was sustained to the question being leading, the prosecutor eliminated the objection by rephrasing the question, "What did you observe?" RP 449. The witness answered, "They were all running to Victor's house." RP 449. The prosecutor then asked, "What kind

of clothing was the female wearing?" RP 450. The witness answered, "Like a tight white shirt, some jeans." RP 450.

At RP 486 and 487, Juan Villa responded three times to questions about the events of June 3, 2018. At 488 he was asked, "On June 3<sup>rd</sup> did you come in contact with Mr. Paniagua?" He responded, "Was that the day of the incident?" RP 488. The prosecutor replied affirmatively. RP 488. After an objection was sustained as leading, the prosecutor rephrased, "Mr. Villa, on June 3<sup>rd</sup> were you living with the defendant on the date of the incident?" to which he replied "Yes." RP 488-89. However, law enforcement witnesses had earlier established June 3, 2018, as the date of the incident, e.g., RP 142.

At 299, witness Bestabe Quinones referred to, "The guy that's pronounced dead." When asked his name, she replied, "I'm not sure. I didn't know him too well." RP 299. The prosecutor asked, "Would Abel Contreras sound about right?" RP 299. An objection sustained as leading. RP 299-300. However, the identity of the deceased was never disputed and was established by many other witnesses. E.g., RP 961-62.

At 739, Detective Aceves was asked if the evidence technician had documented certain things. When that was objected to as leading,

the prosecutor merely asked to explain the procedure; Detective Aceves did so and testified he could tell from the records that the proper documentation had been made. RP 739-40.

At RP 798, expert witness Elizabeth Schroeder testified, "Nothing here was indicative that there was a struggle or anything that happened there. This is all consistent with him pretty much just ending up here and falling down into that location." The prosecutor merely repeated this testimony by asking, "Consistent with somebody getting shot and then walking and then collapsing?" RP 798. After an objection was sustained as leading, the prosecutor rephrased: "You testified earlier about patterns and you testified earlier that there is nothing to indicate a struggle. What do you look for in patterns to determine direction?" RP 798. The witness gave a detailed answer explaining how the blood trail showed the victim moved some distance to where he was found on the floor, concluding by saying, "So none of that was present in this area to indicate that he was actually shot where he ended up." RP 799. There was nothing suggested to the witness.

At RP 815 the prosecutor asked the expert witness, "Would it fair to say that based on your testimony what you are doing is trying to

exclude other explanation for - - - “ After an objection was sustained as leading, the prosecutor rephrased, “As part of your training and experience do you look for other possibilities?” RP 815. The expert witness gave lengthy answer including, “We are always looking at what the possible causes of a pattern of injury of anything we see in a scene could be. . . . We are required to kind of think outside the box and say, okay, but what else could be the particular pattern?” RP 816. Again, nothing was suggested to the witness.

At RP 821 the expert witness was asked, “Based on your observations did it appear to be consistent with a bullet entering from the southeast and then - - “ After an objection was sustained as leading, the prosecutor simply asked, “What did you see?” RP 821. The expert witness proceeded to give a detailed explanation of how the bullet hole in question was determined to be a deflection. RP 821. Again, the witness was doing the testifying.

At RP 894-95, Efren Bueno-Gonzalez testified that on June 3, 2018, he was working on the floor at the home of an individual he knows as an ice cream man. The prosecutor than asked, “So on June 3<sup>rd</sup>, 2018, I believe you testified that you were working in a home in Pasco, Washington; right?” RP 895. The trial court sustained an

objection only as to the last part of the home being located in Pasco, Washington. RP 896. However, since the entire testimony of the witness at RP 894-914 related to the homicide incident on trial, it was obvious from prior testimony that the house was in Pasco, Washington. E.g., RP 142.

It was apparent that in asking the questions in issue, the prosecutor was attempting to refresh the recollections of witnesses or admit evidence. While the trial court in its broad discretion declined to allow leading question in these instances, the prosecutor generally remedied the objections by rephrasing the questions with the intended testimony being properly presented. This is not a case, for example, where the prosecutor put inadmissible evidence before the jury in the form of leading questions. No instance has been cited by defendant where a curative instruction was requested and not given by the trial court.

