NO. 45998-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARRY E. TARRER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Stolz

No. 91-1-00712-0

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

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

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Rules and Regulations

Other Authorities

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

1. Whether the trial court abused its discretion in denying the defendant's motion to continue?

2. Whether the defendant demonstrates actual, or the appearance of, bias by the trial court?

3. Whether the trial court indicated its opinion of the case or the parties in its preliminary cautionary instruction to the jury?

4. Whether the defendant invited any error or waived objection where he approved the language of the instruction in advance?

5. Whether the trial court abused its discretion in excluding proposed expert testimony that lacked proper foundation?

6. Whether the trial court abused its discretion for excluding the expert testimony where the defendant had failed to give proper notice under the court rules?

7. Whether any error in excluding the expert testimony was harmless where the testimony had little or no bearing on the defendant's theory of the case?

8. Whether the defendant demonstrates that the prosecutor's closing argument was improper?

9. Whether the prosecutor's argument regarding the credibility of the defendant's expert was improper?

10. Where the defendant failed to object to the prosecutor's closing argument, does the defendant demonstrate that the argument was flagrant, ill-intentioned, and incurable by instruction?

11. Whether the defendant demonstrates deficiency of counsel and resulting prejudice where counsel failed to give proper notice of an expert witness whose testimony was excluded on other grounds?

12. Whether defense counsel was deficient for failing to object to proper argument?

13. Whether defense counsel's failure to object to certain parts of the State's closing argument could be tactical?

14. Whether cumulative error denied the defendant a fair trial?

B. STATEMENT OF THE CASE.

1. Procedure

On February 28, 1991, the State charged defendant, Larry Tarrer, with one count of murder in the first degree, one count of attempted murder in the first degree and one count of manslaughter in the first degree. CP 1-3. On May 20, 1991, the State amended the information to

one count of murder in the second degree and one count of assault in the first degree. CP 6-7. Defendant entered into an ***Alford/Newton***[1] plea to the amended charges. *See* ***State v. Tarrer***, #41347-7-II, noted at 174 Wn. App. 1029 (2013) (2013 WL 1337942). Defendant subsequently filed a CrR 7.8 motion to vacate his conviction pursuant to the Supreme Court's decision in ***In Re Andress***, 147 Wn.2d. 602, 56 P.3d 981 (2002). *See* ***State v. Tarrer***, 140 Wn. App. 166, 165 P.3d 35 (2007), and #32208–1–II, noted at 130 Wn. App. 1010 (2005). After his motion was granted, the State filed a corrected, then an amended, Information re-instating the original charges. CP 73-76, *see also* ***Tarrer***, 140 Wn. App. at 167.

His first trial commenced on September 28, 2009 before the Honorable Katherine Stolz. ***Tarrer***, 2013 WL 1337942 at *1. The trial ended in a mistrial because the jury was deadlocked. *Id.*, at *2. The second trial commenced on September 20, 2010, also before Judge Stolz. *Id.* The defendant was found guilty and appealed. *Id.* This Court reversed the convictions and remanded for a new trial. *Id.*, at *1.

The third trial began January 13, 2014, again assigned to Judge Stolz. 1 RP 59. After hearing all the evidence, the jury found the defendant guilty, as charged, including aggravating circumstances. CP 79, 81, 525.

---

[1] ***North Carolina v. Alford***, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); ***State v. Newton***, 87 Wn.2d 363, 552 P.2d 682 (1976).

The court imposed an exceptional sentence totaling 896 months. CP 83, 566-572. The defendant filed a timely notice of appeal. CP 546.

2. Facts

In 1991, Claudia McCorvey was living at the Berkley Apartments in the Tillicum neighborhood of Lakewood. 5 RP 530. Ms. McCorvey was a rock cocaine smoker. 5 RP 530. She often got her drugs from a man she knew as "Slim" (later identified as Bishop Johns). 5 RP 532, 6 RP 810.

On January 8, 1991, after returning from work, Ms. McCorvey was home smoking cocaine. 5 RP 536, 539. People were coming and going from her apartment that night. 6 RP 819. Some bought cocaine and left; others smoked cocaine there. 5 RP 537.

Johns brought Lavern Simpkins to McCorvey's apartment. 5 RP 536. Johns was also accompanied by a young man named Larry. 5 RP 543. Larry was later identified as the defendant. 5 RP 552, 6 RP 754, 820. Johns was selling cocaine in McCorvey's apartment that night. 5 RP 536, 539. Ms. McCorvey spent much of that evening in her bedroom hanging out with Johns and Ms. Simpkins. 5 RP 538.

During that night, the defendant and McCorvey went into the bathroom to talk. 6 RP 826. When she came out, McCorvey told Johns that some cocaine was missing. *Id.* Later, the defendant and Johns argued.

5 RP 563, 606. The defendant was angry that he had lost some drugs. 5 RP 564, 606.

The defendant left and went to his car. 6 RP 742. Ricky Owens was in the parking lot. 6 RP 741. A short time earlier, Owens had been at McCorvey's apartment where he had traded a bottle of gin to the defendant for rock of cocaine. 6 RP 739. As Owens left he heard someone exclaim "Somebody' got my shit!" 6 RP 742. Owens saw the defendant go to a car and retrieve a pistol. 6 RP 743. The defendant was angry. 6 RP 742. The defendant walked back to McCorvey's apartment with the pistol. 6 RP 747.

About the same time that the defendant walked out to his car, Bishop Johns also left the apartment. 6 RP 828. Johns walked over to a nearby apartment with a woman named Nicole, who had also been at McCorvey's apartment. 6 RP 828, 833. When Johns got to the nearby apartment, he heard gunshots coming from McCorvey's apartment. 6 RP 833, 834.

As McCorvey was adjusting the stereo in the living room, the defendant suddenly entered the apartment. 5 RP 548-549. McCorvey saw him point a gun at her and then and muzzle flashes. 5 RP 549. She heard Simpkins scream. *Id.* The defendant shot McCorvey twice; once by her breast and the other in the right side of her abdomen. 5 RP 549, 560.

Simpkins was shot 2-3 times; twice in the chest and once in the hand. 4 RP 416.

Simpkins' gunshot wounds were almost immediately fatal. 4 RP 429, 433. The gunshots severed McCorvey's spine and left her a paraplegic. 5 RP 561.

