69835-4

69835-4

NO. 69835-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANTONNIO RAY THOMAS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN ERLICK
THE HONORABLE DEAN LUM
THE HONORABLE CAROL SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUES

1. Has Thomas failed to establish reversible error in a detective's statements because they did not constitute impermissible opinion as to guilt and did not prejudice the defendant?

2. Has Thomas failed to establish reversible error in a witness' statements because they did not violate any pretrial ruling, were clearly speculative, and did not prejudice the defendant?

3. Did the trial court properly exercise its discretion in excluding new discovery that defense counsel disclosed for the first time on the last day of testimony of a three-week trial?

4. Did the trial court properly exercise its discretion in allowing the prosecutor to admit eight photographs of the victim which showed her injuries from different perspectives, helped prove an element of the charged offense, and discredited the defense theories of the case?

5. Is the public trial right satisfied when the selection of alternate jurors occurred in open court and the alternate juror numbers were stated on the record?

6. Has Thomas failed to establish cumulative error that would warrant a new trial where he has shown none?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On June 12, 2012, the State charged Antonnio Ray Thomas with assault in the second degree (count I) and unlawful display of a weapon-domestic violence (count II) based on events occurring on May 28, 2012 and March 25, 2012, respectively. CP 1-8, 18. The State dismissed the unlawful display charge on August 21, 2012. CP 9-10.

Pretrial motions were conducted in front of the Honorable John Erlick, who received the case for trial on December 3, 2012. 1RP; 2RP.[1] The Honorable Carol Schapira received the case for trial on December 6, 2012, after pretrial motions had been completed.[2] 4RP 3-4. On December 19, 2012, a jury convicted Thomas of second degree assault, as charged. CP 99; 11RP 79. The trial court imposed a sentence of six months and restitution. CP 100-05; 11RP 97-98.

Defense counsel moved for an arrest of judgment and the State responded. CP 106-16, 129-36. The trial court subsequently denied the

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[1] The Verbatim Report of Proceedings will be referred to as follows: 12/3/12 (1RP); 12/4/12 (2RP); 12/6/12 proceedings before Judge Lum (3RP); 12/6/12 and 12/10/12 voir dire proceedings before Judge Schapira (4RP); 12/6/12 and 12/10/12 pretrial/trial proceedings before Judge Schapira (5RP); 12/10/12 opening statements (6RP); 12/12/12 (7RP); 12/13/12 (8RP); 12/17/12 (9RP); 12/18/12 (10RP); 12/19/12, 1/4/13, and 2/15/13 (11RP).

[2] Neither Judge Erlick nor Judge Lum (who received the case temporarily prior to Judge Schapira) could preside over the trial after pretrial motions due to scheduling considerations. 2RP 148-59; 3RP 20-21.

defense motion for the arrest of judgment, noting that "there was substantial evidence to support the jurors' finding" of guilt. 11RP 124, 126. Thomas timely appealed. CP 117-28.

2. SUBSTANTIVE FACTS

Antonnio Thomas and Shante Spears have two children in common. 10RP 99. Vivian Heller is Spears' mother. 7RP 29-31; 10RP 99. Heller's long-time boyfriend, Raymond Jennings, and Thomas were members of a motorcycle club. 7RP 35, 50.

In April of 2012, Heller and Jennings took a road trip to California and brought Thomas and Spears' children along. 7RP 36-37. Jennings drove with the children in the car, despite Thomas having previously told Heller not to allow Jennings to do so. 7RP 39; 9RP 189. Jennings lost control of the vehicle and the car went off the side of the road. 7RP 41-42. Heller, Jennings, and the two children were not seriously injured. 7RP 43-45, 183; 9RP 95.

Upon learning of this accident, Thomas and Spears traveled to California to meet Heller, Jennings, and their children. 7RP 46-47; 8RP 138. Heller could tell Thomas was angry. 7RP 48-49, 54. Thomas drove the group back to Washington State in a car rented by Heller. 7RP 49; 9RP 98. After returning to Washington, Spears and Thomas no

longer communicated with Heller, which was difficult for Heller. 7RP 58, 61.

On the evening of May 28, 2012, Memorial Day, Jennings and Heller went to the motorcycle club. 7RP 64-66, 151-52. Thomas was also there. 7RP 84. Heller approached Thomas, gave him a hug, and told him that she was glad to see him.[3] 7RP 86. It appeared to Heller that Thomas had been drinking. 7RP 86. Thomas asked Heller if he could talk to her and she agreed, hoping that communication would result in her being able to see her daughter and grandchildren. 7RP 89. Thomas led Heller out the back door to the club's enclosed back patio. 7RP 90. Thomas then led Heller to the side of the patio furthest away from the door and outside the line of sight of club patrons. 7RP 92-93.

Thomas then asked Heller, "What's this about you running around telling people that I'm suing you?" 7RP 94. Heller didn't know what Thomas was speaking about, but noticed his tone and volume began to escalate. 7RP 94, 96-97. Heller suggested to Thomas that they talk another time when he was sober. 7RP 98. At that point, Thomas pinned Heller against a barrel and started punching Heller repeatedly in the face. 7RP 98-99. All Heller could do was turn her head left to right as he

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[3] According to Thomas, when Heller greeted him and gave him a hug that day, Heller told him, "I'm not going to allow you to be upset with me." 8RP 171.

punched her with both fists. 7RP 100. Thomas repeatedly stated, "I'm daddy, I'm daddy." Id.

Heller escaped from Thomas after what seemed like five or ten minutes. 7RP 102. She immediately ran back inside the club, her face gushing blood. 7RP 104. Someone gave her paper towels to help her control the bleeding from her nose. 7RP 104-05. As Heller was getting into Jennings' car to go to Harborview Medical Center, she saw club members asking Thomas to relinquish his colors, meaning he was terminated from the club. 7RP 106.

A doctor determined that Heller had fractures on both sides of her nose. 7RP 106; 9RP 14. Heller explained what happened to a social worker, who called 911 to report the incident. 7RP 114; 8RP 80. Seattle Police Officer Ryan Keith responded to the hospital, took pictures of Heller, and obtained statements from her and other witnesses. 5RP 41, 46-53, 55.

C. ARGUMENT

1. THE TRIAL COURT EXERCISED SOUND DISCRETION WHEN IT DENIED THOMAS' MOTION FOR A MISTRIAL BASED ON A DETECTIVE'S TESTIMONY THAT THOMAS WAS A SUSPECT.

Thomas claims the trial court abused its discretion in denying his motion for a mistrial based on a police detective testifying as to his

conclusion that Thomas was guilty of the charged offense. This argument should be rejected because the detective never offered an opinion on guilt. Rather, the detective referred to Thomas as a suspect of the alleged crime, which was information that was already known to the jury. Furthermore, even if the officer had testified regarding Thomas' guilt, any prejudice was cured by the trial court's extensive instructions to the jury.

a. Relevant Facts.

