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OF THE STATE OF WASHINGTON
COURT OF APPEALS NO: 264629-III

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STATE OF WASHINGTON
RESPONDENT,

V.

DANIEL ROSS HUWE
APPELLANT

AMENDED PETITION FOR REVIEW OF APPELLANT DANIEL ROSS HUWE

~~RESPONDENT'S BRIEF~~

Answer to Petition for Review

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I. IDENTITY OF PARTY FILING RESPONSE

The Respondent, STATE OF WASHINGTON, by and through its attorney, REA L. CULWELL, Columbia County Prosecuting Attorney, respectfully requests that this Court deny Daniel R. Huwe's petition for review.

II. STATEMENT OF RELIEF SOUGHT

The State respectfully requests that the Court deny Daniel R. Huwe's petition for review.

III. COUNTER STATEMENT OF ISSUES

1. Did the trial court err by changing venue?
2. Did the trial court err in incarcerating Huwe in Walla Walla State Penitentiary during the trial?
3. Did the trial court err in giving the Aggravated Domestic Violence jury instruction pursuant to RCW §9.94A.535(3)(h) and did the trial court err in giving the Aggravated Invasion of Zone of Privacy jury instruction pursuant to RCW §9.94A.535(3)(p)?
4. Did the trial court err in giving the Aggravated Good Samaritan jury instruction pursuant to RCW §9.94A.535(3)(w)?
5. Did special deputy prosecutor's comments in closing argument constitute misconduct?
6. Did the prosecutor elicit improper opinion and/or veracity testimony from witness(es)?

7. Did the prosecutor commit reversible error by commenting on Huwe's past gun ownership?
8. Did the prosecutor improperly comment on Huwe's right to remain silent?
9. Did the prosecutor improperly elicit testimony regarding prior bad acts and the prior trial in violation of trial court's order on motion in limine?
10. Was Huwe's defense counsel ineffective for eliciting certain testimony?
11. Was Huwe's defense counsel ineffective for failing to object to admission of booking room photographs of Huwe?
12. Did the trial court err in failing to disqualify the Columbia County Prosecutor because one of the victims was a contract public defender with whom the Prosecutor had opposed in court?
13. Did the trial court judge err in failing to recuse himself because one of the victims was a contract public defender who appeared before the trial judge as a public defender?
14. Was sufficient evidence presented that Mr. Huwe was able to form the specific intent to kill or assault?
15. Does cumulative effect of any errors require reversal or remand?

IV. COUNTER STATEMENT OF THE CASE

A. FACTUAL HISTORY

On June 12, 2002, Mr. Huwe shot his estranged girlfriend Cathlin Donohue and also shot and killed her friend Lenore Lawrence. (RP T-1 (August 21, 2007) at 36-37; 5-25 & 1-8) Mr. Huwe and Ms. Donohue began dating in June of 2001. (RP T-1 (August 21, 2007) at 11; 15-25) In May of 2002, Ms. Donohue ended the relationship. (RP T-1 (August 21, 2007) at 12; 3-5) Mr. Huwe was unhappy about the breakup. (RP T-1 (August 21, 2007) at 12; 7-9) On June 12, 2002, Mr. Huwe called Ms. Donohue ten times within 40 minutes, she did not answer nine of the calls, finally on the tenth call, she answered the phone. (RP T-1 (August 21, 2007) at 14-15; 10-14) Mr. Huwe asked Ms. Donohue for a ride and she agreed. (RP T-1 (August 21, 2007) at 12; 12-16) Mr. Huwe wanted to go to Ms. Donohue's home. (RP T-1 (August 21, 2007) at 16; 18-21) When Ms. Donohue refused to take him to her home, Mr. Huwe grabbed the back of her hair and slammed her head against the steering wheel. (RP T-1 (August 21, 2007) at 16-17; 23-25 & 1-7) Mr. Huwe also grabbed the keys causing the car to come to an abrupt stop. (RP T-1 (August 21, 2007) at 16-17; 23-25 & 1-7) Ms. Donohue then felt so threatened that she agreed to take him to her home. (RP T-1 (August 21, 2007) at 17; 1-17)

When they arrived Mr. Huwe grabbed Ms. Donohue by the arm and walked her into her home. (RP T-1 (August 21, 2007) at 17; 13-14) Mr. Huwe immediately started accusing Ms. Donohue of involvement with other people. (RP T-1 (August 21, 2007) at 17; 13-17) Mr. Huwe picked up a glass Sobe bottle breaking it by hitting Ms. Donohue in the head, causing a laceration. (RP T-1 (August 21, 2007) at 17, ll. 18-25; 18; 19, ll. 1-12) After that bottle broke, Mr. Huwe continued to strike Ms. Donohue on her arms and legs with glass mason jars. (RP T-1 (August 21, 2007) at 17; 18-25) Mr. Huwe also struck Ms. Donohue with her telephone. (RP T-1 (August 21, 2007) at 20, ll. 12-25; 21, ll. 1-8)

Ms. Donohue went into the kitchen to grab a towel to try and stop the wound from bleeding. (RP T-1 (August 21, 2007) at 25; 8-11) Mr. Huwe went into Ms. Donohue's bedroom and retrieved a .38 caliber handgun from her dresser, returned to the living room stuffing the gun between the couch cushions. (RP T-1 (August 21, 2007) at 28; 6-9) Ms. Donohue came out of the kitchen and sat on the couch where they continued to argue. (RP T-1 (August 21, 2007) at 28; 10-12) The phone rang, Mr. Huwe read the caller ID and saw that it was Ms. Donohue's friend Lenore Lawrence. (PR T-1 (August 21, 2007) at 28; 12-14) Mr. Huwe instructed Ms. Donohue to tell Lenore that everything was fine and that nothing was going on. (PR T-1 (August 21, 2007) at 29; 4-9)

Ms. Donohue did what she was told. (RP T-1 (August 21, 2007) at 29; 4-9) Immediately thereafter, Sue Handley called. (RP T-1 (August 21, 2007) at 29; 11-12) Ms. Donohue told her that she needed help. (RP T-2 (August 21, 2007) at 125, ll. 24-25) Ms. Handley and Ms. Lawrence were together at Ms. Handley's work. (RP T-2 (August 21, 2007) at 126, ll. 3-7) Ms. Handley told Lenore Lawrence that Ms. Donohue said she needed help. (RP T-2 (August 21, 2007) at 126, ll. 3-7) Ms. Handley and Ms. Lawrence left separately to go to Ms. Donohue's house. (RP T-2 (August 21, 2007) at 126, ll. 23-25) Ms. Handley arrived first and knocked on the door. (RP T-2 (August 21, 2007) at 127, ll. 11-12) Mr. Huwe went to the window and told Ms. Handley to go away, he did not let her in and Ms. Handley left. (RP T-2 (August 21, 2007) at 127, ll. 11-20)

Ms. Lawrence arrived next at Ms. Donohue's house. (RP T-1 (August 21, 2007) at 32, ll. 20-25; 34, ll. 4-6) Ms. Lawrence entered the house and upon seeing Ms. Donohue bleeding, confronted Mr. Huwe. (RP T-1 (August 21, 2007) at 34-35; 7-8 & 6-10) Mr. Huwe retrieved the gun from the couch cushions and pointed it at Ms. Lawrence. (RP T-1 (August 21, 2007) at 35; 12-13) Ms. Lawrence ran toward the bathroom at which time Mr. Huwe shot her in the leg. (RP T-1 (August 21, 2007) at 35-36; 12-13 & 1-7) Mr. Huwe then got up from the couch, walked over to

