# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>AARON GUSTER CLOUD,<br><br>Appellant. | No. 45579-0-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

LEE, J. — A jury convicted Aaron Cloud of drive-by shooting, first degree unlawful possession of a firearm,[1] and first degree assault. He appeals, arguing that the State presented insufficient evidence to support a guilty verdict for first degree assault, and that the trial court erred by excluding evidence related to flight and other suspects. In Cloud's statement of additional grounds[2] (SAG), he argues that (1) the trial court erred by admitting impeachment evidence, (2) the trial court erred by admitting identification evidence, (3) he received ineffective assistance of counsel, (4) the prosecutor committed misconduct during closing arguments, (5) the trial court improperly instructed the jury, and (6) cumulative error requires reversal.

[1] Cloud does not challenge his conviction of first degree unlawful possession of a firearm.

[2] RAP 10.10.

We hold that the State presented sufficient evidence to support a guilty verdict for first degree assault, and the trial court did not abuse its discretion by excluding evidence. We further hold that the trial court did not err in its evidentiary rulings, Cloud did not receive ineffective assistance of counsel, the prosecutor did not commit misconduct, and the trial court did not improperly instruct the jury. Finally, the absence of any error forecloses the application of the cumulative error doctrine. Accordingly, we affirm.

## FACTS

Michele Ross was driving her Volkswagen Jetta in Bremerton. Ross's Jetta was silver with black wheels. Cloud, who lived with Ross at the time, sat in the front passenger seat. Brandon Egeler sat in the backseat behind Ross. The windows were rolled down in Ross's car.

Ross was in the left turn lane at a stoplight when a truck, driven by Kyle Fortuna, approached to the right. Cloud had a "verbal confrontation" with Fortuna. 3 Verbatim Report of Proceedings (VRP) at 84. Ross turned left, and the truck followed, chasing the Jetta through traffic. As the truck approached the Jetta on the right, Ross slammed on her brakes to let the truck pass. As Ross stopped, Cloud raised his arm and there was "a pop." 3 VRP at 88. Ross turned onto another street to "get away from the truck." 3 VRP at 90.

Fortuna called 911 and reported that he was shot at by a white male with a shaved head in a silver Jetta with black rims. Fortuna arranged to meet police officers at a nearby gas station. Police officers retrieved one bullet from the driver's door panel of Fortuna's truck.

Bremerton Police Officer Jonathon Meador responded to the report of a drive-by shooting. Officer Meador saw Ross's car and blocked the road with his patrol car. Officer Meador saw Cloud "[m]oving around frantically." 4 VRP at 152-53. When Ross stopped at Officer Meador's

car, Cloud opened his door and ran away. Officer Meador heard gunshots as Cloud began to run from the Jetta, and Officer Meador ordered Cloud to stop, but Cloud continued running. Cloud fell as he ran and was eventually stopped. Police searched the area and found a gun near where Cloud fell. The bullet found in Fortuna's truck matched the caliber of the gun found. Test results of the gun and bullet were inconclusive as to whether the gun found fired the bullet found in Fortuna's truck.

The State charged Cloud with drive-by shooting, first degree unlawful possession of a firearm, and first degree assault. The State moved to exclude evidence that Cloud fled from police because of an outstanding Department of Corrections (DOC) warrant, arguing that the evidence was self-serving hearsay. The State also moved to exclude evidence of other suspects, such as Egeler. Cloud objected to both motions.

1. Hearings outside the presence of the jury

During voir dire of Fortuna outside the presence of the jury, the State played a recording of the 911 call. The caller in the 911 call identified himself as Fortuna, and gave his name, address, make and model of his vehicle, and location. Fortuna testified that the information on the recording was accurate. The 911 call also indicated that Fortuna arranged to meet police officers at a nearby parking lot, and officers testified that they actually met Fortuna at a nearby parking lot. The State moved to admit portions of the 911 call for purposes of identification. Cloud objected, but then acknowledged that the portions of the call that identify the shooter as a white male with a shaved head in a silver Jetta were admissible. The trial court granted the State's motion and admitted the portions of the 911 call related to the identification of the shooter and the vehicle.

