

NO. 67913-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALFONSO SENIOR, JR.,

Appellant.

2012 APR 27 PM 3:11

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN ERLICK

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

RANDI J. AUSTELL
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. THE ALTERCATION AT THE NORTH POINT BAR & GRILL.....	2
2. THE HOMICIDE AT THE GAS STATION	4
3. EVIDENCE BESIDES EYEWITNESS TESTIMONY AGAINST ALFONSO	7
4. THE CHARGES.....	10
5. THE DEFENSE: MISTAKEN IDENTIFICATION	11
C. <u>THE TRIAL COURT PROPERLY ADMITTED ALFONSO'S ADOPTIVE ADMISSION</u>	11
1. FACTS	12
a. Trial Testimony	12
b. The State's Proffer, Alfonso's Objections, And The Trial Court's Ruling	13
2. ADOPTIVE ADMISSIONS	19
a. Standard Of Review.....	19
b. A Trial Court May Admit An Accused's Gesture Or Silence As An Adoptive Admission	20

c.	Adoptive Admissions Do Not Violate The Confrontation Clause	24
d.	The Judge Determines Whether The Foundational Elements Have Been Met; The Jury Determines Whether The Defendant Adopted An Admission	26
e.	The Trial Court Properly Admitted Johnson's Testimony	28
f.	Error, If Any, Was Harmless.....	31
D.	<u>CONCLUSION</u>	35

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Crawford v. Washington, 541 U.S. 36,
124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)..... 14, 15, 25

United States v. Barletta, 652 F.2d 218
(1st Cir.1981)..... 28

United States v. Inadi, 475 U.S. 387,
106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986)..... 24

United States v. Moore, 522 F.2d 1068
(9th Cir.1975 (1976)) 26

United States v. Tocco, 135 F.3d 116
(2nd Cir. 1998) 23

Washington State:

In the Matter of the Marriage of Rideout,
150 Wn.2d 337, 77 P.3d 1174 (2003)..... 30

State v. Anderson, 44 Wn. App. 644,
723 P.2d 464 (1986)..... 19, 20

State v. Baruth, 47 Wash. 283,
91 P. 977 (1907)..... 23

State v. Bauers, 25 Wn.2d 825,
172 P.2d 279 (1946)..... 20, 28

State v. Bourgeois, 133 Wn.2d 389,
945 P.2d 1120 (1997)..... 31, 32

State v. Cotten, 75 Wn. App. 669,
879 P.2d 971 (1994)..... 20, 22, 29

<u>State v. Crowder</u> , 103 Wn. App. 20, 11 P.3d 828 (2000).....	19, 20
<u>State v. Dixon</u> , 159 Wn.2d 65, 147 P.3d 991 (2006).....	19
<u>State v. Fullen</u> , 7 Wn. App. 369, 499 P.2d 893 (1972).....	26
<u>State v. Grisby</u> , 97 Wn.2d 493, 647 P.2d 6 (1982).....	29
<u>State v. Israel</u> , 113 Wn. App. 243, 54 P.3d 1218 (2002).....	22
<u>In re Rights to Waters of Stranger Creek</u> , 77 Wn.2d 649, 466 P.2d 508 (1970).....	31
<u>State v. Mason</u> , 160 Wn.2d 910, 162 P.3d 396 (2007).....	24
<u>State v. McCaughey</u> , 14 Wn. App. 326, 541 P.2d 998 (1975).....	21
<u>State v. Neslund</u> , 50 Wn. App. 531, 749 P.2d 725 (1988).....	1, 12, 16, 18, 20, 22-31
<u>State v. Parr</u> , 93 Wn.2d 95, 606 P.2d 263 (1980).....	20
<u>State v. Parris</u> , 98 Wn.2d 140, 654 P.2d 77 (1982).....	24
<u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961 (1981).....	32
 <u>Other Jurisdictions:</u>	
<u>People v. Silva</u> , 45 Cal. 3d 604, 247 Cal.Rptr 573, 754 P.2d 1070 (1988).....	25

<u>Wilson v. City of Pine Bluff</u> , 6 Ark. App. 286, 641 S.W.2d 33 (1982)	26
--	----

Constitutional Provisions

Federal:

U.S. Const. amend. VI	14, 27
-----------------------------	--------

Statutes

Washington State:

RCW 9.41.040.....	10
RCW 9.94A.533	10
RCW 9A.32.050	10
RCW 9A.76.050	10
RCW 9A.76.070	10

Rules and Regulations

Federal:

FRE 801	23
---------------	----

Washington State:

ER 104	26, 27, 30
ER 401	19
ER 402	19
ER 403	11, 14, 15, 16, 29, 30, 31

ER 801 14, 20, 22

Other Authorities

5 K. Tegland, WASH. PRAC., EVIDENCE LAW
AND PRACTICE (5th ed. 2007)..... 27, 28, 30

Annotation, *Nonverbal Reaction to Accusation,
Other Than Silence Alone, as Constituting
Adoptive Admission Under Hearsay Rule*,
87 A.L.R.3d 706, § 6(a) (1978 & Supp.1988) 21

A. ISSUE PRESENTED

1. In State v. Neslund,¹ this Court established an analytical framework governing adoptive admissions. The Court held that, under the evidence rules, adoptive admissions are not hearsay, and their admission does not violate the Confrontation Clause. Here, the trial court analyzed the admissibility of an adoptive admission under Neslund and rejected the defendant's claims that the statements were hearsay and violated his right to confront witnesses. The defendant makes these same claims on appeal. Should the Court follow its own precedent and similarly reject the defendant's claims?

2. The defendant asks this Court to rule on "tacit admissions" even though the issue is not pertinent to the appeal. Should the Court refrain from ruling on a non-issue when any such ruling would be dicta?

¹ 50 Wn. App. 531, 749 P.2d 725 (1988).

B. STATEMENT OF THE CASE

1. THE ALTERCATION AT THE NORTH POINT BAR & GRILL.

Late evening, on October 15, 2010, several groups of people went to the North Point Bar & Grill² ("Bar"): (1) the defendant, Alfonso Senior, Jr. ("Alfonso"), Antoine Senior ("Antoine") and Robert Swaggerty,³ (2) Darrell "Deon" "Pookie" Webster and Charles Bullock ("CJ"), (3) Pia Inkamp and Brandy Rabon, and (4) Heather Muir, Amie Hudson and Heather Ankrom). 8RP 29-31, 38; 9RP 37-40; 10RP 139-40; 11RP 137-44; 12RP 172-73; 13RP 108-13, 140-42⁴; Ex. 13. Pia Inkamp met "Deon" at the bar the previous summer and they had exchanged telephone numbers. 10RP 137-38. Amie Hudson and Heather Muir had known CJ and "Pookie" for a long time. 8RP 26-28; 9RP 34-40; 11RP 137-39.