Defense counsel called Seattle Police Detective Adam Thorp, the assigned detective, to testify in Thomas' case.[4] 10RP 19, 21. During her direct examination of the detective, defense counsel asked questions about probable cause and the timing of Thomas' arrest. 10RP 34-35, 37.

> Defense counsel: At the time you went out on June 4, [2012] to the residence where Mr. Thomas was living, at that time you believed you had probable cause to arrest; am I wrong or right about that?
>
> Detective: That is correct, I believed I had probable cause.

10RP 34. Detective Thorp next testified that Officer Howard saw the bulletin he had created, contacted Thomas, and set up a meeting for Thomas to come to the North Precinct on June 7, 2012. Id. When defense counsel asked Thorp the purpose for the meeting, the detective responded that it was to obtain a statement from him and make a determination as to

[4] Detective Thorp did not testify in the State's case-in-chief.

whether Thomas would be placed in custody or not. 10RP 35. In response to that answer, defense counsel again brought up the topic of probable cause:

> Defense counsel: But you had already decided there was probable cause to arrest?
>
> Detective: That's correct.
>
> Defense counsel: And you had communicated that clearly with Officer Howard?
>
> Detective: Yes.

10RP 35. The defense counsel questioned the detective's decision of when to arrest Thomas:

> Defense counsel: Now, even before Officer Howard heard what Mr. Thomas had to say, it was your decision to arrest Mr. Thomas?
>
> Detective: Yes.
>
> Defense counsel: All right. And you had not even come face-to-face with [Thomas] yourself?
>
> Detective: Correct.
>
> Defense counsel: Or talked to [Thomas] personally?
>
> Detective: Correct.

10RP 37.

On cross-examination, the prosecutor asked Detective Thorp questions to rebut defense counsel's inference that the detective did not

have a sufficient basis to arrest Thomas as a suspect and to clarify the timing and basis for Thomas' arrest.

> Prosecutor: You indicated that you had PC, but for those of us less familiar with what that means, what does PC mean?
>
> Detective: PC is probable cause, and that is essentially authority to arrest a person. I believe criminal activity has occurred and I can arrest the suspect who conducted that criminal activity.
>
> Prosecutor: To make that determination, sir, do you have to talk to every single person who is at the scene?
>
> Detective: No. .....
>
> Prosecutor: What is – in this case what was it that led you to believe that you had probable cause to arrest Mr. Thomas?
>
> Detective: It was a combination of Ms. Heller's statement both to the initial responding officer, her follow-up statement to me, and the photographic evidence. They all supported probable cause for assault.
>
> Prosecutor: Now, in order to make that determination, in your training and experience, does a detective necessarily – or an officer necessarily had to have talked to a suspect in order to speak with them prior to making a probable cause determination?
>
> Detective: No, not at all.
>
> Prosecutor: And can you tell us why, or what do you mean by that?
>
> Detective: The facts can speak for themselves. Again, the photographs are facts. That shows that she was severely assaulted, and her statement – everyone else's statement that spoke with the responding officer, they were all

> consistent in naming Mr. Thomas as the individual who gave her those injuries. There was no –

10RP 58-60 (emphasis added).

Defense counsel then objected stating that the basis was, "Identifying the culprit as the person who attacked her, however he phrased it." 10RP 60. The trial court sustained the objection and immediately gave the following curative instruction to the jury:

> The issue of probable cause is a completely different standard. I think this is an important and difficult distraction for the jury. The officer's determination about what happened is completely different from the work that the jury has to do. So I'm really not sure where we're going on this. I'm not sure that's [defense counsel's] objection, but I am going to ask that we move on to a different subject.
> My opinion about what might have happened, the officer's opinion about what might have happened, is not relevant to the work that the jury has to do. They will hear the facts and make a determination. So I'm not being critical of the officer. I have no reason to be critical of the officer. He does his work, I do my work, you do your work, but that's not the work of the jury.... Probable cause is not the standard at trial.

10RP 60-61. Shortly thereafter, the trial court added:

> Again, probable cause is a big distraction. The probable cause standard is a completely different legal standard, so I don't want to pursue that. Again, I'm not saying that that's not the officer's standard. That's not the standard here in court.... He can be asked about his investigation. He is not here to weigh the evidence for us. He can tell us what he did, why he did it, what he didn't do and why he didn't do it.

10RP 62-63.

Later that day, defense counsel moved for a mistrial "based upon the fact that [the prosecutor] did ask the officer about probable cause and it has now muddied the waters." 10RP 136. The trial court denied defense counsel's request for a mistrial. Id.

b. Detective Thorp Did Not Offer An Opinion On Thomas' Guilt.

Generally, no witness may testify to his opinion about the guilt of a defendant, either directly or by inference, because such testimony "'invad[es] the exclusive province of the [jury].'" State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (alterations in the original) (quoting City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994). In Demery, the Washington Supreme Court listed five factors for courts to consider when determining whether testimony constitutes an impermissible opinion about the defendant's guilt: (1) the type of witness giving the testimony, (2) the nature of the testimony, (3) the charges, (4) the type of defense, and (5) the other evidence presented. Id. (citing Heatley, 70 Wn. App. at 579).

While there are no bright-line rules on this issue, this Court has "expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt." Heatley, 70 Wn. App. at 579. Trial judges have broad discretion to do what seems fair under the

circumstances.[5] State v. Nelson, 152 Wn. App. 755, 766, 219 P.3d 100 (2009), review denied, 168 Wn.2d 1028, 230 P.3d 1060 (2010).

Thomas asserts that his conviction must be reversed because Detective Thorp "testified extensively as to his conclusion that Mr. Thomas is guilty of the charged offense." Appellant's Brief at 2, 9. This characterization is inaccurate. The detective's words and the context of his statements demonstrate that he was not offering an opinion on guilt. 10RP 59-60; ER 704. Thomas relies heavily upon the first Demery factor, suggesting that because Thorp is a police officer his testimony is likely to prejudice the jury. App. Br. at 12. However, the other Demery factors, particularly the general nature of the detective's testimony and the strength of the other evidence presented, undercut Thomas' argument.

Thomas' argument presupposes that the words "suspect" and "perpetrator" are interchangeable; they are not. The plain meaning of the word "suspect" implies that it is not yet confirmed or known whether or not the one in question is the actual perpetrator of the crime. It was readily apparent from the context that the detective was still investigating the case. The detective's uses of the word "suspect" makes that clear.

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[5] "We defer to trial judges on these questions for a number of reasons. Among those reasons is the inability of appellate courts to craft a rule that would apply to every case... The non-amenability of the problem to rule, because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop, appears to be a sound reason for conferring discretion on the [trial judge]." Nelson, 152 Wn. App. at 766 (citations omitted).

It was also clear that the detective planned to get Thomas' side of the story. Thus, jurors would understand that the detective was simply stating that, at a particular point in time, he had sufficient information to continue his investigation and to arrest Thomas. This is not an opinion on guilt.

