

67247-9
FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2012 FEB 22 PM 4:27

67247-9
NO. 67247-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEROME BLAKE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Thomas J. Wynne, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied due process when witnesses were permitted to render an opinion as to his guilt.

2. The trial court erred when it admitted hearsay evidence despite the declarant's lack of personal knowledge.

3. Appellant was denied a fair trial due to prosecutorial misconduct.

4. The trial court erred in excluding impeachment evidence.

5. Cumulative errors denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Appellant was charged with murder. As a practical matter, the only question for the jury in determining guilt was whether appellant fired the fatal shot. Two witnesses identified appellant as the shooter. These witnesses, while present at the scene, did not see the shooting. Instead, they reached their conclusion appellant was the shooter by considering where the people present at the time of the incident were standing, the demeanor of the individuals, and where the direction from which the muzzle flash came. Despite the lack of first-hand knowledge that appellant was the shooter, the jury was permitted to the witnesses' opinions that he was the shooter. Did these opinions constitute improper comments on guilt denying appellant his constitutional right to a fair jury

trial?

2. Prior to trial, the defense objected to an out-of-court identification of appellant as the shooter on the ground that it was not based on personal knowledge. Yet, the trial court allowed the hearsay to come in under the excited-utterance and present-sense-impression exceptions. Was this reversible error?

3. During closing argument, the prosecutor encouraged the jury to base its verdict on improper opinion testimony, made known his opinion about the credibility of the witnesses, disparaged defense counsel, and diverted the jury's attention away from their duty. Was appellant denied a fair trial due to prosecutorial misconduct?

4. The defense sought to introduce evidence to show the bias of a key State witness. The evidence the defense sought to offer established the fact that this witness's girlfriend had previously been disloyal to the witness by snitching to police about his alleged assaults against her. From this, the defense would have argued that the witness had a reason to lie to his girlfriend when she demanded to know who the shooter was, because he was protecting himself or his good friend, and did not want to be snitched on. The trial court excluded the evidence. Was defendant denied his constitutional right to present a defense?

5. Did the cumulative effect of the above-stated errors deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

On June 28, 2010, the Snohomish County Prosecuting Attorney charged appellant Jerome Blake with one count of first degree murder with a firearm enhancement. CP 119-20. On April 18, 2011, a jury found him guilty as charged. CP 32-33. Although Blake had an offender score of zero, he was sentenced to 360 months. CP 13-23. He appeals his conviction. CP 1-12.

2. The Incident

This case involves a “drug deal gone bad”¹ which resulted in a shooting. CP 60-64; 117-18. On June 22, 2010, Quinlin Bess initiated a drug deal involving Arthur Cooper, Brandon Lewis, and Blake. RP 847. Cooper, Lewis, and Blake belonged to a recording rap group – FAAM Mob. RP 617, 771-72. Bess had been introduced to the group through Cooper. RP 843, 919.

Cooper and Bess had been very close childhood friends in Texas. RP 840-43. Cooper moved up to the Northwest and Bess later followed him; however, by the time Bess arrived, Cooper and Blake had already

¹ See e.g. State v. Stockton, 91 Wn. App. 35, 41, 955 P.2d 805 (1998).

become best friends, music partners, and eventually roommates. RP 771-72, 914, 1052.

By June of 2010, Cooper and Bess had very different life experiences -- while Cooper was producing rap music and performing with FAAM Mob, Bess was unemployed and perpetually short of money. RP 378, 616-17, 773-75, 1010, 1059-61, 1122. Consequently, Bess was unable to fund the drug deal on his own and turned to Cooper, Blake and Lewis to stake the necessary cash. RP 484. Bess arranged for Cooper, Blake, and Lewis to stake \$800 each. RP 848. For his part, Bess expected Cooper to take care of him by either giving him some pills or money after the deal was concluded. RP 850.

On June 22, 2010, Bess contacted his former neighbor, Ivor Williams, to find someone who was selling Oxycontin pills for cheap. RP 612, 619, 624, 848, 923. Williams eventually connected Bess with Marquise Brown (the victim), whom he knew was advertising "cheap" Oxycontin pills. RP 619, 848, 854.

After securing a source, Bess collected the \$2400 from Cooper, Blake, and Lewis, and then rode with his girlfriend, Tricia Hawthorne, and

their friend Tera to an Everett radio station.² RP 852-53. They rode in Hawthorne's white PT cruiser. RP 846, 1006. Shortly after 11:00 p.m., the three arrived at a radio station where they met Williams and Brown. RP 626, 628, 854, 1013. When Brown saw three people in the car, he indicated there were too many people to continue the transaction. RP 854-55, 1014. So Bess and Williams dropped off Hawthorne and Tera at Williams' apartment and then drove Hawthorne's PT Cruiser back to the radio station to pick up Brown. RP 629-31, 854, 1014.

Following Brown's direction, Bess drove to a neighborhood in North Everett. RP 856. Once there, Brown got out of the car and walked around the corner while the others stayed in the car. RP 632, 856. Unbeknownst to Williams and Bess, Brown went to his close friend Quincy LeFall's apartment. RP 356, 365. LeFall had a stash of Oxycontin pills he had obtained in Los Angeles a few months earlier. RP 357. LeFall thought he had purchased the type of Oxycontin pills that could be smoked, but he later discovered he had been supplied with pills that were not smokable and, thus, not particularly desirable as street drugs.

² Bess did not inform Hawthorne or Tera he was attempting to put together a drug deal. RP 852. However, Hawthorne was suspicious Bess was "up to no good." RP 1016.

RP 359-62, 67, 859. Brown was aware of this defect, but he still sought to sell them.³ RP 363-65.

After secretly going to LeFall's apartment, Brown returned to Bess with approximately sixty of the defective Oxycontin pills. RP 364, RP 632. Bess thought that the pills looked odd and suspected they might be fake. RP 632, 858-59. At first, Bess said he did not want the pills, so Brown returned them to LeFall's apartment. RP 632. After Brown returned to the car, however, Bess changed his mind. RP 632. So, Brown went around the corner again and returned with the pills. RP 632. Still suspecting that the pills might be fake, Bess called a friend, Bart Scavera, and sent a picture of the pills. RP 867. Scavera offered his opinion that the pills looked real. RP 867. Bess decided to take them and gave Brown the \$2400 he had collected from Cooper, Blake, and Lewis. RP 633. Brown went around the corner a fourth time to deposit the money at LeFall's apartment and rejoined the others. RP 365.