² The North Point Bar and Grill is also known as the Thunderchief. 9/26/11 RP 31.

³ Antoine and Alfonso are brothers; Swaggerty is their cousin. 10/11/11 RP 16; 10/18/11 RP 63-64.

⁴ The State's designation of the Verbatim Report of Proceedings ("RP") is as follows: 1RP Aug. 8, 2011; 2RP Aug. 9-10, 2011; 3RP Aug. 24-25, Oct. 21 (jury question), Oct. 24 (verdict) and Nov. 10, 2011 (sentencing) (consecutively paginated); 4RP Sept. 19, 2011; 5RP Sept. 20, 2011; 6RP Sept. 21, 2011; 7RP Sept. 22, 2011; 8RP Sept. 26, 2011; 9RP Sept. 27, 2011; 10RP Sept. 28, 2011; 11RP Oct. 6, 2011; 12RP Oct. 10, 2011; 13RP Oct. 11, 2011; 14RP Oct. 12, 2011; 15RP Oct. 13, 2011; 16RP Oct. 17, 2011; 17RP Oct. 18, 2011; 18RP Oct. 19, 2011.

After last call (around 1:30 A.M. on October 16) the four groups left the bar. 8RP 38; 9RP 44-46; 10RP 144; Ex. 2. Antoine, who wore a striped shirt, and Swaggerty, who wore a red Philadelphia Phillies baseball cap, and Alfonso confronted CJ and Webster. 8RP 38-42; 11RP 146-49; Exs. 2, 3.⁵ Antoine and Swaggerty shook hands with Webster, but Alfonso did not. 9RP 44-50, 122. Instead, Alfonso and Webster exchanged words and shoved one another. 8RP 79-80; 10RP 10-12; 11RP 146-47; Ex. 3.⁶ CJ and Hudson tried to hold Webster back. Antoine tried to subdue Alfonso. 8RP 77-80; 9RP 50-52; Ex. 3. CJ and Hudson thought Antoine might know – or be related to – Webster.⁷ 8RP 128; 9RP 52, 57-66.

The dispute continued in the parking lot. 8RP 38-42, 140; 9RP 52-61, 148-49; Ex. 14.⁸ The confrontation ended when a Puyallup Tribal Police Officer, who worked off-duty as a security

⁵ When the witnesses testified about the events of October 15-16, they mostly used clothing as descriptors: Antoine wore a striped shirt and Swaggerty wore a red baseball cap. The description of Alfonso's clothing varied.

⁶ CJ is also on the video; he is the man wearing white. 9RP 99.

⁷ Antoine referred to Webster as Deon, which was Webster's middle name. 9RP 106-07. Antoine's girlfriend at the time was Shonte Webster, Darrell Webster's cousin. 10/18/11 RP 63-64.

⁸ Exhibit 14 is a copy of a disc from one of the bar's security cameras. It shows Antoine, Swaggerty and Alfonso walk to a Lexus SUV. CJ approached the SUV and spoke to the front seat passenger. Then, after the security guard told everyone to go home, the video shows the SUV leave the parking lot. 8RP 172-76.

guard for the bar, went to the parking lot and told everyone to go home. 8RP 38-39, 77, 139-45; 9RP 55-56, 65; Ex. 14.

Before leaving the parking lot, Antoine approached the women parked next to him and asked them to have breakfast at his apartment. 10RP 165, 168-71; 11RP 22, 28. The women, Pia Inkamp and Brandy Rabon, agreed instead to meet them at the Chevron Gas Station ("gas station") down the street to discuss it further. 10RP 148-49; 13RP 147-50. CJ, Webster, and another friend of theirs, Vic Cobb, also headed to the gas station. 8RP 158; 9RP 37-41, 61, 67-68; 11RP 94; Ex. 14. Amie Hudson, Heather Muir and Heather Ankrom drove to the gas station to buy food for Ankrom (who was quite inebriated). 8RP 29; 11RP 151-52.

2. THE HOMICIDE AT THE GAS STATION.

Inkamp and Rabon parked along the side of the gas station. 10RP 150; Ex. 4 at 1:46:48.⁹ As they listened to music, a Lexus SUV ("SUV")¹⁰ pulled into the gas station and parked by the gas pumps. Rabon said to Inkamp, "Hey there is (*sic*) the guys." 10RP 150; 11RP 26-28; 13RP 151-52; Ex. 4 at 1:47:07. Antoine

⁹ Exhibit 4 is a recording of the events as captured by two of the security cameras at the Chevron station (cameras 10 and 11). The citations to exhibit 4 refer to images from camera 11 unless otherwise noted.

¹⁰ Witnesses described the SUV as silver, gray, gold, or champagne colored. 8RP 44-45; 9RP 52-53, 62; 10RP 14; 10RP 147, 169; 11RP 150; 12RP 13, 16, 60; 14RP 105-06, 108-11, 114-17.

and Swaggerty got out of the SUV and walked to Inkamp's car. 10RP 151-52; 11RP 26-28; Ex. 4 at 1:47:23 - :34. Alfonso remained alone by the SUV. 10RP 151; Ex. 4 at 1:47:30. Antoine knelt by Inkamp's window (out of camera range) to discuss having breakfast at his apartment. 10RP 151-54; 11RP 26-28; 13RP 153.

Within two minutes, CJ, Webster and Vic Cobb arrived. 8RP 83; 10RP 153; 13RP 153; Ex. 4 at 1:49:35. Webster saw Inkamp and approached from the front of her car. 10RP 153-55; 13RP 154; Ex. 4 at 1:49:46. CJ got out of the car and approached Alfonso. 9RP 69-73; 10RP 35-37; Ex. 4 at 1:50:00. CJ asked Alfonso if everything was "cool." Alfonso told him everything was cool as long as Webster wasn't "trippin." If Webster was "trippin," Alfonso said, then he "had something for him." 9RP 70. While they were talking, Antoine and Swaggerty confronted Webster. 9RP 73-75; 10RP 37-40. CJ intervened; he grabbed Antoine and Swaggerty and told "Pookie" to return to the car. 9RP 74-75; 10RP 42. Alfonso remained by the SUV. Ex. 4 at 1:40:29; 10RP 151.