Ms. Lawrence and shot her in the back. (RP T-1 (August 21, 2007) at 36; 21-23) Ms. Lawrence screamed for Ms. Donohue to call 911. (RP T-1 (August 21, 2007) at 36; 12) Ms. Donohue ran for the phone in the kitchen. (RP T-1 (August 21, 2007) at 37; 1-7) Mr. Huwe shot Ms. Donohue in the thigh while she was running to call for help. (RP T-1 (August 21, 2007) at 37; 1-7) Ms. Donohue fell to the kitchen floor. (RP T-1 (August 21, 2007) at 39; 22-25)

Ms. Donohue heard Ms. Lawrence crying and begged Mr. Huwe to call 911. (RP T-1 (August 21, 2007) at 40; 1-3) Mr. Huwe picked up the phone and dialed 911 and hung up. He then picked up the phone again, dialed 911 and hung up again. (RP T-1 (August 21, 2007) at 40; 3-5) Mr. Huwe then approached Ms. Donohue while she was lying on the floor and told her he was going to shoot her again. (RP T-1 (August 21, 2007) at 40; 6-7) Mr. Huwe then went to where Ms. Lawrence was lying and gasped. (RP T-1 (August 21, 2007) at 40; 12)

Mr. Huwe, for the third time, then called 911 and said “two people down”. (RP T-1 (August 21, 2007) at 40; 13) Mr. Huwe then placed the gun in his pants and walked out of the house. (RP T-1 (August 21, 2007) at 40;14-18). Mr. Huwe was apprehended several blocks from Ms. Donohue’s house, still in possession of the murder weapon. (RP T-4 (August 22, 2007) at 268, ll. 13-18).

B. PROCEDURAL HISTORY

On February 15, 2007, upon remand for retrial from the Supreme Court, the trial court, on its own motion, addressed change of venue.¹ The State objected to the change of venue motion. Defendant did not object to the change of venue by the Court. On March 1, 2007, the judge indicated that two trial dates (courtrooms) were available, one in Walla Walla County and one in Benton County.² Again, Huwe did not object. On August 8, 2007, the judge, again discussing change of venue, discussed the possibility of busing jurors from Walla Walla county to Columbia County during the trial. (PT-B, pgs 17, ll 15-25; 18; 19, 1-24). Huwe specifically agreed to this procedure. (PT-B, pg 19, ll. 9-20). On August 17, 2007, the judge explained the Walla Walla County jury pool selection process, to which the defendant did not object. (RP PT-E, (August 17, 2007) at 26, ll. 2-11). The judge reiterated that the jurors would be from Walla Walla County. (Id. at pg. 37, ll. 21-25).

The State brought a motion to allow the filing of a Second Amended Information on May 3, 2007. The purpose of the amendment was to include firearms enhancements and aggravating

¹ Huwe did not order, designate, or provide a copy to Plaintiff of the transcript of the pre-trial hearing held on February 15, 2007.

² Huwe did not order, designate, or provide a copy to Plaintiff of the transcript of the pre-trial hearing held on March 1, 2007.

factors of invasion of privacy and domestic violence. State's Motion was granted. (RP PT-A (May 3, 2007) at 6, ll. 10-25).

On May 3, 2007, Huwe's motion requesting funding for experts at state expense regarding alcohol, blood spatter and or ballistics and DNA analysis was also heard and granted. (RP PT-A (May 3, 2007) at 7, ll. 10-13).

Various motions in limine were presented on August 8, 2007. State requested the following orders:

- i. Suppress character evidence of the victims;
- ii. Suppress speculation that the relationship between the victims was more than just friends;
- iii. Suppress any and all contact which either victim had with law enforcement in the past;
- iv. Suppress allegations that either victim had quarrelsome or violent disposition;
- v. Suppress evidence of the victim's alcohol and/or drug use on the date of the incident, June 12, 2002;
- vi. Prohibit Huwe from informing the jury of the potential punishment upon conviction;
- vii. Prohibit Huwe from mention of the first trial;
- viii. Prohibit Huwe from arguing diminished capacity;
- ix. Prohibit Huwe from arguing and presenting any evidence that the medical providers and/or law

- enforcement caused the death of Lenore Lawrence,
or exacerbated the injury of Ms. Donohue;
- x. Huwe not be permitted to argue the theory of self-defense or that some other person committed the crime;
 - xi. Preclude Huwe from presenting any evidence of the suicide of Ms. Donohue's previous boyfriend;
 - xii. Prohibit Huwe from eliciting any expert testimony from mental health counselor, Todd Wagner above and beyond the scope of the one evaluation that he made of the defendant; and,
 - xiii. State also sought an order allowing the admission of Huwe's prior bad acts.

(RP PT-B (August 8, 2007) at 6, ll. 14-25; 7; 8, ll. 1-4).

Huwe brought several motions in limine also heard on August 8, 2007. The defense motions were as follows:

- i. Suppress Huwe's statements made in the booking room or anytime during custody;
- ii. Suppress recordings of telephone calls made by Huwe from a correctional institution;
- iii. Suppress prior bad acts of Huwe or in the alternative that there be a bifurcation of the trial such that proof of the aggravator of a history of

domestic violence be presented to the jury after the verdict on the guilt of Huwe was concluded.

(RP PT-B (August 8, 2007) at 16, ll. 5-12; 17, ll. 6-11).

The court denied suppression of the in custody statements of Huwe, finding that Huwe was given his Miranda warnings prior to making the statements, and that the statements could come in for rebuttal purposes if Huwe argued diminished capacity due to voluntary intoxication. (RP PT-B (August 8, 2007) at 48, ll. 17-21). The court denied Huwe's motion to suppress recorded telephone calls from Huwe. (RP PT-B (August 8, 2007) at 48, ll. 4-7). The court granted State's motion for suppression of past drug use of the victims, victims' contact with law enforcement, that either victim may have had a violent disposition but denied State's motion to suppress victims' use of alcohol on the day of the incident. (RP PT-B (August 8, 2007) at 59, ll. 2-23). The court granted the motion to suppress any mention of potential punishment. (RP PT-B (August 8, 2007) at 59, l. 24). Court granted State's motion to suppress mention of the first trial, but denied in terms of the ability of the parties to use transcripts from the first trial for purposes of prior inconsistent statements. (RP PT-B (August 8, 2007) at 60, ll. 4-8). State's motion to suppress any evidence that the victims were more than friends was granted. (RP PT-B (August 8, 2007) at 62, ll. 9-14). State's motion to preclude

Huwe from asserting diminished capacity was granted, however, intoxication was allowed to be offered regarding the issue of specific intent. (RP PT-B (August 8, 2007) at 65, ll. 20-22). State's motion to preclude Huwe from asserting that a third party committed the crimes was granted. (RP PT-B (August 8, 2007) at 66, ll. 9-11). State's motion to preclude Huwe from raising self-defense was granted. (RP PT-B (August 8, 2007) at 66, ll. 12-17). State's motion to suppress any evidence of victim's former boyfriend's suicide was granted. (RP PT-B (August 8, 2007) at 68, ll. 2-11). State's motion to limit the testimony of Todd Wager was granted. (RP PT-B (August 8, 2007) at 68, ll. 12-17).