After the purchase, Bess dropped Brown at the radio station. RP 634, 862. Still suspicious, however, Bess continued his quest to confirm that the pills were not fake. RP 862. He met with one of his smokers,

³ Williams had no history with LeFall or Brown and was not aware the pills were defective. RP 726-27. His only active role in the transaction was to connect Brown and Bess. RP 726.

Josh. RP 862, 866. Josh tried to light up a pill and concluded that the pills were not smokeable. RP 862. At this point, Bess spoke with Blake and Cooper and informed them that the pills were fake. RP 869, 899.

Before Bess could confront Brown, he had to pick up Hawthorne and Tera and take them home. RP 1019. Bess wanted to leave Hawthorne at their apartment while he dealt with the situation, but Hawthorne did not trust him to take her car without her, so she stayed with Bess. RP 872, 1019.

Meanwhile, Brown continued to lay the groundwork for his elaborate scam. RP 404-05. Brown set up a contact in his cell phone under the name "Mike" -- someone he would later claim to be his supplier. RP 871, 1218. Under this contact, he entered the phone number belonging to his younger brother, Andre Baskins. RP 1218. Brown then called Baskins and sent a text, instructing Baskins not to answer calls from unknown numbers or him. RP 404-405. Following these instructions, Baskins received numerous calls that night but did not answer. RP 405, 870.

At approximately midnight, Bess and Hawthorne returned to the radio station to confront Brown. RP 641, 758, 869. When they arrived, Brown and Williams were both there. RP 641. Bess was agitated and wanted the money back. RP 642, 644. After Bess and Brown exchanged

Meanwhile, several residents' dogs had started barking at the group as they were walking around the street. RP 138, 176. A few neighbors woke up and observed the group of young men standing together in an oval, with one person on a cell phone slightly outside the group. RP 140-41, 163-64, 173. There were no signs of conflict within the group of men. RP 141, 316. The neighbors continued to watch the group, however, because they were concerned someone might break into a car. RP 142, 165, 176.

Suddenly, there was popping noise. RP 142, 165. One male from the group fell to the ground. RP 142, 166. The others ran. RP 165. Neighbors immediately called 911, and it was soon determined that Brown had been shot dead. RP 146-47, 445, 455. No one saw who fired the shot. RP 156-57, 168, 184, 654, 660, 731, 957, 975, 1050.

3. The Investigation

Police arrived at the scene to find Brown's body with a single bullet hole through the forehead. RP 194, 239, 264. There was one casing and one bullet within close proximity to the body. RP 225, 239, 263. Based on stippling marks, the medical examiner determined the gun had been fired approximately three to six inches from Brown's head. RP 441-42. There were no apparent signs Brown had been in a struggle, and neighbors reported seeing no signs of hostility leading up to the shooting.

RP 316, 438. There was no physical evidence at the scene suggesting the identity of the killer, and neighbors did not see which of the men fired the gun. RP 313. The murder weapon was never recovered. RP 1324.

Just a few hours after the shooting, however, lead detective Kevin Allen was able to identify the victim as Brown and developed leads stemming from a voice message left by Bess on Baskin's ("Mike's") phone at 2:26 a.m. (the time of the shooting). RP 258 The substance of message was as follows:

QB: "Hey, bro. This ain't, this ain't your little homeboy, my nigger, we seen you drive off, bro, you took somethin' that don't belong to you, my nigger, you're (history?)"

Followed by muffled noises.

QB: "Go, go, go."

TH: "Who did he shoot? Why was he shooting? Who did he shoot?"

QB: "I don't know. Coop didn't shoot nobody."

TH: "Who shot?"

QB: "Just go."

TH: "You did? Jay did? Did Jay?"⁵

QB: "Yes."

TH: "YG?"⁶ Huh?"

QB: Just go, babe.

TH: Should I go to Marysville?

QB: "Go left, go left."

[Muffled sounds.]

Exhibit 59 (audio copy of message) and Exhibit 94 (transcript).

⁵ Blake's nickname was J or JG. RP 615.

⁶ Brown's nickname was YG.

1043, 1047, 1081. They decided to stay with a friend of Blake's in Burien. RP 890, 1044.

On June 24, 2010, police contacted Hawthorne's parents who live in Everett. RP 489. The Hawthornes did not have any information, but indicated they would pass the message to their daughter that the police were looking for her and Bess, which they did. RP 489, 518, 1046.

The combination of the police presence at Hawthorne's parents' residence, the death threats, and the knowledge that Hawthorne's white PT cruiser could be readily identified with Hawthorne prompted Hawthorne and Bess to seek "police protection." RP 490-91, 495, 987, 1046. On the evening of June 24, 2010, more than 40 hours after the shooting, Bess called the police and arranged a meeting someplace outside of Everett. RP 490, 520. The meeting occurred the next day at Northgate mall. RP 492. When Hawthorne became hysterical due to receiving another death threat, however, the officers arranged for an interview room in a Seattle precinct and conducted interviews there. RP 496, 498.

During the interview, Bess identified the individuals who were present during the incident and told police about the drug deal that had gone bad. RP 544-47. Based on this information, police put together a montage. RP 501. Bess identified Blake and claimed he was the shooter. RP 510, 545. Bess admitted, however, that he never saw the shooter

because his back was turned away at the time of the shooting. RP 880, 957, 975. Instead, he identified Blake based on the location of where people were standing and from where he heard the shot. RP 905-09, 957, 975.

Bess also told police he had been grazed by a bullet, showing an injury to his neck. RP 966. The police, knowing the only bullet was found near the victim's body, suggested to Bess he had been burned by the discharged casing rather than grazed by the bullet. RP 263, 966-69.