Seconds later, Alfonso walked toward the back of Webster's car. Ex. 4 at 1:50:44. CJ had his back to Webster; he focused on Antoine and Swaggerty, who started to back up. 9RP 75.

Approximately 8 seconds later, Alfonso shot Webster.¹¹ CJ heard a bang. 9RP 75. When CJ turned around, the only person he saw was Alfonso, who held something in his hand by his waist. CJ could not tell what it was, because Alfonso turned around and ran. 9RP 109; 10RP 58. At 1:50:67, Antoine, Swaggerty and Alfonso sprinted to the SUV then fled. Ex. 4 at 1:51:04.

Levonte Smith stood in line at the Chevron store, when he heard one gunshot. 14RP 105. Smith spun around and saw a man with a gun held by his side. 14RP 107-08, 114, 118, 129. Smith saw two or three other men back away; they looked surprised. 14RP 114. The men got into an SUV with the gunman and quickly drove away. 14RP 106-09, 143.

Amie Hudson and her friends arrived at the gas station after CJ and Webster. 8RP 47. Hudson saw Antoine and Swaggerty argue with CJ and Webster. 8RP 48-49, 106-07. She focused initially on CJ and Webster, but then she saw Alfonso to her left, closer to the gas pumps. 8RP 49-51, 107, 110. Hudson had an

¹¹ The shooting took place outside the range of the security cameras. However, based on the witness's testimony and the compilation of the security camera footage, the shooting likely occurred at 1:50:52. 18RP 10. After Alfonso shot Webster, CJ pounded on the Chevron store window. Ex. 4 (camera 10 at 1:51:02); (camera 11 at 1:51:23). At 1:51:10 people scattered and cars drove away. 8RP 115; 9RP 75-79; Ex. 4 (camera 10). Twenty-eight seconds later, Amie tried to get into the Chevron store. Ex. 4 at 1:51:48. Amie yelled for someone, anyone, to call 911. 8RP 52, 81-83, 116.

unobstructed view. She looked directly at Alfonso as he fired the gun at Webster's head. 8RP 49-50, 53, 110, 114. When the bullet hit Webster, Webster "just went down." It was instantaneous.¹² 8RP 53, 114.

Paramedics, emergency medical technicians and one Good Samaritan treated Webster at the gas station. 10RP 106-29; 11RP 132-36; 12RP 5-22. Webster had lost a tremendous amount of blood and he could not breathe on his own. 10RP 106-24. Medics transported Webster to Harborview Medical Center, where he later died from a gunshot wound to the head. 15RP 79.

3. EVIDENCE, BESIDES EYEWITNESS TESTIMONY, AGAINST ALFONSO.

Police officers recovered ballistics evidence from the crime scene: (1) a fired bullet, (2) a fired 9mm Luger casing manufactured by "CBC," and (3) an unfired 9mm Luger cartridge manufactured by "FC." 11RP 103; 12RP 83-90, 106, 115.

Soon after the murder, police officers learned where Antoine lived with Swaggerty and Antoine's other brother, Darren. 10RP

¹² Witness accounts varied as to the number of gunshots – one or two shots. 8RP 114-15; 9RP 77; 10RP 18, 160; 11RP 154; 12RP 56-57; 13RP 129-30; 14RP 106. One witness thought at first he had heard two shots, but upon reflection he thought that it was possible there had been only one shot with an echo coming off the wall by the gas station. 12RP 56-57.

165; 11RP 28, 199-202; 17RP 64. On October 16, 2010, the police officers conducted surveillance at the apartment complex. They arrested Antoine that same day as he tried to leave the apartment complex in a Lexus SUV.¹³ 13RP 28-29, 81, 84, 100; 14RP 153. Later that same afternoon, police officers arrested Swaggerty and Alfonso at Antoine and Swaggerty's apartment. 14RP 98-100.

At the apartment, police officers found a key lanyard with a wallet attached on the living room couch.¹⁴ 13RP 56-57. In the wallet, was a New Jersey identification card for Alfonso Senior, Jr.¹⁵ 13RP 57. From Antoine's bedroom, officers seized a "Colt" model 2000 gun case with a 9mm safety and instruction manual inside (but no gun), and an ammunition box containing 9mm "CBC" and 9mm "FC" rounds – some bullets were missing. 13RP 36-40, 61-67.

Rick Wyant, a firearm and tool analyst with the Washington State Patrol Crime Laboratory, performed ballistics tests that determined (1) the fired bullet, a .38 caliber class, is consistent with

¹³ Police officers did not find any evidence in the SUV. 12RP 165-66.

¹⁴ Still photographs printed out from a security camera in the bar show Alfonso wearing a lanyard around his neck with an item that appeared to be a cell phone. Exs. 11-13; 9RP 8-9, 19-23.

¹⁵ When CJ spoke to Alfonso at the gas station, Alfonso told him that he was from New Jersey. 9RP 72-73.

a 9mm Luger, (2) the rifling characteristics of a Colt 2000 are consistent with the fired bullet, and (3) the unfired cartridge and the fired cartridge were both cycled or chambered through the same gun. 14RP 60-79. Also, the type of Colt that had, at some point, been in the empty gun case is a model 2000, which is a 9mm Luger semiautomatic pistol. 14RP 78.

Wyant also explained that if you do not know a bullet is in the chamber, and you manually pull the slide back, the bullet that was in the chamber would eject and fall free. The next bullet in the magazine would then go into the chamber.¹⁶ 14RP 93.

The police created photo montages, which included photographs of Antoine, Swaggerty and Alfonso, to show witnesses.¹⁷ 14RP 161-64. Several hours after Alfonso murdered Webster, CJ viewed three photo montages. 10RP 63; 14RP 167-76; Exs. 72-74. CJ positively identified Antoine, Swaggerty and Alfonso. 14RP 175-76. CJ said, “[H]e (Alfonso) was the one

¹⁶ This possibly explains why the unfired bullet recovered at the crime scene had been cycled through the same firearm as the fired cartridge. If Alfonso had manually pulled the slide back, the chambered round would have ejected and Alfonso may have cut his finger in the process (When Alfonso was arrested, he had a fresh cut on his right index finger. 12RP 167-68).