In *State v. Markham*, 40 Wn. App. 75, 697 P.2d 263 (1985), the defendant claimed he was entitled to a mistrial based on prosecutorial misconduct, including by asking leading question which forced the defense to make continuous objections. The court noted:

Assuming arguendo the examples cited by Markham constitute prosecutorial misconduct, reversal is only

appropriate if there is a substantial likelihood the misconduct affected the jury. . . . The prosecutor was also frequently admonished against asking leading questions, which if anything would make the prosecution, not the defense, look bad in the eyes of the jury.

*Id.* at 90 (citations omitted). The same rationale applies here. The number of objections sustained to leading questions do not seem numerous given the length of the trial, but if anything the sustaining of objections would make the prosecution, not the defense, look bad in the eyes of the jury. There was no prejudice. *See also State v. Swanson*, 73 Wn.2d 698, 699, 440 P.2d 492 (1968) (prosecutorial misconduct by asking leading question is not prejudicial where other evidence establishes the subject of the leading question); *State v. Miller*, 103 Wn.2d 792, 796, 698 P.2d 554 (1985) (leading question by prosecutor on direct examination not reversible error where there is no showing that it was prejudicial); *State v. Belt*, 194 Wn. App. 1006, 2016 WL 2874188 (2016) (Siddoway, J. concurring) (noting that trial courts have broad discretion to permit leading questions and a prosecutor does not engage in misconduct at all when asking leading questions reasonably believed to be allowable within the court's discretion) (unpublished opinion cited pursuant to GR 14.1 for such persuasive value as the court deems appropriate).

The cases cited by defendant are clearly distinguishable. *State v. Alexander*, 64 Wn. App. 147, 882 P.2d 1250 (1992) involved a prosecution for child sexual abuse. The court noted the while the “fact of complaint doctrine” allows admission of a victim’s timely complaint of sexual assault, it does not allow admission of the details of the complaint or the identity of the offender. *Id.* at 151. The court noted that some of the statements may have been admissible under RCW 9A.44.120, but that procedure was not used. *Id.* at 153 n. 2. The prosecutor nonetheless repeatedly asked the victim’s mother whom the victim identified as her abuser. The court noted that “[t]he pattern of repeatedly asking the same question had the effect of telling the jury the answer to it even when all of defense counsel’s objections were sustained.” *Id.* at 155. While the court could not say the prosecutor’s questions, standing alone, warranted the grant of a mistrial, the conviction was reversed due an accumulation of other errors. *Id.* In contrast, as demonstrated above and as the trial court noted, the subject matters of the leading questions were not themselves improper and the evidence was substantially admitted once the questions were rephrased. In the case of *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012), the prosecutor improperly shifted the burden of proof by arguing the jury

could acquit the defendant only if it believed his testimony. *Id.* at 713.

Nothing similar occurred here.

Citing RP 269, 323 and 481, Defendant further argues at 28 that the prosecutor's questions suggested defendant had been identified as a suspect. However, the witnesses who implicated defendant testified during the trial. E.g., RP 912-13, 933, 685. Moreover, Detective Jon Davis testified without objection to the identity of the witnesses who were interviewed, which led to defendant being identified as a suspect. RP 531-32. Any suggestion in the prosecutor's questions that defendant became a suspect was cumulative.

*c. The prosecutor's statement in closing argument that defendant was not a "super shredder" was a reasonable inference from the evidence. In any event, the trial court sustained the objection and no further curative instruction was requested.*

Defendant next argues that in discussing DNA evidence, the prosecutor improperly commented that defendant "was no super shredder." RP 1124. The prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such

inferences to the jury. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). In instant case, there were two eyewitnesses in the same bedroom who testified that defendant shot the victim. RP 912-13, 993. The DNA was collected from grip, trigger area and slide of the firearm, the areas that would be handled by a person firing it. RP 870. Defendant contributed 82 percent of the DNA found on the gun. RP 871. When the eyewitness testimony is combined with the fact defendant contributed 82 percent of the DNA found on the areas of the gun that would be touched in firing it, a reasonable inference arises that the DNA was deposited by defendant firing the gun rather than being a “super shredder” who casually handled the gun.