Bess was not candid with police on numerous issues during interviews. RP 1260-81. At first, he claimed he was not at the scene, but abandoned this pretense when police told him the physical evidence suggested otherwise. RP 574, 930, 988, 1260. Next, Bess failed to tell police that Cooper and Lewis each had a stake in the drug deal – instead claiming Blake had staked the entire \$2400. RP 531, 580-81, 931, 1267. Bess also initially failed to mention Cooper's presence at the scene. RP 544. When he finally admitted Cooper was present, Bess was very misleading about his relationship with Cooper, leading the police to believe that he hardly even knew Cooper and could not identify him. RP 533, 544, 577, 1263. Bess also denied Cooper had a gym bag, had covered his face, or was agitated immediately prior to the shooting. RP 954, 1277-81. Most importantly, Bess was inconsistent as to where

everyone was standing at the time of the shooting. RP 959. In fact, when he was drawing a diagram for police at one point, police realized his diagram did not square up with the physical evidence and informed him that his diagram was inconsistent with his previous statement. RP 1276-1281.

Armed with Bess's conclusion Blake was the shooter, police called Williams in for questioning. RP 548. After one and a half hours of unrecorded questioning, during which police made it clear they did not believe William's version of events, Williams acquiesced and identified Blake as the shooter. RP 75, 548, 551-53, 718, 1235-37. Williams qualified his identification, however, indicating that he did not actually see the shooter, but was instead basing his identification on where people were standing and the direction from where the muzzle flash came. RP 659-60, 712-13, 731-32, 741.718. Williams later admitted he could not rule out Cooper as the shooter because Cooper was standing in the same area as Blake.⁷ RP 659-60, 718, 741.

A few days later, the police located Cooper and spoke with him. RP 814. Cooper denied being at the scene, but was very nervous. RP 814; CP 63. Because police had no information suggesting he pulled the

⁷ Unlike Bess, Williams told police about Cooper's involvement and identified him. RP 807.

trigger at the time, Cooper was not arrested.⁸ RP 814-15. Cooper was uncooperative with both parties after this and ultimately did not testify at trial. CP 63.

Meanwhile, Blake was located, arrested, and charged with Brown's murder. CP 117-20. For the remainder of the investigation, the police focused exclusively on convicting Blake and were not concerned with pursuing others for their involvement in the underlying drug transaction and shooting. RP 1330-33. The police never recovered the drug money or drugs. RP 1327. At one point, Detective Allen contemplated not getting DNA testing on the bullet casing found at the scene because it might complicate the state's case against Blake, whom he considered to be the shooter, and could potentially allow the defense to argue Bess was the shooter.⁹ RP 1324-25.

In the end, the case against Blake remained largely circumstantial. The police never recovered the murder weapon. RP 1324. Although

⁸ Later, police discovered phone records from one cell phone provider suggesting Cooper was calling Blake at the exact time of the shooting; however, one expert testified phone record times often vary from provider to provider with different timing recorded for the same calls. RP 1363-64, 1375-80. Thus, the phone call easily could have been made right after the shooting. *Id.*

⁹ Ultimately, Allen was told DNA testing would likely be useless because the bullet casing had been saturated with Brown's blood. RP 1326.

police subsequently located a safe owned by Blake which contained a box of bullets that were from the same manufacturer as was the bullet used to shoot Brown, the safe had been kept in Blake and Cooper's shared apartment and contained some of Cooper's papers that were dated just two days before the shooting.¹⁰ RP 347, 1122-25, 1245, 1250. Most importantly, no one actually saw the shooting. RP 156-57, 168, 184, 654, 660, 731, 957, 975, 1050.

4. The Trial

i. Pretrial Motions

Prior to trial, the defense moved to exclude the voice mail recording in which Bess first claimed Blake was the shooter (Exhibit 59). RP 54-57; CP 69-71. Defense counsel argued the statement could not be admitted as substantive evidence because it constituted hearsay for which there was no exception. RP 57. Defense counsel specifically argued the statement did not qualify as an excited utterance because Bess did not actually see the shooting and, thus, lacked personal knowledge. RP 57-58; CP 70. She also argued that the statement was not a presence sense impression because the statement was made in response to Hawthorne's repeated questions. RP 58; CP 71.

¹⁰ Cooper's girlfriend later testified that she had previously accessed the safe. RP 1128.

In response, the State argued Bess had personal knowledge of the fact Blake was the shooter, stating:

[Bess] is very specific that there is no doubt in his mind that the defendant is the shooter, based on his knowledge of where the five people involved in the situation were standing...

Mr. Bess, based on where Cooper was, where Ivor Williams was, where Brown was, where Blake was, and where he himself was standing, has no doubt that it was the defendant who was the shooter.

RP 58-59.

The trial court agreed with the State's analysis and allowed the identification on the voice recording to come in as substantive evidence under both the excited utterance and present sense hearsay exceptions. RP 59.

The defense also moved under ER 607 to admit impeachment evidence that was relevant to showing bias and why Bess would have had reason to lie to Hawthorne about who shot Brown. RP 19-20, 30; CP 65-67. Defense counsel proffered evidence showing Hawthorne had on multiple occasions called police and reported domestic violence by Bess. RP 30; Exhibit 1; CP 67. As a result, Bess was eventually charged and pled guilty to fourth degree assault, DV. Exhibit 1. Defense counsel explained that the jury would be tasked with determining whether Bess truthfully answered Hawthorne's persistent questions regarding the

shooter's identity. RP 19-20, 23; CP 67. Counsel explained that the fact that Hawthorne had previously been disloyal to Bess and snitched was relevant to show why Bess would have had reason to lie. Id.

In response, the State argued the fact of Bess' prior DV conviction was irrelevant and highly prejudicial and, therefore, should be excluded. RP 25-26. The trial court agreed and excluded the evidence. RP 28, 30.

Next, the defense moved generally to exclude improper prosecutorial vouching and specifically objected to any prosecutorial vouching for the credibility of the Bess and Williams. RP 64. The trial court granted the motion. RP 67.

