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NO. 63142-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDO ASLANYAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION I

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A. ISSUES PRESENTED

1. The defendant claims certain statements made by the prosecutor during closing argument and trial constituted misconduct. Should this Court agree that the defendant's failure to object bars appellate review? Further, even if this Court finds the alleged misconduct flagrant and ill-intentioned, the misconduct was not so prejudicial as to call into question the verdict. Has the defendant failed to prove that but for the alleged misconduct there is a substantial likelihood he would not have been found guilty?

2. In order to prevail on a claim of ineffective assistance of counsel, the defendant must prove deficient performance, and that the deficiency prejudiced him. Having failed to establish error in his earlier argument, appellate counsel recasts his claim as ineffective assistance of counsel. Even if this Court finds meritorious some of the defendant's alleged errors, the unchallenged evidence overwhelmingly establishes the defendant's guilt. Has the defendant failed to establish actual prejudice?

3. A mistrial is appropriate only where a defendant can establish an incurable prejudice that resulted in a deprivation of his right to a fair trial. Here, an interpreter who translated for the victim on cross-examination failed to interpret two extraneous comments. The trial court later informed the jurors of the previously un-translated asides. The trial court cured the error, and the defendant failed to establish any prejudice. Did the trial court properly deny the motion for a mistrial?

4. Does the defendant's failure to prove multiple trial court errors and substantial prejudice bar him from prevailing under the "cumulative error" doctrine?

5. After the defendant filed his opening brief, the Washington State Supreme Court held that double jeopardy principles are not violated by imposition of a firearm enhancement where use of a firearm is an element of the crime. Is the defendant's claim foreclosed by the supreme court's recent decision in State v. Kelley?

B. SUMMARY OF ARGUMENT

To provide context for the first degree assault (Aslanyan shot Tigran Koshkaryan, who was unarmed) and Aslanyan's self-defense claim, it is important to know what happened at Aslanyan's dinner party, which preceded the shooting by two days. In sum, one of Aslanyan's guests, Hamlet, had made anti-Semitic remarks to another guest, Simon. Although there was no testimony as to what was said, it was undisputed that the remarks were anti-Semitic and that the remarks led to several disagreements among different guests. One such disagreement involved Tigran and Aslanyan's godson, Eddie Jr. Two days later, Aslanyan still harbored ill-will toward Tigran; Aslanyan remained irate because not only had Tigran assaulted his godson, Tigran had disrespected him in his home and in front of his family. Aslanyan and Tigran exchanged angry words, which turned into a physical confrontation that culminated in Aslanyan shooting Tigran.

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged defendant Edo Aslanyan with assault in the first degree while armed with a firearm. CP 41. The jury rejected Aslanyan's self-defense claim and convicted him as

charged. CP 158-59. The trial court found that substantial and compelling reasons justified an exceptional sentence below the standard range.¹ CP 199-203. The court imposed 60 months for the assault and another 60 months consecutively for the firearm enhancement. CP 181-88. Aslanyan timely appeals. CP 189.

2. SUBSTANTIVE FACTS

a. The December 2nd Party.

At trial, witnesses testified that the Armenian community in Seattle is very close-knit; families often get together for barbecues. 11/25/08RP 323. On December 2, 2007, Aslanyan hosted a day-long feast, known in the Armenian culture as a *hash*, at his Auburn residence. 11/25/08RP 329-30, 404; 12/1/08RP 27, 36. Although *hash* is actually a winter soup that simmers for about 14 hours, it also refers to an Armenian tradition in which families gather for a whole day of eating and drinking. 11/25/08RP 329-30, 404; 12/1/08RP 38. Everybody was drinking vodka; many of the men at the party got drunk. 11/25/08RP 334, 343-44; 11/26/08RP 716-17.

¹ The trial court found that a downward departure was warranted because of a failed self-defense claim and because the victim fueled the conflict. 2/12/09RP 10-11; CP 199-203. The State has not appealed the exceptional sentence.

The guests included Aslanyan's cousin's husband, Hamlet, Hamlet's son (and Aslanyan's godson), Eduard "Eddie Jr.," the victim of the charged incident, Tigran Koshkaryan, and Tigran's surrogate father, Konstantin Aslanian (he allowed Tigran to live with him when Tigran moved to Seattle and he taught Tigran a trade).² 11/25/08RP 321-22, 332; 11/26/08RP 705; 12/1/08RP 40, 154. Konstantin's friend, Simon, also attended the party. Simon is not Armenian; he is Jewish.³ 11/25/08RP 335.

A heated discussion occurred between Hamlet and Simon in which Hamlet made anti-Semitic remarks. 11/25/08RP 335-38. Konstantin told Hamlet to leave Simon alone. 11/25/08RP 338. Because Simon was offended, he left the party. 11/25/08RP 337; 12/1/08RP 41.

Konstantin, who had introduced Simon to many of the partygoers, took umbrage at Hamlet's remarks. 11/25/08RP 338. Tempers flared again — this time between Konstantin and Hamlet. 11/25/08RP 338. Eddie Jr. pulled his father away from Konstantin.

² Konstantin and the defendant have the same last name, although spelled differently; they are not related. 11/25/08RP 321.

³ The State intends no disrespect, but because many of the persons involved have similar last names, the State refers to most of the people by first name. To distinguish between Eddie Jr. and the defendant, who is also known as Eddie by his friends, the State uses the defendant's last name.

11/26/08RP 707. Shortly after, Hamlet left the party with his wife and younger son (not Eddie Jr.). 11/26/08RP 708; 12/1/08RP 41.

After Hamlet left, Konstantin and Aslanyan argued, as did Eddie Jr. and Konstantin. 11/25/08RP 338; 11/26/08RP 709; 12/1/08RP 65-66. Konstantin asked Aslanyan why he had invited someone as offensive as Hamlet to his party. 12/1/08RP 65-66. Aslanyan told Konstantin that if he did not like his guests, then he could leave. 12/1/08RP 66. Meanwhile, Eddie Jr. became upset with Konstantin because he was speaking ill about his father, Hamlet, who had already left the party. 11/25/08RP 339-40; 11/26/08RP 709.

Then Tigran got involved in the dispute. 11/25/08RP 339-40; 12/1/08RP 67. Angry words and foul language were exchanged as Eddie Jr. and Tigran each defended their respective "fathers." 11/25/08RP 339-40; 11/26/08RP 568, 572-73, 584; 12/1/08RP 67. The other guests tried to calm everybody down. 11/25/08RP 339-41.

The confrontation between Eddie Jr. and Tigran became physical. 11/26/08RP 572-76, 586-87, 711; 12/1/08RP 7, 67, 71. They pushed and grabbed at one another. 11/26/08RP 573, 711. Tigran attacked Eddie Jr. as people tried to separate the men.