Also at a hearing outside the presence of the jury, Cloud sought to introduce evidence of his outstanding DOC warrant through testimony of a police officer. The State objected, arguing that the evidence was self-serving hearsay and that the trial court had previously granted the State's motion to exclude the evidence. Cloud argued that the statement was being offered as motive of flight. Cloud stated that the evidence would rebut the State's argument that he fled because of consciousness of guilt. The trial court asked, "[D]o you anticipate offering any evidence aside from the fact that there was a DOC warrant, any other evidence connecting that DOC warrant to the issue of flight?" 7 VRP at 527. Cloud responded: "No." 7 VRP at 527. The trial court found that: "It seems to me if the only information the jury has is that your client had a DOC warrant[,] to argue that that was the basis of the reason he ran, without any other evidence, is speculative." 7 VRP at 527.

Subsequently, again outside the presence of the jury, Cloud sought to admit testimony from the arresting officer, Officer Forbragd, that Cloud made a statement upon arrest to the effect of: "Okay, guys. It's just a DOC warrant. It's only a warrant." 7 VRP at 546. The State objected on the basis of self-serving hearsay and the trial court's prior rulings on motions to exclude the evidence. Cloud, however, argued that the statement was not hearsay. Cloud argued that the statement went "to the state of mind of the defendant at the time of his arrest and his actions prior to his arrest, which is not hearsay. It is not offered for the truth of the matter asserted. In fact, I don't care really that—whether there was or was not a warrant." 7 VRP at 547. The trial court allowed Officer Forbragd's testimony. The State moved to prohibit further explanation or argument about the DOC warrant. The State argued that Officer Forbragd's statement was admitted, but requested that "no evidence be added to that statement to further explain what a DOC

warrant is, why it would be a lesser reason for them to run, anything about three-day sanctions." 8 VRP at 586-87. Cloud responded: "I agree, Your Honor." 8 VRP at 587.

2. Trial

At trial, Ross testified that on the day of the shooting, Cloud was "on edge" and "[u]neasy," and that she was concerned after Cloud and Fortuna's "verbal confrontation." 3 VRP at 78, 84. Ross testified that she never saw a gun, and denied telling Officer Floyd May that "[t]he driver of the truck and [Cloud] got into a dispute, and he pulled a handgun and began shooting at the truck." 3 VRP at 99.

For purposes of impeachment, the trial court allowed Officer May to testify that Ross told him that Cloud and Fortuna "got into a dispute, and Cloud pulled out a handgun and began shooting at the truck" and that she did not know that Cloud had a gun before he started shooting. 4 VRP at 208. The trial court instructed the jury that the testimony could be considered only for the purposes of impeachment.

Fortuna testified at trial. However, he repeatedly testified that he did not recall the events and that he did not want to testify.

During the State's direct examination of Fortuna before the jury, the State played the portions of the 911 call that the trial court ruled admissible. Fortuna testified that he remembered being shot at and that he recognized the silver Jetta as the car involved. Fortuna also testified that he identified Cloud at the scene, but that he felt pressured to do so. Fortuna did not recall telling officers that he saw a passenger's arm stick out of the Jetta's window and shoot at him. Fortuna also denied telling police officers that he saw a gun in Cloud's hand. Fortuna saw the "silhouette

of a gun," heard a gunshot, and "ducked." 4 VRP at 135. This was a scary and traumatic event for Fortuna.

Officer Meador testified that Cloud was the only white male with a shaved head at the scene, and that Egeler had a "medium haircut" but not "a shaved head." 4 VRP at 190. Officer Michael Nelson testified that Fortuna identified Cloud the evening of the shooting.

After the State and Cloud rested, Cloud informed the trial court that he intended to argue that there were two people in the car who matched the physical description of the suspect. The State objected. Cloud argued that the evidence could "go toward the issue of reasonable doubt. Rather than saying there's another suspect, it goes to the issue of reasonable doubt as to whether they got the right suspect." 8 VRP at 583. Cloud claimed that he was entitled to "argue any fact in evidence and bring whatever inferences we can bring to those facts during the course of argument, even if the argument would be that another person is in the position to, meets the description of, and had the opportunity to commit the crime." 8 VRP at 583-84. The trial court ruled that Cloud could

> argue based on what's been presented at trial regarding identity, specifically the testimony of Mr. Fortuna regarding identity, and the other evidence related to identity of those persons in the car. I'm not going to, [defense counsel], allow you to argue at this point that—or make a statement indicating that [Egeler] must have been the shooter because I don't believe the evidence at this point, applying that evidence to *Mak*,[3] that you can argue that he's the other shooter or he wasn't.