Furthermore, while defense counsel's motion for a mistrial was "based upon the fact that [the prosecutor] did ask the officer about probable cause," 10RP 136, the topic of probable cause was initially raised by defense counsel during her direct examination of Detective Thorp. 10RP 34. Defense counsel's questions insinuated that the detective did not have a sufficient basis to arrest Thomas without contacting him and hearing his side of the story. 10RP 34-35, 37. Further, her questions suggested that the police were dishonest because they tricked Thomas into providing a statement when they already knew he would be arrested. Id. Generally, once a material issue has been raised by one party, the opposing party can explain, clarify, or contradict the evidence.[6] State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). Once Thomas'

[6] "It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

counsel made the issue of probable cause relevant to challenge the sufficiency of the police investigation, the State's questions on cross-examination were designed to clarify and explain why the detective took the investigative steps that he did when he did, and what led him to believe Thomas was a suspect.

The nature of Detective Thorp's testimony differs significantly from other testimony that this Court has held constituted an impermissible opinion about the defendant's guilt. In those cases, the statements related directly to the defendant's guilt.[7] In contrast, this Court has held that general statements about the evidence in a case, even those that inferentially suggest the defendant's guilt, are not necessarily impermissible opinion testimony.[8]

The other Demery factors also support the conclusion that Detective Thorp did not testify to his opinion about Thomas' guilt. Thomas was charged with second degree assault and entered a general denial. CP 18; 1RP 12, 19. Heller testified that Thomas had assaulted her

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[7] In State v. Carlin, this Court held that it was improper for a police officer to testify that his canine partner tracked the defendant's "guilt scent." 40 Wn. App. 698, 703, 700 P.2d 323 (1985), overruled on other grounds by Heatley, 70 Wn. App. 573. In State v. Barr, Division III of this Court held it was improper for an officer to testify that the defendant's statements and body language during questioning indicated his guilt. 123 Wn. App. 373, 383, 98 P.3d 518 (2004), review denied, 154 Wn.2d 1009 (2005).

[8] In State v. Sanders, an officer's testimony that the absence of drug user paraphernalia "'indicates that [the defendant's] house is not used for that purpose'" was not an opinion that the defendant was guilty of intending to distribute the cocaine found there. 66 Wn. App. 380, 389, 832 P.2d 1326 (1992); see also State v. Madison, 53 Wn. App. 754, 760-62, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989).

and Jennings verified that he saw Thomas in the club's back area when Heller came out of it with a crooked nose and bloody face. 7RP 98-102, 158-59. A doctor testified that she had a fracture on both sides of her nose. 9RP 14. Given that testimony, it is unlikely that the jury convicted Thomas because they were prejudiced by Detective Thorp's testimony.[9]

Detective Thorp never expressed an opinion regarding guilt; this Court should reject Thomas' opinion testimony challenge.

c. The Motion For A Mistrial Was Properly Denied Because The Detective's Testimony Was Cumulative, It Did Not Prejudice Thomas, And The Trial Court Effectively Prevented Prejudice By Her Curative Comments To The Jury.

A trial court's decision to deny a motion for a mistrial is reviewed for manifest abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A reviewing court will find an abuse of discretion only if no reasonable trial judge could have decided that a mistrial was not necessary. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A mistrial should be granted 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. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). Accordingly, the reviewing court gives deference to the trial court's judgment, as the trial judge is clearly in the best position to

[9] See also *infra,* Section C(1)(c), refutation of defense theories of case.

determine whether irreparable prejudice has occurred. See Lewis, 130 Wn.2d at 707.

When reviewing a trial court's decision to deny a motion for mistrial based on a witness's objectionable remarks, appellate courts generally examine three factors: 1) the seriousness of the irregularity; 2) whether the error involved cumulative evidence; and 3) whether the trial court properly instructed the jury to disregard the remarks. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Jurors are presumed to follow the trial court's instructions to disregard inadmissible testimony. Johnson, 124 Wn.2d at 77. Moreover, the testimony in question must be examined "against the backdrop of all the evidence" and in light of the record as a whole. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). A trial court's decision to deny a motion for mistrial should not be overturned on appeal unless the record demonstrates that the irregularity prejudiced the defendant such that it affected the outcome of the trial. See Weber, 99 Wn.2d at 165.

Here, in light of the entire record, the trial court exercised sound discretion in ruling that the extraordinary remedy of a mistrial was not warranted. There was nothing the jury heard that was so prejudicial that it outweighed the court's instructions to disregard the detective's objected-to comments.

The "irregularity" here – calling Thomas a suspect – was minimal, as described in the previous section. Detective Thorp testified why he developed probable cause that Thomas was a suspect for the assault, but did not testify that Thomas was guilty of the crime. Even if this court finds that testimony to be error, the irregularity was not serious. It would have been apparent to the jury that he was simply saying he had probable cause to arrest.

The second factor, whether the error involved cumulative evidence, also suggests that the trial court properly denied this motion for a mistrial. The detective did not share anything that the jury did not already know when testifying that Thomas was suspected of committing the crime. As the jurors are instructed, the fact that Thomas had been charged with a crime does not mean that he is guilty and can not be held against him. 4RP 33; 11RP 4, 8. While the detective referenced the photos, Heller's statement, and other statements corroborating Heller's account, the jury had already learned of this evidence. 10RP 59-60. Thus, Detective Thorp's testimony about Thomas being a suspect and the evidence which led police to make him a suspect was entirely cumulative. The jury would likely have been amazed if, based on the victim's statement and the photos, Thomas was <u>not</u> a "suspect."

The third factor, whether the trial court properly instructed the jury to disregard the remarks, weighs heavily in favor of finding that the trial court properly exercised its discretion in denying the motion for a mistrial. In addition to reiterating repeatedly to the jury that probable cause was a completely different legal standard than guilt beyond a reasonable doubt, the trial court told the jury that the issue of probable cause was a distraction and that the officer's opinion about what might have happened was not relevant to the work that the jury has to do.[10] 10RP 60-63. The jury was later instructed that they were not to discuss or consider any evidence the court had asked them to disregard. CP 41; 11RP 5. The jury is presumed to follow the court's instructions unless there is evidence in the record to the contrary. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). No such evidence exists.

A trial judge is best suited to judge the prejudice of a trial irregularity. Weber, 99 Wn.2d at 166. Here, the trial court's decision to deny this motion for a mistrial should not be overturned because the record does not demonstrate that the detective's testimony prejudiced the defendant such that it affected the outcome of the trial. Id. at 165.

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[10] The appellant states that the trial court's curative instruction consisted of "inform[ing] the jury that probable cause is not the same standard the jury is to apply." App. Br. at 10. However, the court's instruction was considerably more extensive than that. See *supra*, Section C(1)(a); 10RP 62-63.