¹⁷ Some witnesses were either unable to identify anyone in the montages or choose someone other than Antoine, Swaggerty or Alfonso. 12RP 161-62, 179-81, 183-84; 14RP 167-68.

that Bullock was not holding onto (when Webster was shot). 14RP 175-76.

That same evening, Hudson viewed three montages. 8RP 87. Hudson positively identified Alfonso as “the man who shot the man who died.” Ex. 5; 8RP 85-86; 12RP 181-82; 13RP 12; 14RP 178-79.

In court, Hudson positively identified the defendant, Alfonso Senior, Jr., as “the gentleman that shot Pookie.” 8RP 87.

4. THE CHARGES.

The State charged Antoine with felony rendering criminal assistance in the first degree and unlawful possession of a firearm in the second degree. CP 97-98; RCW 9A.76.070(1), (2)(a); RCW 9A.76.050; RCW 9.41.040(2)(a)(i). Pre-trial, Antoine pleaded guilty as charged. CP 99-101; 5RP 2-20.¹⁸

The State charged Alfonso alternatively with intentional murder in the second degree and felony murder in the second degree, and unlawful possession of a firearm in the second degree. CP 96-97; RCW 9A.32.050(1)(a), (b); RCW 9.41.040(2)(a)(i). For purposes of a sentence enhancement, the State also alleged

¹⁸ Antoine pleaded guilty under King County Cause No. 10-1-08799-7 KNT. As of August 27, 2012, Antoine had not filed a notice of appeal.

Alfonso had been armed with a firearm when he committed the murder. CP 96; RCW 9.94A.533(3).

5. THE DEFENSE: MISTAKEN IDENTIFICATION.

Alfonso's defense, other than a general denial, was mistaken identification. CP 92. Dr. Geoffrey Loftus testified generally about the fallibility of eyewitness identifications, based, in part, on "weapon focus," or "cross-racial identification" or "false memory" or "global versus detailed information." 17RP 83-145. The jury rejected Alfonso's defense and found him guilty as charged. CP 140-43. Alfonso appeals. CP 156.

C. THE TRIAL COURT PROPERLY ADMITTED ALFONSO'S ADOPTIVE ADMISSION.

Alfonso asserts that the trial court erred by admitting testimony by one witness about an exchange between Swaggerty and Alfonso. The court ruled that a reasonable jury could conclude that Alfonso's nonverbal reaction to Swaggerty's accusation constituted an adoptive admission; *i.e.*, that Alfonso murdered Webster. Alfonso claims that (1) Swaggerty's statement was inadmissible hearsay, (2) the court erred by "saddling the jury" with the preliminary determination as to admissibility, (3) the court

should have excluded the evidence under ER 403, and (4) the witness's testimony violated the Confrontation Clause.

The Court should reject these claims. State v. Neslund, a case decided by the Court, resolves the first, second and fourth claims against Alfonso. Moreover, the trial court acted within its broad discretion when it ruled that the probative value of the witness's testimony was not substantially outweighed by the danger of unfair prejudice. Alfonso's claims fail.

1. FACTS

a. Trial Testimony.

When Alfonso murdered Webster, Franisa Johnson was Swaggerty's girlfriend. 17RP 61-63, 74. Johnson knows Swaggerty's cousins, Alfonso and Antoine and Antoine's former girlfriend, Shonte Webster (Darrell Webster's cousin and the mother of Antoine's child). 17RP 63-64. Although Johnson had known Alfonso for only a week or so before the homicide, she had previously seen him at the apartment Swaggerty shared with Antoine and Antoine's other brother, Darren. 17RP 64-65.

On October 16, 2010, at about 2:00 or 3:00 A.M., Swaggerty arrived at Johnson's apartment. 17RP 66. Swaggerty was upset. 17RP 66. He paced back and forth and talked to himself. 17RP

66. About ten minutes later, Johnson and Swaggerty went to bed. They arose the next morning between 7:00 and 8:00 A.M. 17RP 67, 74. Swaggerty asked Johnson to turn the television on so he could watch the news. 17RP 68. The news broadcasted a story about the shooting at the Chevron Station the night before; it was then that Johnson learned Darrell Webster had been shot and killed. 17RP 68, 76.

Later that morning, around 9:00, Johnson and Swaggerty drove to Antoine and Swaggerty's apartment. 17RP 68. When they arrived, Alfonso was there with his son. 17RP 68. This was the first time that Swaggerty had seen Alfonso since he (Alfonso) murdered Webster. 17RP 72. Alfonso told his son to go outside just before Swaggerty spoke. Swaggerty said, "Why did you do that?" 17RP 70, 77. Alfonso responded by silently shaking his head left to right. 17RP 70-71, 77. Alfonso did not say, "Do what" or "I did not do anything." Alfonso said nothing; he just shook his head from left to right. 17RP 70-71, 77-81.

b. The State's Proffer, Alfonso's Objections, And The Trial Court's Ruling.

The State sought to admit Johnson's testimony regarding Alfonso's reaction – his failure to deny doing "that" and his head

shake, which implied that Alfonso did not know why he shot and killed Webster – as an adoptive admission. 15RP 54-57; 16RP 31-32. The State asked the court to hear Johnson's proposed testimony outside the jury's presence and to then make a threshold determination as to whether a jury could reasonably conclude that Alfonso's reaction to Swaggerty's statement constituted an adoptive admission. 16RP 29-31, 37-39, 49-50.

Alfonso objected to Johnson's proposed testimony on three different bases:¹⁹ (1) the jury would have no context for the statement or response, *i.e.*, it was vague and ambiguous and should thus be excluded under ER 403,²⁰ (2) it was hearsay,²¹ and (3) under Crawford,²² Johnson's testimony regarding Swaggerty's

¹⁹ Defense counsel provided the trial court and the State with a brief that detailed his objections to Johnson's proposed testimony; however, the brief was never filed with the court. See 16RP 31 (court discussed Alfonso's hearsay objection "as set forth in your brief"); 16RP 42 (State addressed "section three of defense counsel's brief") and 16RP 43-44 (Court stated it "has read your (defense counsel's) brief).

²⁰ ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

²¹ "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

²² Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

statement would violate Alfonso's Sixth Amendment²³ right to confront Swaggerty. 15RP 57-58; 16RP 26-29, 43-49.