In any event, the trial court sustained the objection. RP 1125. No further curative instruction was requested. RP 1125. There was no prejudice.

*2. The cumulative error doctrine has no application here.*

Defendant next argues he is entitled to a new trial based on “cumulative error.” To prevail on a cumulative error claim, a defendant must show a combination of trial errors denied him a fair trial even where any one of those errors, taken individually, may not justify reversal. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 65-66,

296 P.3d 872 (2013). Thus, Yates was not entitled to a new trial based on cumulative error where errors that occurred were not prejudicial. *Id.* As previously demonstrated, the matters raised in this appeal were either not errors at all or were not prejudicial.

3. *The testimony of Detective Aceves was proper. In any event, any error was cured by the trial court's instructions.*

Defendant further argues he was prejudiced by a brief mention by Detective Aceves that a DNA buccal swab was obtained from defendant at the Franklin County Jail six days after his arrest. The witness was simply asked how he went about obtaining the swabs. RP 734. He explained that after obtaining a warrant, "I went to – on the 6<sup>th</sup> of June I went to the Franklin County jail because we knew that's where the defendant was at." RP 735. Defendant requested a curative instruction but made no motion for mistrial at that point. RP 735. The trial court orally instructed the jury: "At this time the court is going to instruct the jury that the portion of this witness's testimony after having indicated that he acquired the buccal swabs is to be stricken. It's being stricken from the record and you are to disregard in its entirety." RP 737.

Near the close of all the evidence, defendant included the testimony of Detective Aceves in his motion for mistrial. RP 875. The trial court ruled:

With regard to Detective Aceves, he testified very briefly; went into the fact that when he was collecting the buccal swabs that he went to the jail to collect those from Mr. Paniagua.

The court did grant the objection to that, did instruct the jury to disregard such testimony entirely and believes the jury has done that and does not make me believe the jury hasn't disregarded the testimony entirely.

Further, there was no testimony that Mr. Paniagua was actually being held in the jail at that time. There was no mention at that point of when this was even done. It could have been simply that he was over there for purposes of collecting it,

There was plenty of testimony from the police department as well; . . . therefore, I don't think it's risen to the level where they have been left with the understanding that he was being incarcerated at the time that this occurred. And I believe, based on the court granting the objection and striking the testimony and telling the jury to disregard it, there has been no prejudice to the defendant from that.

RP 878-89. Prior to closing arguments, the trial court gave and read to the jury the following instruction: "The fact that the defendant was arrested and/or in jail cannot be used to infer guilt." RP 1072; CP 282. The instruction was proposed by defendant. RP 1021.

As previously noted, the denial of mistrial is reviewed only for abuse of discretion. *Rodriguez*, 146 Wn.2d at 269-70. Our Supreme Court further stated in *Rodriguez*: “The mere fact that a jury sees an inmate wearing shackles does not mandate reversal.” *Rodriguez*, 146 Wn.2d at 270 (collecting cases). If that is true of seeing the defendant in physical restraints at time of trial, the same is certainly true of hearing a buccal swab was taken from defendant at the jail six days after his arrest.

Defendant's attempts to distinguish *State v. Mullen-Coston*, 115 Wn. App. 679, 64 P.3d 40 (2003), *aff'd*, 152 Wn.2d 107, 95 P.3d 321 (2004) are unpersuasive. The court not only addressed the probative value of admitting the defendant's incarceration status, it also considered the lack of prejudice, stating at 115 Wn. App. 693-94:

But although references to custody can certainly carry some prejudice, they do not carry the same suggestive quality of a defendant shackled to his chair during trial. Jurors must be expected to know that a person awaiting trial will often do so in custody. Many factors go into the determination of whether a defendant will be released pending trial, including the seriousness of the charged crime and the person's ability to pay bail. In this case, a reasonable juror would know that a defendant in a first degree murder trial was not likely to be released pending trial unless he paid a substantial amount of bail, regardless of whether he was later found to be innocent. In contrast, shackling a defendant during trial sends the message to the jury

that the judge, corrections officers, and security personnel presently fear the defendant or think that he might leap from his chair at any point and cause harm to someone in the courtroom. That is much stronger prejudice than a reference to the fact that the defendant was in jail on the same charge for which he is being tried.