8 VRP at 585-86. During Cloud's closing argument, he argued that there was another passenger who may fit the description of the shooter and that the physical description was vague.

The trial court instructed the jury that

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[3] *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986).

> [a] person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that death or a serious physical injury to another person may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally.

Clerk's Papers (CP) at 103 (Jury Instruction 10).

The jury found Cloud guilty as charged. Cloud appeals.

## ANALYSIS

### A. SUFFICIENCY OF THE EVIDENCE—FIRST DEGREE ASSAULT

Cloud argues that the State presented insufficient evidence to show that he acted with intent to inflict great bodily injury. Specifically, Cloud argues that "the evidence that he discharged a firearm at a pursuing vehicle, standing alone, is insufficient to support a conclusion that he acted with the requisite *mens rea* required to sustain a conviction for first degree assault." Br. of Appellant at 17. We disagree.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are deemed equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations

are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Under RCW 9A.36.011(1), to convict Cloud of first degree assault, the State must prove beyond a reasonable doubt that Cloud, with intent to inflict great bodily harm, assaulted the alleged victim with a firearm. First degree assault is a specific intent crime, requiring proof of "intent to produce a specific result, as opposed to intent to do the physical act that produces the result." *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Specific intent may be inferred from all the facts and circumstances, including the manner in which the assault was committed and the nature of the prior relationship between the alleged assailant and the victim. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). "First degree assault does not, under all circumstances, require that the specific intent match a specific victim." *Elmi*, 166 Wn.2d at 215.

Notably, Cloud does not argue that the State presented insufficient evidence that he committed the drive-by shooting. Instead, he argues that the mere act of firing a gun is insufficient to demonstrate that he intended to inflict great bodily harm for purposes of first degree assault.

Based on the evidence presented at trial, a rational trier of fact could have reasonably inferred that Cloud intended to inflict great bodily harm when he shot at Fortuna's truck because Cloud had just had a confrontation with Fortuna at a stoplight, Fortuna was driving the truck, and Cloud shot at the truck. Further, a rational trier of fact could have reasonably inferred that Cloud was aiming at Fortuna because he was the driver of the truck and a bullet from the same caliber gun as the one found was stuck in the driver side door of the truck Fortuna was driving. Thus, because Cloud shot at the driver side of the truck, where he knew that Fortuna was sitting, a rational trier of fact could have reasonably inferred that Cloud intended to inflict substantial bodily injury.

*See State v. Woo Won Choi*, 55 Wn. App. 895, 899, 906, 781 P.2d 505 (1989) (analyzing a different statute, held sufficient evidence supported the jury's verdict to find specific intent to kill where following an altercation at a restaurant and while driving, the defendant shot at the victim through an open car window and the victim ducked out of the way), *review denied*, 114 Wn.2d 1002 (1990). Because a rational trier of fact could have found beyond a reasonable doubt that Cloud intended to inflict great bodily harm on Fortuna when Cloud shot at Fortuna, Cloud's argument that the State presented insufficient evidence fails.

Cloud relies on *State v. Ferreira*, arguing that "the court held that the use of a firearm to assault another was alone insufficient to constitute substantial evidence of an intent to inflict great bodily injury." Br. of Appellant at 23; *State v. Ferreira*, 69 Wn. App. 465, 469, 850 P.2d 541 (1993). Cloud mischaracterizes the holding in *Ferreira*. There, the defendant fired shots into a house, but the trial court rejected findings that the defendant "actually saw anyone inside the house" or that he "fired at 'occupied areas' of the house." *Ferreira*, 69 Wn. App. at 469. The court held that the evidence was insufficient to establish the defendant's intent to inflict great bodily harm.[4] *Ferreira*, 69 Wn. App. at 469.

Unlike *Ferreira*, Cloud knew that Fortuna was in the truck and he shot at the occupied area of the truck. Cloud knew that the vehicle was occupied because he had just had an exchange with the driver. Further, Cloud shot at the occupied area of the truck, striking the driver side door. Accordingly, *Ferreira* is inapplicable.

[4] The court held that the evidence supported a finding that the defendant intended to create apprehension or fear, supporting a conviction of second degree assault. *Ferreira*, 69 Wn. App. at 469-70.