Thomas cannot show material prejudice because the detective's comments were only relevant to the early stages of the investigation. The defense at trial focused on the fact that Heller's injuries resulted from a fall caused either by a stress-induced seizure or from losing her balance after Thomas scrambled away from her alleged assault of him. 1RP 4, 12-21; 8RP 192-99; 11RP 56-60, 63. None of this information developed at trial was available to the detective at the time he was determining that probable cause existed to arrest Thomas. Thus, it mattered little that the detective had probable cause to arrest. He did not know all these other facts that would later be asserted by Thomas and his counsel.

Furthermore, Thomas has not shown material prejudice because evidence of his guilt was substantial. Heller never wavered with respect to the fact that it was Thomas' continuous punching of her face that caused her injuries, and Jennings account circumstantially corroborated her testimony. 5RP 68; 7RP 158-59; 8RP 95. Thomas had a motive for the assault because the evidence suggested he was still angry with Heller for her letting Jennings endanger his children's lives. 7RP 48-49, 54, 61, 96-97.

Moreover, the alternative defense theories of how Heller sustained her injuries were not plausible in light of the evidence of the case. While defense counsel argued that Heller may have fallen due to a seizure,

11RP 56-57, there was absolutely no evidence to support this claim.[11] 1RP 21-22. Heller had experienced two seizures in the past year and a half prior to the time of trial and did not have the type of seizures that cause one to fall. 8RP 111, 121. Heller testified she did not have a seizure on the day of the assault, which she knew because the type of seizures she had allowed her to be aware of what is happening when the seizure occurs. 8RP 110-11, 114-16. This defense theory was baseless.[12]

Defense counsel's alternate theory, involving Heller's alleged attack on Thomas, was also unsupported by any credible evidence. Thomas testified at trial that Heller "tackled" him, they both fell down, he scrambled away from her, and then looked back to see her falling forward toward the ground. 8RP 192-99; 9RP 110. However, the jury had numerous reasons to not find this testimony credible. For one, Heller could not have been falling towards the ground if she was already on the ground. Also, the injuries sustained by Heller were inconsistent with having fallen.[13] Thomas gave several different versions of events as to

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[11] Defense counsel even conceded that Heller's nurse "can't say for sure [Heller had a seizure on May 28, 2012] because nothing points to that." 1RP 22.

[12] While defense counsel originally planned to have a seizure clinic nurse practitioner, who had previously seen Heller, testify during trial, defense counsel later chose not to, presumably due to the nurse's pretrial testimony that falling down is not part of the types of seizures Heller has and that he had no reason to believe that Heller had a seizure on May 28, 2012. 1RP 9-10; 2RP 23-24.

[13] See *infra*, Section C(4)(b).

what occurred in the back of the club.[14] Moreover, neither Thomas nor his defense counsel could come up with a motive as to why Heller, a fifty-five year-old grandmother, would attack Thomas, particularly when, even by Thomas' own account, she felt great remorse for the car accident,[15] wanted to mend their relationship, and had *just* told him she was not going to let him be upset with her. 7RP 61, 89; 8RP 171; 9RP 96-97.

Thomas has failed to meet his burden of demonstrating a prejudicial effect on the jury's verdict. The overwhelming evidence of guilt led to Thomas' conviction, not the detective's remarks.

2. THE TRIAL COURT EXERCISED SOUND DISCRETION WHEN IT DENIED THOMAS' MOTION FOR A MISTRIAL BASED ON A WITNESS' TESTIMONY THAT THOMAS OWNED A GUN.

Thomas argues reversal of his conviction is required because the court abused its discretion by denying the motion for a mistrial made by defense counsel when Jennings testified that Thomas had a gun on the night in question, in violation of the court's pretrial rulings. This argument should fail as it mischaracterizes both the trial court's pretrial

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[14] Thomas told Jennings that Heller fell down, but told his friend that Heller attacked him. 7RP 174; 9RP 140-41, 168. Thomas later told that same friend that he and Heller had been discussing money when she attacked him. 9RP 142. However, Thomas testified that he could not even get any words out before Heller attacked him. 8RP 192; 9RP 110.

[15] When Thomas first saw Heller at the hotel in California where she and his children had been staying, Heller began crying and apologized to Thomas for the car accident. 9RP 96-97.

rulings and Jennings' testimony. None of defense counsel's pretrial rulings involved excluding any mention of a gun. Jennings did not testify that he knew Thomas had a gun on the night of the assault, but rather suggested that Thomas owned a gun. Moreover, after sustaining defense counsel's objection on this topic, the trial court provided the jury with a detailed curative instruction assuring them a gun had nothing to do with the allegation in this case.

a. Relevant Facts.

In its pretrial motions, defense counsel moved to exclude any prior bad acts, including any evidence regarding a prior incident where Thomas was alleged to have displayed a gun at the motorcycle club. CP 55-56, 70-71; 2RP 137. This incident, alleged to have occurred on March 25, 2012, had been charged as an unlawful display of a weapon-domestic violence (count II) in the original information, but had been dismissed before trial. CP 1-8, 9-10. The court granted the defense motion to exclude any prior bad acts, including any mention of that incident. 2RP 137-40.

Jennings testified that on May 28, 2012, he and Heller went to the motorcycle clubhouse. 7RP 152-53. Jennings saw Thomas speaking with Heller, but then could not find Heller. 7RP 155, 157-58. He then saw Heller come through the club's back door crying and screaming, with

blood all over her, black eyes, and a bent, twisted nose. 7RP 158-59. Jennings ran to the back door to see what happened and saw Thomas standing in the back area. Id.

Jennings then stated, "I run (sic) back there because I was going to jump on him. But I remembered he had a gun so I figured that's what he hit her with, was the gun." Id. Defense immediately objected. 7RP 159-60. The trial court responded:

> I'm going to ask the jurors to strike that answer. I'm not sure there's any factual basis for it, so I apologize to the witness. But let's take a short break so that counsel and I can discuss this, but again I will urge the jurors to disregard the last answer in its entirety, and I am striking it from our record.

7RP 160.

Defense counsel moved for a mistrial. Id. She claimed Jennings' testimony violated the pretrial ruling that prior bad acts would not be brought up, specifically the alleged gun-drawing incident that led to the since-dismissed count II. 7RP 160, 164-65. The trial court then denied the motion for a mistrial, noting that Jennings said that he didn't see what had happened and thus his testimony was clearly speculative. 7RP 170. When the jury returned, the trial court provided a detailed curative instruction:

> The court mentioned to you just before I sent you into recess that I was striking the last answer of Mr. Jennings.

> Again, witnesses are not allowed to speculate, they're not allowed to guess what might have happened. They're called here to testify about what they might have seen, what they might have heard primarily. As I mentioned to you, I am striking that answer. That means that you must not discuss that during your deliberations or consider it in any way. I will ask everybody to make sure that it is not in their notes... I don't want a stray remark in your notes to show up. As I say, I am striking it from the record. It is deleted from the record...
> I will assure you that there is no issue having to do with a gun having anything to do with this case... I am letting you know that the state of the record in this case today and moving forward is not concerned with a gun in any way, shape or form... you'll hear all of the evidence, and I can assure you that what I'm saying is true.