11/26/08RP 573, 711; 12/1/08RP 7, 70. After Tigran grabbed Eddie Jr. by the shirt and pulled Eddie Jr. toward himself, Eddie Jr. head-butted Tigran, who then fell to the floor. 11/26/08RP 574, 586-89, 711, 718-19; 12/1/08RP 7, 70-71, 75. Shortly after, Eddie Jr. left the party. 11/26/08RP 579-80, 598, 711; 12/1/08RP 7.

Tigran was upset because partygoers had interceded; Tigran wanted to retaliate for having been head-butted. 11/26/08RP 576, 598, 712. Tigran repeatedly telephoned Eddie Jr. and demanded that he return to the party. 11/26/08RP 579-80, 712; 12/1/08RP 8, 19, 77.

About 45 minutes later, Eddie Jr. returned. 11/26/08RP 598; 12/1/08RP 79. Tigran left the dinner table to confront him. 11/26/08RP 599-601; 12/1/08RP 10, 79, 195. Someone yelled that Tigran had armed himself with a knife. 11/26/08RP 599-601; 12/1/08RP 10, 81. Several men ran to the front door to disarm Tigran; however, only Aslanyan and his son, Gregory, saw Tigran holding a knife.⁴ 11/25/08RP 342; 11/26/08RP 601, 723;

⁴ The defense failed to disclose that Gregory Aslanyan was a possible witness. Without prior notice to the State, and without previously providing a summary of Gregory's anticipated testimony, the defense endorsed Gregory as a witness, to corroborate his father's testimony regarding Tigran having armed himself with a steak knife. 12/1/08RP 187-88. Of note, two days later when Aslanyan spoke to the police about Eddie Jr. and Tigran's confrontation, he stated that Tigran had tried to stab Eddie Jr. with an "unknown object." 12/1/08RP 155, 216.

12/1/08RP 11-12, 14, 82-83, 196. Tigran testified that he did not arm himself with a knife. 11/25/08RP 342. And Eddie Jr. testified that Tigran never threatened him with a knife and that he had never seen a knife in Tigran's hand. 12/1/08RP 723.

Both Tigran and Eddie Jr. were intoxicated. 11/25/08RP 343; 11/26/08RP 713, 717. Tigran cursed at Eddie Jr. and said that he wanted to beat him up. 11/26/08RP 713. Eddie Jr. told Tigran to calm down — to let things go. 11/26/08RP 713. But Tigran grabbed Eddie Jr., at which point Eddie Jr. head-butted Tigran again. 11/26/08RP 714; 12/1/08RP 7, 196. About ten minutes later, Tigran left. 12/1/08RP 90.

Afterward, Aslanyan said that he was not angry with Tigran; he was, however, disappointed that Tigran would behave so inappropriately in his home. 12/1/08RP 83. Aslanyan said that Tigran had disrespected everybody at the party; he had been a "blubbering idiot." 12/1/08RP 124. Sergo Adamyan, another guest at the party, stated that Aslanyan was upset because he had been disrespected in his house — and in front of women and children. 11/26/08RP 594-95. Another guest, Grigor Marsikyan, said that Aslanyan was upset not only because the fight had occurred in his house but because Tigran had attacked Eddie Jr., Aslanyan's

godson. 12/1/08RP 17-18. In the Armenian culture, a godfather is a very important person. 12/1/08RP 18.

b. The December 24th Shooting.

Two days later, Aslanyan called both Eddie Jr. and Tigran to make certain that neither man was still upset. 11/26/08RP 714-15; 12/1/08RP 90. Eddie Jr. told Aslanyan that everything was fine — the argument with Tigran was merely "drunk conversation." 11/26/08RP 714-15; 12/1/08RP 90. Aslanyan invited Tigran to his home to eat leftovers from the party. 11/25/08RP 346; 12/1/08RP 90-91. Tigran, however, felt so ashamed of his behavior at the party that he declined Aslanyan's invitation. 11/25/08RP 347-48; 12/1/08RP 92. Instead, the men agreed to meet at a sports bar. 11/25/08RP 348, 352; 12/1/08RP 95-96.

Tigran wanted to meet Aslanyan to discuss how poorly Simon had been treated at the party. 11/25/08RP 349-51. About six weeks before Aslanyan's party, Simon had invited Tigran, Konstantin and Aslanyan to his house for a nice dinner. 11/25/08RP 350-51. Tigran thought Simon was very nice and that he had shown the men respect. So, Tigran felt badly about what had happened at the party. 11/25/08RP 349-51.

Tigran arrived first. 11/25/08RP 355. He went into the bar, looked around for Aslanyan, used the bathroom and then called Aslanyan on his cell phone. 11/24/08RP 183; 11/25/08RP 355. Aslanyan, who had just arrived, told Tigran to come outside and have a cigarette with him. 11/25/08RP 355-56.

When Tigran saw Aslanyan he knew that he had been drinking; he could smell the alcohol. 11/25/08RP 358; 12/1/08RP 137. Aslanyan testified that Tigran inquired (as had Konstantin at the party) about what kind of people Aslanyan had invited to his house. 12/1/08RP 100, 102, 161. Aslanyan became upset. 12/1/08RP 102. Aslanyan told Tigran not to disrespect him — not to "talk to him like a little punk." 11/19/08RP 88; 11/25/08RP 360; 12/1/08RP 220. Then Aslanyan disrespected Tigran's mother. 11/25/08RP 361.

Each man claimed that the other was the first aggressor. 11/25/08RP 361; 12/1/08RP 102. Tigran testified that he deflected Aslanyan's punch, grabbed his other flailing hand and then head-butted Aslanyan. 11/25/08RP 362-63. Aslanyan testified that Tigran got upset and violently pulled on an expensive gold chain that Aslanyan had worn. 12/1/08RP 102-03, 161-62. He insisted that Tigran had tried to rob him by repeatedly pulling on the gold

chain. 12/1/08RP 161-62. Aslanyan said that Tigran punched him in the head and then head-butted him, knocking him down.⁵

12/1/08RP 103, 142.

When Aslanyan fell down, a .40 caliber handgun that he always carried for protection fell from his waistband to the ground. 11/19/08RP 91; 11/25/08 363-64, 370; 12/1/08RP 96, 104, 131. Tigran told Aslanyan that he should be ashamed of himself for bringing a gun. 11/25/08RP 364, 397. Tigran reached into his pants pocket for his car keys and turned to leave when he heard two shots. 11/25/08RP 364, 370. Tigran could not believe that Aslanyan had shot at him. Tigran heard a third shot as he turned and ran toward the sports bar. 11/25/08RP 364. Tigran staggered into the bar, told people to call 911 because he had been shot and collapsed. 11/24/08RP 187-89; 11/25/08RP 364, 372, 483.