Cloud also relies on *State v. Mitchell*,[5] and *State v. Choi*.[6] However, *Mitchell* and *Choi* have been rejected by *State v. Anderson*. 72 Wn. App. 453, 458-59, 864 P.2d 1001 (1994). In *Anderson*, the defendant was convicted of first degree assault. *Anderson*, 72 Wn. App. at 457. The defendant argued on appeal that the evidence was insufficient to support his first degree assault conviction, relying on cases "decided under former versions of the first degree assault statute," including *Choi* and *Mitchell*. *Anderson*, 72 Wn. App. at 458. Division One of this court held:

> Predecessors to the current first degree assault statute required proof of intent to kill . . . but the present version of the statute, effective July 1, 1988, requires only an intent to inflict great bodily harm. . . . Given the different intent requirements between the former and current statutes, we do not find the decisions cited by Anderson persuasive on the issue of sufficiency of the evidence here.

*Anderson*, 72 Wn. App. at 458-59 (internal citations omitted). The cases cited by Cloud are not persuasive on the issue of sufficiency.

B. EVIDENTIARY ISSUES

We review a trial court's decision to exclude or admit evidence for an abuse of discretion. *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons. *Id.* at 283-84. An abuse of discretion is found when "no reasonable person would take the view adopted by the trial court." *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). "Appellate courts cannot substitute their own reasoning for the trial court's reasoning, absent an abuse of discretion." *Lord*, 161 Wn.2d at 295.

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[5] *State v. Mitchell*, 65 Wn.2d 373, 397 P.2d 417 (1964).

[6] *Woo Won Choi*, 55 Wn. App. 895. .

Criminal defendants have a constitutional right to present evidence in their own defense. *State v. Hawkins*, 157 Wn. App. 739, 750, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). But, the evidence must be relevant; there is no constitutional right to present irrelevant evidence. *Lord*, 161 Wn.2d at 294. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

1. Exclusion of evidence regarding Cloud's outstanding DOC warrant

Cloud argues that the trial court denied him his right to present exculpatory evidence.[7] Specifically, Cloud argues that the trial court erred by excluding evidence of the existence of his DOC warrant because it was relevant to rebut the State's claim that Cloud ran out of a "consciousness of guilt" and it supported Cloud's claim that he fled from police because of an outstanding warrant. Br. of Appellant at 29. We disagree.

Cloud contends that although the court allowed him to present evidence of his statement to police about the existence of a DOC warrant when he was arrested, that statement "was obviously self-serving and probably not credible in the eyes of the jury,[8] particularly given the lack of any evidence presented that there actually was an outstanding warrant." Br. of Appellant at 30.

Cloud elicited testimony from Officer Forbragd that when Cloud was arrested, Cloud said, "Okay, guys. It's just a DOC warrant. It's only a warrant." 7 VRP at 546. Cloud argued that the statement was admissible as evidence of his state of mind when he was arrested, and stated, "It is not offered for the truth of the matter asserted. In fact, I don't care really that—whether there was

[7] Cloud does not provide any citation to the record to support his argument.

[8] The credibility of evidence is a question reserved for the jury. *See Camarillo*, 115 Wn.2d at 71.

or was not a warrant. It has to do with his state of mind at the time he was arrested." 7 VRP at 547.

Essentially, Cloud is arguing that although he explicitly told the trial court that he was not offering his statement about the DOC warrant for the truth of the matter asserted, he should have been allowed to prove the truth of the matter asserted. We reject Cloud's argument based on invited error.

Under the invited error doctrine, a defendant may not make a tactical decision and later rely on that decision as the basis for reversal. *State v. Mercado*, 181 Wn. App. 624, 629-30, 326 P.3d 154 (2014). Moreover, Cloud "cannot change theories of admissibility on appeal." *State v. Pavlik*, 165 Wn. App. 645, 651, 268 P.3d 986 (2011), *review denied*, 174 Wn.2d 1009 (2012). Accordingly, Cloud's argument that the trial court erred by excluding evidence that Cloud expressly stated he was not offering fails.

To the extent that Cloud argues the trial court erred by not allowing him to elicit testimony from Detective Gray regarding Cloud's DOC warrant, that argument also fails. During cross-examination of Detective Crystal Gray, Cloud sought to admit evidence from Detective Gray that Cloud was arrested and booked for the charges in this case and because of an outstanding DOC warrant. The State objected, and Cloud argued that the testimony should be admissible "for purpose of intent on flight." 7 VRP at 526. The trial court asked Cloud: "To what extent are you going to tie in the fact that there was a warrant to that being the causation of flight? . . . do you anticipate offering any evidence aside from the fact that there was a DOC warrant, any other evidence connecting that DOC warrant to the issue of flight?" 7 VRP at 526-27. Cloud responded: "No." 7 VRP at 527. The trial court sustained the State's objection, and ruled that "if the only

information the jury has is that your client had a DOC warrant to argue that that was the basis of the reason he ran, without any other evidence, is speculative." 7 VRP at 527.