The trial court outlined its analysis: First, was the statement testimonial? Second, if the statement was non-testimonial, does Crawford apply? Third, if Crawford does not apply, then do Swaggerty's statement and Alfonso's nonverbal response fall within a hearsay exception? Fourth, if so, the court would then need to do an ER 403 analysis based upon vagueness, confusion to the jury, lack of context and lack of relevance. Finally, if the court deems the evidence is admissible, is a limiting instruction appropriate? 16RP 36.

The trial court recognized that a hearsay violation differs from a Confrontation Clause violation. 15RP 60. The court stated that it did not believe Swaggerty's question was testimonial and, therefore, Crawford did not apply. Defense counsel conceded that the "bulk of the case law" is "contrary to his position" that Swaggerty's question was testimonial. 16RP 26-29.

Next, the court stated it must determine the nature of Alfonso's response as a threshold question; *i.e.*, could any

²³ "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. AMEND. VI.

reasonable trier of fact find that this is an adoptive admission.

16RP 37. The issue, the court said, is not the question, but it's the defendant's response. The court noted that Swaggerty's question was not being offered for the truth of the matter asserted; it was being offered for the defendant's response. That response would be an adoptive admission, which is not hearsay under the rule, or, it's a statement by a party opponent. 15RP 60.

The court wanted to hold a hearing outside the jury's presence to determine the admissibility and scope of Johnson's proposed testimony.²⁴ 16RP 33, 37, 47-49. The court said, "I think this is critical, I'm not prepared to make an uninformed decision." 15RP 66. The court advised the parties to review State v. Neslund.²⁵

After the court heard Johnson's proposed testimony, the court said the jury could reasonably infer that Swaggerty's statement referenced the shooting, based on Swaggerty's presence at the shooting, his agitated state at Johnson's apartment, the news

²⁴ Johnson's testimony outside the jury's presence was consistent with her trial testimony. However, Johnson also testified that she interpreted Alfonso's head shake as "I don't know." Johnson said that, in her experience, people do not shake their head to imply that they did not do "that"; rather, people shake their head as Alfonso did when they do not know why they did something. 17RP 26.

²⁵ 50 Wn. App. 531, 749 P.2d 725 (1988).

story about the homicide and because Swaggerty's first words to Alfonso were, "Why did you do that?" 17RP 52. The court concluded that the accusation was not vague and thus not inadmissible under ER 403. 17RP 52.

The court further stated:

Then we are dealing with a response, and if it's not an admission, which is not my determination, it's the jury's determination, but if it's not an admission, or an adoption of the accusation, then, the instruction²⁶ tells the jury, "ignore it, don't give it any weight, ignore it, you can't use it for any purpose." If shaking one's head is not a response that an ordinary person would give when faced with such an accusation under the circumstances, then, it may be perceived as an adoptive admission by the jury. And I think that from the threshold standpoint, under the circumstances, it's sufficient for the jury to consider.

17RP 52-53.

The court said that both sides could argue the inferences that they wanted the jury to draw from the evidence. The court told defense counsel that, "You can make your argument, 'Well, maybe

²⁶ During Johnson's testimony, the trial court gave the jury the following limiting instruction:

Members of the jury, you have just heard some -- a statement with regard to Mr. Swaggerty's statement. Evidence of Mr. Swaggerty's statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the defendant in the face of it. Unless you should find that the defendant's silence and conduct at the time indicated an admission that the statement was true, you should entirely disregard the statement.

17RP 71. Defense counsel said that the limiting instruction was "acceptable to the defense." 17RP 58.

Alfonso told his son, you know, get out of here, you can't be in this room,' and that's why he said, 'Why did you do that?' Sure, that could be what he was referring to. . . ."27 17RP 54-55.

Based largely on Neslund, the court concluded that Swaggerty's accusation was incriminating if it referenced the shooting. The accusation was made in Alfonso's presence and hearing, and was of a kind to which an innocent person in Alfonso's situation would deny. The inference of whether or not the defendant's response was that of an innocent person or an adoptive admission of the accusation was a question of fact for the jury to decide.²⁸ 17RP 55.

²⁷ This inference is precisely what defense counsel asked the jury to draw in his closing argument. 18RP 45-46.

²⁸ The court recognized that it had to make the threshold determination based solely on evidence that would be presented to the jury, not on additional information known to the parties that provided a clear context for Swaggerty's statement and Alfonso's reaction. 17RP 51-52.

Information known by the parties, but not the jury, included a conversation between Swaggerty and Alfonso that occurred as they drove away from the Chevron Station.

Swaggerty asked Alfonso, "'what the fuck did you do that for?' Robert Swaggerty said Alfonso Senior responded that he was scared and just reacted. Robert Swaggerty asked Alfonso Senior the next morning, 'what the fuck happened last night?' He said Alfonso Senior replied, 'he wish (*sic*) he never did it.'"

CP 23 (defense trial brief) (footnote citations to the appendices omitted).

2. ADOPTIVE ADMISSIONS.

a. Standard Of Review.

Determining whether evidence is admissible is within the trial court's discretion and will be reversed only upon a showing of manifest abuse of discretion. State v. Crowder, 103 Wn. App. 20, 25, 11 P.3d 828 (2000). Additionally, the trial court's rulings on relevance and prejudicial effect under ER 402²⁹ and 403 should only be reversed for an abuse of discretion. State v. Anderson, 44 Wn. App. 644, 652, 723 P.2d 464 (1986). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds; *i.e.*, if the decision rests on facts unsupported by the record or on the wrong legal standard. State v. Dixon, 159 Wn.2d 65, 76, 147 P.3d 991 (2006); Crowder, 103 Wn. App. at 25-26.

²⁹ ER 402 provides: "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

"'Relevant evidence' means evidence having 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.

b. A Trial Court May Admit An Accused's Gesture Or Silence As An Adoptive Admission.

Whether a statement is hearsay depends on the reason for which it is offered. Crowder, 103 Wn. App. at 26. A statement is not hearsay if it is "offered against a party and is . . . (ii) a statement of which the party has manifested an adoption or belief in its truth." ER 801(d)(2). A party may manifest his adoption of a statement by words, gestures, or silence. State v. Neslund, 50 Wn. App. 531, 550, 749 P.2d 725 (1988). An adoptive admission is attributed to the defendant and becomes his own words. State v. Cotten, 75 Wn. App. 669, 689, 879 P.2d 971 (1994).

