NO. 44945-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY GREG O'HAVER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John Hickman

No. 12-1-03170-5

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
Kawyne A. Lund
Deputy Prosecuting Attorney
WSB # 19614

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Was appellant entitled to a self defense instruction when he assaulted his wife or attempted to break into the victim's home? 1

2. Did the trial court abuse its discretion when it denied appellant's motion for mistrial after the court made a comment to a corrections officer? 1

3. Did appellant waive his right to challenge by failing to object to a witness's comment that appellant "ha[s] done this before?" 1

4. Did the prosecutor's use of the term "victim advocate" taint the jury even when he only referred to a piece of paper? 1

5. Did the trial court commit error in admitting Officer Welsh's testimony? 1

6. Was there cumulative error at the trial court level? 1

B. STATEMENT OF THE CASE. 1

1. Procedure 1

2. Facts 2

C. ARGUMENT 6

1. APPELLANT WAS NOT ENTITLED TO A SELF DEFENSE INSTRUCTION 6

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR MISTRIAL AFTER MAKING A COMMENT TO A CORRECTIONS OFFICER 11

3. THE APPELLANT FAILED TO PERSERVE A CHALLANGE TO WITNESS'S COMMENT THAT "THEY HAVE DONE THIS BEFORE." 13

4. THE PROSECUTOR DID NOT CONSULT WITH A VICTIM ADVOCATE 15

5. THE TRIAL COURT DID NOT COMMIT ERROR IN ADMITTING OFFICER WELSH'S TESTIMONY 16

6. THE TRIAL COURT DID NOT COMMIT CUMULATIVE ERROR 18

D. CONCLUSION. 20

Table of Authorities

State Cases

In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994) 19

State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003)....................12

State v. Coe, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984) 19

State v. Craig, 82 Wn.2d 777, 514 P.2d 151 (1973) 7

State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990).......................7, 8

State v. Garcia, No. 42890-3-II, (Nov. 13, 2013) 13

State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)....................15

State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000).........................12

State v. Grimes, 165 Wn. App. 172, 186, 267 P.3d 454 (2011)................14

State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).................12

State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) 19

State v. Kirkman, 159 Wn.2d 918, 938, 155 P.3d 125 (2007).................18

State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).........................12

State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)........................14

State v. Riley, 137 Wn.2d 904, 976 P.2d 624 (1999) 6

State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995)................19

State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990)...19

State v. Thrift, 4 Wn. App. 192, 480 P.2d 222 (1971)..............................12

State v. Weber, 159 Wn.2d 252, 279, 149 P. 3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007) 19

Federal And Other Jurisdictions

United States v. Garsson, 291 F. 646, 649 (D.N.Y. 1923) 18

Other

WPIC 16.04 6

WPIC 60.01 9

WPIC 65.03 10

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was appellant entitled to a self defense instruction when he assaulted his wife or attempted to break into the victim's home?

2. Did the trial court abuse its discretion when it denied appellant's motion for mistrial after the court made a comment to a corrections officer?

3. Did appellant waive his right to challenge by failing to object to a witness's comment that appellant "ha[s] done this before?"

4. Did the prosecutor's use of the term "victim advocate" taint the jury even when he only referred to a piece of paper?

5. Did the trial court commit error in admitting Officer Welsh's testimony?

6. Was there cumulative error at the trial court level?

B. STATEMENT OF THE CASE.

1. Procedure

The appellant was charged by information on August 22, 2012, with two counts of Assault in the Second Degree, one of which carried a firearm enhancement. In November, 2012, the State filed an amended information adding two additional counts of Assault in the Second Degree, both with firearm enhancements. One count added an additional charge regarding victim Dettling, and the other count added a new victim, Mr. Hoover.

After several continuances of trial dates, the case was called for trial on March 18, 2013, by Judge John Hickman. The court heard several motions, including a motion in limine by the State regarding appellant's proposed evidence in support of his self defense claim. After hearing testimony from the appellant, who was the only witness called, the trial court excluded the proposed testimony on various grounds. (The trial court ultimately allowed the jury to be instructed on self defense.)