State's motion to admit prior bad acts of Huwe was granted, but such evidence would only be allowed at the bifurcated portion of the trial to determine if the aggravating factor of a history of domestic violence was found. (RP PT-B (August 8, 2007) at 80, ll. 13-25).

On August 17, 2007 Huwe brought a motion to have a special prosecutor appointed based upon the status of Ms. Donohue being a contract public defender in the county. (RP PT-E (August 17, 2007) at 32, ll. 4-25; 33-35). Defendant's motion was denied on the grounds that the defendant showed no actual harm or prejudice to the defendant. (RP PT-E (August 17, 2007) at 35, ll. 18-22).

Trial was held on August 21, 2007. (RP T-1 (August 21, 2007) at 5). Huwe was found guilty of Murder in the Second Degree and Assault in the First Degree, both with firearm enhancement. (RP T-9 (August 27, 2007) at 640, ll. 18-25; 651; 643, ll.-5.) Bifurcated hearing on aggravating factor of pattern of abuse/domestic violence and invasion of privacy was held and the jury found no pattern of abuse/domestic violence, but did find that Huwe had invaded Ms. Donohue's privacy. (RP PT-B (August 8, 2007) at 699; ll. 9-23).

Huwe was sentenced on August 30, 2007. (RP PT-F (August 30, 2007). State recommended 252 months plus enhancement of 60 months for a total of 312 months. (RP PT-F (August 30, 2007) at 5, ll. 6-19). Huwe was sentenced to the top end of the standard range without enhancement for a total of 468 months. (RP PT-F (August 30, 2007) at 42, ll. 7-13).

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court of Appeals' decision in denying Huwe's request for dismissal or remand is not in conflict with any decision of the Supreme Court. The Court of Appeals' decision is not in conflict with another decision of the Court of Appeals. There is no significant question of law under the Constitution of the State of Washington or of the United States involved in this case. This case does not involve an issue of substantial public interest that

should be determined by the Supreme Court. No error was committed in this case.

Huwe received a fair trial, Huwe failed to object at trial, and there was sufficient evidence to prove beyond a reasonable doubt that Huwe murdered Lenore Lawrence and assaulted Cathlin Donohue.

A. TRIAL COURT DID NOT ERR BY CHANGING VENUE.

Huwe received a fair trial by a jury from Walla Walla County. Huwe's argument is unsupported by law or facts. Huwe failed to designate the portion of pre-trial transcripts and/or the court record regarding the change of venue in this matter. Huwe failed to object to the change of venue at trial. Huwe fails to allege for the first time on appeal that any alleged error actually affected his rights. Huwe's argument fails.

At the pre-trial hearing held on February 15, 2007, the trial court commented on the difficulty of being able to find enough qualified jurors within Columbia County and indicated that it would consider changing venue to Walla Walla County. The Plaintiff argued against change of venue. Huwe did not object to change of venue. At the pre-trial hearing held on March 1, 2007, the trial court judge indicated that two trial dates (courtrooms) were available, one in Walla Walla County and one in Benton County. Again, Huwe did not object. On August 17, 2007, the

judge explained the Walla Walla County jury pool selection process, to which the Huwe did not object. Huwe had three dates in which he could have and failed to object in open court to the change of venue. Furthermore, Huwe failed at anytime prior to trial to file a formal pleading objecting to any change of venue. Huwe waived his right to be tried in the county where he murdered Lenore Lawrence and assaulted Cathlin Donohue. (*See, State v. Pesja*, 75 Wn.App 139, 876 P.2d 963 (Div. II, 1994) (defendant waived challenge to venue by waiting until end of State's case to challenge it); *See also, State v. Dent*, 123 Wn.2d 467, 479, 896 P.2d 392 (1994) (criminal defendant waives any challenge to venue by failing to present it by time jeopardy attaches, when the jury is sworn)).

To raise a constitutional error for the first time on appeal, “[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *see also* RAP 2.5(a)(3). “Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” *State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992). Here, Mr. Huwe does not show how being tried by jurors from Walla Walla County had such an effect.

Huwe cites to *Gut v. State of Minnesota*, 76 U.S. 35, 1869 WL 11595 (1869) to support his claim. (Amend. Pet. For rev. at pg. 4) The court in *Gut*, held that the Minnesota law permitting a defendant to be tried in a district adjoining the district where the offense occurred was constitutional. Huwe's claim fails. Huwe quotes *Salinger v. Loisel*, 265 U.S. 224, 232, 44 S.Ct. 519, 68 L.Ed. 989 (1924) for the proposition that an accused *cannot* be tried in one district when offense was not committed in that district. (Amend. pet. for rev. at pg. 5) (*emphasis added*). However, the *Salinger* court recognized that an accused may and can be tried in a district where the offense was not committed as permitted by the federal Constitution. *Salinger, supra* 265 U.S. at 233-34. Huwe's claim fails.

No error occurred in changing venue to Walla Walla county, Huwe's claim fails and review should be denied.

B. TRIAL COURT DID NOT ERR IN HOUSING HUWE AT WALLA WALLA STATE PRISON.

The trial court did not err by not ordering Huwe be held in Columbia County jail during the trial. Huwe's argument is unsupported by law or facts and fails.

Pursuant to RCW §36.28.010 the Columbia County Sheriff must arrest and commit to prison all persons who break the peace, or attempt to break it and all persons guilty of public offense. REV.

CODE WA. §§36.28.010(2). The Sheriff may house a person in another jurisdiction. *See, generally*, REV. CODE WA. §70.48.090. Courts, on the other hand, have the inherent authority to administer justice and to ensure the safety of court personnel, litigants, and the public. *State v. Wadsworth*, 139 Wn.2d 724, 991 P.2d 80 (2000).

The Sheriff's Office dictates the incarceration of an inmate. The court dictates any security measures to be taken in the court room. Both the Sheriff and trial court acted within their respective authorities in this matter. Huwe's claim fails.

Huwe basis his claim of error on the allegation that while he was being transported to Columbia County from Walla Walla, a juror might have seen Huwe along with transport officers in uniform.

Huwe immediately notified the trial court of the potential sighting and stated that he was not sure to what extent if any the juror saw Huwe. (RP T-3 (August 22, 2007), at 144, ll. 10-25; 145; 146, ll. 1-13). The trial court specifically addressed the potential sighting, ruling "I don't find there has been any breach of . . . of court rule or order by the court by virtue of the juror having seen Mr. Huwe." (RP (August 22, 2007), at 145, ll. 17-29). The trial judge then suggested that the van take an alternate route so as to avoid any potential future sighting, to which Huwe agreed. (RP (August 22, 2007), at 145, ll. 21-25; 146, ll. 1-15).

Here, nothing in the record suggests the incident prejudiced the juror against Huwe. *See State v. Gosser*, 33 Wn.App. 428, 435, 656 P.2d 514 (1982), (not reversible error simply because jurors see defendant wearing shackles).

Huwe waived his challenge to this jury. At no time did Huwe request that the jury be questioned about the potential sighting. At no time did Huwe request a mistrial be declared. At no time did Huwe request a jury instruction regarding the potential sighting or his transportation be given. Huwe waived his right to challenge his housing in Walla Walla and transport to Columbia County each day of the trial. Huwe's claim fails.