Ms. McCorvey was pregnant when the defendant shot her. 5 RP 553. She was rushed to Madigan Army Medical Center, where emergency medical staff delivered her baby surgically. 3 RP 272. Despite the efforts of the medical staff, the baby lived less than an hour. 3 RP 278. The baby died from loss of blood and oxygen due to McCorvey's wounds and blood loss. 3 RP 277, 4 RP 446-447.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO CONTINUE.

In both criminal and civil cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. ***State v. Downing***, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The trial court decision to grant or deny a motion for continuance is reviewed under an abuse of discretion standard. *Id.* The appellate court will not disturb the trial court's decision unless the appellant or petitioner makes "a clear showing ... [that the trial court's] discretion [is] manifestly

unreasonable, or exercised on untenable grounds, or for untenable reasons. *Id.*, quoting ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In ***Downing***, the defendant moved for a continuance in order to secure expert testimony for the express purpose of reconsidering the trial court's ruling that the child victim was competent to testify. Trial had already begun and a jury was selected. During the lunch hour on the day of trial, defense counsel was able to reach the expert witness he had been trying to contact, Dr. John C. Yuille. Dr. Yuille had previously been consulted as an expert with regard to Downing's case. Upon learning that the victim had contact with other alleged victims, the expert expressed concern that the contact could taint the victim's testimony. 151 Wn. 2d at 270. Before opening statements and outside the jury's presence, defense counsel moved for a continuance in order to secure Dr. Yuille's testimony regarding the potential effect contact with other alleged victims could have had on the victim's independent recollection of events.

On review, the Court compared the reasons for granting the continuance and reopening the issue of the victim's competency against the reasons for denying the motion to determine if the trial court abused its discretion. A trial court's denial of a continuance motion may infringe on a defendant's right to compulsory process and right to present a defense "if the denial prevents the defendant from presenting a witness material to his

defense." ***Downing***, 151 Wn.2d at 274–275. An appellate court examines a trial court's denial of a continuance motion in regard to a criminal defendant's constitutional right to present a defense on a case-by-case basis. *Id.*, at 275. The Court examines "'the circumstances present in the particular case.'" ***Downing***, 151 Wn.2d at 275 n. 7 (quoting ***State v. Eller***, 84 Wn.2d 90, 96, 524 P.2d 242 (1974)). While an appellate court reviews the trial court's decision to grant or deny a continuance motion for an abuse of discretion, it reviews *de novo* claims of a denial of Sixth Amendment rights, including the right to present a defense. *See e.g.*, ***State v. Jones***, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); ***State v. Iniguez***, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

> [E]ven where the denial of a motion for continuance is alleged to have deprived a criminal defendant of his or her constitutional right to compulsory process, the decision to deny a continuance will be reversed only on a showing that the accused was prejudiced by the denial and/or that the result of the trial would likely have been different had the continuance not been denied.

State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994) (citing ***Eller***, 84 Wn.2d at 95–96).

In the present case, at a hearing on November 8, 2013, defense counsel informed the court that he was currently not ready for trial, but did anticipate being ready by the trial date. 1 RP 22. The court was very familiar with the facts, legal issues, and evidence of this case. The court

pointed out that since the case had been tried twice already, the evidence was pretty well known. *Id.* The parties were considering resolution of the case at the time. 1 RP 23. A status conference was set for December 13. *Id.*

The status conference was held on December 12. Then, defense counsel moved to continue the trial date. 1 RP 26. Defense counsel stated that his investigation concluded that a man named "Tab" was the shooter. *Id.* Counsel wanted more time to investigate the case and contact witnesses. He also requested a *subpoena duces tecum* to Madigan Hospital for the names of the doctors in the emergency room treating Ms. MCorvey in 1991. *Id.*

The court denied the motion, giving detailed reasons, based upon its detailed knowledge of the case:

> THE COURT: The Court is going to deny the continuance request. This case has been pending in front of me since 2008. I've tried it twice already. The issues of the photomontage were affirmed by the Court of Appeals. The issue of the doctor that wrote the note has been – you know, [previous defense counsel] Mr. Thornton did an extensive search for that individual and could not find them in any state on any medical register which the Court, then, excluded that which was affirmed as a decision by the Court of Appeals.
>
> I mean -- and where these other, quote, witnesses came from regarding the shooter, I mean, if someone has just told you that, it's remarkably astonishing; and you've been on this case seven months since May 22nd of this year

> [Defense Counsel]: Yeah, we've been following up on that.
>
> THE COURT: -- and so the bottom line is:
> That's been seven months, and it will be eight months by the time we get to trial. The Court does not see that there is any need -- given the fact this case has been tried twice -- that there is a reason for me to continue it, so I'm going to deny the motion to continue. We're going to go to trial on January 13th.

1 RP 31. After additional discussion, the court went on to repeat that defense counsel had been on the case for seven months, which the court found to be "more than adequate time to prepare, given that the case has gone to trial twice." 1 RP 33. The court also noted that the case itself was 22 years old, and the defendant was in custody and entitled to a speedy trial. *Id.* The State then offered to have the currently assigned Sherriff's detective assist the defense in locating the witnesses that defense counsel was having difficulty with. 1 RP 33-34.

On January 10, 2014, defense counsel moved to continue the trial date in order to obtain expert testimony regarding eyewitness identification. 1 RP 39-40. On the day of trial, January 13, defense counsel renewed his motion to continue, in order to obtain Dr. Loftus' testimony. 1 RP 61. The defense still had not filed a witness list, and had not prepared its proposed jury instructions. 1 RP 64, 65. The State eventually withdrew its opposition to Dr. Loftus testifying, because the State was already prepared to cross-examine him. 1 RP 65, 69.

The defendant fails to demonstrate abuse of discretion or prejudice regarding the court's decision. Defense counsel had eight months to prepare for trial. He had the benefit of the extensive investigation and preparation, and advice of an attorney who had tried the case twice before. The defense theory was the same: mistaken identity. The court was going to allow the testimony of Dr. Loftus. The State was calling the same witnesses; their testimony was a known factor. Most of the evidentiary issues were settled.