Washington Courts of Appeal have held that the defendant's reaction to the accusation, which merely consisted of a nod or some other head movement, was admissible against him as an adoptive admission, to demonstrate his acquiescence in the accusation's truth. See, e.g., State v. Bauers, 25 Wn.2d 825, 839-43, 172 P.2d 279 (1946), *overruled on other grounds by State v. Parr*, 93 Wn.2d 95, 105, 606 P.2d 263 (1980); see also State v. Anderson, 44 Wn. App. at 651 (holding that the defendant manifested adoption of a statement by nodding head "yes"); State

v. McCaughey, 14 Wn. App. 326, 328, 541 P.2d 998 (1975)

(same).³⁰

Bauers was charged with murdering his wife. 25 Wn.2d at 838. The victim's mother, Mrs. Fuller, testified that the morning after her daughter and Bauers had spent the night together, her daughter (who bore marks on her neck indicating that her neck had been compressed) stated in Bauers' presence that during the previous night Bauers had assaulted and threatened to kill her. Id. at 839. Bauers did not deny the statement; he simply shook his head "as though she was being silly." Id. at 840. Later that same day, in Bauers' and two police officers' presence, the victim said that Bauers had kept her in a locked room all night threatening to kill her. Id. Again, Bauers did not deny the accusation. Fuller said that Bauers gave a "one-sided smile" and shook his head – not in the negative to indicate his denial of the wife's statement, but "as though something was too silly." Id. The trial court admitted both the victim's statement and Bauers' reactions as tacit admissions.

³⁰ Federal and other state courts of appeal have also held that, under circumstances calling for a reply, nodding or other head movements by an accused can constitute an adoptive admission. See generally Annotation, *Nonverbal Reaction to Accusation, Other Than Silence Alone, as Constituting Adoptive Admission Under Hearsay Rule*, 87 A.L.R.3d 706, § 6(a) (1978 & Supp.1988); but see id. at § 6(b) reporting cases in which nodding or other head movements have been held inadmissible.

A party may also manifest adoption of statement by complete silence. See, e.g., Neslund, 50 Wn. App. at 550-51 (and cases cited therein); see also Cotten, 75 Wn. App. at 689-90 (finding that the defendant's lack of disagreement with a description of the crime constituted an adoptive admission); State v. Israel, 113 Wn. App. 243, 281-82, 54 P.3d 1218 (2002) (finding that a conversation between the defendant and two others, planning future robberies, was held admissible as an adoptive admission because the defendant remained silent).³¹ When an incriminating or accusatory statement is made in the accused's presence and hearing, and he does not deny it, contradict it, or object to it, both the statement and the accused's reaction are admissible as evidence of his acquiescence in its truth. Neslund, 50 Wn. App. at 550.

Silence constitutes an admission only if (1) the party-opponent heard the accusatory or incriminating statement and was mentally and physically able to respond; and (2) the statement and circumstances were such that it is reasonable to conclude the party-opponent would have responded had there been no intention to acquiesce.

Neslund, 50 Wn. App. at 551.

³¹ Alternatively, the conversation was held admissible as a statement in furtherance of a conspiracy (see ER 801(d)(2)(v)). Israel, 113 Wn. App. at 281-82.

In Neslund, a wife was charged with murdering her husband. Neslund, 50 Wn. App. at 535. The trial court permitted Neslund's brother, Paul, a prosecution witness, to recount a conversation he had overheard, in which Neslund and their brother, Robert, described, apparently to a third person, how they had killed the victim and disposed of his body. Id. at 549-53. Robert's portion of the conversation was held admissible against Neslund on the theory that she had manifested a belief in the truth of his statements by not disagreeing with them. Id. at 553.

Because of the inherently equivocal nature of silence, courts must exercise caution when considering whether the silence is an adoptive admission. Neslund, 50 Wn. App. at 551 (citing State v. Baruth, 47 Wash. 283, 292, 91 P. 977 (1907)). However, ambiguity in and of itself does not preclude admitting silence as an adoptive admission. See, e.g., United States v. Tocco, 135 F.3d 116, 128-29 (2nd Cir. 1998) (testimony that, after the witness cautioned Tocco's brother that Tocco was talking about their involvement in the arson and Tocco's brother responded by nodding his head affirmatively, was admissible under the federal rules of evidence³²

³² Fed. R. Evid. 801(d)(2)(B) provides that a statement is not hearsay if "[t]he statement is offered against an opposing party and: ... (B) is one the party manifested that it adopted or believed to be true."

as an adoptive admission, regardless of any ambiguity surrounding the meaning of Tocco's brother's nod, because the witness's statement was one that an innocent person, under these circumstances, would normally deny).

c. Adoptive Admissions Do Not Violate The Confrontation Clause.

The prohibition against hearsay and the Confrontation Clause generally protect similar values, but "the overlap is not complete." Neslund, 50 Wn. App. at 554 (quoting United States v. Inadi, 475 U.S. 387, 393, 106 S. Ct. 1121, 1125 n.5, 89 L. Ed. 2d 390 (1986)). The Washington Supreme Court has made clear that, "To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge." State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). The Confrontation Clause does not preclude a witness from testifying as to what he has heard or seen. State v. Parris, 98 Wn.2d 140, 153, 654 P.2d 77 (1982).

As this Court recognized in Neslund, Constitutional Confrontation rights are not implicated by admitting the defendant's own incriminating out-of-court statements. Neslund, 50 Wn. App. 554. Adopted admissions require admitting the statements to which the defendant is deemed to acquiesce. Id. at 556. The

Court said, "Adoptive admissions are, by their very nature, attributed to the defendant, even though couched in the words of a third person. It is the defendant's response to the incriminating statement that 'makes it evidence.'" Id.

The United States Supreme Court stated in Crawford that, "The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford v. Washington, 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 1369 n.9, 158 L. Ed. 2d 177 (2004).

[B]y reason of the adoptive admissions rule, once the defendant has expressly or impliedly adopted the statements of another, the statements become *his own admissions*, and are admissible on that basis as a well-recognized exception to the hearsay rule. . . . Being deemed the defendant's own admissions, we are no longer concerned with the veracity or credibility of the original declarant. Accordingly, no confrontation right is impinged when those statements are admitted as adoptive admissions without providing for cross-examination of the declarant.

People v. Silva, 45 Cal. 3d 604, 624, 247 Cal.Rptr 573, 754 P.2d 1070, 1080 (1988) (internal citation omitted); see also Neslund, 50 Wn. App. at 554-55.