Aslanyan testified that after Tigran had head-butted him, Tigran reached inside his jacket and Aslanyan thought that he was reaching for a weapon — although Aslanyan did not see any weapon sticking out of Tigran's waistband. 11/19/08RP 90-91;

⁵ One week after the incident, Aslanyan saw a family care physician. Aslanyan complained about the bridge of his nose. He claimed that the injury was the result of a head-butt, which had not bled at the time. An x-ray showed a new fracture and an old injury. 12/1/08RP 42, 44, 48.

12/1/08RP 104, 135, 137. He said that Tigran charged him and he shot at Tigran until he no longer posed a threat. 12/1/08RP 104-05, 133.

Aslanyan called 911 and told the operator that he had shot a man who had tried to rob him of his gold necklace.⁶ 11/24/08RP 272; 12/1/08RP 107. The police officers who responded to the 911 call examined Aslanyan's neck and did not see any injuries consistent with Tigran having pulled Aslanyan's chain. 11/24/08RP 302-03; 12/1/08RP 226.

Meanwhile, a patron of the sports bar, Ryan Pate, took off his sweatshirt and applied pressure to Tigran's chest to stop the bleeding. 11/24/08RP 219. Pate could not tell where Tigran was wounded because Tigran was covered in blood. 11/24/08RP 219-20, 241-42. Tigran's pulse was very weak. 11/24/08RP 219. Pate told Tigran that he was going to be okay and stayed with him until paramedics arrived. 11/24/08RP 226.

Tigran was hospitalized for two weeks. 11/25/08RP 373; 12/2/08RP 9. One bullet entered his chest. The bullet broke two

⁶ At the time of the alleged robbery, Aslanyan was wearing a Rolex watch and a pinkie ring with a three-carat diamond, which had a combined value of over \$16,000 — yet, apparently Tigran did not attempt to steal either piece of expensive jewelry, only the gold chain. 11/24/08RP 300-01; 12/1/08RP 32-33, 35.

ribs and Tigran's lungs collapsed either as a result of the bullet or the broken ribs. 11/25/08RP 373; 12/2/08RP 9, 11-12, 15. Tigran suffered a second gunshot wound to his left arm, which resulted in permanent nerve damage. 11/25/08RP 374; 12/2/08RP 14-17.

Aslanyan told the responding police officers that he had never known Tigran to carry a firearm and that Tigran had never threatened his life in any way. 11/19/08RP 92; 12/1/08RP 170-72, 223. At trial, however, Aslanyan said that when Tigran punched him, he was scared for his life. 12/1/08RP 172, 182. Aslanyan testified that he was afraid because two days earlier Tigran had a knife and tried to stab Eddie Jr. However, he did not bring the gun because he feared Tigran; he brought the gun because he always carries it. 12/1/08RP 131, 139, 182.

D. ARGUMENT

1. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

Aslanyan claims that the prosecutor committed misconduct both during his examination of witnesses and in his closing argument. Specifically, Aslanyan contends that the prosecutor improperly interjected himself as a witness in the proceedings and improperly appealed to the passion and prejudice of the jury by eliciting testimony and commenting in closing argument about

anti-Semitic remarks that a guest at Aslanyan's party had made toward another guest.

These claims have no merit. The anti-Semitic remarks provided context for the events that culminated in Aslanyan shooting Tigran. Further, the record is not clear that the prosecutor interjected himself in the proceedings rather than attempted to impeach a witness with a prior inconsistent statement that he made to the defense investigator. Even if the prosecutor's question was objectionable, Aslanyan's failure to object constitutes waiver. Finally, the prosecutor never imputed the anti-Semitic remarks to Aslanyan or attempted to bolster Tigran's credibility with the evidence. Rather, the prosecutor argued that the evidence explained why Tigran had agreed to meet with Aslanyan two days after the party and what motivated Aslanyan to shoot Tigran.

To prevail on a claim of prosecutorial misconduct, Aslanyan must show both improper conduct and prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). Failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Russell,

125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. Roberts, 142 Wn.2d at 533.

a. The Fact That Anti-Semitic Remarks Were Made Was Relevant.

Aslanyan first contends that the prosecutor's examination of witnesses concerning the anti-Semitic remarks made by Hamlet at the party constituted misconduct because the remarks were irrelevant to the shooting that occurred two days later. Br. of Appellant at 26-27. This claim fails. Both trial attorneys recognized that the anti-Semitic remarks were the genesis of the events that culminated in the shooting. Thus to provide context for the shooting, both the prosecutor and defense counsel discussed the anti-Semitic remarks in their opening statements and examined witnesses about the remarks.

All relevant evidence is admissible. ER 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Because the anti-Semitic remarks tended to explain the

ill-will that led up to, and immediately preceded the shooting, the evidence was relevant; hence, it was admissible.

i. Opening statements.

During opening remarks, the prosecutor talked about the events at Aslanyan's party that led to the shooting two days later:

Konstantin is there, Hamlet's there with his son, Eddie Jr., the defendant's obviously there with his family, and Tigran is there.

During the course of this a lot of vodka was drunk, a lot of wine was drunk, and Hamlet starts making anti-Semitic comments about another guest there, a person by the name of Simon, who is Jewish. And this set Konstantin off, the person who helped Tigran, and he went after Hamlet for that.

Well, this set Eddie, Jr. off, who is Hamlet's son, and so he went after Konstantin for that. Well, this set Tigran off, and so he went after Eddie, Jr. for that.

11/24/08RP 156-57.

There was no objection to the prosecutor's remarks. Indeed, defense counsel likewise commented about the events that led up to the shooting in his opening statement:

And so as this barbeque unfolds, as counsel points out, Konstantin and Hamlet Vardanyan have a history and there is some discourse, and there is (*sic*) anti-Semitic comments directed toward the guy, Hamlet Vardanyan (*sic*).

11/24/08RP 167.

ii. Witness testimony.

During direct examination, the prosecutor asked Tigran about the myriad arguments that had occurred at the party. The following exchanges occurred:

Q. And who is Simon?

A. Simon is a friend of us, too, you know. A friend of, actually, Konstantin. He's too old for me.

Q. He's a friend of Konstantin?

A. Yeah.

Q. Okay. And is Simon Armenian?

A. No.

Q. What is Simon's nationality? Do you know?

A. I believe he's Russian.

Q. Okay. And do you know what his religious beliefs are?

A. He's Jewish.

Q. He's Jewish? Okay.

So, without turning this into a history lesson, has there been some conflict between the Armenians and Jewish people in the past?