Defense counsel also sought to exclude the photo montages presented to Williams and Bess and used to identify Blake because they were unnecessary and cumulative. Defense counsel informed the trial court the defense was not disputing Blake's presence at the scene and oral testimony would sufficiently establish this fact.¹¹ RP 67; CP 72. The prosecutor said he realized the defense was not disputing the defendant's presence at the scene, but he still wanted to use the identifications to make

¹¹ It is apparent from the defense's written and oral motion that it was under the impression the montage identification would only be used to identify Blake as being at the scene, not as the shooter. RP 67; CP 72.

his case. RP 68. The trial court denied the motion and admitted the photo montage identification.¹² RP 68.

Finally, the defense moved to preclude any witness from offering testimony that constituted an opinion on the guilt of the defendant or the veracity of witnesses. CP 73. The defense went on to give a specific example of the type of evidence it sought excluded, pointing to officer testimony that Hawthorne and Bess gave consistent statements to the police. CP 73; RP 74. When responding, the State focused on this specific example and agreed it was a proper objection. RP 74. The trial court granted the motion and specifically precluded the State from offering any testimony suggesting Bess' and Hawthorne's police statements were consistent with one another. RP 74.

ii. Trial Evidence Pertaining to Comments on Guilt

Bess and Williams both testified they did not see the shooting. RP 660, 731, 884, 955. They testified that they merely deduced Blake was the shooter after considering where the parties were standing, the demeanor of the parties, and the location of the muzzle flash. RP 659-60, 712-13, 718, 741, 955, 975-76.

¹² During the trial, after it became apparent that one of the montages had a picture with Blake in an orange corrections jumpsuit, the trial court excluded the actual photos but allowed testimony regarding the montage identification. RP 501-06, 510.

Despite this, the jury was permitted to hear testimony from officers that both Williams and Bess had identified Blake as the shooter.¹³ RP 501, 510, 550-551, 545, 551-554. In addition, Detective Allen testified Bess had been consistent in his identification. RP 545. Allen also described Williams' identification of Blake via a photomontage as "a good pick."¹⁴ RP 553.

In addition to those identifications, the jury repeatedly heard the voice mail recording in which Bess concluded Blake was the shooter. RP 409-10, 473, 886, 1233, 1455. Additionally, Hawthorne was permitted to testify that Bess told her "J shot that boy." RP 1038.

Finally, when Detective Allen explained on the stand that the police were not interested in pursuing drug charges against those involved in the underlying transaction, he also informed the jury that they were instead trying to catch the "big fish, meaning Mr. Blake." RP 1331. Defense counsel objected. RP 1331. The trial court sustained the objection and instructed the comment be stricken. RP 1331.

¹³ At one point, the trial court sustained defense's counsel hearsay objection to Detective Allen's direct quote of Williams who, at the time he was making a photo identification, allegedly said "This is the person who shot YG." However, the jury was still permitted to hear that Williams identified Blake as the shooter. RP 550-51, 554-55.

¹⁴ When the defense later objected to Allen's comment outside the jury's presence, the prosecutor agreed it was "probably inappropriate." RP 556.

After the prosecutor invited Allen to finish his explanation, Allen stated: “In cases like this, many times in order to get the big fish...” RP 1332. Defense counsel objected again. It was sustained and the jury was again instructed to disregard the “big fish” statement. RP 1332. Allen then testified that the focus of the investigation was on catching the killer and in order to successfully bring Blake to trial he needed the cooperation of the others involved in the drug deal. RP 1332.

Later, in his closing argument, the prosecutor strongly relied on Bess’ and Williams’ opinions as substantive evidence, concluding: “I repeat this again: the only evidence you have heard during the course of this trial is the defendant is the person who pulled that trigger.”¹⁵ RP 1455, 1457-58, 1461, 1467, 1473-74.

¹⁵ Further facts regarding closing arguments are set forth below.

C. ARGUMENT

I. APPELLANT WAS DENIED A FAIR TRIAL WHEN THE JURY HEARD MULTIPLE WITNESS COMMENTS ON GUILT.

Blake's right to a fair trial was violated when the State presented lay opinions that were either direct or inferential comments on Blake's guilt and then argued the substantive value of those opinions to the jury.¹⁶ Reversal is, therefore, required.

A defendant's right to a fair trial under the Sixth Amendment and article I, section 21 of the Washington Constitution is violated when a witness is permitted to express his or her opinion as to guilt. State v.

¹⁶ Although the defense did not specifically object to each piece of improper opinion evidence, such an objection is apparent from the record. First, the defense sought to exclude opinions of guilt generally. CP 73; RP 74. Additionally, the defense objected to the admission of the voice mail message where Bess identified Blake on the ground it was not based on first-hand knowledge. RP 54-59, 69-71; CP 71. Finally, defense counsel objected – on hearsay grounds – to Allen's direct quotation of Williams' identification. RP 554-55. Given the defense's several attempts to exclude comments on guilt and hearsay identifications that were not predicated upon personal knowledge, this error was properly preserved. See, State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987) (citing ER 103 and finding the issue sufficiently preserved from the context of the record).

Even if this Court concludes appellant's objection is not apparent from the record, he may still raise this issue for the first time on appeal because an explicit or nearly explicit comment on guilt – as is present here – constitutes manifest constitutional error. See, State v. King, 167 Wn.2d 324, 329, 332, 219 P.3d (2009).

Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007); State v. Johnson, 152 Wn. App. 924, 931-35, 219 P.3d 958 (2009). The evil sought to be avoided by prohibiting a witness from expressing an opinion as to the defendant's guilt or innocence is having that witness tell the jury what result to reach rather allowing the jury to make an independent evaluation of the facts. 5A K. Tegland, Wash.Prac., Evidence, § 309, at 470 (3d ed. 1989). To this end, no witness may express an opinion as to the guilt of a defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

The first issue to resolve is whether Bess' and Williams' identification of Blake as the shooter constituted opinion evidence. Blacks Law Dictionary defines "opinion evidence" as follows:

Evidence of what a witness thinks, believes, or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves.