Although defense counsel asserted that "Tab" was the actual shooter, and counsel argued that he was trying to locate witnesses, he never explained to the court what the status or prognosis of that investigation was. He never explained how, or if, this information was suddenly revealed or developed since the last trial, and why more time would realistically be productive. He never established that his claimed potential evidence was anything other than speculative.

It is for the trial court to decide when enough time has been permitted for sufficient trial preparation; otherwise counsel could request unlimited continuances, asserting that he had more briefs to write, was still searching for a definitive witness, or was otherwise unprepared. The court considered all the circumstances and decided that eight months was enough time to prepare this case. It did not abuse its discretion.

2. THE DEFENDANT FAILS TO DEMONSTRATE ACTUAL, OR THE APPEARANCE OF, BIAS OF THE TRIBUNAL.

The Court of Appeals has held that "a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." ***State v. Bilal***, 77 Wn. App. 720, 893 P.2d 647 (1995). However, before a violation of the appearance of fairness doctrine can be found, there must be evidence of a judge's actual or potential bias. *Id. See also* ***State v. Post***, 118 Wn. 2d 596, 619, 826 P. 2d 172 (1992).

In ***State v. Ra***, 144 Wn. App. 688, 175 P.3d 609 (2008), a defendant convicted of attempted murder raised several issues relating to comments made by the judge who presided over his trial. The Court of Appeals reversed the defendant's conviction and remanded the case for a new trial, but the basis for that decision was the trial court's admission of gang evidence. *Id.*, at 702. In reaching its decision, the court also considered the defendant's claim that the trial court "did not display the appearance of impartiality during trial and sentencing." *Id.* At 704. The appellate court found the trial court was "inappropriate" when it said the defendant was "some distorted character who breeds and lives violently," when it chastised the defendant for nodding his head in apparent agreement with the court, and when it showed "evidence and potentially undue concern for the victim's war record." ***Ra***, 144 Wn. App. at 705. The court declined to decide whether the court's actions required reversal,

having reversed the defendant's conviction on other grounds, but it did remand the case to the trial court for trial "before a different judge." ***Ra***, at 707.

In ***State v. Gamble***, 168 Wn.2d 161, 225 P.3d 973 (2010), the Supreme Court addressed several cases that, like the present one, were directly affected by the ***Andress*** and ***Hinton***[2] decisions. One of the defendants in that case was James Alexander. Mr. Alexander was originally convicted of second degree felony murder and sentenced to an exceptional sentence of 300 months. ***Gamble***, 168 Wn.2d at 185. After Alexander's conviction was reversed pursuant to ***Andress / Hinton***, the State tried to amend the charges to Homicide by Abuse; the trial court dismissed those charges and entered a judgment of guilty for first degree manslaughter. ***Gamble***, at 185.

The Supreme Court entered an intervening opinion that resulted in a motion for reconsideration from the State, and the trial court granted that motion and allowed trial on the homicide by abuse charge, which resulted in a guilty verdict, followed by another exceptional sentence, this time 400 months. ***Gamble***, 168 Wn.2d at 185-86.

Alexander claimed the trial court violated the appearance of fairness doctrine in two areas. First, the trial court "expressed a belief in his guilt" and said it was "disturbed by the facts" of his case because they

---

[2] ***In re Personal Restraint of Andress***, 147 Wn.2d 602, 56 P.3d 981 (2002); ***In re Personal Restraint of Hinton***, 152 Wn.2d 853, 100 P.3d 801 (2004).

involved "a father's abuse of his child," comments that were reported by the media. ***Gamble***, 168 Wn.2d at 188. The Supreme Court rejected this argument because the court's comments were made at a pre-trial hearing, outside the presence of the trier of fact, when the court was rejecting the State's effort to amend to homicide by abuse and directing a verdict of first degree manslaughter. *Id.* The court stated: "there was nothing improper in the court's remarks at the time and in the context in which they were made." *Id.*

The test for determining whether a judge's impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts. ***Sherman v. State***, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). The appellate court presumes that a judge acts without bias or prejudice. ***State v. Franulovich***, 89 Wn.2d 521, 525, 573 P.2d 1298 (1978). The party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias. ***Gamble***, 168 Wn.2d at 187–188. "Judicial rulings alone almost never constitute a valid showing of bias." ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). Therefore, the defendant's appearance of fairness claim, supported solely by the trial court's adverse rulings, fails.

The defendant argues that the court showed bias in refusing to consider new case law. App. Br. at 24. However, the record reflects that the court read the defendant's memorandum of law, including cases:

> THE COURT: Well, you're going to have to get some sort of a synopsis of what you think Dr. Loftus is going to testify to; but again, you know, *I took a look through your memorandum* I got this morning; and *I went back and pulled up the case*, you know, Section B, admission of eyewitness identification, you know. *I went through all of it*. I mean, that ruling was affirmed. That is the state of the law in this case.

1 RP 67-68 (emphasis added). As the defendant points out in his brief at 24, the court then went on to remark about the prospective or future rulings of appellate courts on the issue. 1 RP 68. This does not show bias; it shows that the court disagrees with the defendant on a legal issue. The trial court was correct that the Court of Appeals had upheld the trial court's previous ruling regarding the eyewitness identification procedure. *See* ***Tarrer***, at *10-11.

The defendant asserts that the court's knowledge that the defendant was a drug dealer showed bias. App. Br. at 23. The discussion and remarks cited by the defendant occurred outside the presence of the jury during Claudia McCorvey's testimony. 5 RP 689. McCorvey had testified that she had heard the defendant complaining that he had lost a container of drugs. 5 RP 563-564, 606. On cross-examination, defense counsel questioned whether McCorvey had previously said that she had not heard

such a conversation. 5 RP 683. On re-direct, the State revisited defense questions about drug dealers' violence in the victim's Tillicum neighborhood, and about the defendant's stated belief that someone had taken his drugs. 5 RP 688.

The defendant objected to the State characterizing the defendant as a drug dealer. 5 RP 688. The court knew that the defendant had admitted in testimony in a previous trial that he was a drug dealer, and that the State was going to call another witness to testify that the defendant was a drug dealer. 5 RP 689. The State stated that it was going to do this. *Id.*

The court's remark was in response to the defendant's "vehement" objection, as if this were some outrageous allegation. The court's remark explains that the court was aware of the coming evidence in the case and that, at minimum, the defendant's "vehement" objection would be answered with the defendant's own sworn testimony. This does not display bias; this explains the basis of the court overruling the defendant's objection. It might be noted that the defendant does not assign error to the court's evidentiary ruling.