The court recessed the trial due to a previously scheduled recess. The trial resumed April 8, 2013, with witnesses beginning the following day. A total of 14 witnesses were called, including three for appellant. Thirty exhibits were admitted including two firearms, ammunition, a broken bat, and photographs.

The case was given to the jury on April 17th, and a verdict rendered the following day to one count of Assault in the Second Degree involving Mr. Dettling, and a lesser included count of Assault in the Fourth Degree involving appellant's wife. The appellant was sentenced on May 24, 2013.

This appeal timely follows.

2. Facts

On August 21, 2012, the appellant came home from work to find his wife and children at home, but no dinner. This became a point of contention between the appellant and his wife. VI: RP 445, 508, 511. The

appellant believed dinner was tardy because his wife had been drinking. VII: RP 439-40, 442. After several hours and more alcohol, the verbal disagreement escalated. 4/10/13: RP 195-96. While both were in the kitchen, the appellant took the sink spray nozzle and sprayed his wife in the face with it. 4/10/13: RP 198; VI: RP 511-13. She testified it was hard to breath and the defendant held her so she could not flee. 4/10/13: RP 200-01. Ultimately she fell backwards, against a wall. VI: RP 513. She ran from the home to the nearby neighbors, the Dettlings. 4/10/13: RP 202.

At the same time as the O'Haver's altercation, neighbor Dettling and several of his friends were outside the Dettling residence. They saw Mrs. O'Haver run from the side of the house in their direction. 4/10/13: RP 256. However she either slipped or was pushed to the ground by appellant. While on the ground witnesses gave varying accounts of appellant's next actions. Mr. Hoover testified he saw the appellant aggressively yank Mrs. O'Haver up from the ground. 4/10/13: RP 281. Mr. Dettling testified that he saw the defendant slap Mrs. O'Haver several times as she lay on the ground. *Id.* The appellant and his wife retreated into their residence. The witnesses were sure, however, that shortly thereafter, she emerged from the residence and fled in their direction, toward the Dettling home. 4/10/13: RP 256, 282.

At one point, Mr. Dettling went to the appellant's residence to check on the welfare of Mrs. O'Haver. V: RP 348-50. Appellant punched Dettling in the chest several times. V: RP 353. The two men exchanged words and the appellant ultimately pulled a handgun and threatened Dettling. V: RP 354. Dettling left the residence immediately after the appellant pointed the gun and quickly returned to his home. *Id.* As soon as he reached his home he gave his wife their "code word" for needing their firearm. His wife, Mrs. Dettling, knew to immediately retrieve the weapon and give it to her husband, which she did. V: RP 355. In the meanwhile, Mr. Dettling directed his wife and Mrs. O'Haver, who his wife was consoling, to hide in the bedroom and shut the door. 4/10/13: RP 204; V: 301. They did as instructed. Even from the bedroom they could hear an argument occurring at the doorway of the home. V: RP 303-04. Mrs. O'Haver said she did not want to go outside despite appellant's demands she do so. V: RP 304; VI: RP 495.

Mr. Dettling explained how he tried to shut his front door but was unable because the appellant was continuously pushing against him to try and get into his house. V: RP 356-58, 390. The pushing match continued for sometime and included the appellant trying to kick the door in--a portion of which was observed by responding officers--and also by using the victim's bat to try to break in the door. *Id.* The bat had been sitting inside the Dettling home, near the doorway. V: RP 403. While the door was partially open as the two men struggled, the appellant grabbed the bat

from Dettling who had it in his hand and began using it as a weapon. V: RP 384-85. Appellant does not dispute that the bat belonged to the Dettlings or that he used it against the door, but claims that the bat had been resting outside the home, near the door. VI: RP 502-04. The bat ultimately broke during the assault on the Dettling door, but not before breaking the door lock. V: RP 357; VI: RP 503, 521. The bat was recovered by officers and admitted at trial. III: RP 144-45; CP 214-217.

While at the Dettling's door, the appellant called out to his wife. He demanded she come outside, V: RP 303-04; 4/10/13: RP 204. She refused and stayed inside the Dettling home. As the melee continued at the door, the appellant pushed his hand through the door. He was holding his handgun at the time and pointed it at Mr. Dettling and then began to assault him physically with a part of the gun. V: RP 359-60, 391. Mr. Dettling sustained injuries to his head and eye. VI: RP 551.