7RP 172-73. Jennings completed his testimony with no further mention of a gun, nor was a gun mentioned by any other witness during the pendency of the trial.

b. Jennings Did Not Violate The Trial Court's Pretrial Rulings.

Jennings never testified about the March incident where Thomas was alleged to have drawn his gun at the club, nor did he testify about any of Thomas' prior criminal activity or bad acts. Rather, Jennings' testimony that, "I remembered he had a gun," clearly referred to the fact that he recalled Thomas *owned* a gun, not that Jennings knew that Thomas had it with him on the night of the incident. 7RP 159.

The context of Jennings' statement confirms that was the intended meaning. Jennings' testimony reflects that he had not been in close

enough contact with Thomas prior to the assault to have even assessed whether Thomas was then in possession of a gun. 7RP 151-58. Nor did he observe what occurred between Thomas and Heller in the back of the club. Id. It was clear that Jennings' statement was pure speculation and that he was referring to the fact that Thomas owned a gun, which does not constitute prior criminal activity or a bad act. Jennings' testimony suggested that his recollection that Thomas owned a gun is what caused him not to "jump" on Thomas. 7RP 159. Additionally, his recollection of Thomas' gun-ownership made him speculate that Thomas used the gun metal to cause Heller's injuries because of their severity. [16]

A review of the record will show that defense never made, and trial court never granted, a motion to exclude evidence that Thomas had or displayed a gun on the night of the assault, May 28, 2012. Thomas argues that this testimony from Jennings violated Judge Erlick's ruling "that the State could not present evidence that Mr. Thomas had or displayed a gun at the motorcycle club on the night in question." App. Br. at 14. This mischaracterizes the court's ruling. Rather, the motion granted by Judge Erlick prohibited evidence of Thomas drawing a gun during the March incident at the club, not on the night of the assault.

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[16] When the prosecutor questioned and instructed Jennings during a recess immediately following the objection-drawing testimony, Jennings stated that he assumed Thomas used a gun because "you can't do that with fists." Id. (prosecutor quoting Jennings).

The discussion between the parties during pretrial motions confirms that what the trial court excluded was any mention of this prior March incident involving a gun. Judge Erlick began addressing that specific motion in the following manner:

> First, let's address the issue of the gun which was a charged offense. And was dismissed by the State. So will the State be offering any evidence of the display of a gun or Mr. Thomas having a gun at the locus delecti?

2RP 137. Moreover, when the prosecutor asked the defense counsel which pretrial ruling she was claiming Jennings violated by mentioning a gun, defense counsel responded:

> That the prior bad acts were not going to be talked about... Prior bad acts was the court ruling and there was no indication that the prior bad acts were going to be brought up...There was an incident at the motorcycle club allegedly and that was what was Count II in this case. Originally, Mr. Thomas was charged with Count II, and that was the one that referred to a gun incident where there was something at the club where there were people talking about guns and apparently...Mr. Thomas threw[17] a gun. That was not going to be talked about in trial. That was a prior bad act.

7RP 164-65. Thus, at the time of trial, no confusion existed between the court and parties which incident Thomas' pretrial motion regarding a gun

[17] The transcription says "threw." 7RP 165. The actual allegation was that Thomas *drew* a gun during the March incident. CP 6-7.

was pertaining to.[18] However, Jennings did not violate any pretrial ruling because he did not mention this March gun-drawing allegation, nor any of Thomas' prior bad acts or criminal activity.

c. The Motion For A Mistrial Was Properly Denied Because Jennings' Testimony That Thomas Owned A Gun Did Not Prejudice Thomas.

Even assuming *arguendo* that this Court finds that Jennings' comment was in violation of the defense pretrial ruling, Thomas' conviction should not be overturned because he can not demonstrate that the irregularity prejudiced him such that it affected the outcome of the trial.[19] Weber, 99 Wn.2d at 165.

The irregularity was not that serious since, as previously noted, Jennings was merely stating his belief that Thomas owned a gun and he was clearly speculating about what had happened.[20] The jury heard nothing from Heller about a gun being used during the assault; it was clear from her testimony that a gun was not involved. There is no reason to believe that the jury would accept Jennings' testimony speculating about

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[18] Indeed, the heading of the section in the defense trial memorandum in which defense moved to exclude the allegations of the incident at the motorcycle club involving the gun was "Motion to Exclude Prior Bad Acts." CP 56 (emphasis added).

[19] See *supra,* Section C(1)(c), regarding the legal standard involved in overturning the denial of a motion for a mistrial.

[20] Even Jennings' word choice, i.e. that he *figured* a gun was what Thomas hit Heller with, relayed to the jury that Jennings was speculating about what happened in the back of the club. 7RP 159.

the use of a gun when the victim herself had testified that Thomas' fists and strength were his weapon of choice during his assault on her.[21]

Jennings' testimony regarding a gun was clearly speculation. As such, it was not cumulative since speculation is not admissible. However, any prejudice caused by this off-hand comment would have been cured by the immediate and repeated instructions from the court to disregard Jennings' remark. The trial court could not have been more thorough in instructing the jurors that a gun had absolutely nothing to do with the case, that the testimony was stricken, that the jury was not to take any notes about it, and that they were not allowed to consider it in any way. 7RP 160, 172-73. After the court's extensive curative instruction, both before the motion for a mistrial and following it, there could be no remaining confusion amongst the jurors that a gun was not involved in the assault allegations. No evidence exists to suggest that the jury here did not follow the trial court's instructions, so the jury is presumed to have followed them. Kirkman, 159 Wn.2d at 928.

If Jennings' testimony was a trial irregularity, the trial court was best suited to judge the prejudice of it. Weber, 99 Wn.2d at 166. Having

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[21] Thomas also argues that part of the reason why the irregularity was serious was because of defense counsel's immediate reaction to the testimony. App. Br. at 16. However, defense counsel's strategic decision about when and how to object does not impact the level of seriousness of the irregularity. If it did, defense counsels would react dramatically every time they objected and argue that such a reaction rendered the objection-drawing statement incurable.

done so and having determined that her instructions would cure any resulting prejudice, the trial court exercised sound discretion in denying the mistrial motion. The record does not demonstrate that Jennings' speculation, which was thoroughly corrected, prejudiced Thomas such that it affected the outcome of the trial. Again, the evidence of Thomas' guilt was substantial.[22]

Contrary to defense counsel's assertions at trial, the mere mention of the word gun does not necessitate a mistrial. 7RP 164, 166. Where gun possession was not an element and where it was clear there were no allegations involving a gun, Jennings' testimony was more irrelevant and unresponsive than it was prejudicial.