The defendant criticizes the court for remarking about the prosecuting attorney's closing argument during a pretrial motion. App. Br. at 25. In context, this occurred when the prosecutor responded to the defendant's motion *in limine* to restrict the State's closing argument in advance. *See* CP 432-433. All parties in court were aware that, in its

decision, the Court of Appeals had found fault with several of the prosecutor's arguments. This is why the case was being retried. The trial court's remarks merely acknowledge that this was a retrial with the same prosecutor, and the prosecutor could edit his prior closing to comply with the ruling of the Court of Appeals.

The Court of Appeals must also consider the context of the entire case. The court had presided over two jury trials by that point in time, heard all of the witnesses testify twice, and heard the defendant testify twice.

Moreover, it is worth noting that the Court of Appeals decision took no issue with the trial court's previous rulings or conduct in this case. The Court reversed the defendant's convictions for what it determined to be improper conduct by the State, not the trial court. After reversing the defendant's convictions on prosecutorial misconduct grounds, the Court also addressed several evidentiary issues that could arise on re-trial. The Court upheld the trial court's rulings regarding the admission of medical records and two eyewitness identifications, and the appellate court upheld this court's rulings on two motions to dismiss the case based on the evidence that remained by the time of the 2009 and 2010 trials. The Court did not criticize the trial court's rulings, demeanor, or conduct during the trial.

The defendant fails to provide evidence of bias of the trial court, or even the appearance of bias or unfairness.

3. THE TRIAL COURT'S INTRODUCTORY ADMONITION WAS NOT A COMMENT ON THE EVIDENCE OR THE CASE.

a. The court's admonition was not a comment.

Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. ***State v. Hansen***, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). To constitute a comment on the evidence, it must appear that the court's attitude toward the merits of the cause is reasonably inferable from the nature or manner of the court's statements. ***State v. Carothers***, 84 Wn.2d 256, 267, 525 P.2d 731 (1974).

The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury. ***Hansen***, 46 Wn. App. at 300. If a party demonstrates that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. ***State v. Bogner***, 62 Wn.2d 247, 249, 253–54, 382 P.2d 254 (1963). If the defendant can show such a comment, the State has the burden to show that no prejudice resulted to

the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment. ***State v. Elmore***, 139 Wn.2d 250, 276, 985 P. 2d 289 (1999).

In this case, the defendant points to the trial court's detailed preliminary instruction:

> THE COURT: All right. It is important that you keep your minds open and attentive throughout the trial. Do not discuss the case among yourselves or with anyone else. Do not permit anyone to discuss the case with you or in your presence. Violation of this order is serious. It may involve a personal penalty to you and would result in a mistrial which could cause great inconvenience and injury to the parties, to the case, and to the County. Experience has shown that it is difficult to keep an open mind during the progress of the case if you are to discuss the case among yourselves or express your opinions before you have heard all of the evidence.
>
> You will not be sequestered and kept together during this trial. Because of this, you are admonished not to read, view, or listen to any report in the newspaper, radio, television, or Internet on the subject of this trial. Do not permit anyone to read or comment on it to you or in your presence. It is important that you keep your mind free of extraneous influences so that you may decide the case on the evidence and on the Court's instructions on the law.
>
> The media may be present in the courtroom throughout the trial, but they may not be here for the entire trial; so, therefore, impressions may not be complete or even accurate. If your friends and family ask you about the case, you must tell them that you are under the Court's instructions not to discuss the case. When the trial is over, you will be freed from this instruction and will, therefore, be free to discuss the case with your family and friends. We cannot emphasize strongly enough that you are not to discuss the case or conduct any research on your -- by yourself on the subject of this trial. This is very important

> because it can lead to a mistrial. That has recently happened both in King and Snohomish Counties where the State -- the jurors have committed misconduct during deliberation by researching the issues in the case. That means the county has to try the case. In the case of the King County case, it was a rape case which means the victim will have to testify again. In the Snohomish case, it was a child rape case which meant that, ultimately, the Prosecutor's Office dealt with the case because they did not want the five-year-old victim to have to testify again; so it's very important that you not conduct any research. Do not blog about your experiences. Do not communicate about your experiences via Twitter or Facebook. Basically, don't do that because it would cause a mistrial. All right? I will also repeat that frequently throughout the trial because we cannot err on the side of caution enough.
> ...

2 RP 183-184.

Any possible misinterpretation by the jury that the court's admonition amounted to a comment on the evidence or the case in general by the judge was averted by the admonishments included in the advance oral instruction:

> The law does not permit me to comment on the evidence, and I will not intentionally do so. By a comment on the evidence, I mean some expression or indication from me as to my opinion as to the value of the evidence or the weight of it. If it appears to you I do comment on the evidence, you are to disregard such apparent comment entirely.
> ...
> You are officers of the court, and you must act judiciously with an earnest desire to determine and declare a proper verdict. Throughout the trial, you should be impartial and permit neither sympathy nor prejudice to influence you.

2 RP 185-186. This is part of the standard preliminary instruction to the jury. *See* WPIC 1.01.

The jury was again admonished at the end of the case in instruction 1:

> Our state constitution prohibits a judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

C P 490-491. The preliminary instruction was not erroneous, and was not a comment regarding the case, the defendant, or the evidence. Even if it could be read as a comment, it was cured by the instructions as a whole.

b. <u>If error, it was invited or waived by the defendant</u>.

The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involves constitutional rights. ***State v. Studd***, 137 Wn.2d 533, 546–47, 973 P.2d 1049 (1999). Under the invited error doctrine, "even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." ***State v. Winings***, 126 Wn. App. 75, 89, 107 P.3d 141 (2005). Here, the defendant heard and approved the

detailed additions and emphasis of the preliminary instruction in advance. Therefore, any error in the instruction was invited and the appellate court is precluded from reviewing it.