Blacks Law Dictionary 1093 (6th ed. 1990). Even out-of-court statements that are not based on personal knowledge may constitute opinion evidence when offered as substantive evidence. Compare, Johnson, 152 Wn. App. at 931-35 (holding out-of-court statements used substantively was improper opinion evidence); with, State v. Demery, 144 Wn.2d 753, 761-63, 30 P.3d 1278 (2001) (holding out-of-court statements that were not offered or argued as substantive evidence did not constitute improper

opinion evidence).

In this case, Bess' and Williams' conclusion that Blake shot Brown constituted opinion evidence because it was not a fact to which they had personal knowledge. Instead, the witnesses drew an inference based on where everyone was standing, the demeanor of those at the scene, and the location of the muzzle flash.¹⁷ Hence, the testimony regarding Bess' comment to Hawthorne (i.e. "Jay shot that boy), the voice mail recording in which Bess identified Blake as the shooter (Exhibit 59), and all testimony pertaining to Williams' and Bess' identification of Blake as the shooter constituted opinion evidence.

The next question is whether this opinion testimony constituted an impermissible opinion about Blake's guilt. To answer this question, the following factors are considered: (1) the type of witness involved; (2) the specific nature of the testimony; (3) the nature of the charges; (4) the type of defense; and (5) the other evidence before the trier of fact. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Applying these factors to this case, the opinion evidence constituted an improper comment on Blake's guilt.

¹⁷ The prosecutor was aware the identifications were based merely on inference, having stated as much during pre-trial motions and closing arguments. RP 58-59, 1469.

The “core element” in determining Blake’s guilt was whether he was the person who shot Brown. See, State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) (focusing on the “core element” of the charges when concluding a witness offered an impermissible opinion as to guilt). Given this fact, Bess’ and Williams’ opinions that Blake was the shooter, which went to the only question left for the jury to decide, unfairly tipped the scales in the State’s favor.

Notably, the opinion evidence was entirely unnecessary. Both Williams and Bess offered testimony about all the factors they observed – the position where people were standing, the location of the muzzle flash, and the demeanor of the individuals involved. Based on this testimony, the jury was in just as good of a position as Bess or Williams to draw inferences as to who shot Blake. Consequently, Bess and Williams’ opinions that Blake was the shooter served no purpose other than to comment on Blake’s guilt.

This error was not harmless. Because this type of error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving the error was harmless beyond a reasonable doubt. Olmedo, 112 Wn. App. at 533. It cannot meet this burden here.

On the one hand, the State’s case against Blake was not strong. No one saw the shooting. There was no physical evidence suggesting the

identification of the shooter. There were multiple people present at the scene who had the same motive and opportunity to shoot the victim. The murder weapon was never recovered. On the other hand, the defense produced a considerable amount of other-suspect evidence from which a juror could have reasonably inferred that either Cooper or Bess had shot Brown.

Furthermore, the harm caused by the improper opinion testimony was compounded by Detective Allen's attempts to improperly bolster the State's case by slipping in prejudicial testimony. Allen's characterization of Williams' identification of Blake as "a good pick" constituted improper vouching for Williams' credibility. RP 553. Allen's attempt to slip in the hearsay statements that Williams made when making the identification, was equally improper. RP 554. Finally, his characterization of Blake as the "big fish" (i.e. the killer) was a highly inflammatory comment on Blake's guilt.¹⁸ RP 556, 1330-32. The fact that it came from an officer was particularly damaging. See, King, 167 Wn.2d at 331 (explaining a

¹⁸ Although the trial court instructed the jury to disregard "big fish" comment and the hearsay regarding Williams' statement (RP 1331-32), that bell already had been rung too many times for the instruction to effectively unring it. See, State v. Holmes, 122 Wn. App. 438, 446, 93 P.3d 212 (2004) (instruction could not unring bell where detective commented on defendant's right against self-incrimination). Hence, these instructions did not cure the harm.

law enforcement officer's opinion testimony may be especially prejudicial because the "officer's testimony often carries a special aura of reliability."). As such, these comments served to further underscore the improper opinion testimony and undermine Blake's ability to receive a fair jury trial.

Finally, the harm to Blake's right to a fair trial was further amplified when the prosecutor made this opinion evidence a central element in the State's case and repeatedly emphasized the substantive value of these opinions on guilt. RP 1455, 1456, 1457-58, 1461, 1467, 1473-74.

In sum, all the evidence pertaining to Williams' and Bess' opinion that Blake pulled the trigger constituted improper comments on Blake's guilt and, thus, should have been excluded. Given the weakness of the State's case and its repeated emphasis on the substantive value of these opinions, their admission was not harmless. Reversal is, therefore, required. See, Johnson, 12 Wn. App. at 934 (reversing where jury permitted to hear out-of-court statements of defendant's wife constituting an opinion on guilt and prejudice shown); State v. Farr-Lenzini, 93 Wn. App. 453, 465, 970 P.2d 313 (1999) (reversing where improper lay opinion on defendant's guilt shown to invade jury's province); State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (reversing where

expert “effectively testified” that the defendant was guilty as charged by stating his belief that the child was not lying about sexual abuse); Black, 109 Wn.2d at 349, 745 P.2d 12 (reversing where expert testimony that the victim suffered from rape trauma syndrome constituted “in essence” a statement that the defendant was guilty where defense was consent).

II. HE TRIAL COURT ERRED WHEN IT ADMITTED HEARSAY EVIDENCE DESPITE THE DECLARANT’S LACK OF PERSONAL KNOWLEDGE.

Under the rules of evidence, the State was required to show that Bess had personal knowledge of the fact that Blake shot Brown before his out-of-court statements could qualify as a hearsay exception under the excited-utterance and present-sense-impression rules. The trial court’s failure to hold the State to its burden, even after the defense objected, was reversible error.

The personal knowledge requirement is a threshold requirement for most hearsay exceptions. State v. Karpenski, 94 Wn. App. 80, 112, 102, 971 P.2d 553 (1999), overruled on other grounds, State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003). “Even though a hearsay statement satisfies the criteria set forth on the face of a hearsay exemption or exception, it cannot be reliable if, at the time it was made, the declarant spoke or wrote without personal knowledge.” Id.