Huwe cites *State v. Gonzales*, 129 Wn.App. 895, 120 P.3d 645 (Div. III, 2005) for his claim. In *Gonzales*, the trial court specifically informed the jury, bringing attention to the fact, that the defendant was being transported from jail in restraints. *Id.* at 898. The appellate court found Gonzales's constitutional rights were violated because not only did the judge inform the jury of the defendant's transportation to and from jail, but the judge also specifically informed the jury that the defendant was in restraints, was in jail because he could not post bail and was under guard in the courtroom; such statements tainted the jury. *Id.*

Here, there were no such statements made by the judge. Huwe's rights to an impartial jury trial were not violated, his claim fails and review should be denied.

C. TRIAL COURT DID NOT ERR IN GIVING THE DOMESTIC VIOLENCE AND THE AGGRAVATOR ZONE OF PRIVACY JURY INSTRUCTIONS.

The jury answered the zone of privacy question in the affirmative, Huwe was sentenced within the standard ranges for his crimes and cannot appeal his standard range sentence.

Regardless, Huwe's argument fails substantively. Huwe argues that the domestic violence jury instruction and the zone of privacy jury instruction are in conflict and a finding of "yes" on both cannot be had because he "shared zones of privacy" with the victim because he was in a domestic relationship with her. (*See*, Amend. Pet. for Rev. at pg. 7).

Huwe's argument fails. Huwe cites to no facts or case law that supports his contention that two people who are in a domestic relationship necessarily have the same zone of privacy or that two people who are in a domestic relationship cannot violate one another's zone of privacy.

A finding of domestic violence is based upon the finding of a domestic relationship which is defined, as properly instructed by the court, as two people who are or have been in a dating

relationship. A reasonable jury, based upon the evidence presented found that Huwe and the victim were in a dating relationship.

There was no dispute by the defendant as to this dating relationship. (*See, generally*, cross-examination of Donohue at RP transcript T-1, pgs 52-75; T-2, pgs. 89-97).

Case law supports that Huwe's actions in entering and remaining in the victim's home where he assaulted her with a firearm constitutes an invasion of privacy, regardless of their prior dating relationship. (*See, State v. Coleman*, 152 Wn.App. 552, 216 P.3d 479 (Div. II, 2009), (defendant's entry into victim's bedroom greater invasion of privacy than if entered and assaulted victim in building not victim's residence); *State v. Hicks*, 61 Wn.App. 923, 929-30, 812 P.2d 893, 896 (1991) (factor recognizes the citizens' right to let down their guard and enjoy relaxed atmosphere of their homes); *State v. Falling*, 50 Wn.App. 47, 55, 747 P.2d 1119, 1123 (1987) (victim who is assaulted in the home also suffers heightened psychological injury, since home is no longer island of security it was before crime)). Here, Huwe committed the crime against Ms. Donohue in her home, not his. (RP T-1 (August 21, 2007) at 17; 5-14). Huwe's claim fails and review should not be granted.

D. TRIAL COURT DID NOT ERR BY INSTRUCTING THE JURY ON THE AGGRAVATOR GOOD SAMARITAN.

The jury answered the good Samaritan question in the negative, therefore Huwe has no claim that such instruction was in error. (RP T-9 (August 27, 2007) at 641; ll. 19-24). Furthermore, even if the jury answered the good Samaritan question in the positive, Huwe was sentenced within the standard ranges for his crimes and cannot appeal his standard range sentence.

Huwe appears to argue because the jury asked a question about the good Samaritan issue, they were not focusing on the question of his guilt, thus he was prejudiced. (*See*, Amend. Pet. for Rev. at 8). Huwe's argument is nonsensical. The jury was instructed only to consider the special aggravator verdict form if they unanimously found Huwe guilty of Murder in the second degree. (RP transcript T-8 pg 563, ll. 8-20). A jury asking a question regarding the special verdict form shows that they had already considered the charge of Murder 2 and found Huwe guilty. Huwe's claim fails.

Moreover, an erroneous jury instruction is harmless if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008). The jury instruction did not affect the verdict as the jury found that the aggravator did not exist.

Such a finding cannot contribute to the jury's verdicts of guilty.

Huwe's argument fails and review should be denied.

E. PROSECUTOR DID NOT ENGAGE IN MISCONDUCT IN CLOSING ARGUMENT.

“To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct by the prosecutor and prejudicial effect.” *State v. O'Donnell*, 142 Wn.App. 314, 327, 174 P.3d 1205 (2007) (quoting *State v. Munguia*, 107 Wn.App. 328, 336, 26 P.3d 1017 (2001)). “[T]he defendant bears the burden of proof on both issues.” *Id.* at 328, 26 P.3d 1017 (citing *Munguia*, 107 Wn.App. at 336, 26 P.3d 1017).

Huwe argues prosecutorial misconduct occurred when the prosecutor, in her closing argument, suggested the jury ignore the lesser-included offense instructions. In her closing argument, the prosecutor stated:

The judge rightfully has told you of a series of crimes that are under murder in the second degree, and under assault in the first degree.

But ... I am going to ask you-I am going to suggest to you that it would make more sense for you to just let the defendant go than to compromise. It would make more sense to either find him guilty of murder in the second degree, and assault in the first degree, or none of it. Because if there was one whit of evidence, one suggestion from anybody that the defendant was acting recklessly, or acting negligently, you know, then you might have a case for manslaughter.

8 RP (Aug. 24, 2007) at 573.

The jury, with respect to the second degree murder charge, was instructed on the lesser included crimes of first and second degree manslaughter and with respect to the first degree assault charge, the jury was instructed on the crimes of second and third degree assault. The prosecutor continued, arguing the facts did not support the lesser crimes.

The prosecutor argued inferences from the trial evidence as shown in this record. Such argument is not misconduct. “The prosecutor has wide latitude in closing argument 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). Huwe did not raise the issue at trial, he did not object.

Even if the prosecutor engaged in misconduct, Huwe has not met the showing required for prosecutorial misconduct raised for the first time on appeal, that “the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.” *O'Donnell*, 142 Wn.App. at 328, 174 P.3d 1205 (*quoting Munguia*, 107 Wn.App. at 336, 26 P.3d 1017). Huwe’s claim fails and review is not warranted.

**F. PROSECUTOR DID NOT COMMIT MISCONDUCT
REQUIRING REVERSAL IN ELICITING TESTIMONY.**

“Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant.” *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). “A witness may not give an opinion as to another witness's credibility.” *State v. O'Neal*, 126 Wn.App. 395, 409, 109 P.3d 429 (2005), *aff'd*, 159 Wn.2d 500, 150 P.3d 1121 (2007).

Huwe complains about the following State’s questioning of Mr. Spray:

[The State:] Did [Mr. Huwe] say anything else?..

[Mr. Spray:] ... He made a reference to, “I’m going to end this tonight.”

[The State:] Was [Mr. Huwe] smiling, when he said that?

[Mr. Spray:] No, ma’am.

[The State:] Did you think [Mr. Huwe] was joking, when he said that?

2 RP (Aug. 21, 2007) at 107.

Huwe did not object to these questions.

Second, Mr. Huwe points to the State’s questioning of Mr. Spray:

[The State:] Beside [sic] idle chitchat, did [Ms. Donohue] tell you anything else?

[Mr. Spray:] Yes. She said that she was back in Dayton because of her boyfriend’s suicide.