Law enforcement officers arrived in response to the 911 calls from Dettling's two friends who had been at the residence. In the course of his arrival, Officer Welsh observed the defendant apparently just beginning a kick at the door. 4/10/13: RP 164-65. Appellant was still holding the firearm which he used to assault Mr. Dettling. Dettling also had his gun, which he set down as instructed.

Mrs. O'Haver was examined for injuries, which were later photographed and included a least one black eye and general scrapes and

abrasions. 4/10/13: RP 206; CP 218-223. Mr. Dettling was transported for his injuries. VI: RP 538.

At trial the prior acts of both his wife and those allegedly of Mr. Dettling were excluded by the trial court for various reasons. VI: RP 480-84. Despite the fact that it was unrefuted the appellant was trying to break into the victim's residence, the appellant requested and received self defense instructions, *except* the instruction regarding the defense being unavailable to those who are the first aggressors, which was not requested. The jury convicted appellant of one count of Assault in the Second Degree (with firearm enhancement) for his assault on Mr. Dettling, and Assault in the Fourth Degree for his assault of his wife.

C. ARGUMENT.

1. APPELLANT WAS NOT ENTITLED TO A SELF DEFENSE INSTRUCTION

a. Appellant did an intentional act reasonably likely to provoke a belligerent response.

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use or attempt to use force upon or toward another person. WPIC 16.04 *In relevant part*

A person cannot start a fight and then claim self-defense. *See* ***State v. Riley,*** 137 Wn.2d 904, 976 P.2d 624 (1999). Likewise, one cannot commit a crime and then claim self-defense when the victim reacts

with violence. *See* ***State v. Craig***, 82 Wn.2d 777, 514 P.2d 151 (1973). In ***Craig*** the defendant was charged with felony murder for fatally beating and stabbing a cab driver, and then robbing him. When the defendant leaned over the seat to steal the cab driver's money, the driver tried to strike the defendant with a lug wrench. In addition to another theory, the defendant argued self-defense. The trial court and the Supreme Court held that, because the defendant was the aggressor and had not abandoned his threatening behavior, the defendant was not entitled to a self defense instruction. ***Craig*** at 784.

Similar to the general facts of ***State v. Dennison***, 115 Wn.2d 609, 801 P.2d 193 (1990) the appellant committed a criminal act, here the assault of his wife. In ***Dennison,*** the defendant was burglarizing an apartment in a house. The victim, also armed with a gun, appeared in the bedroom doorway. According to Dennison, Dennison grabbed the victim's hand which was on the gun and pushed it into the air. Dennison held his own gun in the victim's stomach. Dennison asserted that he backed the victim out of the house onto the porch.

Dennison testified that he was withdrawing from the residence, just trying to escape, that the crime was over, and he did not intend to hurt anyone. He claimed the victim shot at him and that he returned fire,

fatally injuring the victim. ***Dennison*** at 613. The Supreme Court concurred with the trial court's rejection of self-defense. ***Dennison*** at 616.

Just as the defendant in ***Dennison*** was not withdrawing from the situation, ncither was Mr. O'Haver in the present case. The Supreme Court said the following:

> [I[f Dennison had truly intended to withdraw from the burglary and communicated his withdrawal to the decedent, he would have dropped his gun or surrendered. Because Dennison still had his gun, although pointed to the ground, this action did not clearly manifest a good faith intention to withdraw from the burglary or remove the decedent's fear.

Dennison at 618.

In the present case, the court instructed the jury on self-defense *and* no duty to retreat. CP 123-162. However, the court did *not* give, nor was it requested, a "first aggressor" instruction.

As in ***Dennison***, appellant provoked the violence that ensued. He had no right to assault his wife, and he had no right to break into victim Dettling's home. Witnesses Humen, Hoover, and Mr. Dettling saw the appellant assault his wife. 4/10/13: 246, 272; V: RP 345-47, 349. There was also physical evidence to corroborate the assault. 4/10/13: RP 206; CP 218-223.