Indeed, ER 602 provides:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

For the most part, this personal knowledge requirement applies equally to out-of-court declarants. Karpenski, 94 Wn. App. at 112; see also, Brown v. Keane, 355 F.3d 82, 89-90 (2d Cir.2004) (noting that “[t]he present sense impression exception applies only to reports of what the declarant has actually observed through the senses, not to what the declarant merely conjectures” and that, under the excited utterance exception, “[t]o be competent as evidence ... the declarant's factual assertion must rest on personal knowledge” because “[m]ere excitement ... not coupled with knowledge of the event described, adds nothing to reliability”); Schering Corp. v. Pfizer Inc. et al., 189 F.3d 218, 233 (2d Cir.1999) (stating that personal knowledge is required for admissibility of hearsay statement as a present sense impression); United States v. Tocco, 135 F.3d 116, 128 (2d Cir.1998) (discussing requirement of personal knowledge under the excited utterance exception); Bemis v. Edwards, 45 F.3d 1369, 1372-73 (9th Cir.1995) (“the excited utterance exception is only available if the declarant has firsthand knowledge of the subject matter of her statement”).

Hearsay evidence should be excluded if it cannot be reasonably said the declarant had first-hand knowledge of the relevant fact for which the statement is being offered. State v. Vaughn, 101 Wn.2d 604, 611-12, 682 P.2d 878 (1984) (citing 5 Teglund, Washington Practice § 219 (2d ed. 1982)); see also, 2 McCormick on Evidence § 313 at 331 (John W. Strong 4th ed. 1992) (explaining “[i]f it appears that the declarant did not have adequate opportunity to observe the facts recounted, the declaration will be rejected for lack of firsthand knowledge”). That was not done here.

Here, the State offered the voicemail recording (Exhibit 59) as substantive evidence that Bess had identified Blake as the shooter. Prior to trial, appellant specifically objected on the ground that it contained hearsay and the declarant (Bess) lacked personal knowledge. Yet, the trial court permitted the recording to come in as an excited utterance and presence sense impression. This was error because the State did not, and could not, meet the threshold requirement of showing Bess had personal knowledge of the fact Blake shot Brown. See, State v. Vaughn, 101 Wn.2d at 611-12.

Based on the same authority cited above, Hawthorne’s testimony that Bess said, “Jay shot that boy” and the other testimony regarding out-of-court identifications of Blake as the shooter were equally objectionable

for lack of personal knowledge.¹⁹ Although a prior out-of-court identification by a witness testifying at trial is not hearsay under ER 801(d)(1)(iii), this provision only applies if the identification was “made after perceiving the person.” Bess and Williams saw Blake at the scene, but they never perceived Blake shoot Brown – they just inferred it. Hence, these witnesses’ statements identifying Blake as being at the scene might be properly admitted, but their identification of Blake as the shooter should have been excluded.

The trial court’s error was not harmless. As discussed above, the State’s case was not particularly strong. In its argument, the State relied heavily on the hearsay statements at issue, which went directly to the core issue in this case -- identification of the shooter. RP 1455, 1456, 1457-58, 1461, 1467, 1473-74. As such, the admission of this evidence merits reversal. See, State v. Jacob, 242 Neb. 176, 201-02,494 N.W.2d 109 (1993) (reversing a murder conviction where the State failed to establish the victim identification was based on knowledge or was merely an opinion); People v. Wasson, 65 Cal. 538, 4 P. 555, 556 (Cal.1884) (reversing a murder

¹⁹ The defense’s failure to object to each piece of evidence should not weaken appellant’s claim. Given the trial court’s pretrial ruling implying that Bess possessed sufficient personal knowledge necessary to identify Blake as the shooter, it would have been futile to continue lodging this same objection.

conviction where the victim's out-of-court statement as to who he thought shot him was not based on personal knowledge); Berry v. State, 63 Ark. 382, 38 S. W. 1038 (1897) (murder conviction reversed where declarant identified the defendant as the murderer not based on personal knowledge but based on inference).

III. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENTS, DENYING APPELLANT A FAIR TRIAL.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed under the state and federal constitutions. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011).

Because of their unique position in the Justice system, prosecutors must steer wide from unfair trial tactics. Monday, 171 Wn.2d at 676 (citing Case, 49 Wn.2d 66, 70-71)).

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 578. Even where there is no objection, reversal is still required where the improper statements are “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The cumulative effect of multiple incidents of misconduct is considered when determining flagrancy and prejudice. State v. Boehning, 127 Wn. App. 511, 519, 519, 111 P.3d 899 (2005).

Here, the prosecutor committed multiple acts of misconduct during closing argument including: encouraging the jury to base its verdict on lay opinions of guilt; expressing his opinion about the credibility of witnesses; disparaging defense counsel; and diverting the jury’s attention away from their duty. The cumulative effect of these acts establishes both flagrancy and prejudice.

i. Emphasis on Improper Opinions

As discussed above, it is improper for the State to rely on lay opinions of guilt as substantive evidence. Yet, this did not stop the prosecutor from using such evidence as the cornerstone of closing

argument. The State reminded the jury of the opinion evidence no less than six times, concluding with: “I repeat this again: the only evidence you have heard during the course of this trial is the defendant is the person who pulled that trigger.” RP 1455, 1456, 1457-58, 1461, 1467, 1473-74. For reasons explained above, this constituted serious misconduct.

ii. Endorsing Witness Credibility And Inviting The Jury To Align Itself With The State.

It is the jury's province to determine credibility -- it is not for the prosecutor to tell the jury what he or she believes the truth to be. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Thus, it is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. State v. Ramos, 164 Wn. App. 327, 341, n.4, 263 P.3d 1268 (2011) (quoting State v. Ish, 170 Wn.2d 189,196, 241 P.3d 389 (2010)). Accordingly, prosecutors may not endorse the credibility of a witness in closing statements. Reed, 102 Wn.2d at 145.

It is also improper for a prosecutor to make statements that are calculated to align the jury with the prosecutor and against the defendant. Id. at 146-47. A prosecutor may point to circumstances which cast doubt on a witness' veracity or which corroborates his or her testimony, but a “[f]air trial” certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression

of his own belief of guilt into the scales against the accused.” Case, 49 Wn.2d at 71 (citing State v. Susan, 152 Wn. 365, 278 P. 149 (1929)).