2 RP (Aug. 21, 2007) at 106. Huwe did not object to this question.

The question posed to Mr. Spray as to how he personally interpreted the statement by Huwe was not improper opinion testimony and did not go to the veracity of Huwe. Furthermore, even if the question was improper, Huwe waived his right to challenge the questioning by not objecting and his argument fails to support review for the first time on appeal. *See O'Donnell*, 142 Wn.App. at 328, 174 P.3d 1205 (quoting *Munguia*, 107 Wn.App. at 336, 26 P.3d 1017). The challenged questions are a small portion of the testimony which occurred within four days of testimony. A “curative instruction would have obviated the prejudice it engendered.” *O'Donnell*, 142 Wn.App. at 328, 174 P.3d 1205 (quoting *Munguia*, 107 Wn.App. at 336, 26 P.3d 1017).

Huwe points to the State’s questioning of Deputy Franklin:

[The State:] Did you ask [Ms. Donohue] what her address was?

[Captain Franklin:] Yes, I did.

....

... [s]he said, “St. Mary’s.”

[The State:] ... And technically, she was at St. Mary's?

[Deputy Franklin:] Yes, she was.

[The State:] And, so, in the letter of your question to her, she right then was residing at St. Mary's. So, technically that was correct.

4 RP (Aug. 22, 2007) at 242. Huwe did not object to this questioning.

Huwe further complains about the prosecutor's closing argument discussing Ms. Donohue's testimony. Huwe did not object to the argument. Assuming prosecutorial misconduct occurred, for argument's sake, Huwe waived his right to challenge the questioning by not objecting nor requesting a curative instruction which would have alleviated any impropriety. *See O'Donnell, supra*. Huwe's argument fails to support review for the first time on appeal.

Huwe also challenges the following question posed by the prosecutor to Mr. Spray: "[w]ithout talking about any response or any further comment ... did [Mr. Huwe] say anything else to you about any plans he had, perhaps?" 2 RP (Aug. 21, 2007) at 106. Huwe argues this question was prejudicial, because it allowed the jury to consider other acts in deciding the case against Huwe.

Huwe's assertion that the prosecutor prejudiced the trial by stopping Mr. Spray from testifying to hearsay or other inadmissible or prejudicial issues is not logical. No other acts or hearsay statements were elicited by the prosecutor. Mr. Spray did not answer the question; Huwe's objection to the question was

sustained. Hence, no misconduct occurred. 2 RP (August 21, 2007) at 106, ll. 14-19). Review is not appropriate.

**G. PROSCUTOR DID NOT COMMIT MISCONDUCT
IN PRESENTING EVIDENCE REGARDING HUWE'S GUN
OWNERSHIP.**

Huwe argues the prosecutor, in an objection to Huwe's cross-examination of Ms. Donohue on how many guns she has or does own, stated that

“[w]e have established that the defendant has had a few guns in the past, and a rifle, but I don't know how **her**, ah experience in the past has anything to do with the handgun that was used to shoot her.”

(1 RP (August 21, 2007) pgs. 58, ll. 15-25; 59; 60, ll. 1-5;

emphasis added). The prosecutor utilized the term “defendant”

incorrectly, by mistake. The record shows that the prosecutor

should have used the term “witness,” “victim,” or “Ms. Donohue.”

The reference to “her” indicates that the Prosecutor was referring

not to defendant's past gun ownership, but to the witness's past

gun ownership. *Id.* A reasonable jury would have concluded the

same thing.

Furthermore, Huwe did not object. Huwe did not request a

curative instruction. Huwe waived his right to raise this issue and

fails to show how any conduct by the Prosecutor prejudiced him.

No review is warranted.

H. PROSECUTOR DID NOT COMMENT ON HUWE'S RIGHT TO REMAIN SILENT.

Though [t]he State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence[,]” a defendant's pre-arrest silence does not implicate due process principles. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). Unlike post-arrest/post-*Miranda* silence, pre-arrest silence lacks the implicit assurance from the State about its punitive effect in future proceedings. *Id.*

Huwe argues the State in rebuttal closing argument improperly commented on his pretrial silence; “what kind of person calls for an ambulance? ... it's the kind that won't give his name, will say it doesn't matter who did this.” 8 RP (Aug. 24, 2007) at 614-15. Huwe did not object.

The Prosecutor referred to Huwe's actions and statements made before Huwe was facing accusations, before any right to remain silent was implicated. The Prosecutor's arguments are appropriately based upon the trial evidence.

Even assuming this statement was misconduct, Huwe cannot raise the issue for the first time on appeal and a curative instruction would have eliminated any possible prejudice. *O'Donnell, supra*, 142 Wn.App. at 328. Review should be denied.

**I. PROSECUTOR DID NOT IMPROPERLY ELICIT
PRIOR BAD ACT OR PRIOR TRIAL TESTIMONY.**

Huwe complains that the following testimony, elicited by the Prosecutor violated the trial court's pretrial ruling that no prior bad acts of Huwe are admissible in the guilt phase of the trial:

[The State:] What .38 Special?

[Ms. Donohue:] The .38 Special that I had, ah, borrowed from Mr. Dean Krouse.

[The State:] When did you borrow the .38 Special?

[Ms. Donohue:] Ah, probably a month before this incident occurred.

....

[The State:] And, ah, why did you borrow it?

[Ms. Donohue:] I was afraid for my safety.

[The State:] Who were you afraid of?

[Ms. Donohue:] Mr. Huwe.

....

[The State:] And is this the gun you referred to that you borrowed for protection from [Mr. Huwe]?

[Ms. Donohue:] That's correct.

1 RP (Aug. 21, 2007) at 25-27. Mr. Huwe did not object or ask for a curative instruction.

Though, as the Court of Appeals correctly points out, the State sought to admit the evidence of Ms. Donohue borrowing a gun because she feared Huwe and the court ruled that no prior bad

acts of Huwe were admissible during the guilt phase, none of the testimony is prior bad acts of Huwe. (PT-B pgs. 8, ll. 2-3; 79, ll. 11-15). Consistent with the court's pre-trial ruling, the Prosecutor elicited the testimony and defense counsel did not object, specifically cross-examining Ms. Donohue on the issue. (1 RP (August 21, 2007), pgs. 57, ll. 8-25; 58, ll. 1-14). The testimony was not improper.

Even assuming the Prosecutor should not have elicited such testimony, Huwe cannot raise the issue for the first time on appeal and a curative instruction would have eliminated any possible prejudice. *O'Donnell, supra*, 142 Wn.App. at 328. Review should be denied.

Huwe secondly complains that the Prosecutor committed misconduct when she asked Ms. Donohue if she recalled when pictures of her bullet wound were taken, and Ms. Donohue responded, “[t]hose were taken prior to the first trial.” 1 RP (Aug. 21, 2007) at 37. Huwe did not object.

The trial court, prior to trial excluded *explicit* mention of the first trial. PT-B (August 8, 2007) pgs. 60, ll. 2-25; 61, ll. 1-2). The trial court specifically recognized that “there’s no way to avoid this jury not finding out about the existence of the past trial, . . . ,” but ruled that flagrant mentioning of Huwe’s prior conviction is prohibited. *Id.* at pg. 60, ll. 9-25.

This was not misconduct; the prosecutor did not mention the first trial, or elicit such a response from Ms. Donohue.

Regardless, a curative instruction would have eliminated any prejudice created. *See O'Donnell, supra*, 142 Wn.App. at 328.

J. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR ELICITING CERTAIN TESTIMONY.

To establish ineffective assistance of counsel, Huwe must show his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him.

McFarland, supra, 127 Wn.2d at 334-35. Prejudice requires a showing that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Huwe first points to questioning by defense counsel of Ms. Donohue regarding how she obtained the gun used in the crimes. Huwe did not object to this questioning. As addressed hereinabove, elicitation of testimony regarding how and why Ms. Donohue obtained the gun used by Huwe to shoot and kill Ms. Lawrence and shoot and harm Ms. Donohue did not violate the trial court's exclusion of Huwe's prior bad acts in the guilt phase of the trial. *See*, Section VI. I *hereinabove*.

Assuming this line of questioning was deficient performance, Huwe cannot establish prejudice. Given the ample

evidence implicating Mr. Huwe, it cannot be said that the outcome would have been different but for this questioning. *See McFarland*, 127 Wn.2d at 335, 899 P.2d 1251. Accordingly, defense counsel was not ineffective.

K. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO ADMISSION OF BOOKING ROOM PHOTOGRAPHS.

Huwe also argues defense counsel was ineffective for failing to object to admission of booking room photographs. Specifically, he argues defense counsel should have objected to a photograph of him where he was handcuffed to a chair. He also argues ineffective assistance from defense counsel pointing out this fact, by asking, “[b]ut in this picture he is apparently wearing handcuffs; is he chained to the chair?” 4 RP (Aug. 22, 2007) at 292.

Defense counsel engaged in a legitimate trial tactic in allowing the admission of the booking photographs. Huwe placed into issue his state of intoxication at the time of the murder and assault as it tended to negate intent to commit the crimes. Argument could be made that the photographs support Huwe’s contention that he was intoxicated. Assuming the failure to object to this photograph, and questioning the witness regarding the restraints was deficient performance, Huwe cannot establish

prejudice. Given the evidence presented, it cannot be said the outcome would have been different had the jury not been exposed to this evidence. *See McFarland*, 127 Wn.2d at 335, 899 P.2d 1251. Accordingly, Mr. Huwe cannot establish ineffective assistance of counsel and review should be denied.

L. TRIAL COURT DID NOT ERR IN REFUSING TO DISQUALIFY THE COLUMBIA COUNTY PROSECUTOR'S OFFICE OR TO APPOINT AN INDEPENDENT SPECIAL COUNSEL.

Huwe's argument that he did not receive a fair trial because the Prosecutor, Ms. Culwell, should have been disqualified is unsupported by law or facts.

Huwe contends Ms. Culwell's professional relationship with Ms. Donohue gave her a personal interest in this case. Abuse of discretion is the standard to review a decision regarding disqualification of a prosecutor. *State v. Orozco*, 144 Wn.App. 17, 19, 186 P.3d 1078, *review denied*, 165 Wn.2d 1005, 198 P.3d 512 (2008) (*citing State v. Schmitt*, 124 Wn.App. 662, 666, 102 P.3d 856 (2004)). "When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

A prosecutor is required to act impartially as a quasi-judicial officer required to act impartially. *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). “If a prosecutor’s interest in a criminal defendant or in the subject matter of the defendant's case materially limits his or her ability to prosecute a matter impartially, then the prosecutor is disqualified from litigating the matter, and the prosecutor's staff may be disqualified as well.” *State v. Ladenburg*, 67 Wn.App. 749, 751, 840 P.2d 228 (1992), *abrogated on other grounds by State v. Finch*, 137 Wn.2d 792, 808-10, 975 P.2d 967 (1999). Prosecutors are not subject to the appearance of fairness doctrine. *See Finch*, 137 Wn.2d at 810, 975 P.2d 967. Thus, a defendant must show an actual lack of impartiality to disqualify a prosecutor.

Here, all Huwe can show is that as opposing counsel, Ms. Culwell and Ms. Donohue spoke a few times per week and appeared in court as adversaries. No evidence exists of anything more than a casual relationship as a direct result of the working relationship. Disqualification is not required.

Huwe relies on *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988). In *Stenger*, a death penalty case, the court found the prosecutor should be disqualified from handling the case, where he previously represented the defendant in an unrelated criminal case. *Id.* at 518, 521-22, 760 P.2d 357. The disqualification was based

upon “privileged information” known to the prosecutor would work to the defendant’s disadvantage. *Id.* at 521-22 760 P.2d 357. Here, unlike *Stenger*, Ms. Culwell never represented Huwe or had access to privileged information.

Next, Huwe relies on *People v. Superior Court of Contra Costa County*, 19 Cal.3d 255, 137 Cal.Rptr. 476, 561 P.2d 1164 (1977), *superseded by statute as stated in People v. Conner*, 34 Cal.3d 141, 147, 193 Cal.Rptr. 148, 666 P.2d 5 (1983). In *Superior Court of Contra Costa County*, the court upheld the trial court’s disqualification of the prosecutor in a homicide case, where the victim’s mother was an employee of the prosecutor’s office who worked in the very office in which the prosecution was being prepared. *Id.* at 269-70, 137 Cal.Rptr. 476, 561 P.2d 1164. Here, unlike *Superior Court of Contra Costa County*, Ms. Donohue did not work in the same office as Ms. Culwell and did not exert any influence in the case. *Superior Court of Contra Costa County* is distinguishable.

Huwe cites *State v. Cox*, 246 La. 748, 167 So.2d 352 (1964), to support his claim. In *Cox*, the defendant was charged with defaming a judge and the prosecutor. *Id.* at 757-58, 167 So.2d 352. The prosecutor recused himself from the case, but continued to represent the State in the case alleging defamation of the judge. *Id.* at 758-59, 167 So.2d 352. The court found the trial court judge

had the mandatory duty to order the prosecutor to recuse himself, “when it was disclosed to him that [the prosecutor] was, in effect, an injured party in both cases and had a personal interest in securing the conviction.” *Id.* at 764, 167 So.2d 352. Here, unlike *Cox*, Ms. Culwell is not a victim of nor did she have any involvement in the charged crimes other than as the prosecuting attorney. *Cox* is distinguishable and Huwe’s claim fails.

Huwe further cites various other cases for the proposition prosecutorial decisions where personal interests, such as financial, familial or business associations, or other personal loyalties raise concern about the fairness of said decisions.³ Huwe fails to identify any personal interest that affected Ms. Culwell’s prosecutorial decisions. The court did not abuse its discretion in refusing to disqualify Ms. Culwell.

The Missouri Court of Appeals dealt with a similar issue in *Adkins v. State of Missouri*, 169 S.W. 3d 916 (2005). The defendant therein asserted that the prosecutor had an improper interest in the outcome of the case because of his close relationship

³ Huwe cites and quotes *Marshall v. Jerrico, Inc.* 446 U.S. 238, 100 S.Ct. 1610, (U.S. Dist. Col. 1980), *Bordenkircher v. Hayes*, 434 U.S. 357, 365, 95 S.Ct. 663, 669, 54 L.Ed.2d 604 (1987), *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 3105-06, 92 L.Ed.2d 460 (1986), *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, (1986).

with the victims' family. *Id.* Both victims worked for the local county Sheriff's Department. *Id.* The court held that there was no need for disqualification. The court stated:

[The prosecutor], did not socialize with the victims' family or represent them as their attorney. The evidence showed only that the prosecutor was casually familiar with the victims' family because of their work in local government. Disqualification was not required. If disqualification were required where a prosecutor casually knows the victims, prosecutors in small jurisdictions would too frequently be prevented from doing their jobs.