Furthermore, it was evident that the appellant was not welcome at the Dettling's home. Mr. Dettling testified at length about his struggle to

keep his front door closed and appellant out. V: RP 356-58, 390. The appellant also testified to repeatedly both kicking the door and striking it with the victim's bat trying to get in. *Id.*, VI: RP 502. It was undisputed the door lock set was broken in the process. VI: RP 503, 521; CP 224-228.

Mrs. Dettling testified to the commotion she heard and her husband's fear for her safety and that of Mrs. O'Haver such that he instructed them to hide in the bedroom. V: RP 356. There was also testimony that the appellant circled the home banging on the windows and other door. V: RP 359. Mr. Dettling testified the appellant took the bat from his hand while *inside* his residence. V: RP 384. He also testified that appellant repeatedly hit him on the head with the muzzle of the firearm he was brandishing by *reaching inside* the door. V: RP 391. Both of these acts amount to burglary.

> Burglary is committed when a person enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime is armed with a deadly weapon or assaults any person.

WPIC 60.01 *Burglary in the First Degree.* The definition of "enter" includes:

> [T]he entrance of the person, or the insertion of any part of the person's body, or any instrument or weapon in the person's hand and used or intended to threaten or intimidate another person or to detach or remove property.

WPIC 65-.03 *Enter--Definition.*

The witnessed actions of appellant assaulting his wife likewise do not support the giving of a self defense instruction.

The witnesses testified that appellant pursued Mrs. O'Haver to the Dettling house. 4/10/13: RP 275; V: RP 380. They witnessed appellant grab Mrs. O'Haver and aggressively yank her up from the ground. 4/10/13: RP 281. They testified that while on the ground, the appellant hit her more than once. V: RP 377. No one observed Mrs. O'Haver attempt do anything other than flee her husband.

Additionally, the 2007 incident involving the O'Havers was too remote in time and appeared to possibly be an unintentional injury to appellant's eye. The activity involving Mrs. O'Haver's school guard event was not sufficiently developed to determine how inappropriate her actions were. It was not explored, in any manner, despite having Mrs. O'Haver clearly available to testify. This single event alone does not necessarily represent the nature of acts sufficient to claim self defense. The trial court was in the best position to assess the credibility of the parties and the

sufficiency of the evidence, and did not commit error in refusing to allow testimony to either event.

Based upon the facts of this case and the applicable law, it is clear the appellant was not entitled to a self defense instruction. Therefore, the trial court did not err in excluding the prior acts involving either the appellant's wife or neighbor, Mr. Dettling.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR MISTRIAL AFTER MAKING A COMMENT TO A CORRECTIONS OFFICER.

Appellant requests a new trial based on the following comments by the trial court:

> THE COURT: Ms. Mangus, is there any reason, either from counsel or from our reasons, that we can't start at 9:00 tomorrow morning?
>
> THE CLERK: No, Your Honor.
>
> THE COURT: Counsel, do you have any conflicts?
>
> MR. JOHNSON: No.
>
> MR. MILLER: No, Your Honor.
>
> THE COURT: *So, officer, we'll see everybody back here at 9:00, okay.*
> You're excused. You leave -- you can leave your instructions in the notebook. That's fine. Just don't take them with you.
> (Jury excused.)

RP 640. [Emphasis added].

The rule in this state has been established that the verdict of the jury in a criminal case will be set aside and a new trial granted to the defendant, because of an error occurring during trial of the case, only when such error may be designated as prejudicial. ***State v. Thrift***, 4 Wn. App. 192, 480 P.2d 222 (1971). A trial court "'should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. ***State v. Mak***, 105 WN. 692, 701, 718 P.2d 407 (1986). The trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. ***State v. Hopson***, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

Determining whether a trial irregularity is so prejudicial as to warrant a mistrial depends on "(1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." ***State v. Greiff***, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). The defendant claiming the challenge in this particular situation bears the burden of establishing that the challenged conduct was both improper and prejudicial. ***State v. Cheatam***, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). In a very recent Division II case, the court held that the jury' s exposure to a first degree robbery reference in an

errant jury instruction was less serious than the type of irregularities that trigger a mistrial. ***State v. Garcia***, No. 42890-3-II, (Nov. 13, 2013).