Adoptive admissions are not admitted for purposes of establishing the truth of the matter asserted, but are admitted to show the defendant's failure to deny the declarant's accusatory or

incriminating statements. Neslund, at 555-56. Without the context supplied by the triggering accusation, “an adoptive admission generally would be unintelligible to the jury. Id. at 556. The source of the accusation is immaterial; it is only the defendant’s reaction to the accusation that is probative. State v. Fullen, 7 Wn. App. 369, 380, 499 P.2d 893 (1972).

- d. The Judge Determines Whether The Foundational Elements Have Been Met; The Jury Determines Whether The Defendant Adopted An Admission.

This Court explained the specific foundational requirements for adoptive admissions by silence in Neslund.³³ 50 Wn. App. at 551-52. Before admitting any evidence as an adoptive admission, the trial court must find sufficient foundational facts from which the jury could reasonably conclude that the defendant “actually heard, understood, and acquiesced in the statement.”³⁴ Id. at 551 (quoting United States v. Moore, 522 F.2d 1068, 1075 (9th Cir.1975 (1976))); Wilson v. City of Pine Bluff, 6 Ark. App. 286, 290-91, 641 S.W.2d 33, 36-37 (1982) (same). Whether the defendant made an

³³ The Court looked to federal courts, which construed the federal corollary to ER 104(b) (see n.18 supra), for guidance. Neslund, 50 Wn. App. at 551-52.

³⁴ The trial court determines some preliminary factual issues under ER 104(a): “Preliminary questions concerning the . . . admissibility of evidence shall be determined by the court, subject to the provisions of section (b).”

adoptive admission is a matter of conditional relevance determined by the jury. Neslund, 50 Wn. App. at 551-52; see also ER 104(b).³⁵

Generally, when determining if the foundational requirements have been met, the trial court considers only evidence that the jury would be permitted to consider. 5 K. Tegland, WASH. PRAC., EVIDENCE LAW AND PRACTICE § 104.7, at 128 (5th ed. 2007). Additionally, the circumstances must also be such that “an innocent person would normally be induced to respond.” Neslund, at 551 (citation omitted). The testimony of one witness as to the conversation is sufficient to support a finding that a defendant heard and understood the statements, and that he had the ability to, but did not, deny the account. See Neslund, at 553.

To avoid violating a defendant’s Sixth Amendment right to have his case tried by a jury,³⁶ the preliminary question to be decided by the court, under ER 104(a), is the question of law whether a reasonable jury could find an adoptive admission by a preponderance of the evidence. Neslund, 50 Wn. App. at 552 n.7

³⁵ ER 104(b) states: “**Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.”

³⁶ “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .” U.S. CONST. AMEND. VI.

(citing United States v. Barletta, 652 F.2d 218, 219-20 (1st Cir.1981)). Thus, the trial court's decision is only a threshold determination; whether an accused has adopted an admission is a matter to be determined ultimately by the jury. Id. at 551-52; see also Bauers, 25 Wn.2d at 842 (finding admissible the defendant's head shake in response to the victim's accusation, but stating that the meaning of the defendant's head shake was for the jury to determine).

The jury's role in determining relevance is deciding the weight to be given to the evidence. "During its deliberations, the jury is free to accept or reject any testimony or any exhibit, as it sees fit." 5 K. Tegland, WASH. PRAC., EVIDENCE LAW AND PRACTICE § 104.8, at 130.³⁷

e. The Trial Court Properly Admitted Johnson's Testimony.

In this case, the trial court followed to a tee the procedure the Court adopted in Neslund. First, the trial court listened to Johnson's proposed testimony outside the jury's presence. 17RP 19-42. Second, the court considered only evidence that the jury would be permitted to consider. 17RP 51-52 (stating that the

³⁷ See also CP 111, 114 (Court's instructions to the jury).

inquiry must be limited to what the jury knows). Third, the court made a preliminary determination that a sufficient factual foundation existed in Johnson's testimony to permit the statement to be heard by the jury. 17RP 51-55. Fourth, the court ruled that Alfonso's adoptive admission did not violate the Confrontation Clause. 16RP 36-38, 44. Fifth, the court concluded that the accusation was not vague and thus not inadmissible under ER 403. 17RP 52. Finally, the court gave a limiting instruction that was "acceptable to the defense." 17RP 58, 71. The jury is presumed to have followed the court's limiting instruction. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). The trial court properly admitted Alfonso's adoptive admission.

Alfonso argues that adoptive admissions are inadmissible hearsay. This claim fails for two reasons: (1) an adoptive admission is attributed to the defendant and becomes *his own words*,³⁸ and (2) adoptive admissions are not admitted for purposes of establishing the truth of the matter asserted, but are admitted to show the defendant's failure to deny the declarant's accusatory or incriminating statements. Neslund, 50 Wn. App at 555-56.

³⁸ State v. Cotten, 75 Wn. App. at 689.

Alfonso urges this Court to overrule Neslund, and hold that ER 104(a), not ER 104(b), governs the admissibility of adoptive admissions. Alfonso states that, “[T]he trial court saddled the jury with the questions of admissibility.” Alfonso misapprehends the law. As Tegland explains, in matters of conditional relevance, the jury does not literally rule on admissibility. See 5 K. Tegland, WASH. PRAC., EVIDENCE LAW AND PRACTICE § 104.8. “[T]he judge, and the judge alone, decides whether the foundation facts are both admissible and sufficient to permit the introduction of the primary evidence. . . .” Id. at 130 (footnotes omitted).

Alfonso next asks this Court to reject the “tacit admission” rule, even though it is unnecessary to resolve the issues in the instant case. The Court should decline the offer. See In the Matter of the Marriage of Rideout, 150 Wn.2d 337, 354, 77 P.3d 1174 (2003) (where language has no bearing on the decision, that language is dictum).

Alfonso next asserts that, under ER 403, the trial court erred in admitting the evidence. The Court should reject this claim. After the trial court heard Johnson’s testimony and looked at the circumstances surrounding Swaggerty’s question and Alfonso’s response, the court concluded that the accusation was not vague

and thus not inadmissible under ER 403. 17RP 52. Alfonso has not demonstrated that the trial court abused its considerable discretion in admitting the evidence.