3. THE TRIAL COURT PROPERLY EXCLUDED DEFENSE TESTIMONY THAT WAS UNTIMELY DISCLOSED TO THE STATE.

Thomas asserts that the trial court denied his ability to present a defense and abused its discretion by excluding evidence that Heller admitted to attacking Thomas. This argument should be rejected. Defense counsel disclosed new discovery about proposed witness testimony on the last day of testimony in an almost three-week trial. The court properly excluded this new evidence because it was untimely, noting that defense counsel had more than enough time to discover and disclose

[22] See *supra*, Sections B(2), C(1)(c), re: substantial evidence of Thomas' guilt.

the information and that admitting the evidence would be unfair to the State.

a. Relevant Facts.

Prior to trial, defense counsel told the prosecutor that Spears would be called to testify about the troubled relationship that she had with Heller and about a telephone call to Spears the day after the assault in which Heller was alleged to have admitted attacking Thomas. 2RP 121-22. Since this proposed testimony was either irrelevant or inadmissible hearsay, the prosecutor moved to exclude it in a pretrial motion. 2RP 121, 123-24; Supp. CP__ (Sub. 55, pgs. 19-20). The prosecutor also informed the trial court that Spears had previously told the prosecutor that Heller had always maintained that Thomas attacked Heller. 2RP 122.

Judge Erlick asked the defense counsel about the scope of what Spears' testimony would be. 2RP 124. In response, defense counsel made no mention of any phone call that Heller was alleged to have placed to Spears. 2RP 124-26. The trial court ruled that Spears could testify regarding her knowledge of Heller's epilepsy seizures or her stress surrounding her not being able to see her grandchildren, but could not testify about family dynamics or family history. 2RP 130.

Defense counsel later informed the judge that she had heard from Thomas that Spears had a phone conversation with Heller on May 28th in

which Heller admitted to attacking Thomas. 2RP 135. The trial court indicated that an offer of proof would be needed prior to Spears' testimony as to what, if anything, Spears heard from Heller when speaking on the phone with her, noting that "we don't have anything from the proverbial horse's mouth which is Ms. Spears."[23] 2RP 135-36.

Over two weeks later, on the last day of testimony, defense counsel was reminded that the offer of proof was needed from Spears. 9RP 15. Defense counsel responded:

> I do not plan to even ask her about that because it was my understanding that she actually didn't hear in a phone call or speakerphone or whatever... It's my understanding that she did not hear that particular phrase... and we've had more than enough cumulative, as it will be, we've had more than enough evidence as to what – we've had Mr. Thomas and Mr. Marvin testify to what she said on the phone, even though, yes, so I think we've had more than what we need.[24]

10RP 15-16.

However, later that same day, defense counsel asked the court for permission to ask Spears on direct examination about a set of text messages between Spears and Heller two days after the incident that Spears had just told her about. 10RP 76-77. Heller had allegedly escalated during these messages, ultimately texting:

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[23] He also ruled that any alleged statements would be hearsay, that Spears could not testify about them unless an appropriate foundation were laid, and that, if admitted, the statements would be for impeachment purposes only. Supp. CP__ (Sub. 62, pgs. 17-18).

[24] Thomas and his friend, Jesse Marvin, testified that Heller called Thomas the day after the incident and admitted to attacking Thomas. 9RP 51, 152.

> Every punch – this punch was for [one of Heller's grandchildren] against Mr. Thomas, this punch to Mr. Thomas was for [the other of Heller's grandchildren]... [Heller] told Ms. Spears that each of these punches was for one of her grandchildren.

10RP 77 (recounting by defense counsel). Defense sought to admit this new evidence as relevant and exculpatory. 10RP 77, 79.

When the trial court asked defense counsel why this information was coming out at that time, she responded, "Your Honor, you are as surprised as I believe [the prosecutor] is," and suggested the prosecutor should have been the one to discover this information during her witness interview of Spears. 10RP 77-78, 81. Defense counsel argued that, while she was not previously aware of the information, the content of the text message conversation should be admitted because it was "dynamic and important information." 10RP 85.

The court ruled that it was "not going to permit brand-new information to come in," 10RP 86, and noted:

> The court is not prepared every time the wind shifts to say, sure, let's talk about that... This is a witness who was well known to the parties... This is not a witness who's been traveling in South America, who's refused to speak with you or refused to speak with the State. Whatever reason Ms. Spears has for telling us this today and not having told anybody this before... it just means it's something we can't work on...This is not a rolling process.... Obviously, you [defense counsel] would have been overjoyed to know this even a week ago, but we didn't know it a week ago. It is not going to come in.... we simply can't manage that. It's not fair

> to the State, and frankly it's not something that we have the ability to go back and make sure that that really happened, and that's the reason that I'm not willing to put it in.

10RP 86-87, 88-90.

b. Excluding Evidence Disclosed On The Last Day Of Testimony Is Not An Abuse Of Discretion.

A trial court has wide discretion to determine the admissibility of evidence, and the trial court's decision whether to admit or exclude evidence will not be reversed on appeal unless the appellant can establish that the trial court abused its discretion. State v. Rivers, 129 Wn.2d 697, 709-10, 921 P.2d 495 (1996). A court abuses its discretion when its evidentiary ruling is manifestly unreasonable or based upon untenable grounds or reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's evidentiary ruling may be upheld on the grounds the trial court used or on other proper grounds the record supports. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The threshold to admit relevant evidence is very low; even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Evidence is relevant if a logical nexus exists between

the evidence and the fact to be established. State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15 (1999). However, "[a]lthough 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." ER 403.

The evidence rule that relevant evidence is generally admissible does not trump all other court rules and law. ER 402. A party seeking to admit relevant evidence still must comply with other court rules. Superior Court Criminal Rule 4.7 requires each party to disclose "the names...of persons whom [they] intend to call as witnesses...together with any written or recorded statements and the substance of any oral statements of such witnesses" by the omnibus hearing. As summarized by the prosecutor:

> [B]oth parties have a mutual discovery obligation. Just as the State has to turn over all of its discovery to defense, defense is required under 4.7 to provide the prosecutor with a summary of what they intend for their witnesses to testify about. The purpose of that...is so the prosecutor can prepare a case. The reason why that's done well in advance of trial is so that all parties are operating under the same information. So that I, for example, could have questioned Ms. Heller if necessary about what the defense witness is saying and so that the State is not blindsided by information well into the second week of trial.

10RP 80.

The trial court applied CrR 4.7 when analyzing whether to allow this evidence at trial. The omnibus in this case was on October 19, 2012. Supp. CP __ (Sub. 35). On the omnibus order, defense counsel checked a box indicating she had "provided the plaintiff with all discovery required by CrR 4.7(b)." Id. Excluding this extremely late evidence, which was in clear violation of CrR 4.7, is not manifestly unreasonable or based upon untenable grounds or reasons. By the time defense counsel sought to admit Spears' new proposed testimony, Heller had already testified and the State had rested its case. 7RP 25-122; 8RP 24-121; 9RP 40. The prosecutor could not talk to Heller about the information or call her as a rebuttal witness because Heller had left on vacation as of the day that this new evidence came forward, as the defense counsel had previously been informed. 10RP 81-82.