A. No.

....

Q. Would you consider some Armenians to be anti-Semitic? Do you know what I mean by that?

A. I don't know.

....

Q. Would you consider some Armenians to not think very well of the Jewish people and the Jewish faith?

- A. I don't know about that.
- Q. . . . But, at some time during this party, was there something that was happening regarding Simon? Were people saying things about him?
- A. Yes.
- Q. Okay. Could you tell us about that?
- A. Hamlet was talking about it, because Armenia has a genocide. 1915, the Turkish brought genocide, and we were trying to prove that, Armenians and -- you know, not every nationality could prove that, you know, like French did, Canada did, I believe United States not.

So, Jew people, they don't even -- like, they don't understand that. So they start -- Hamlet, he starts to, like, what, you guys don't say that? Wouldn't you guys prove that, you know? Jew people? And he goes, like -- and he start to put the bad words in there. And he says, like, come on, I'm the only one who is a Jew in here, in this house, and I'm sitting with Armenians, and I don't have no problem with that, and that problem is not only -- it's not, like -- I can't do anything about it, you know? That's the state, the country. That's a country problem. It's not my problem, you know?

. . . .

- Q. . . . So Hamlet was upset with Simon because Simon wouldn't acknowledge that the Armenians also had a genocide?
- A. I don't -- no, no.
- Q. No? Just take your time.
- A. The point was, like -- the point was, like, he was trying to say, like, why not Jew people prove the genocide?

. . . .

- Q. And Simon obviously was taking offense to that? He felt he was being offended by him?
- A. Offended? What do you mean?
- Q. He felt as though Hamlet was putting him down?
- A. Yes.

11/25/08RP 335-37. There was no objection.

Later in the direct examination, Tigran explained that the reason he agreed to meet with Aslanyan two days after the party was to talk about Simon. 11/25/98RP 349-51. The following exchange occurred:

- Q. And then why did you want to meet up someplace?
- A. So we can talk.
- Q. Talk about what happened at [Aslanyan's] house, or talk about what?
- A. Not actually talk about what -- his house, I was trying to talk about Simon.
- Q. About Simon?
- A. Yes.

11/25/08RP 349. There was no objection.

Tigran explained that about six weeks before Aslanyan's party, Simon had invited Konstantin, Aslanyan and Tigran to his home. 11/25/08RP 350-51. Tigran said that Simon had "put [out] a nice table" and had "respect[ed] us very well." 11/25/08RP 350. So, Tigran wanted to tell Aslanyan how badly he felt that Hamlet –

Aslanyan's guest – had treated Simon. 11/25/08RP 351. There was no objection.

The defense called Sergo Adamyan, another guest at Aslanyan's party. During cross-examination, the deputy prosecutor inquired whether "this whole fight was over Eddie Jr.'s dad making pretty nasty anti-Semitic remarks about another guest. . . ?"⁷

11/26/08RP 582. Adamyan responded, "I don't know. I wasn't at the -- at that scene. I was outside at that time." 11/26/08RP 582.

The prosecutor confirmed that Adamyan had spoken with a defense investigator and then attempted to impeach him with those previously made statements. Adamyan conceded that he had seen Konstantin and Hamlet argue, but he maintained that he did not know what the argument was about. 11/26/08RP 582-83. The following exchange then occurred:

- Q. But you don't know what the argument was about?
- A. Yes, I don't know what the argument was about.
- Q. Yeah. One of the comments in the investigative report was that Hamlet, Eddie Jr.'s father, verbally attacked Simon, making numerous anti-Semitic and personally

⁷ Again, no witness testified as to the specific anti-Semitic remarks that Hamlet had made. All that is clear from the record is that the remarks were pejorative and the impetus for the myriad disagreements that followed.

demeaning remarks to him in a Russian language.

No one I interviewed was able to give me a direct word for it, but I was told it was much worse than someone calling you a motherfucker in the English language. So were you there when Hamlet was making these remarks to Simon?

A. I'm sorry. I don't know anything about anti-Semitic, you know, argument.

11/26/08RP 583. Again, there was no objection.

Eddie Jr. testified on Aslanyan's behalf. On direct examination, Eddie Jr. acknowledged that a fight had occurred at the party between his father (Hamlet) and Konstantin. 11/26/08RP

707. Cross-examination began as follows:

Q. Well, Tigran was upset because your dad was making disparaging comments towards Simon, wasn't he?

A. Simon? Yeah. I think that's where it started from. I didn't know about Simon. I find out he was -- first it started from Simon. I only heard the part when he was arguing about Konstantin outside. He came out of the house, and he was being loud.

Q. Who was arguing with Konstantin outside?

A. My dad.

Q. But you didn't know that your dad was making these comments about Simon because he was Jewish?

A. No.

11/26/08RP 715. Referring to the statement that Eddie Jr. had given the defense investigator, the prosecutor said,

Q. And [the defense investigator] writes in his report that, "Hamlet turned his attention to another party guest named Simon. Hamlet verbally attacked Simon, making numerous anti-Semitic comments about him. Hamlet's verbal attack on Simon then continued until he and Simon -- until he, Simon, and his wife had departed."

So you told all that to [the investigator]? Why don't you tell us about that.

....

A. I didn't tell them that I heard Simon's argument with my dad. I heard -- Konstantin was arguing with my dad. That's when I jumped in.

Q. Okay. Why was your dad making these comments to Simon?

A. I don't know.

11/26/08RP 715-16. There was no objection.

Aslanyan testified. On direct examination, the following exchange occurred:

Q. The events at the party, were you present when a disagreement brewed up between a couple of the elder males that was (*sic*) there?

A. Yes, sir.

Q. You have some memory of that?

A. It was mostly -- they were talk about politics, mostly politics. And I don't care too much about politics. I was kind of going in, you know, staying inside the house, going outside

the house, and coming back. And I'm the host, so kind of a little bit of everywhere.

Q. Now, I think there has been earlier testimony there might have been some anti-[S]emitism. Were you present during that?

A. No, no, sir, I never heard anything anti-semitic (*sic*).

Q. You understand what I mean?

A. Yes, sir, racial. I never heard anything racial. The people at my house, they know better than to -- you know, especially -- they are older man than me, they know better than to speak that way.

12/1/08RP 38-39.