Here, the prosecutor improperly endorsed the credibility of witnesses in closing argument. First, when discussing the inconsistencies between the testimony of Hawthorne, Bess, and Williams, the prosecutor stated the following: “I would suggest that the differences in their stories tell you that the general story they are giving you is accurate.” RP 1452. Notably, the prosecutor did not argue that, in general, inconsistent testimony from different witnesses suggests credibility because it shows an absence of tailoring. Likewise, the prosecutor essentially did not encourage the jury to consider for themselves that the witness’ stories were accurate given the inconsistencies. Instead, the prosecutor essentially told the jury that he found these witnesses’ general story to be accurate because of the inconsistencies. This was impermissible vouching and it was flagrant given the trial court’s pre-trial ruling excluding such arguments. See, Ramos, 164 Wn. App. at, 341, n.4.

In addition, the following prosecutorial endorsement was also improper:

“[William and Bess] are telling you what they saw[. A]nd the inferences they drew immediately, **I would suggest are the inferences you ought to draw**. He pulled the trigger and we know that based on the location of everyone else.

RP 1469 (emphasis added). Through this statement, the prosecutor improperly endorsed Bess' and Williams' comments on guilt by suggesting to the jury that these witnesses reached a proper conclusion and he personally believed the jury also should reach that conclusion.

Finally, the prosecutor summed up his closing argument by telling the jury "I want you to hold the defendant responsible for what he did back on June 23." RP 1474. This statement implied that the prosecutor personally believed the defendant was guilty and effectively suggested to the jury that it should align itself with the prosecution and hold him accountable. This was improper.

iii. Disparaging Defense Counsel

A prosecutor commits misconduct by personally attacking defense counsel, impugning counsel's character, or generally disparaging defense counsel as a means of convincing jurors to convict the defendant. State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008). Remarks by the prosecutor that malign defense counsel or their role in the criminal justice system are improper. State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993); State v. Gonzalez, 111 Wn. App. 276, 282-84, 45 P.3d 205 (2002); United States v. Friedman, 909 F.2d 705, 709-10 (2nd Cir.1990); Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir.1983). "[S]uch tactics

unquestionably tarnish the badge of evenhandedness and fairness that normally marks our system of justice and [courts] readily presume because the principle is so fundamental that all attorneys are cognizant of it.” Bruno, 721 F.2d at 1195.

Prosecutors may not use idioms or phrases that imply defense counsel’s deceitfulness. State v. Thorgerson, 172 Wn.2d 438, 450-52, 258 P.3d 43 (2011). In Thorgerson, the prosecutor argued defense counsel’s presentation of the case was “bogus” involving “sleight of hand.” The Washington Supreme Court found this comment improper, explaining:

[T]he prosecutor impugned defense counsel's integrity, particularly in referring to his presentation of his case as “bogus” and involving “sleight of hand.” ... In particular, “sleight of hand” implies wrongful deception or even dishonesty in the context of a court proceeding. Webster’s Third New International Dictionary, 2141 (2003) (“sleight of hand” defined in part as “adroitness and cleverness in accomplishing a deception” and “a cleverly executed trick or deception”). The prosecutor went beyond the bounds of acceptable behavior in disparaging defense counsel.

Id. at 451-52. Just as in Thorgerson, the prosecutor’s argument crossed the line between a vigorous response to the defense’s case and misconduct.

Here, defense counsel dedicated much of her closing argument to closely scrutinizing the forensic evidence and the various testimony as to where everyone was standing at the time of the shooting. From this, she argued the evidence showed that either Bess or Cooper had pulled the

trigger. RP 1498-09.

In response, the prosecutor stated: “When Ms. Kyle gets up with her push-pins and this proves Quinlin Bess is the shooter she is making it up out of whole cloth.” RP 1526. The idiom “to make something up out of whole cloth” means to fabricate a lie.²⁰ Hence, the prosecutor’s statement amounts to nothing less than calling defense counsel a liar. And the prosecutor did not stop there. After essentially calling defense counsel a liar, the prosecutor punctuated his point by characterizing defense counsel’s arguments as “wild ass guesses” and warning the jury not to be pulled into her “little play acting.” RP 1526.

These statements went beyond just arguing the evidence or challenging the defendant’s theory; instead these comments mocked defense counsel, painted her as deceitful, and suggested she was trying to draw the jury into a crazy fabrication of the facts. The argument was patently offensive and improper.

iv. “Do the Right Thing”

ABA Standards for Criminal Justice 3–5.8 (3d ed.1993) provides:

²⁰ McGraw-Hill Dictionary of American Idioms and Phrasal Verbs., The McGraw-Hill Companies, Inc., 2002; see also, William Safire, “On Language; Out of the Whole Cloth” New York Times, July 19, 1998 (found at: <http://www.nytimes.com/1998/07/19/magazine/on-language-out-of-the-whole-cloth.html?pagewanted=all&src=pm>).

“The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.”²¹ Hence, when discussing the evidence, the prosecutor “has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.” Case, 49 Wn.2d at 71. To do so constitutes misconduct. Evans, 163 Wn. App. 635, 644-46 Wn. App. (2011).

Here, the prosecutor diverted the jurors’ attention by asking them to “do the right thing” and convict Blake. A prosecutor improperly broadens the jury's duty to include a responsibility to do the right thing when it asks the jury “to do the right thing” and return a guilty verdict. State v. Musser, 721 N.W.2d 734, 756 (Iowa, 2006). The issue in any criminal case is ultimately one of guilt or innocence as shown by the evidence. Consequently, an exhortation to the jury to “do the right thing” has been held error where it implies, in order to do so, the jury can only reach a certain verdict, regardless of its duty to weigh the evidence and follow the court's instructions on the law. Jackson v. State, 791 So.2d 979, 1029 (Ala.Crim.App.2000), cert. denied, 532 U.S. 934, 121 S.Ct. 1387, 149 L.Ed.2d 311 (2001).