In ***Garcia,*** the defendant was convicted of first degree assault, first degree unlawful possession of a firearm, and unlawful possession of a controlled substance. At trial, he stipulated that he had committed a "serious offense" for purposes of the unlawful possession of a firearm charge to prevent the State from introducing evidence of his prior first degree robbery conviction. However, the jury instructions inadvertently included an instruction stating that the jury had to find that Garcia committed first degree robbery in order to convict him of first degree unlawful possession of a firearm. The trial court replaced the erroneous instruction and instructed the jury to disregard it. The trial court denied Garcia' s motion for a mistrial. The Court held that the irregularity was not sufficient to set aside the jury's verdict.

Similar to the present case, an innocuous comment to a corrections officer did not specifically reference the defendant in any way and does not rise to the level of irregularity that justifies setting aside the jury's verdict.

3. THE APPELLANT FAILED TO PERSERVE A CHALLANGE TO WITNESS'S COMMENT THAT "THEY HAVE DONE THIS BEFORE."

Appellant assigns error to a comment made by witness John Hoover. It reads as follows:

> Q. After you saw Mr. O'Haver hit Ms. O'Haver, what did you do next?
> A. At that point in time we were all kind of looking at each other in shock because it came on very suddenly and unexpectedly. Mr. Dettling said I can take care of this. *This is my neighbors, and they've done this before.* And so Mark -- that's Mr. Dettling -- went in the direction they had run, which is around the side of the house. That would be -- if I know my directions in that area, it would kind of be like the south side I'm guessing. Then John said -- John Humen said that --
> Q. Don't tell me exactly what he said, just what --

RP 273. [Emphasis added]. It is clear that appellant did not object and therefore did not properly preserve the issue for appeal. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, if a party makes a showing of manifest error affecting a constitutional right they may still have the right to seek review of the claimed error. In the present case, the appellant cannot make any such showing. For the exception to apply, appellant would have to show (1) the error implicates a specifically identified constitutional right, and (2) error is "manifest" in that it had 'practical and identifiable consequences' in the trial below. ***State v. Grimes***, 165 Wn. App. 172, 186, 267 P.3d 454 (2011), *citing* ***State v. O'Hara***, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

To show an error that is "manifest" requires an appellant to show "actual prejudice," which is determined by looking at the asserted error to see if it had "practical and identifiable consequences" at trial. ***State v.***

Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). In the present case, appellant can show neither a "manifest" error nor identify a "practical and identifiable consequence" at trial.

The error was not properly preserved and does not rise to the level of magnitude to ignore the lack of preservation of error.

4. THE PROSECUTOR DID NOT CONSULT WITH A VICTIM ADVOCATE.

Appellant asserts that the prosecutor's comment that he needed to consult with a "victim advocate" before moving on with his case amounted to an inappropriate inference of guilty. In fact, what the prosecutor was doing was checking for his next witness. He was doing this by consulting *with a piece of paper*. 4/10/13: RP 284. The following is the comment in question by the prosecutor:

> THE COURT: Any redirect?
> MR. MILLER: Your Honor, can I have just a moment to talk to my victim advocate real quick?
> THE COURT: Talk to who?
> MR. MILLER: *The victim advocate, Your Honor, in this case. It's a piece of paper I want to look at, Your Honor.*
> THE COURT [sic]: No. I have nothing further, Your Honor.
> ....
> MR. MILLER: Your Honor, that's all the witnesses that we have for today. I have the rest lined up for tomorrow morning to finish up.

RP 283-84. [Emphasis added]. First, the defense did not object to the

alleged error of commenting or using the phrase "victim advocate." Second, as noted in the section directly before this, there is nothing to indicate that the error, if any, was of any consequence whatsoever to the outcome of the case. Lastly, review of the transcript indicates that the prosecutor specifically commented that he was consulting a *piece of paper*. It is hard, if not impossible, to find error in a prosecutor consulting a piece of paper to determine if he had any further witnesses for the day. Appellant makes a substantial leap when arguing the comment amounted to inference of guilt. There is no error that can be assigned to this innocuous comment.