Aslanyan said that when he met Tigran in the parking lot, Tigran harangued him about his party guests. 12/1/08RP 100-03. Tigran was "very loud," "very angry." 12/1/08RP 100. Tigran said, "What kind of people are you inviting in your house?" 12/1/08RP 102. Aslanyan responded that Konstantin was not the only person who was upset over what had happened; he said, "I was feeling upset, too." 12/1/08RP 102. Aslanyan told Tigran that if he did not like Aslanyan's guest list, then he should not have been at the party. 12/1/08RP 102. Aslanyan said that Tigran responded by pulling on Aslanyan's gold chain and punching him. 12/1/08RP 103. The physical confrontation escalated; Aslanyan shot Tigran "until he let go." 12/1/08RP 103-04.

iii. Legal argument.

Aslanyan did not object to any of the comments he now challenges on appeal. The failure to object to prosecutorial misconduct constitutes a waiver unless the alleged misconduct was so flagrant and ill-intentioned as to render a curative instruction ineffective. Russell, 125 Wn.2d at 86. And, this Court will not reverse unless a substantial likelihood exists that the alleged prosecutorial misconduct affected the verdict. Id.

The anti-Semitic remarks were relevant and admissible. Without this context, the jury would have had to assess the shooting in a vacuum. The anti-Semitic remarks gave rise to the heated argument between Hamlet and Konstantin, which led to Eddie Jr.'s disagreement with Konstantin, which led to Tigran's confrontation with Eddie Jr., which led to Aslanyan feeling disrespected and motivated him to take matters into his own hands two days later when he shot Tigran. Consequently both attorneys explored this relevant topic with witnesses.

While it is possible that the attorneys could have sanitized the evidence by eliciting testimony about the fact of the argument between Simon, Hamlet and Konstantin without eliciting evidence about the content of the argument, as counsel on appeal suggests,

but there was no reason to do so. See Br. of Appellant at 26 (suggesting that the subject matter of the argument could have been "food, weather, or a football game."). First, and most significantly, the anti-Semitic remarks were never imputed to Aslanyan. The record is unequivocal that Hamlet, not Aslanyan, made the pejorative comments and that Hamlet, not Aslanyan, was anti-Semitic.

It is also the very nature of the remarks that helped the jury to understand why tempers flared and men squared off with one another. Hamlet's anti-Semitic remarks were the quintessential "fighting words." The hateful remarks evoked heated arguments that would have been difficult for the jurors to understand had they been led to believe that the disagreement was over food, weather or a football game.

Moreover, it was Tigran's query about the kind of people that Aslanyan had invited to his party that angered Aslanyan, and Aslanyan's response to Tigran that immediately preceded the shooting. 12/1/08RP 100-03. Most certainly the anti-Semitic remarks and the fall-out from Simon, Hamlet and Konstantin's argument were relevant to the shooting.

Aslanyan also contends that the prosecutor injected himself in the proceedings when he attempted to impeach Adamyan. The State disagrees. In context, it does not appear that the prosecutor was referring to himself when he said, "No one I interviewed was able to give me a direct word for it, but I was told it was much worse than someone calling you a motherfucker in the English language." 11/26/08RP 583. Rather, it appears as though the "I" refers back to the defense investigator who wrote the report with which the prosecutor attempted to impeach Adamyan.⁸

This type of ambiguity is precisely why a timely objection is critical. If, in fact, the prosecutor's question was improper, an objection and a curative instruction could have ameliorated any prejudicial effect. See Russell, 125 Wn.2d at 88.

b. The Prosecutor Did Not Improperly Appeal To The Jurors' Passions And Prejudices.

Aslanyan next contends that the prosecutor appealed to the jurors' passion and prejudice in closing argument. Br. of Appellant at 19-25. This claim is without merit. The prosecutor argued that

⁸ On appeal, Aslanyan noted that the defense investigator's report was never marked or admitted. Br. of Appellant at 9 n.1. However, the party seeking review must ensure that there is an adequate record on appeal. See, e.g., Story v. Shelter Bay Co., 52 Wn. App. 334, 345, 760 P.2d 368 (1988) (finding inadequate trial record precluded appellate review).

the anti-Semitic remarks, and all that followed, explained why Tigran agreed to meet with Aslanyan two days after the party and how Tigran's confrontation with Aslanyan regarding the anti-Semite at his party triggered the fist-fight, and ultimately, the shooting.

This Court reviews the prosecutor's comments "in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given." State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). A prosecutor has wide latitude in a closing argument to "draw and express reasonable inferences from the evidence." State v. Mak, 105 Wn.2d 692, 698, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986) (footnote omitted). While granted wide latitude in closing argument, prosecutors may generally not appeal to the passions and prejudices of a jury. State v. Thach, 126 Wn. App. 297, 316, 106 P.3d 782, review denied, 155 Wn.2d 1005 (2005).

Absent an objection to the comments during the trial, a request for a curative instruction, or a motion for mistrial, the issue of prosecutorial misconduct cannot be raised for the first time on appeal unless the misconduct was so flagrant and ill-intentioned that the prejudice could not be obviated by a curative instruction. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990).

In closing argument, the prosecutor referred back to a theme that he had developed in his opening statement — that Aslanyan's party was a bit like the movie, "My Big Fat Greek Wedding." 11/24/08RP 156 (opening); 12/16/08RP 13 (closing). The prosecutor said,

Well, evidently, as part of the Armenian culture, they like to have parties. I think -- I talked about it earlier in opening statement, that it is kind of like My Big Fat Greek Wedding. Well, when you listen to the way the defendant described what went on there, I think it is pretty much more like Animal House. For goodness gracious, at a family barbecue, we have Jew-bashing, we have people throwing up in the living room, we have people saying that other people are chasing people around with knives. That is not My Big Fat Greek Wedding, that is an out of control, out of hand party at the defendant's residence. The defendant is responsible for that. But what is the defendant doing? He doesn't do anything. He doesn't kick anybody out.

. . . .

So Tigrin (*sic*) is in that situation. Tigrin (*sic*) told you that he was there, that he was sitting right there when Simon, who Tigrin (*sic*) describes as a very nice man, who also happens to be Jewish, was there. And all the sudden Eddie Jr.'s dad is laying into him about whether or not there was actually a Holocaust. So now, Tigrin's (*sic*), for lack of a better way of putting it, his friend, his mentor, comes to the defense of Simon. And so now, the two elders get into an argument over it. They are both drunk, everybody is drunk, it sounds like. . . .What did Tigrin (*sic*) tell you about that? When he woke up the next morning and he realized what had happened there, he felt bad (*sic*) about it. You don't go into somebody's house, Tigrin (*sic*) tells

you, and disrespect them. You don't disrespect people's wives, you don't disrespect people's children, you don't use the type of language that was used, and he felt bad (*sic*) about it. So for some reason, the defendant calls up Tigrin (*sic*), and it makes a certain amount of sense if he is trying to placate the situation, as the defendant testifies, he called up Eddie, and asked Eddie if he thought everything was all right, and Eddie said yeah. Then, he called up Tigrin (*sic*) and asked if everything was all right, and . . . Tigrin (*sic*) said yeah. And that was it. It doesn't explain why it is the defendant then decides to go down and meet with Tigrin (*sic*). Well, that's because he didn't tell you why. Tigrin (*sic*) told you why he met with the defendant, it is because of Simon. Yeah, he felt bad (*sic*) about what happened in that residence, and he wanted to make amends to the defendant's family for that. But he had another motive. He wanted to make it right for Simon. He wanted Simon to feel like he was part of them. No, not that he was the token Jew hanging out with the Armenians, but that he was part of them as a person. It is obvious, from listening to Tigrin (*sic*) testify, he is passionate, he wears his emotions on his sleeve. He didn't hide that from you. And he was upset. He wanted to meet with the defendant in order to talk about that.