The denial of defense counsel's request to admit this untimely discovery was particularly appropriate in light of the fact that defense counsel had been reminded about the importance of abiding by CrR 4.7 at the very beginning of trial. On the very first day of trial, Judge Erlick had underscored to defense counsel the importance of the reciprocal discovery obligations imposed by CrR 4.7 and even read a portion of the rule to

her.[25] 1RP 69-70, 73-74. He gave a detailed explanation about the purpose of the rule:

> The purpose of turning [discovery] over is so that we don't end up in the middle of the trial with an offer of materials that the State has never seen or the defense has never seen. Both sides are entitled to prepare for their trial. We try not to have surprises at trial.

1RP 73. Simply practicing as an attorney in a court of law is sufficient notice that one need be aware of and abide by court rules. However, where defense counsel had already been specifically warned about the importance of timely discovery disclosures and had CrR 4.7 read to her, the trial court was well within its discretion to later prohibit Spears from testifying regarding evidence that was not previously disclosed.

Nevertheless, Thomas asserts that the trial court denied his ability to present a defense and abused its discretion by excluding evidence that Heller admitted to attacking Thomas. This assertion is false. The trial court gave Thomas considerable latitude in developing alternative theories of the case. Moreover, defense counsel herself stated that she had already presented "more than enough evidence" regarding what Heller allegedly said about attacking Thomas and that additional evidence on that front would be cumulative. 10RP 15-16. Thomas should not now be able to

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[25] The trial court was prompted to explicitly remind defense of the CrR 4.7 mutual discovery obligations when, after the judge ruled that certain defense discovery be turned over to the State, defense counsel indicated she did not want to give up said discovery "until it's necessary." 1RP 65.

challenge whether his counsel was able to present sufficient evidence to support the defense theory of the case, when his counsel made the strategic assessment at the time that there *was* enough evidence and he is not claiming ineffective assistance of counsel.

Even assuming *arguendo* that the court's excluding this untimely discovery was an abuse of discretion, the error would have been harmless. Substantial evidence pointed to Thomas' guilt and the record does not demonstrate that exclusion of Spears' proposed testimony prejudiced Thomas such that it affected the outcome of the trial.[26]

4. THE TRIAL COURT PROPERLY ADMITTED PHOTOGRAPHS OF THE VICTIM'S INJURIES.

Thomas argues that the trial court abused its discretion by admitting cumulative, prejudicial photos of the injuries of the victim. This argument should fail. The photos that were admitted by the court were necessary to the State's case as they showed the mechanics of the injury Heller sustained and rebutted the defense theories of the case. Moreover, as noted by the trial court, the pictures admitted by the court were not cumulative and were "not horrible photos." 5RP 73-75.

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[26] See *supra*, Sections B(2), C(1)(c), re: substantial evidence of Thomas' guilt.

a. Relevant Facts.

During the State's case in chief, the State sought to admit eight photos of Heller's injuries in the hospital through Seattle Police Officer Ryan Keith. When the officer arrived at the hospital on May 28, 2012, he observed Heller lying awake and alert in a hospital bed with a neck brace on. 5RP 42-43. He observed there was blood under Heller's nose and it looked like she had swelling around her mouth, lips, cheeks, right eye, and nose. 5RP 44. Heller's nose also looked like it had been "pushed over to the side of her face, the left side of her face." Id. Heller complained of pain to the top and back of her head, and to her lower back. 5RP 46.

Officer Keith took photos of Heller and her injuries, including a full-length photo from the foot of her hospital bed (Exh. 1), a right side profile of her face (Exh. 2), a left side profile of her face and shoulder (Exh. 3), one angled more toward the front which did not show her nose pushed to one side (Exh. 4), and one of the top of her head (Exh. 8).[27] 5RP 47-49, 51. The officer also took a picture looking straight down on the front of Heller's face, which *did* show the crooked nature of her nose (Exh. 5), and two close-up photos of that area from a lower angle (Exh. 6 and 7). 5RP 49-50.

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[27] Although the photo of the top of Heller's head was mostly hair, the officer said he took it because Heller said she had pain to the top of her head. 5RP 46, 51, 57.

Prior to the officer authenticating the photos, defense counsel objected to the photos as being "cumulative and repetitive and unnecessarily graphic." 5RP 47. The court overruled the objection. Id. When the State offered these eight photos as exhibits after laying the necessary foundation, defense counsel again objected to the cumulative nature stating she had not seen them before the officer testified to them.[28] 5RP 46. The trial court noted that the two close-up photos of Heller's crooked nose were virtually the same, adding "I think perhaps they're all admissible. I might reserve on one or two where it's showing the same thing as another photo." 5RP 54. The court later admitted all the photos except the duplicate of the close-up she had referenced. 5RP 68.

After the photos were published, defense counsel again addressed the photos, challenging the technology behind their reproduction and calling them "a little bit over the top as far as being graphic and showing numerous shots of Ms. Heller's bloody face." 5RP 71-72. The court responded, "These are not horrible photos" and "we see much more serious photos." 5RP 73. She added, "I only struck Number 7 [the duplicate close-up of Heller's nose] because I thought it was kind of out of

[28] The photos had been provided in original discovery and were also presented to defense counsel prior to showing the officer. 5RP 46, 51-52.

focus and it looked a lot like Number 6...it looked like he went in closer and I just didn't find it particularly helpful."[29] 5RP 74.

Over defense counsel's objection, the trial court also later admitted a photograph Heller took of herself three weeks after the assault where she had two black eyes and a cast on her nose before surgery (Exh. 15). 5RP 109-10; 6RP 106.

b. The Photographs Helped The State To Meet Its Burden And To Refute The Defense Theories Of The Case.

The trial court properly exercised its broad discretion in determining that the photos of the victim's injuries were relevant and would be helpful to the fact finder in determining whether the State had met its burden.[30] ER 401, 402. The State had to prove that Heller's injuries constituted "substantial bodily harm."[31] CP 18; RCW 9A.36.021(1)(a). The admitted photos of Heller's injuries demonstrated that her face was indeed substantially, and more than temporarily, disfigured.

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[29] While State's Exhibit No. 7 was included in the appendix to Appellant's Opening Brief, this photo was not admitted by the trial court. 5RP 68.

[30] See *supra*, Section C(3)(b), for legal standard applied to determine whether court abused its discretion by its rulings on evidence.

[31] "Substantial bodily harm" means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part. CP 88; WPIC 2.03.01.

Additionally, the photos helped to refute the defense theories of the case by showing that Heller's injuries could not have been the result of a fall. While the State's theory was that Heller's injuries were the result of Thomas repeatedly punching her face, the defense theory was that her injuries were the result of a fall caused either from an epileptic seizure or, alternatively, from Heller losing her balance when Thomas scurried away from her alleged attack of him. 8RP 192-99; 11RP 59-60. Each of the admitted photos depicted a different angle of Heller's face and body, and these different perspectives showed that her injuries and swelling were all over her face. The jury could therefore reasonably infer that her deformed nose and mangled face resulted not from a fall to the ground (where injury would exist at the one point of impact), but rather from numerous hits to the face. Thus, the photos were an integral part of understanding the mechanics of the injury and were extremely probative as to what had actually occurred.