Also, a party who fails to object to jury instructions below waives any claim of instructional error on appeal. ***State v. Edwards***, 171 Wn. App. 379, 387, 294 P.3d 708 (2012). However, the defendant may still raise the issue if it is a manifest constitutional error. RAP 2.5(a)(3). The burden is on the defendant to demonstrate that the error is both manifest and is of constitutional dimension. RAP 2.5(a)(3); ***State v. O'Hara***, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). The appellate court construes exceptions to RAP 2.5(a) narrowly. ***State v. Montgomery***, 163 Wash.2d 577, 595, 183 P.3d 267 (2008).

Before giving the preliminary instruction, the court advised the parties that, because of recent mistrials, it was going to emphasize to the jury that jurors not seek out information on their own. The court specifically mentioned that it was going to use an example of a King County case where the victim was going to need to testify again:

> THE COURT: Also, I'm going -- when I'm giving the preliminary, you know, instructions, and we're getting into the section regarding do not view, listen, read, newspapers, radio, television, Internet, whatever, because of the fact there have been recently a number of mistrials in this and other states because of juror misconduct in doing their own research, *we are trying to emphasize very seriously to them that they cannot do that by pointing out the fact that in King County, they're going to have to retry a case; and the*

victim will have to re-testify, so it is very important that you follow what we say. All right.

[Defense Counsel]: *That's fine, Your Honor.*

[Prosecuting Attorney]: That's fine with me.

THE COURT: All right.

[Defense Counsel]: Nothing else from the Defense.

2 RP 180(emphasis added).

When the jury was present, the court gave the detailed preliminary instruction quoted and included in subsection a. above. After the instruction, the defendant failed to object, request a clarifying or curative instruction, or any other remedy. His advance approval, and later failure to object, waived the issue on appeal.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S REQUEST TO ADD AN EXPERT WITNESS AFTER THE DEADLINE FOR WITNESS LISTS HAD PASSED AND THE TRIAL TESTIMONY HAD BEGUN.

a. Trial court's discretion to permit expert testimony.

The trial court has broad discretion to admit or reject expert testimony under ER 702. *See* ***State v. Roberts***, 142 Wn.2d 471, 520, 14 P.3d 713 (2000); ***State v. Rafay***, 168 Wn. App. 783, 285 P.3d 83 (2012). The trial court may reject expert testimony in whole or in part. ***Group***

Health Co-op of Puget Sound v. State Dept. of Revenue, 106 Wn.2d 391, 399, 722 P.2d 787 (1986), citing ***Brewer v. Copeland***, 86 Wn.2d 58, 74, 542 P.2d 445 (1975). The trial court has the discretion to reject expert testimony if the court is not satisfied with the trustworthiness of the expert's underlying information. ***Group Health***, 106 Wn.2d at 398.

A criminal defendant does have a constitutional right to present evidence in his own defense. ***Washington v. Texas***, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); ***State v. Maupin***, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). There is, however, no right to present irrelevant or inadmissible evidence. ***State v. Jones***, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

Here, the trial was well into the State's case when the defendant raised the issue of calling a medical witness. 6 RP 802. Dr. Howard, the medical examiner who performed the autopsy on Lavern Simpkins, had already testified. The defendant informed the court that he wished to recall Dr. Howard to testify regarding the effects of cocaine on persons. 6 RP 802. Dr. Howard had since moved to Spokane to be an assistant medical examiner there, and had been brought in for the sole purpose of testifying regarding the autopsy. 4 RP 398, 413. Therefore, the court suggested that the defense get a local doctor to testify regarding the effects of cocaine. 6 RP 803. After the noon recess the same day, the defendant gave notice that he intended to call Dr. Eric Kiesel, the current Pierce County medical

examiner, to testify not about the effects of cocaine, but to rebut Claudia McCorvey's testimony regarding her bullet wounds and that she had been shot in her front. 6 RP 804.

After moving on to hear another witness, the court heard argument regarding Dr. Kiesel's proposed testimony. Defense counsel explained that he was proposing to call Dr. Kiesel to testify regarding the entrance and exit wounds of both Lavern Simpkins and Claudia McCorvey. 6 RP 883. Dr. Kiesel's testimony would be based, in part, on opinions of treating physicians in 1991. 6 RP 883-884.

The trial court stated:

> THE COURT: Well, first of all, all your witnesses were supposed to be disclosed two weeks prior to trial. I mean, we are now two -- into the third week of trial; and you suddenly pull this little rabbit out of your hat. Secondly, the appellate court's ruling regarding these records is that they are opinion, not fact because they were not examining her to characterize her wounds one way or the other. Even under the business records exception, witnesses cannot testify about other's opinions. Basically, you're asking me to let Dr. Kiesel testify as to their opinions based on his review of what are, apparently, fairly sketchy medical records and without any x-rays, any photographs, anything to substantiate any of this; and it says flatly, determinations of whether a gunshot wound is an entrance or exit wound are opinions. Therefore, they would be entitled to cross-examine as to those opinions.
>
> [Defense Counsel]: I think that's perfectly fine.
>
> THE COURT: Well, he can't testify to those opinions because he -- it's someone else's opinion. All he can say is, yeah, I looked at records; and he can't give you an opinion

> one way or the another; so, no, Dr. Kiesel is not going to testify. A, he wasn't timely disclosed; and, B, his report really is just an attempt to try to circumvent the opinion that the Court of Appeals has already rendered regarding those medical records which is: They don't come in.

6 RP 888-889. Indeed, The Court of Appeals had previously upheld this same trial court's ruling in this case, that an expert witness could not testify to others' opinions; specifically whether McCorvey's gunshot wound was an entry or exit. ***Tarrer***, at *10, citing ***State v. Wicker***, 66 Wn. App. 409, 413, 832 P.2d 127 (1992).

During further discussion, the court responded:

> THE COURT: Okay. I'm excluding these because, again, we don't have anybody who could actually testify regarding how or why they made a determination, what measurements, what photographs, any of that. It just doesn't exist.
>
> [Defense Counsel]: Experts testify all the time –
>
> THE COURT: Okay.
>
> [Defense counsel]: -- without having viewed the patient, for instance, in a personal injury case.
>
> THE COURT: Dr. Kiesel is not testifying because it doesn't sound like he could -- I mean, from what I read, he can't give an opinion; and he's saying, well, 50 percent of the time, maybe they're right and maybe they're wrong; but that's not an opinion with any certainty that we're going to bring into this courtroom.
>
> [Defense Counsel]: But it was to rebut Dr. Howard with regard to his –

> THE COURT: Dr. Howard is a separate issue, Mr. Underwood. You're talking pears versus apples. He specifically is testifying only to the autopsy that he performed on Lavern Simpkins. He has made no testimony regarding any of the wounds on Claudia McCorvey's body, so it doesn't matter what he testified to in regards to Lavern Simpkins. I mean, if you thought you have another pathologist who is going to come in and say that, no, his opinion is wrong, and those were, you know, reversed, we would be hearing from that person.