12/16/08RP 13-16. There was no objection.

Defense counsel addressed the anti-Semitic remarks in his closing argument as well:

You have a family gathering, lots of different personalities. We have got one man that's talking about another man, a couple elders, a couple older guys, probably my age, maybe older. But there antisemitic (*sic*) comments that are made. Historically, there were the Turks that came into Armenia, and there was the Holocaust. Historically, the Germans may have, at one point in time before

that, sent some of the German Jews down there to help the Turks. Discussion back and forth. Does that amount to any really relevant evidence as far as what's going on? It just sort of sets the stage. The real act happened right in the parking lot next to [Tigran's] truck. But it sets the stage, as we move forward, we get an understanding of Armenians, what's going on.

12/16/08RP 50.

The prosecutor and defense counsel properly referred to the anti-Semitic remarks as setting the stage for all that followed. As discussed fully above, without the background of what had occurred at the party, the jury would have been hard-pressed to have an appropriate understanding of what all the fuss was about.

Although perhaps the prosecutor's references to "Jew-bashing" and "token Jew" were inartful, he captured the essence of Hamlet's remarks. Tigran did not quote Hamlet's remarks verbatim, but, in context, it is evident that the words were pejorative. The prosecutor's comments were thus reasonable inferences.

Aslanyan also contends that certain remarks by the prosecutor were an attempt to prejudice the jury against Aslanyan. However, the prosecutor never imputed the anti-Semitism to Aslanyan or suggested that Aslanyan tolerated family or friends

who were bigots. In fact, Aslanyan unequivocally stated that he believed the people at his party knew better than to engage in anti-Semitic conversation. 12/1/08RP 39. Just before the fight that culminated in the shooting, Aslanyan told Tigran that he, too, was upset at the tenor of the conversation that had occurred at his party. 12/1/08RP 102. Rather, the remarks focused on the State's theory: that Aslanyan's motive for meeting with Tigran two days after the party was to mete out justice for Tigran's impudence. See 12/16/08RP 36-38.

When read in context, as a whole, the prosecutor was not attempting to garner sympathy for Tigran, he was explaining to the jury why Tigran had agreed to meet with Aslanyan — because he wanted Aslanyan to accept Simon into their close-knit Armenian community.

Aslanyan claims that the argument was especially inflammatory because the prosecutor referred to the Armenian "genocide" as a "Holocaust," a word, he contends, exclusively describes World War II atrocities. See Br. of Appellant at 28-29 & n.4. Aslanyan reads an apparent slight in the record when none was uttered or intended. One need only look at Wikipedia, an

internet site, to learn that "The Armenian Genocide [is] also known as the Armenian Holocaust."⁹

In sum, the prosecutor argued the evidence and reasonable inferences from the evidence. While at times he may have been inartful in his choice of language, he did not commit misconduct.

By contrast, the cases upon which Aslanyan relies involved flagrant and ill-intentioned misconduct or matters outside the record. See State v. Belgarde, 110 Wn.2d 504, 507-09, 755 P.2d 174 (1988) (conviction reversed despite defense counsel's failure to object where misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice engendered by the misconduct; prosecutor asserted defendant was associated with a "deadly group of madmen" and "butchers that kill indiscriminately," likening defendant's American Indian membership to "Kadafi" and "Sean Finn" of the Irish Republican Army); State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (prosecutor called the defendant a liar no less than four times and case clearly a "murder two," and not manslaughter, said the defense counsel did not have a case, and exhorted the jury to disbelieve the defense witnesses because "they were from out of town and drove fancy

⁹ Available at http://en.wikipedia.org/wiki/Armenian_Genocide.

cars"; State v. Claflin, 38 Wn. App. 847, 850-51, 690 P.2d 1186 (1984) (finding that the prosecutor's reading of a poem utilizing "vivid and highly inflammatory imagery" in describing the emotional effect of rape on victims and that contained numerous prejudicial allusions to matters outside the actual evidence was so prejudicial that no curative instruction could have neutralized the harm), review denied, 103 Wn.2d 1014 (1985).

The cases are not analogous. Whereas the prosecutors in Belgarde and Reed personally attacked the defendant or his counsel, here the prosecutor never implied that the jurors should view Aslanyan with disgust¹⁰ or Tigran as a hero, with whom the jurors should sympathize.¹¹ Here, there was no misconduct at all, much less conduct that remotely mirrored the egregious misconduct in Belgarde, Reed and Claflin.

Even if any of the prosecutor's remarks were improper, an objection followed by a curative instruction would have ameliorated the prejudicial effect. See Russell, 125 Wn.2d at 88. This Court presumes a jury follows such instructions. State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994). There is nothing in this

¹⁰ Br. of Appellant at 31.

¹¹ Br. of Appellant at 32.

case to forestall that presumption. The Court should reject this claim.

2. ASLANYAN HAS FAILED TO ESTABLISH THAT DEFENSE COUNSEL WAS INEFFECTIVE.

Aslanyan recasts his previous argument under the catch-all theory of ineffective assistance of counsel. In essence, Aslanyan argues that if he has failed to demonstrate flagrant, ill-intentioned prosecutorial misconduct then the Court should reverse his conviction because it was ineffective assistance of counsel to fail to make objections that would have cured the resulting prejudice.¹² Br. of Appellant at 38. Aslanyan's same argument, re-couched as a claim of ineffective assistance, should be rejected.

To demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel performed deficiently, and (2) the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice results where there is a reasonable probability

¹² Aslanyan does not claim that counsel was ineffective for failing to object to the prosecutor's witness examinations that he had alleged above constituted prosecutorial misconduct. In addition, the State has presumed that the remedy that Aslanyan seeks for the alleged ineffective assistance of counsel is reversal. Aslanyan's brief is silent on this point. See Br. of Appellant at 36-38.

that but for counsel's deficient performance, the outcome would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). If Aslanyan fails to satisfy either prong of this test, this Court need not address the other prong. Hendrickson, at 78.