The probative value of these photos was not outweighed by any cumulative nature or unfair prejudice. ER 403. The trial court properly exercised its discretion by admitting only eight photos; it excluded the only one which appeared to be duplicative of another. Exh. 7; 5RP 74. The photos showed Heller conscious and awake, and were not extremely

bloody or gory in any way. As noted by the court, the content of the photos was really not that bad. 5RP 73.

Even assuming *arguendo* that admitting all of the photos was an abuse of the trial court's considerable discretion, doing so was harmless where a doctor testified Heller's nose was broken and evidence of Thomas' guilt was substantial.[32] 9RP 14.

5. THE TRIAL COURT'S ALTERNATE JUROR SELECTION PROCESS PRESERVED THE FOUNDATIONAL PRINCIPLE OF AN OPEN JUSTICE SYSTEM.

Thomas contends that the trial court violated his constitutional right to a public trial by selecting alternate jurors in private, off the record. This argument should be rejected. The selection of the alternate jurors occurred in public and the alternates that were chosen were stated on the record. Furthermore, the public trial right did not attach to the process of drawing a number to choose the alternate jurors, because this selection does not implicate the core values of the public trial right. Therefore, Thomas has not established that a closure or public trial right violation occurred.

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[32] See *supra*, Sections B(2), C(1)(c), re: substantial evidence of Thomas' guilt.

a. Relevant Facts.

On the last day of trial, prior to the judge instructing the jury, the parties selected two alternate jurors off the record and the court read them aloud on the record. 11RP 3. The trial court stated:

> We just did a random selection of little pieces of paper and the defense picked Juror No. 3 as the first alternate and the State picked Juror No. 4 as the second alternate. So they'll be dismissed with instructions at the end of closing.

Id. There is nothing in the record to suggest that, when the alternates were selected, Thomas was not present at the time, nor that any members of the press or public were excluded from the courtroom. Id.

After the counsels delivered their closing arguments, the court informed the jury that Jurors No. 3 and 4 were randomly selected to be the alternates. 11RP 76-77. The court excused those jurors with instructions not to discuss the case with anyone until it was confirmed that they would not be called back. 11RP 77.

b. The Process Used To Select Alternate Jurors Did Not Constitute A Courtroom Closure That Implicated Thomas' Public Trial Rights.

Whether the constitutional right to a public trial has been violated is a question of law, subject to de novo review on direct appeal. State v. Bone-Club, 128 Wn.2d 254, 256, 906 P.2d 325 (1995). There is a strong presumption that courts are to be open at all stages of trial. State v.

Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012). The right to a public trial ensures a fair trial, reminds the prosecutor and judge of their responsibilities to the accused and the importance of their functions, encourages witnesses to come forward, and discourages perjury. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

If, in experience and logic, the core values of the public trial right are implicated by a particular proceeding, then the public trial right attaches to that proceeding. Sublett, 176 Wn.2d at 72-73; Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II). The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." Sublett, 176 Wn.2d at 73; Press-Enterprise, 478 U.S. at 8. The second part of the test, the logic prong, asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id. If the answer to both is yes, the public trial right attaches. Sublett, 176 Wn.2d at 73; Press-Enterprise, 478 U.S. at 7-8.

The entitlement to alternate jurors in criminal trials is governed by Superior Court Criminal Rule 6.5. With respect to the process of selecting alternate jurors, this rule provides:

> When the jury is selected the court may direct the selection of one or more additional jurors, in its discretion, to be known as alternate jurors. Each party shall be entitled to one peremptory challenge for each alternate juror to be selected.

CrR 6.5. The rule does not require that the actual selection of the alternate juror be done while the court is on the record. However, in this case, this information *was* open to the public because the alternate juror selection was conducted in an open courtroom with Thomas and the attorneys present, and the alternates selected were stated on the record. Thus, there was no closure of trial because the courtroom was not "completely and purposefully closed to spectators so that no one may enter and no one may leave." Sublett, 176 Wn.2d at 71.

There is nothing in experience which would require the selection of an alternate juror to be done while the court was on the record. Thomas has cited no case, rule, or practice aid that requires this. Thus, history does not compel the process he argues for.

Under the logic prong, a trial or reviewing court must consider whether openness will "enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Id. at 508. Relevant to the logic inquiry are the overarching policy objectives of having an open trial such as fairness to the accused ensured by permitting public scrutiny of proceedings. Richmond

Newspapers, Inc. v. Virginia, 448 U.S. 555, 572, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).

As it pertains to this case, the logic prong of the test is whether having the proceedings being recorded or transcribed during the actual time that the alternate juror was chosen increases the fairness of the jury selection process. The fairness would not be enhanced by having the drawing of a number recorded or transcribed. There is no logical purpose of having that narrow portion of the proceedings recorded, nor any perceivable benefit related to the public trial right that would flow from it. There is no reason to believe that the process used in selecting alternate jurors diminished the prosecutor's or judge's understanding of their responsibility to the accused and the importance of their functions. The trial court allowed any members of the press or public who wanted to be present. The procedures used by the court were explained to the jury. 11RP 76-77. For these reasons, the alternate juror selection process used in this trial was just as fair as in a case where the alternates are selected on the record.

Thomas fails to analyze the alternate juror selection process under the experience and logic test, and he also provides no authority for his assumption that a closure occurred. Because Thomas has not shown that the selection of alternate jurors is information that has historically been

open to the press and general public, nor any showing that the alternate juror selection would play any "significant positive role" in the jury selection process, this court should find that there was no courtroom closure that implicated Thomas' public trial rights. Thus, the public trial right does not attach to the particular procedure used for selecting alternate jurors and the Bone-Club factors did not have to be considered by the court. Therefore, the trial court protected the foundational principle of an open justice system.

6. BECAUSE NO ERROR OCCURRED, THE DOCTRINE OF CUMULATIVE ERROR DOES NOT APPLY.

Cumulative trial errors may deprive a defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cases in which courts have found that cumulative error justifies reversal include multiple significant errors. E.g., Coe, 101 Wn.2d 772 (discovery violations, three types of bad acts evidence improperly admitted, impermissible use of hypnotized witnesses, improper cross-examination of the defendant); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (improper hearsay as to details of child sex abuse and identity of abuser, court challenged defense attorney's integrity in front of jury, counselor vouched for credibility of victim, prosecutor misconduct).

No trial error has been shown, so the cumulative error doctrine is

inapplicable in this case.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Thomas' conviction and sentence.

DATED this 26th day of February, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla L. Zink, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ANTONNIO RAY THOMAS, Cause No. 69835-4-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.

Dated this 26th day of February, 2014

Wynne Brame
Done in Seattle, Washington