6 RP 894-895.

Here, the defendant wanted to call Dr. Kiesel, the Pierce County medical examiner, a forensic pathologist, to testify regarding the bullet wounds of Claudia McCorvey, the surviving victim in the shooting. 6 RP 895-896. Dr. Kiesel had never examined Ms. McCorvey or her wounds. The court pointed out that the defendant could certainly call an expert to disagree with Dr. Howard's examination and conclusions regarding the autopsy of Lavern Simpkins, because that would be based upon Dr. Howard's reports and testimony. 6 RP 896. However, there was no similar basis for an opinion or testimony regarding Claudia McCorvey's injuries. 6 RP 895-896.

b. The trial court's discretion to enforce deadline for witness list.

Discovery in criminal cases is regulated by CrR 4.7. Under CrR 4.7(b)(1), defendants must disclose the names and addresses of intended witnesses, as well as the substance of their testimony, no later than the omnibus hearing. A trial judge has broad discretion under the rule to

control the discovery process and impose sanctions for failure to abide by the rules. CrR 4.7(h)(7); ***State v. Hutchinson***, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). However, "[e]xclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly." *Id.*, at 882.

A judge's sanction ruling is reviewed for abuse of discretion. ***State v. Linden***, 89 Wn. App. 184, 189–190, 947 P.2d 1284 (1997), *review denied*, 136 Wn.2d 1018, 966 P.2d 1277 (1998). There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons, including the misconstruction of a rule. ***State v. Brown***, 132 Wn.2d 529, 572, 940 P.2d 546 (1997). The reviewing court may also consider whether a reasonable judge would rule as the trial judge did. *See* ***State v. Vy Thang***, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

While sanctions for discovery violations typically do not include exclusion of evidence (***State v. Ray***, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991)), evidence may be excluded when that is the only effective remedy. ***Hutchinson***, 135 Wn.2d at 881–883. In order to exclude evidence because of a discovery violation, the court must consider and weigh four factors: (1) the effectiveness of other sanctions; (2) the impact of witness preclusion on the evidence at trial and outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the testimony; (4) whether the violation was willful or in bad faith. *Id.* at 883.

As argued above, the primary reason the trial court did not permit Dr. Kiesel's testimony was because it lacked the proper foundation. Although the trial court did not specify the ***Hutchinson*** factors, there is no right to present irrelevant or inadmissible evidence. ***Jones***, 168 Wn. 2d at 720. Because the evidence was not admissible, the ***Hutchinson*** analysis is unnecessary.

c. If error, the ruling was harmless.

Generally, a trial court's determination on the admissibility of evidence does not rise to an issue of constitutional magnitude. *See* ***State v. Gunderson***, -Wn. 2d -, 337 P. 3d 1090, 1095 (2014) (admission of ER 404(b) evidence). Non-constitutional error requires reversal only if, "within reasonable probabilities," the outcome of the proceeding "would have been materially affected had the error not occurred." ***State v. Crenshaw***, 98 Wn.2d 789, 800, 659 P.2d 488 (1983) (citing ***State v. Tharp***, 96 Wn.2d 591, 637 P.2d 961 (1981)). That is the case here. The trial court was within its discretion to exclude Dr. Kiesel's testimony. This court has previously affirmed that ruing. The issue did not implicate a constitutional right of the defendant.

The proposed testimony was very limited. Even if Dr. Kiesel had testified, he had no basis to opine whether McCorvey had been shot in the front or the back. At most, Dr. Kiesel could testify that emergency room doctors sometimes mischaracterize or misdiagnose whether a gunshot

wound is an entrance or an exit. 6 RP 888. Even if McCorvey had been shot in the back, that did not disprove her testimony that it was the defendant who shot her and Simpkins, nor would it rebut Dr. Howard's testimony that Simpkins was shot in the front. Under the circumstances, the proposed evidence would not have affected the jury's verdict.

Even if the trial court had erred in its balancing of the ***Hutchinson*** factors, this Court should still affirm. The alleged error was harmless even under the constitutional harmless error standard. Error of constitutional magnitude can be harmless if it is proven to be harmless beyond a reasonable doubt. ***Chapman v. California***, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Any error in excluding the evidence was harmless beyond a reasonable doubt.

5. THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. ***State v. Gentry***, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. ***State v. Carver***, 122 Wn. 2d 300, 306, 93 P. 3d 947 (2004).

a. Argument to which the defendant objected.

When reviewing an argument that has been challenged as improper, the court reviews the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994). The Court's focus is less on what the prosecutor said; but rather on the effect which was likely to flow from the remarks. *See* ***State v. Emery***, 174 Wn.2d 741, 762, 278 P. 3d 653 (2012). "The criterion always is; has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Id.*, quoting ***Slattery v. City of Seattle***, 169 Wash. 144, 148, 13 P.2d 464 (1932). Where defense counsel objected to a prosecutor's remarks at trial, the trial court's rulings are reviewed for abuse of discretion. ***State v. Gregory***, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006).

Here, the State argued, in part:

> Doing justice in a particular case, in a criminal case, means doing the right thing for the right reasons. It means reaching a proper verdict based on the evidence and the law and nothing else, and I say those last words because there are times in trials when there are witnesses who are called whose sole purpose is to distract you, to confuse you, to make you worry, and to make you hesitant about reaching a verdict. Geoffrey Loftus is a perfect example of one of those individuals, one of those kind of witnesses, because Geoffrey Loftus's entire testimony was designed to make

> you think that it's impossible for any eyewitness to ever accurately identify –

10 RP 1271-1272. The defendant objected that this "mischaracterizes the evidence." 10 RP 1272. The court responded: "It's closing argument. It's up to the jury to determine what Geoffrey Loftus's testimony was." *Id.* On appeal, the defendant extends the basis of his objection to disparaging the defense. App. Br. at 39-41.