Aslanyan cannot sustain his burden. As argued extensively above, error did not occur. Consequently, counsel was not deficient for failing to object. Yet, if this Court disagrees, Aslanyan has not sustained his burden in establishing that the argument affected the verdict. See State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 423 (1995) (stating that a reversal should occur only when the reliability of the verdict is called into question).

It was undisputed that Aslanyan shot Tigran. It was undisputed that Tigran was unarmed. It was undisputed that Aslanyan did not see a weapon. It was undisputed that Tigran never threatened Aslanyan with a weapon.

Based on the unchallenged evidence, Aslanyan has failed to show that the Court should question the reliability of the jury verdict.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING ASLANYAN'S MOTION FOR A MISTRIAL.

Aslanyan contends that the court abused its discretion when it (1) denied his motion for a mistrial after it was brought to the court's attention that the interpreter who had assisted Tigran neglected to translate two extraneous comments that Tigran had uttered in frustration, and (2) denied defense counsel the opportunity to recall Tigran and cross-examine him about the comments. Aslanyan claims that the trial irregularity denied him a fair trial. Br. of Appellant at 39-47.

Aslanyan's argument should be rejected for two reasons. First, the omissions were extraneous comments; they were "asides," not substantive evidence. The translator interpreted the questions and answers. Second, the trial court cured any prejudice by informing the jury of the asides between Tigran and the interpreter. Thus, because Aslanyan failed to establish any prejudice, the court properly denied his motion for a mistrial.

Trial irregularities are irregularities that occur during a criminal trial that implicate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 761 n.1, 675 P.2d 1213 (1984). In considering whether a trial irregularity warrants a

new trial, the court must consider (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. State v. Post, 118 Wn.2d 596, 620, 837 P.2d 599 (1992). A mistrial should be granted only when "nothing the trial court could have said or done would have remedied the harm done to the defendant." State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) (quoting State v. Swenson, 62 Wn.2d 259, 280, 382 P.2d 614 (1963)). The trial court has wide discretion to cure trial irregularities and its decision is reviewed for abuse of discretion. Post, 118 Wn.2d at 620. Great deference is given to the trial court because it is in the best position to discern prejudice. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Ultimately, this Court will reverse the trial court only if there is a substantial likelihood the trial irregularity prompting the mistrial motion affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002).

Tigran testified on cross-examination with the assistance of an interpreter. After defense counsel had completed cross-examination, Aslanyan's friends and family members told counsel that the interpreter had failed to translate some extraneous,

disparaging comments and that the translation was inaccurate in several regards. 11/25/08RP 441. Defense counsel brought the matter to the court's attention. 11/25/08RP 441-42. The court said, "I swore in the interpreter, and unless the interpreter's accuracy is below sort of an acceptable standard, then I'm not going to do anything about it." 11/25/08RP 442. Nevertheless, the court invited briefing and said that possibly a neutral and qualified interpreter could listen to the court reporter's tape and render an exact translation. 11/25/08RP 444-45. At defense counsel's request the court did not release Tigran from his subpoena; however, the court permitted him to return to California, where he resided. 11/25/08RP 445-46.

On December 1, the court notified counsel that it had contacted "interpreter services" to arrange for a new translation. The court stated, "I think the court has a responsibility to make sure the interpretation is accurate, so the court will do this." 12/1/08RP 232-33. The court recessed the trial for two weeks after the close of all other evidence to obtain a final translation. 12/2/08RP 3-35.

On December 15, the court stated that the translation by the new court-ordered interpreter was insufficient because the interpreter could not sufficiently hear the Armenian to render a

translation. 12/15/08RP 3. The defense produced a digitally enhanced recording and a transcript *prepared by the defendant*. 12/15/08RP 3-5.

The court reviewed the transcript and determined that there were a couple of instances in which Tigran made extraneous comments that the defense had characterized as disparaging. 12/15/08RP 4-7. Other than the two instances in which Tigran expressed frustration with defense counsel, the court found no other significant differences between the actual testimony and the translation. The court, therefore, determined that it would be unnecessary to recall Tigran for further cross-examination. 12/15/08RP 4.

After comparing the defendant's translation with the trial court's notes, the court ruled:

We have to look at whether the translation is subject to grave doubt. I don't have a basis for doing that except the suggested interpretation by your client and his friends and family. If I assumed that that translation has some validity, and I say it's questionable in my mind, because I found myself being attributed to expressions that I have never used, and so I doubt the accuracy of the thing altogether, but if we assume that it has some validity and we compare your client's proposed interpretation with what the certified interpreter -- the sworn interpreter gave *the differences are minor in the context of the evidence but for two things*: and they

are his asides, which expressed annoyance towards defense counsel. And defense counsel has argued that that is relevant to evaluating the witness, Tigran's, credibility. . . .So I think that the best approach I can take at this point, given that we are so far beyond the evidence that our jurors are going to be forgetting all of the evidence, and that we need to bring this case to a resolution, there is insufficient basis for a mistrial. . . .I think the best thing that I would suggest is that I instruct the jury that there were two asides between the witness and the interpreter that appeared not to have been translated.

12/15/08RP 36-37 (italics added).

The court advised the jury that there were two additions to Tigran's testimony because two comments between Tigran and the interpreter had not been translated. 12/16/08RP 4-5. The court said:

And let me set the context: Mr. Smith [defense counsel] was asking questions of Tigran about the path of the bullet, where it entered, where it exited. And he asked this question: "Okay. And where did it go in? Where did it go in, if it came from here?" And Tigran answered, "No, no, no, no, no, goes in under my armpit, comes out my arm." And that part more or less was interpreted to you. And then he said as an aside, "*Doesn't this guy -- doesn't dummy get it?*" And then shortly after that, Mr. Smith asked, "And the one thing that is under the armpit? This one under here is a bullet coming out or going in?" And apparently, as part of an aside with the interpreter, he said words to the effect in Armenian, "*Oh, my God.*" Then there was a later answer. So that is the addition to the record.

12/16/08RP 4-5 (italics added).

This ruling was not an abuse of the court's discretion. See Post, 118 Wn.2d at 620; Weber, 99 Wn.2d at 166. The trial irregularity was not serious. The asides that the interpreter had failed to translate were merely extraneous comments.

Aslanyan contends that the court did not consider the impact that the inaccurate translation had on the defense theory of the case. Br. of Appellant at 45. Yet, to the extent that the asides had any impact on Aslanyan's self-defense theory, the jury heard the comments. Besides, the two asides could not have had as much significance as Aslanyan contends on appeal because counsel never mentioned the asides – or any inferences that the jury should draw from the asides – during his closing argument.