Adkins v. State of Missouri, 169 S.W. 3d at 920

The second prong of Huwe's argument is that the conduct Prosecutor Culwell engaged in during pretrial motions is evidence of Prosecutor Culwell's lack of impartiality. The conduct Huwe cites is as follows:

- i. Pre-trial motions to establish aggravating factors which would support an exceptional sentence.
- ii. Motion in Limine to preclude admission of any character evidence of the victim.

Seeking enhancement based upon aggravating factors in a murder trial is not overreaching but is a legitimate honorable weapon of a zealous prosecutor. In *State v. Huson* 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S. Ct. 886, 21 L.Ed.2d 787 (1969), the court stated:

When prosecutor is satisfied on question of guilt, he should use every legitimate honorable weapon in

his arsenal to convict. No prejudicial instrument, however, will be permitted.

Likewise, seeking to limit the introduction of irrelevant character evidence of the victim is a reasonable tactic for an attorney representing the State in a murder trial. Washington Courts encourage early rulings by a trial court on motions in limine for a variety of reasons. Such rulings are “helpful to both parties and (avoid) interruption of proceedings before a jury.” *State v. Porter*, 36 Wn.App. 451 (1984). Motions in limine are particularly important in criminal cases, to obtain before a jury is impaneled, rulings on sensitive evidentiary issues, such as the admissibility of prior convictions. *See, e.g., Porter*, 36 Wn.App. at 452; *State v. Latham*, 30 Wn.App 776 (1981); *State v. Koloske*, 34 Wn.App. 882 (1982). One important function of a motion in limine is to “dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his (or her) presentation.” *State v. Evans*, 96 Wn.2d 119 (1981). Early rulings on matters concerning the admissibility of certain evidence should be obtained prior to trial through motions in limine for “the benefit of the parties and the proper administration of justice.” *Latham*, 30 Wn.App. at 780, *see also, Tegland, Courtroom Handbook on Washington Evidence*, at 166 (1998). The motions in limine which were granted were not appealed because they were appropriate. The fact that the prosecution sought a fair trial

through motions in limine is not proof of disqualifying lack of impartiality. Just like the proposition that all evidence is in some way harmful to a defendant, prosecutors' actions in an adversarial proceeding with a defendant are adverse. Such is the spine of our judicial system.

A prosecutor has a duty to be fair and impartial, as well as a duty to the citizens of the state to zealously represent the state's interest in keeping its citizens safe. The prosecutor herein fulfilled her duties.

Huwe finally argues that because the prosecutor sought an "increase in Mr. Huwe's sentence," that the prosecutor was vindictive and the vindictiveness was due to the fact that Huwe successfully secured a re-trial of his case. (*See*, Amend. Pet. for Rev. at 20). Huwe was not sentenced to any greater punishment than he was sentenced to after his first trial and therefore cannot show that he has been harmed by any action taken by the prosecution at his second sentencing. Even if Huwe was given a greater punishment, he cannot show that the reason the prosecution sought a greater punishment was due to vindictiveness. Ms. Culwell did not prosecute the first case and simply applied prosecutorial standards of charging and prosecuting when prosecuting this matter. Huwe's claim fails and review should be denied.

Huwe fails to present any facts which show the prosecutor engaged in unfair conduct. Accordingly, the trial courts refusal to disqualify Prosecutor Culwell should be upheld.

M. TRIAL JUDGE DID NOT VIOLATE APPEARANCE OF PROPRIETY BY HEARING THE CASE.

The last court day before trial, Huwe brought up by oral motion that the Judge should consider recusal based upon Ms. Donohue being a contract public defender. The court denied Huwe's request for consideration. Huwe argues the judge had a personal conflict of interest because Ms. Donohue regularly appeared before him.

Recusal decisions are reviewed for an abuse of discretion. *State v. Leon*, 133 Wn.App. 810, 812, 138 P.3d 159 (2006). A judge must recuse him or herself if the judge is biased against a party or if impartiality reasonably may be questioned. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992); CJC 3(D)(1). Whether a reasonable person with knowledge of the relevant facts would question the judge's impartiality is the objective test to be applied. *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). "Prejudice is not presumed." *State v. Dominguez*, 81 Wn.App. 325, 328, 329, 914 P.2d 141 (1996). "Evidence of a judge's actual or potential bias is

required before the appearance of fairness doctrine will be applied.” *Id.* at 329, 914 P.2d 141 (*citing Post*, 118 Wn.2d at 618-19, & n. 9).

Huwe cites to no facts or evidence that the trial judge had actual bias or any potential bias to raise the appearance of fairness doctrine. Ms. Donohue appeared before the judge on multiple occasions in her capacity as an attorney and the judge greeted her once outside the courtroom at a bar association meeting. Recusal was not required. *See, e.g., Leon*, 133 Wn.App. at 812-13, 138 P.3d 159 (recusal not required where prosecution witness had regularly appeared before the presiding judge).

Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit. Because Post’s appearance of fairness claim does not contain evidence of actual or potential bias of the judge toward him, Post’s appearance of fairness claim is without merit.

State v. Post, 118 Wn. 2d at 619

Huwe attempts to analogize the case of *State v. Graham*, 91 Wn.App. 663, 960 P.2d 457 (Div. II 1998) where a judge was required to recuse himself when the victim of the crime was the judge’s client. There is no facts to support such a relationship here.

Here, there was no bias, unfairness or impropriety. Huwe fails to cite any conduct by the trial judge as evidence of actual or potential bias. There are no such references because no such

evidence exists. The requirement that evidence be presented cannot be ignored. Huwe cannot cite to any such evidence. Accordingly, no grounds for review exist.

N. SUFFICIENT EVIDENCE EXISTED FOR THE JURY TO FIND INTENT TO KILL AND ASSAULT.

The evidence sufficiency test is whether, after viewing the evidence and all reasonable inferences most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980), (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). All reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). The inferences drawn from the evidence must be interpreted most strongly against defendant. *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992).

The court should defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom. *State v. Bryant*, 89 Wn.App. 857, 869, 950 P.2d 1004 (1998) (citing *State v. Hayes*, 81 Wn.App. 425, 430, 914 P.2d 788 (1996)). Both direct and circumstantial evidence may sustain a guilty verdict. *State v. Brooks*, 45 Wn.App. 824, 826, 727 P.2d 988 (1986). A claim of insufficiency admits the truth of the

State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201.

Viewing all evidence and reasonable inference therefrom, sufficient evidence exists that Huwe intended to murder Lenore Lawrence and assault Cathlin Donohue; review should be denied.

1. Substantial Evidence Exists that Huwe Intended to Kill.

“A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW §9A.08.010(1)(a). “Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances.” *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). And “a trier of fact may infer that a defendant intends the natural and probable consequences of his or her acts.” *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983). Absent an outright admission, a defendant's intent is necessarily inferred from the defendant's actions.