Finally, Alfonso claims that the admission of Johnson's testimony violated the Confrontation Clause. This Court, however, rejected this argument in Neslund (holding that admitting the defendant's own incriminating out-of-court statements do not violate the Confrontation clause). 50 Wn. App. 554.

In sum, the arguments that Alfonso makes here have all been resolved against him in Neslund. Alfonso has not demonstrated that Neslund is "incorrect and harmful." See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The Court should accordingly reject Alfonso's claims.

f. Error, If Any, Was Harmless.

Even if the trial court erred in admitting Alfonso's adoptive admission, the error was harmless. Improperly admitted evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). When an error resulted from violation of an evidentiary rule and not a constitutional mandate, this Court applies "the rule that error is not

prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.”³⁹ Id. (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). An error in admitting evidence that does not result in prejudice to the defendant does not require reversal. Bourgeois, at 403.

In assessing whether the error was harmless, the court must evaluate the admissible evidence against any prejudice caused by the inadmissible testimony. Bourgeois at 403. On the one side, the testimony of CJ Bullock provided strong evidence that Alfonso shot Webster. CJ was looking at Antoine and Swaggerty when Webster was shot. 9RP 73-78. CJ identified all three men from photograph montages; Alfonso was the man CJ was not holding onto. Exs. 72-74; 14RP 164-68, 171-76. When CJ turned to look for Webster, he saw only Alfonso, who held something in his hand down by his waist. 9RP 109; 10RP 58. CJ saw Antoine, Swaggerty, and Alfonso run away. 9RP 109; 10RP 64. CJ’s testimony was corroborated by exhibit 4, the gas station video, which shows the

³⁹ As stated above, adoptive admissions do not violate the Confrontation Clause. The nonconstitutional harmless error thus applies.

three men run toward their car immediately after the shooting and then flee.⁴⁰ Ex. 4 (camera 11) at ~1:50:67 – 1:51:04.

Forensic testing of the physical evidence found at the scene (a fired bullet, a fired 9mm Luger “CBC” cartridge and an unfired 9mm Luger “FC” cartridge) determined that the fired CBC cartridge and the unfired FC cartridge had both been cycled or chambered through the same firearm. 14RP 71-73. A Colt is one potential firearm from which the fired bullet could have been shot. 14RP 66.

The Colt box recovered from Antoine’s bedroom contained no firearm, but it had an owner’s manual for a model 2000, which is a 9mm Luger semiautomatic pistol and consistent with the rifling characteristics of the fired bullet recovered at the scene. 13RP 61-64; 14RP 77-79. The box of ammunition recovered from Antoine’s bedroom contained two different types of cartridges: CBC and FC. 13RP 61, 67; 14RP 74-75.

Most compelling was Amie Hudson’s testimony. Hudson had an unobstructed view of Alfonso. 8RP 110. She looked directly at Alfonso as he fired a gun at Webster’s head. 8RP 49-59,

⁴⁰ Several witnesses associated the three men with a silver or champagne-colored SUV. 8RP 44-45 (Hudson); 9RP 21-22; Ex. 11 (Loescher); 10RP 146-47, 168-72 (Inkamp); 11RP 66 (Mehline); 11RP 150 (Muir); 14RP 104-05 (Smith (saw the man who held the gun get into the SUV)).

107. Hudson saw the bullet hit Webster. 8RP 53. She saw Webster instantaneously drop to the ground. 8RP 53. Later that same day, Hudson looked at a photo montage, exhibit 5, and circled the picture of the man that she saw shoot Webster. 8RP 86; 14RP 178-79. In court, Hudson positively identified Alfonso as “the gentleman that shot Pookie.” 8RP 87.

Balanced against this substantial evidence of guilt is what can only be described as the slight prejudicial effect of Johnson's testimony. Moreover, defense counsel offered the jury an alternative explanation for the exchange between Swaggerty and Alfonso. 18RP 45-46. Counsel cautioned the jury against viewing Johnson's testimony in isolation. In isolation, the statement was incriminating, but viewed in the “broader context,” there was a “very reasonable explanation” for the statement. 18RP 45-46. Alfonso had told his son to go outside, and then Swaggerty asked, “Why did you do that,” and Alfonso just shook his head. 18RP 46. “And it was no big deal.” 18RP 46.

In rebuttal, the State emphasized that the box of ammunition located in Antoine and Swaggerty's apartment, which contained bullets manufactured by the same two companies, “FC” and “CBC,” as the spent casing and the live bullet recovered from the crime

scene is what links the evidence to Antoine's apartment, and ultimately, to Alfonso. 18RP 97.

With regard to Alfonso's reaction to Swaggerty's question ("why did you do that?"), the State told the jury, "[I]f you don't think there is enough context to know exactly what the men were talking about, they could have been talking about sending his son out or not, then, *disregard it altogether.*" 18RP 97. The prosecutor asked the jury to view Alfonso's response in context. 18RP 98. And, again, she reminded the jurors that, "[I]f you don't think that's an admission, then, disregard it altogether." 18RP 98. Most importantly, the prosecutor emphasized that Alfonso's reaction was only "[o]ne piece of evidence." 18RP 98.

Thus, even if the trial court erred in allowing Johnson to testify about Swaggerty's question and Alfonso's reaction, the Court should conclude that within reasonable probabilities, the outcome of the trial would not have been different had she not so testified. In light of the evidence as a whole, the error was harmless.

D. CONCLUSION

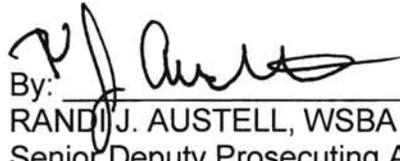
The trial court properly admitted Alfonso's adoptive admission. There was a sufficient factual foundation to admit the evidence and to permit the jury to determine the relevance. But,

even if the court erred in admitting the evidence, the error was harmless. The Court should affirm Alfonso Senior, Jr.'s conviction for murder in the second degree and unlawful possession of a firearm in the second degree.

DATED this 27 day of August, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

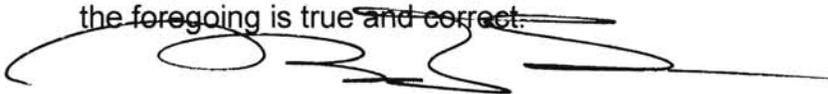

By: _____

RANDI J. AUSTELL, WSBA #28166
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of Brief of Respondent, in STATE V. ALFONSO SENIOR, JR., Cause No. 67913-9-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

08-27-12
Date