In addition, once the court informed the jury of the extraneous remarks, it cured any prejudice. It would have been inappropriate for the trial court to grant a mistrial when it had provided Aslanyan a complete remedy.

The cases that Aslanyan relies upon are inapt because here the interpreter assisted only a witness, not the defendant. See Br. of Appellant at 40-43 (citing e.g., State v. Teshome, 122 Wn. App. 705, 712-13, 94 P.3d 1004 (2004) (citing United States v. Cirrincione, 780 F.2d 620, 634 (7th Cir.1985) (adopting a four-part

test to measure the competence of an interpreter's performance), review denied, 153 Wn.2d 1028 (2005)).

In this case, the issue was not the competence of the interpreter vis-à-vis the defendant. Aslanyan fully understood what was said – in Armenian and in English – as evidenced by the transcript he prepared. The only issue here is whether the trial court cured any prejudice resulting from the trial irregularity. And, as discussed above, the trial court eliminated any prejudice.

In the alternative, Aslanyan contends that the trial court erred by not permitting the defense to recall Tigran and cross-examine him about the disparaging remarks. This claim is without merit. The right to recall a witness for further cross-examination is within the discretion of the trial court. State v. Johnson, 64 Wn.2d 613, 615, 393 P.2d 284 (1964). This Court reviews the decision for an abuse of discretion. State v. Williams, 118 Wn. App. 178, 183, 73 P.3d 376 (2003). As discussed fully above, there was nothing substantive in the extraneous comments about which to cross-examine Tigran. Consequently, the trial court did not abuse its discretion in declining to permit Aslanyan to recall Tigran.

Finally, Aslanyan claims that the trial court's ruling denied the defense the opportunity to question Tigran "why he would show

such disrespect to defense counsel," and denied the jury the opportunity to view Tigran as the "primary aggressor" in the parking lot. Br. of Appellant at 47-48. The State disagrees. Even if the jury had heard why Tigran disrespected defense counsel, the verdict would have been the same because Aslanyan brought a gun to a fist-fight.

4. ASLANYAN IS UNABLE TO SUSTAIN HIS BURDEN IN SEEKING REVERSAL PURSUANT TO THE "CUMULATIVE ERROR" DOCTRINE.

Aslanyan argues that, if none of the alleged errors he has claimed warrants reversal of his conviction on its own, the conviction should nevertheless be reversed based on the combined effect of these errors. This argument fails.

The cumulative error doctrine applies only where several trial errors occurred which, standing alone, may not be sufficient to justify reversal, but when combined, may deny the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003) (citing State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)), review denied, 151 Wn.2d 1031 (2004). It is axiomatic, however, that to seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Where

errors have little or no effect on the outcome of trial, the doctrine is inapplicable. Greiff, 141 Wn.2d at 929. Here, as explained above, Aslanyan has failed to satisfy this burden. The conviction should be affirmed.

5. THERE WAS NO DOUBLE JEOPARDY VIOLATION.

After Aslanyan filed his supplemental brief, claiming that double jeopardy principles are violated by the imposition of a firearm enhancement where the use of a firearm is an element of the underlying offense, the Washington Supreme Court rejected the precise argument.¹³ State v. Kelley, --- P.3d ---, 2010 WL 185947 (No. 82111-9, filed January 21, 2010).

In Kelley, the defendant was charged with first degree murder, second degree unlawful possession of a firearm and second degree assault. During the commission of the crimes, Kelley used a .45 caliber handgun and a 9 millimeter handgun. Kelley, 2010 WL 185947 at 2. In addition, the State alleged two firearm enhancements each on the murder and assault charges.

¹³ On February 12, 2010, Aslanyan's appellate counsel filed a corrected supplemental brief. It appears to have been an oversight that counsel corrected only the incorrect citations to the clerk's papers and omitted reference to the Washington State Supreme Court's decision in Kelley, which was issued after counsel filed his opening brief but before he filed the corrected brief.

Id. A court convicted Kelley as charged and returned four firearm enhancements. Id.

On appeal, Kelley claimed that the firearm enhancements on the assault conviction violated double jeopardy principles.

Division II of this Court rejected Kelley's argument.¹⁴ Id. at 2-3 (citing State v. Kelley, 146 Wn. App. 370, 189 P.3d 853 (2008)).

The supreme court affirmed, finding that the legislature's intent was clear that cumulative punishments are intended. Kelley, 2010 WL 185947 at 6-7. The court held that "imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm." Id. at 12.

Kelley is dispositive. Aslanyan was charged with first degree assault for intentionally assaulting Tigran Koshkaryan, with intent to inflict great bodily harm "with a firearm and force and means likely to produce great bodily harm or death, to-wit a handgun." CP 41. The State also alleged a firearm enhancement. CP 41. The jury convicted Aslanyan as charged and returned a firearm enhancement. CP 158-59.

¹⁴ Division I of the Court likewise rejected the same argument. See State v. Nguyen, 134 Wn. App. 863, 869, 142 P.3d 1117 (2006) (concluding that the "argument is essentially based upon semantics.").

Aslanyan's adoption of the argument made in Kelley, that the firearm enhancement is an "element" of a greater offense and thus creates redundant punishment, is without merit. See Kelley, 2010 WL 185947 at 6-12. There is no double jeopardy violation. Accordingly, this Court should affirm Aslanyan's sentence.

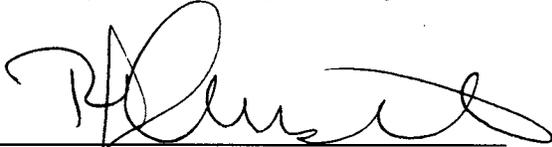
E. CONCLUSION

For the reasons stated above, the Court should affirm Aslanyan's judgment and sentence.

DATED this 18 day of February, 2010.

Respectfully submitted,

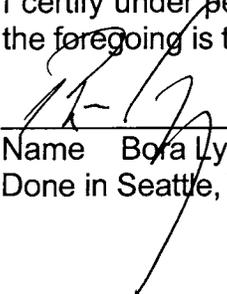
DANIEL T. SATTERBERG
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By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Ryan Boyd Robertson, the attorney for the appellant, at Law Office of Ryan Robertson, 645 SW 153rd Street, Suite #C-2, Burien, WA, 98166, containing a copy of Brief of Respondent, in STATE V. EDO ASLANYAN, Cause No. 63142-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Bora Ly
Done in Seattle, Washington

02/18/2010
Date

FILED
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STATE OF WASHINGTON
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