Here, the prosecutor was arguing the credibility of the defendant's expert, Dr. Loftus, not disparaging the defendant. Arguing the credibility of witnesses is a fundamental aspect of closing argument in almost every trial. There is no question that prosecutors (and defense attorneys) have wide latitude to argue reasonable inferences from the facts concerning witness credibility. ***State v. Stenson***, 132 Wn.2d 668, 727, 940 P. 2d 1239 (1997). Expert witnesses are certainly no exception.

The defense called Dr. Loftus to raise doubt; to tell the jurors that eyewitnesses were mistaken and their memories unreliable. Dr. Loftus' testimony could cause a juror to wonder about knowing or remembering events correctly. The prosecutor was arguing against this effect or conclusion.

The argument to "do the right thing for the right reason" is not improper. The State is referring to conviction, based upon the evidence.

The defense could make the same "do the right thing for the right reason" argument, referring to acquittal in a close or difficult case.

This part of the argument does not misstate the law; but even so, a prosecutor's misstatement of the law in closing argument does not warrant a new trial where the jury was properly instructed. ***State v. Classen***, 143 Wn. App. 45, 64-65 n. 13, 176 P.3d 582 (2008). Here, the jury was correctly instructed regarding reasonable doubt and the burden of proof. Instruction 2; CP 492. The jury was further correctly instructed that it was the sole judge of the credibility of witnesses in general (Instruction 1, CP 490), and of the experts in particular. Instruction 6, CP 496. The court correctly instructed the jury that they were free to reject the expert opinions. *Id.* The prosecutor was obviously encouraging the jury to reject Dr. Loftus' opinions.

b. Arguments to which the defendant failed to object.

If the defendant did not object to the State's closing argument at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. ***State v. Emery***, 174 Wn. 2d 741, 760-761, 278 P. 3d 653 (2012). If the defendant failed to object, he must show that (1) "no curative instruction would have obviated

any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *Id.*, at 761, citing ***State v. Thorgerson***, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

The defendant argues on appeal that the prosecutor misstated the law when he argued that the jury should be "mindful of Claudia McCorvey, Lavern Simpkins, Marquise McCorvey, and the others who have been affected by this case." App. Br. at 38, 10 RP 1271. The defendant failed to object to this argument at trial. For the first time on appeal, the defendant also criticizes the prosecutor for arguing that "23 years is a very long time to wait for some final justice to come in this case; but it is almost here." App. Br. at 41, 10 RP 1271.

Prosecutorial misconduct can arise when the State refers to evidence outside the record or makes bald appeals to passion or prejudice. *See, e.g.*, ***State v. Fisher***, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). But, in closing argument, the prosecutor has wide latitude in making arguments to the jury and drawing reasonable inferences from admitted evidence. ***State v. Gregory***, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). The prosecutor's improper statements are prejudicial only where there is a substantial likelihood that the misconduct affected the jury's verdict. ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

The above remarks of the prosecuting attorney essentially ask the jury to do justice. These remarks are not inflammatory, nor do they appeal to prejudice and passion. *Cf*, ***State v. Belgarde***, 110 Wn.2d 504, 507–08, 755 P.2d 174 (1988). At most, they misstate the law. Somewhat similar remarks were made in ***State v. Pierce***, 169 Wn. App. 533, 280 P.3d 1158 (2012), where the prosecutor argued that he brought the case "on behalf of" the victims. *Id.*, at 558. The Court of Appeals found that this was not an appeal to passion and prejudice, but an improper statement of the law and curable by jury instruction. *Id.*

As a possible appeal to the jury's emotion and sympathy, these arguments were cured by the court's instructions. The trial court instructed the jury that it must remain fair. As pointed out above, in the preliminary instruction, before any evidence was heard, the court instructed the jury:

> You are officers of the court, and you must act judiciously with an earnest desire to determine and declare a proper verdict. Throughout the trial, you should be impartial and permit neither sympathy nor prejudice to influence you.

2 RP 186. At the end of the trial after receiving all the evidence, the court further instructed the jury:

> As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties

> receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Instruction 1; CP 491. It must be presumed that the jury followed the instructions given. *See* ***State v. Warren***, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Also for the first time on appeal, the defendant objects to part of the State's argument regarding reasonable doubt:

> A reasonable doubt arising from the lack of evidence is the question of: Do you have enough? Again, there will always be more. Do you wish you had more? Do you wish you had DNA evidence? Do you wish you had shoe prints? Do you wish you had the gun and the ballistics that tie it to it? I mean, all of these things are stuff that you could have that you don't have; and I'm going to suggest to you that the law doesn't let you think about those things when you decide if the case was proved beyond a reasonable doubt. What you look at is: Is the evidence that was actually presented enough?

10 RP 1297. The defendant now says that this somehow misstates the concept of "beyond a reasonable doubt." App. Br. at 38-39. This portion of the argument is correct, and even more so in context of the entire reasonable doubt argument, which begins two pages earlier at 10 RP 1296.

The prosecutor points out Instruction 2, which he displays on a screen or board. 10 RP 1296. He accurately argues:

> What it does not say is beyond any doubt to a hundred percent certainty, beyond all doubt, or beyond a shadow of a doubt. The burden of proof is beyond a reasonable doubt because there is no such thing as a perfect trial.

Id. He goes on to correctly point out that reasonable doubt may arise from the evidence or lack of evidence. 10 RP 1296-1297. He then gives examples of doubts that could arise from evidence. *Id.*

The portion that the defendant now objects to also excludes what the prosecutor argued next:

> Again, there will always be more. Do you wish you had more? Do you wish you had DNA evidence? Do you wish you had shoe prints? Do you wish you had the gun and the ballistics that tie it to it? I mean, all of these things are stuff that you could have that you don't have; and I'm going to suggest to you that the law doesn't let you think about those things when you decide if the case was proved beyond a reasonable doubt. What you look at is: Is the evidence that was actually presented enough? That's just the list I came up with in a couple minutes. Where's the gun? Where's the fifth bullet? Where's -- who got shot first? What order were the shots fired? Where's the other guy who was there? We heard the name Tab, and we heard the name -- we heard the name Tab and the name Furnace during the course of this trial. Where's Nicole? All those are questions. You know what? They're all legitimate questions. They're all legitimate questions. They are not reasonable doubt.
>
> Beyond a reasonable doubt isn't a common phrase that you say every day. It's a serious decision you reach only after considering all of the evidence. The presumption of innocence continues even now as we sit here during closing argument. Beyond a reasonable doubt is a level of certainty that comes from knowing that you made the right decision. The instruction that defines beyond a reasonable doubt talks about abiding belief. If you have an abiding belief in the truth of the charge, then you're satisfied; and what that means is: The day after your verdict when you go home, and your family and friends say, hey, is that trial over, and you say, yep, it is, what did you guys do, we found him guilty, was that the right decision, yes, it was,

> that's an abiding belief; and two years later when you get your next jury summons, and you think back to the case that you sat on in 2014, and you think to yourselves, we made the right decision, and we found Larry Tarrer guilty of all those charges, that's an abiding belief.