In *State v. Rafay*, 168 Wn. App. 734, 285 P.3d 83 (2012), the court found the defendant's trial counsel was not ineffective in failing to object when the attorney for his co-defendant informed the jurors during voir dire that the defendants were in custody. *Id.* at 842. The court cited *Mullen-Coston* for the following proposition: "Jurors must be expected to know that a person awaiting trial will also do so in custody." *Id.* at 842 n. 196.

Also instructive are two unpublished opinions, cited pursuant to GR 14.1 for such persuasive value as the court deems appropriate. In *State v. Huaman*, 4 Wn. App. 2d 1069, 2018 WL 3738197 (2018), the defendant complained that the testifying officers "repeatedly discussed the fact that Mr. Huaman was in jail." However, the court cited *Mullin-Coston* for the propositions that "references to the defendant's pretrial custody status do not automatically violate the right to a fair trial or the presumption of innocence" and "Jurors must be expected to know that a person awaiting trial will often do so in

custody.” In *In re Pers. Restraint of Mendes*, 199 Wn. App. 1049, 2017 WL 2954707 (2017), evidence was introduced of phone calls made by the defendant from jail. The court relied on *Mullin-Coston* in noting that “jurors must be expected to know that a person awaiting trial will at some point be in custody, particularly when the defendant is charged with something as serious as murder.” The court further noted that the jury only heard the defendant was in jail *at some point*. “Given the severity of the charges, it was likely the jury would have understood that Mendes would have been confined to the jail at some point, and Mendes cannot show that this information violated his right to a fair trial or eroded the presumption of innocence.”

*Mullen-Coston* has been followed by a court in another jurisdiction. In *State v. Capers*, 704 S.E.2d 39 (N.C. App. 2010), the defendant complained of testimony that he was handcuffed when arrested in New York and transported back to North Carolina. The court said that just as “it is common knowledge that a defendant may not be able to post bail and will be transported to trial in handcuffs, it is also common knowledge that when people are arrested, they are handcuffed.” *Id.* at 45 (citing *Mullin-Costin* and other cases).

In the instant case, the brief comment at best suggested defendant may have been in custody six days after his arrest, something that would have been hardly a shock to the jury. Moreover, the jury was instructed to disregard the comment, an instruction which it presumptively followed. *State v. Wilmoth*, 31 Wn. App. 820, 824-25, 644 P.2d 1211 (1982). There was no reversible error.

4. Any error was harmless.

Even if some error occurred during the course of the trial, it was harmless. Error not of constitutional magnitude is grounds for reversal only if the reviewing court determines it is reasonably probable the outcome of the trial had been different had the error not occurred. *State v. Chiariello*, 66 Wn. App. 241, 245, 833 P.2d 1119 (1992). Constitutional error is not grounds for reversal where it is harmless beyond a reasonable doubt. *State v. Wilmoth*, 31 Wn. App. 820, 825, 644 P.2d 1211 (1982).

As previously mentioned, at the outset of the case there was no dispute that defendant fired the shot that killed the victim; in the omnibus application, defense counsel listed the defenses as accident or self-defense. RP 32. The defense was changed to general denial at time of trial only when those defenses did not prove

to be viable. RP 34. The State's evidence at trial was completely uncontracted. The only viable question was one of premeditation, which the jury resolved in defendant's favor. RP 1155. Any error during the course of the trial was harmless.

Dated this 26<sup>th</sup> day of November, 2019

Respectfully submitted,  
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<p>Lisa Ellner liseellnerlaw@comcast.net</p>	<p>I hereby certify that a copy of the foregoing was delivered to opposing counsel sent via this Court's e-service by prior agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>Dated November 26, 2019, Pasco WA</p> <p> Misty McBrearty, Legal Secretary</p> <p>Original e-filed at the Court of Appeals; 500 N. Cedar Street, Spokane, WA 99201</p>
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