Huwe pointed a gun directly at Lenore Lawrence, as Lenore ran, he pulled the trigger. (RP T-1 36; 1-21). Huwe then got up from the couch, walked over to Lenore and shot her again in the back. (RP T-1 36, 22-23). Aiming a gun at a person and pulling the trigger two separate times is enough evidence for a rational trier of fact to infer intent to kill. The trier of fact may

infer from circumstantial evidence that a defendant intends the natural and probable consequences of his acts. *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983). The natural and probable consequence of pointing a gun at a person and pulling the trigger is death. Huwe's argument fails.

The court addressed a similar argument in *State v. Mitchell*, 65 Wn.2d 373, 373, 397 P.2d 417 (1964). Huwe alleged insufficient evidence of intent to kill based upon the following:

(a) there was no evidence, apart from the act of shooting, from which the jury could infer the intent to kill, and (b) the evidence demonstrates that defendant was, at the time of the shooting, too intoxicated to form the requisite intent.

Id.

The court upheld the conviction stating that the specific intent to kill is to be gathered from all of the circumstances of the case. *Id.* As to the affect of defendant's intoxication upon the requisite intent, the court looked to the fact that although intoxicated, defendant was able to move around, aim and fire the weapon involved. *Id.*

The evidence from which a rationale trier of fact could draw the inference of the intent to kill is as follows:

- a- Huwe sought out the gun at Ms. Donohue's house;
- b- Huwe hid the gun in the couch cushions;
- c- Huwe pulled the gun from the couch cushions;
- d- Huwe pointed the gun at Lenore Lawrence;

- e- Huwe shot Lenore in the buttocks as she was running away;
- f- Huwe then got up, went after Lenore Lawrence and shot her again in the back.

“Proof that a defendant fired a weapon at a victim is, of course, sufficient to justify a finding of intent to kill.” *State v. Hoffman*, 116 Wn.2d 51, 84-85, 804 P.2d 577 (1991). Huwe’s argument that no rationale trier of fact could find the requisite intent to kill is specious.

Huwe argues that he thought he was shooting blanks. There is absolutely no such evidence and this is unsupported by the record. There is no merit to this argument. If Huwe thought he was shooting blanks, there would have been no reason to point the gun at Ms. Lawrence the first time or to get up off the couch, aim the gun at her back and shoot her again. Huwe’s actions speak clearly of his intent to kill. The decision should be affirmed.

2. Substantial Evidence Exists that Huwe Intended to Assault.

As with Huwe’s shooting Ms. Lawrence, his aiming and shooting Ms. Donohue shows his intent to assault. Pointing a gun at a person and then firing is sufficient to establish intent to inflict great bodily harm. *See Hoffman*, 116 Wn.2d at 84-85, 804 P.2d 577. Huwe’s acts of going to Ms. Donohue’s bedroom, retrieving

the gun, hiding it in the living room couch cushions, retrieving it, aiming at Ms. Donohue as she ran from the living room and pulling the trigger, naturally result in Ms. Donohue being non-fatally shot, thus being assaulted by Huwe. A rational and reasonable trier of fact could find that Huwe intended to assault Ms. Donohue based on these facts. Huwe's argument fails and his conviction should be affirmed.

3. Huwe's Voluntary Intoxication, If Any, Did Not Negate His Intent To Kill and Assault.

Voluntary intoxication is not a defense to a crime. RCW 9A.16.090. Voluntary intoxication can be argued to assist the jury in determining whether a defendant could form the intent to commit crime. A Defendant must show that he/she was unable to form the required specific intent and must show that the inability is reasonably and logically be connected to the defendant's intoxication. *State v. Gabryschak*, 83 Wn.App. 249, 921 P.2d 549 (1996). The defendant, through his own expert or cross-examination, is required to elicit substantial evidence of the defendant's drinking and of the effects of the alcohol on the defendant's mind or body. *Id.*

The court in *Gabryschak*, found no evidence in the record from which a rational trier of fact could reasonably and logically infer that the defendant was too intoxicated to be able to form the

required level of intent. *Id.* The court looked to the evidence that defendant responded to questions and requests by the officers which demonstrated that he understood the nature of the requests and that he fled the scene which demonstrated that he knew he was going to jail.

The *Gabryschak*, court also noted that there was no evidence that defendant's speech was slurred, that he stumbled, appeared confused or was disoriented as to time and place, or that he otherwise exhibited sufficient effects of the alcohol from which a rational juror could logically and reasonably conclude that his intoxication affected his ability to think and act in accord with the required intent. *Id.* at 255.

Huwe elicited no evidence at trial that he was extremely intoxicated. Huwe failed to present any evidence that his intoxication affected his ability to form intent. No evidence was presented that would allow a rational trier of fact to deduce that his level of intoxication precluded him from forming the required intent. The State believes the Court should not have instructed the jury regarding voluntary intoxication as the prerequisites to such instruction were not met. Huwe was able to walk around Ms. Donohue's house without falling or bumping into furniture, Huwe was able to search in Ms. Donohue's bedroom for the gun, find it and hide it in the couch cushions. (RP T-1 (August 21, 2007) at 25,

28; 10-13 &6-9). Huwe was able to pull the gun out, point it at Lenore Lawrence, and when Ms. Lawrence ran, aim the gun at her, pull the trigger and hit his target. (RP T-1 (August 21, 2007) at 36; 5-7). Huwe was then able to get up from the couch, walk over the where Lenore was, aim the gun at her again and shoot her again in the back. (RP T-1 (August 21, 2007) at 36; 5-23). Huwe was able to then aim the gun at Ms. Donohue, pull the trigger and hit his running target. (RP T-1 (August 21, 2007), at 36-37; 24-25 &1-8). Huwe walked over to Ms. Donohue and told her he was going to shoot her again. (RP T-1 (August 21, 2007) at 40; 6-7). Huwe was then able to pick up the phone, dial 911, hang up, call again, hang up, walk over to Lenore and call 911 again and state that there were two people down. (RP T-1 (August 21, 2007) at 40; 9-13). Huwe then stuffed the gun in his waistband and walked out of the house. (RP T-1 (August 21, 2007) at 40; 14-18). After Huwe fled the scene of the crime he walked through a neighboring yard and was seen by his supervisor from work, Mr. Pulliam, who testified that he saw defendant walking normally. (RP T-4 (August 22, 2007) at 259; 5-7). When confronted by Sheriff Hessler, Huwe was walking, not stumbling, and after the second request to drop to his knees, he did so. (RP T-4 (August 22, 2007) at 268; 7-18).

Huwe cannot reasonably argue that the evidence suggests he was intoxicated to the point that he could not act in accord with

the requisite intent. Huwe's argument is unsupported by any evidence. Huwe's actions speak to his ability to form the specific intent required. The fact that Mr. Huwe does not like the consequences of his actions, does not equate to the inability to form the specific intent to kill or assault. The trial courts result should be affirmed.

O. CUMULATIVE EFFECT OF ANY ERRORS DOES NOT REQUIRE REVIEW BY THE SUPREME COURT.

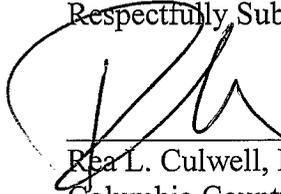
The cumulative error doctrine applies where "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). However, when no prejudicial error is shown, cumulative error could not have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn.App. 478, 498, 794 P.2d 38 (1990).

Here, no prejudicial error has been shown, no cumulative error exists. Huwe's request for review should be denied.

VI. CONCLUSION

Based on the above, Huwe's petition for review should be denied.

Respectfully Submitted, March 12, 2010



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