When the prosecutor urged the jury to “do the right thing” and

²¹ ABA Standards for Criminal Justice serve as “useful guidelines” when considering claims of prosecutorial misconduct. United States v. Young, 470 U.S. 1, 8, 105 S.Ct. 1038, 84 L.Ed.2d 1(1985).

convict Blake, he inappropriately diverted the jury's attention from its duty to decide the case solely on the evidence by injecting issues broader than the guilt or innocence of the defendant. This was improper. See, Impson v. State, 721 N.E.2d 1275, 1283 (Ind.App.2000) (holding prosecutor's request that the jury "do the right thing" was an improper statement insofar as it urged the jury to act for reasons other deducing guilt or innocence from the evidence that was before it); Lisle v. State, 113 Nev. 540, 937 P.2d 473, 482 (1997) (holding prosecutor's statements to the jury that it must be "accountable" and "do the right thing" were improper).

v. Flagrant and Prejudicial

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675. Repeated misconduct strongly suggests flagrancy. State v. Venegas, 155 Wn. App. 507, 525, 228 P.3d 813 (2010). The cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect. State v. Walker, 164 Wn. App. 724, 265 P.3d 191, (2011) (citing Case, 49 Wn.2d at 73). This is the case here.

As explained above, the prosecutor committed flagrant misconduct by repeatedly introducing and using lay opinions as substantive evidence

of appellant's guilt, vouching for witnesses, encouraging the jury to align itself with the State, disparaging defense counsel, and diverting the jury from its duty.

The prosecutor's misconduct was prejudicial. Even though the jurors were instructed that they were to decide witness credibility and to rely on the evidence, not argument, when determining guilt, these instructions paled in the face of the prosecutor's repeated misconduct. Given this record, the evidence was not so compelling that one can say the jury would have reached the same verdict absent the prosecutor's flagrant misconduct. Hence, reversal is required. See, Walker, 164 Wn. App. at 738-39; Evans, 163 Wn. App. at 647; Venegas, 155 Wn. App. at 526-27.

IV. APPELLANT WAS DENIED HIS RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT EXCLUDED IMPEACHMENT EVIDENCE.

A person accused of a crime has a constitutional right to confront his or her accuser. U.S. Const. amend. VI; U.S. Const. amend. XIV; Const. art. 1, § 22; State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The primary and most important component of confrontation is the right to conduct a meaningful cross-examination of adverse witnesses. State v. Foster, 135 Wn .2d 441, 456, 957 P.2d 712 (1998). This constitutional right also includes the right to impeach a prosecution witness with evidence of bias. Davis v. Alaska, 415 U.S. 308, 315-18, 94

S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). To secure this right, the Court of Appeals has explained: “[i]t is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility.” State v. Wilder, 4 Wn. App. 850, 854, 486 P.2d 319 (1971).

Blake was not given the “great latitude” necessary to secure his constitutional right to confrontation. Instead, the trial court denied Blake his constitutional right to impeach Bess with evidence of bias when it precluded defense counsel from asking Hawthorne whether she had ever called police and reported wrongdoing by Bess. If Hawthorne answered affirmatively -- as the defense expected -- the defense would have been able to pursue its theory that Bess was not truthful with Hawthorne when he first answered the question “Who shot Brown?” because Bess did not want Hawthorne snitching on himself or his close friend Cooper. This evidence was thus relevant to the defense’s case and Blake should have been given great latitude in his cross-examination of Hawthorne to illicit this impeachment evidence.

Not only was the impeachment evidence relevant to the defense, but it was not overly prejudicial. While State argued the evidence of Bess’s conviction was too prejudicial, it did not necessarily follow that the

charge or conviction against Bess needed to be revealed; rather, just the fact that Hawthorne had previously reported Bess to the police. Thus, any prejudice could have been greatly reduced by limiting the scope of the evidence. Consequently, it was error for the trial court to exclude this bias evidence.

This error was prejudicial. An error excluding bias evidence is presumed prejudicial but is subject to a harmless error analysis. State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). Reversal is required unless the State can prove beyond a reasonable doubt that the unconstitutional act did not prejudice the defendant and that he would have been convicted even if there had been no error. State v. Fitzsimmons, 93 Wn.2d 436, 452, 610 P.2d 893 (1980), overruled on other grounds by City of Spokane v. Kruger, 116 Wn.2d 135, 803 P.2d 305 (1991); Johnson, 90 Wn. App. at 69.

The trial court's ruling was not harmless because the voice mail identification and Bess' alleged statement to Hawthorne that "Jay shot that boy" were crucial to the State's case. Indeed, one need only read the State's closing argument to discover that this evidence served as the lynchpin for the State's case. RP 1455, 1456, 1457-58, 1461, 1467. Because Blake's conviction rests substantially on Bess's credibility and his statements to Hawthorne, this error was not harmless.

V. CUMMULATIVE ERROR DENIED APPELLANT A FAIR TRIAL.

The cumulative error doctrine applies when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

As set forth above, the jury heard repeated comments on guilt by lay witnesses and improper hearsay evidence that was not predicated upon personal knowledge. The prosecutor committed multiple acts of misconduct during closing argument that included: repeatedly emphasizing comments on guilt, expressing his opinion about the credibility of the witnesses, disparaging defense counsel, and diverting the jury's attention away from their duty by directing them to "do the right thing" by finding Blake guilty. Additionally, the trial court erroneously excluded important impeachment evidence, encroaching on the defendant's right to fully present his defense.

Also explained above, these multiple errors had the effect of denying Blake a fair trial. On the one hand, State's case was weak and the defense presented a credible other-suspect defense. On the other hand, there were multiple trial errors that went to the core issue of the case –

identification of the shooter. This record shows Blake did not receive a fair trial and, therefore, his conviction should be reversed.

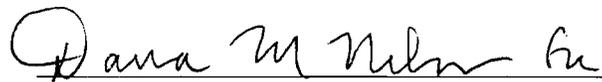
D. CONCLUSION

For the foregoing reasons, this Court should reverse Blake's conviction and remand for a new trial.

DATED this 22nd day of February, 2012

Respectfully submitted,

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