10 RP 1298-1299. Here the prosecutor frankly acknowledges the reality of every trial; that there are always details that the jury, or any fact-finder, will wonder about. He is doing what all criminal trial attorneys do; arguing the quantum of evidence to convict compared with lack of evidence. He argues that the evidence the jury heard is enough to convict and the missing details he mentioned were unnecessary where the evidence, including Claudia McCorvey, Rickey Owens, Bishop Johns, and the defendant's fingerprints, all placed the defendant at the scene. McCorvey and Owens identified the defendant as the person with the gun; and McCorvey identified him as the person who shot her and Lavern Simpkins. This is a proper argument, it is not misconduct.

Ever since ***Brinegar v. United States***, 338 U.S. 160, 174, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879 (1949) and ***In re Winship***, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), criminal attorneys have been arguing the meaning of "reasonable doubt." Since even before that time, they have been arguing the strength and sufficiency of the evidence. That is what the parties did in the present case.

The defendant fails to show that, if the prosecuting attorney misstated the law, that the arguments were flagrant, ill-intentioned, and incurable by instruction. The court had correctly instructed the jury regarding all the issues raised regarding the prosecutor's argument. Trial counsel could have objected, if he thought the point was crucial, and requested the court to emphasize or remind the jury of the instructions given. Any improper argument here was minor and curable by an instruction. *See* ***Warrren***, 165 Wn.2d at 28. The defendant has waived appellate objection to remarks he failed to object to at trial.

6. THE DEFENDANT FAILS TO DEMONSTRATE DEFICIENCY OF COUNSEL AND RESULTING PREJUDICE.

A claim of ineffective assistance of counsel arises from a defendant's right to counsel under the Sixth Amendment to the United States Constitution. *See* ***Strickland v. Washington***, 466 U.S. 668, 685-687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The purpose of examination of counsel's performance is to ensure that criminal defendants receive a fair trial. *Id.*, at 684. In ***Strickland***, the Supreme Court summarized:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Id., at 686.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. ***Strickland***, at 687; ***State v. Thomas***, 109 Wn.2d 222, 225–226, 743 P.2d 816 (1987). "Surmounting Strickland's high bar is never an easy task." ***Padilla v. Kentucky***, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Counsel's performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's performance was not deficient. *Id.* The court reviews counsel's performance in the context of all of the circumstances presented by the case and the trial. *Id.* at 334–335. Performance is not deficient where counsel's conduct can be characterized as legitimate trial strategy or tactics. ***State v. Kyllo***, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); ***McFarland***, 127 Wn.2d at 336.

a. Deadline for expert witness.

Under the definition given in ***McFarland***, failing to timely file a witness list or give notice of a witness could be "deficient" performance. But the defendant must also show prejudice flowed from this deficiency. In the present case, as argued above, the trial court excluded Dr. Kiesel's testimony because it lacked a sufficient basis, not simply because of late disclosure. The court was willing to admit defense expert testimony

regarding entrance and exit wounds on the victims, provided the testimony had a proper basis. 6 RP 894, (see quotes *supra*). Although the court was displeased that defense counsel had failed to file a timely witness list; that did not preclude the defense from calling a qualified expert witness. Therefore, the defendant cannot demonstrate prejudice from the failure to file a timely witness list.

b. Additional objections to State's closing argument.

The defendant faults his defense attorney because counsel did not object to more of the prosecutor's closing argument. App. Br. at 45. A defense attorney's decision not to object to portions of the prosecutor's closing argument is within the wide range of permissible professional legal conduct. *See* ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 717, 101 P.3d 1 (2004). Lawyers rarely object during closing argument absent egregious misstatements. *Id.* As argued above, the prosecutor's arguments were proper; there was no basis for an objection. Even where the State had perhaps misstated the law, it was not "egregious." The court had properly instructed the jury on the law. Tactically, defense counsel could decide to wait to address and rebut these particular remarks by pointing out the State's erroneous argument and drawing the jury's

attention to the applicable instructions. This was not deficient performance.

The defendant must also show prejudice; that the trial court would have sustained the objection, and this would likely have resulted in a different verdict. The defendant cannot meet this burden. After the prosecutor made his argument, defense counsel had the opportunity to argue the opposite; that there were many doubts in this case, specifically that the State's witnesses were wrong or incredible. This is just what he argued. 10 RP 1301-1330.

7. THERE WAS NO CUMULATIVE ERROR DEPRIVING THE DEFENDANT OF A FAIR TRIAL.

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).

The record of this case, as a whole, shows that the defendant received a fair trial. As argued above, the court correctly ruled on the conduct of the trial, admission of evidence, and instructed the jury. He fails to show the type and amount of cumulative error depriving him of a fair trial.

D. CONCLUSION.

The defendant received a fair trial where he was represented by competent counsel who made proper decisions in conducting the defendant's case. The record reflects that the court and the prosecuting attorney were mindful of, and guided by, this Court's previous opinion in the same case.

The State respectfully requests that the conviction be affirmed.

DATED: JANUARY 5, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas C. Roberts

THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

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.

1/5/15 [signature]

Date Signature

PIERCE COUNTY PROSECUTOR

January 05, 2015 - 2:31 PM

Transmittal Letter

Document Uploaded: 3-459981-Respondent's Brief.pdf

Case Name: STATE V. LARRY E. TARRER

Court of Appeals Case Number: 45998-1

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: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

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

SLOANEJ@NWATTORNEY.NET