5. THE TRIAL COURT DID NOT COMMIT ERROR IN ADMITTING OFFICER WELSH'S TESTIMONY.

Appellant argues that Officer Welsh's testimony that domestic violence calls are dangerous for officers, that this particular call for service was to be taken seriously, that someone may be attempting to take another's life, and the suspect was trying to gain entry--possibly to take another life, violated appellant's right to a fair trial. However, each of the representations are supported either by the record or by common knowledge.

It is a commonly held belief that while all law enforcement work can be dangerous, responding to a domestic violence call can be particularly

dangerous for officers. This is neither novel nor prejudicial. Additionally, Officer Welsh is certainly in a position to have personal knowledge of such things, it also explained his behavior in how he and his fellow officers assessed the O'Haver situation.

Officer Welsh testified that upon arrival at the O'Haver scene, he could hear someone saying something to the effect, "I'm going to kill you." 4/10/13: RP 164. This statement coincided with observing the appellant who appeared to have just finished kicking at the Dettling's front door. 4/10/13: RP 164-65. Officer Welsh also testified that he observed the appellant with a gun in his hand when officers arrived. 4/10/13: RP 165. It is further undisputed that appellant retrieved his handgun from his home and brought it to the Dettling home. *Id.* Witnesses Humen and Hoover both explicitly testified they saw the appellant leave his residence and appear to be following quickly behind Mr. Dettling all the while carrying a handgun. 4/10/13: RP 275, 283. These are statements of fact and were properly before the jury.

The issue regarding what Officer Welsh was to read to the jury regarding prior statements of Mrs. O'Haver was properly addressed outside the presence of the jury. When Officer Welsh did not read precisely as written in his report, defense counsel's objection was sustained in the presence of the jury. V: RP 336. Furthermore, the court

instructed the jury "to disregard that particular phraseology, and it will be stricken from the record." *Id.* Whatever alleged damage was done by the officer deviating from his report, was clearly cured by the court's ruling and instruction to the jury. At no time did the witness express an opinion as to appellant's guilt. He portrayed the scene, the people involved, and his role.

Officer Welsh did not offer an opinion on the credibility of any witness nor did he testify to anything that could be considered the ultimate fact in issue in this matter. He described the demeanor of witnesses, i.e., that Mrs. O'Haver appeared very scared...[and] distressed. 4/10/13: RP 170. Counsel objected to answers he deemed inappropriate, and the court ruled accordingly. 4/10/13: RP 170-71. Only with the greatest reluctance and with clearest cause should judges...consider second-guessing jury determinations.... " ***State v. Kirkman***, 159 Wn.2d 918, 938, 155 P.3d 125 (2007) "Juries are not leaves swayed by every breath." ***United States v. Garsson***, 291 F. 646, 649 (D.N.Y. 1923).

6. THE TRIAL COURT DID NOT COMMIT CUMULATIVE ERROR.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect

trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also* ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

Errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g.*, ***State v. Stevens***, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.").

Appellant argues that cumulative error deprived him of a fair trial. Under the cumulative error doctrine, we may reverse a defendant' s conviction when the combined effect of trial errors effectively denies the defendant' s right to a fair trial, even if each error alone would be harmless. ***State v. Weber***, 159 Wn.2d 252, 279, 149 P. 3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007). But cumulative error does not apply where there are no errors or where the errors are few and have little or no effect on the trial' s outcome. ***Weber*** at 279.

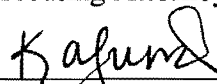
In the present case, any error was not prejudicial to the appellant in that it did not affect the outcome of the case nor to the degree to deprive him of a fair trial.

D. CONCLUSION.

Based upon the facts of this case and the applicable case law, the State respectfully requests the Court to affirm appellant's convictions.

DATED: November 19, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Kawyne A. Lund
Deputy Prosecuting Attorney
WSB # 19614

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11 19 13 ______________
Date Signature

PIERCE COUNTY PROSECUTOR

November 19, 2013 - 1:56 PM

Transmittal Letter

Document Uploaded: 449455-Respondent's Brief.pdf

Case Name: St. v. O'Haver

Court of Appeals Case Number: 44945-5

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers   Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): ________

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ________

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: **tnichol@co.pierce.wa.us**

A copy of this document has been emailed to the following addresses:

griff1984@comcast.net