Cloud argues that the trial court erred by not allowing him to offer evidence connecting the DOC warrant to the issue of flight, even though Cloud told the court that beyond Detective Gray's testimony, he was not planning on offering evidence connecting the DOC warrant to the issue of flight. Thus, Cloud complains that the trial court excluded evidence that Cloud said he was not offering. Cloud's argument fails. *See Mercado*, 181 Wn. App. at 629; *see also Pavlik*, 165 Wn. App. at 651.

2. Exclusion of argument that Egeler was the shooter

Cloud argues that the trial court erred by not allowing him to argue that Egeler was the shooter.[9] Cloud's argument fails.

After the State and Cloud had rested, Cloud informed the trial court that in closing arguments, he intended to argue that there were two people in the car who matched the physical description of the suspect. Cloud stated that he did not intend to argue that Egeler was likely the shooter because he may have fit the physical description of the shooter. Cloud noted that "[r]ather than saying there's another suspect," the evidence that "there are potentially more suspects . . . goes to the issue of reasonable doubt as to whether they got the right suspect." 8 VRP at 583.

The trial court ruled that Cloud could "argue based on what's been presented at trial regarding identity, specifically the testimony of Mr. Fortuna regarding identity, and the other evidence related to identity of those persons in the car" but that Cloud could not argue that "Egeler must have been the shooter." 8 VRP at 585-86.

[9] Cloud does not provide any citation to the record to support his argument.

In closing arguments, Cloud argued that there was another passenger who may fit the description of the shooter and that the physical description was vague. On appeal, Cloud argues that the trial court erred by not allowing him to argue that Egeler was the shooter. However, Cloud represented to the trial court that he was not going to argue that Egeler was the shooter. Thus, Cloud claims that the trial court erred by excluding argument that he represented to the trial court that he did not want to argue. Therefore, Cloud invited the trial court's alleged error. *See Mercado*, 181 Wn. App. at 629-30. Cloud's claim that the trial court erred by excluding argument that he did not intend to make fails.

C. SAG ISSUES

While a defendant is not required to cite to the record or authority to support issues raised in his SAG, he must still "inform the court of the nature and occurrence of [the] alleged errors." RAP 10.10(c). We are not required to search the record to find support for defendant's claims, nor will we consider matters outside the record. RAP 10.10(c); *State v. McFarland*, 127 Wn.2d 322, 335, 338 n.5, 899 P.2d 1251 (1995).

1. Evidentiary issues[10]

We review a trial court's decision to admit evidence for an abuse of discretion. *Lord*, 161 Wn.2d at 294. A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons. *Id.* at 283-84. An abuse of discretion is found when "no reasonable person would take the view adopted by the trial court." *Atsbeha*, 142 Wn.2d at 914. "Appellate courts

[10] To the extent that Cloud's SAG argues that the trial court erred by excluding evidence of Egeler as the shooter, this argument is addressed above, at section B 2.

cannot substitute their own reasoning for the trial court's reasoning, absent an abuse of discretion." *Lord*, 161 Wn.2d at 295.

a. Michelle Ross's statements to Officer May

Cloud argues that the trial court erred by allowing Officer May's testimony to impeach Ross.[11] We disagree.

Under ER 613, a prior inconsistent statement of a witness may be admissible. In effect, the earlier inconsistent statement is not offered to prove the truth, but rather to show that trial testimony is unreliable. *State v. Garland*, 169 Wn. App. 869, 885, 282 P.3d 1137 (2012). Generally, a witness's prior statement is admissible for impeachment purposes if it is inconsistent with the witness's trial testimony. *Id.*

Cloud argues that he does not challenge "the procedure that took place to impeach [Ross]"; rather, he challenges "the purpose for which the State impeached [Ross]." SAG at 2. Cloud argues that the State's purpose in offering Officer May's testimony was to introduce inadmissible hearsay evidence—not to impeach Ross.[12] Cloud contends that the State's improper purpose is evidenced by the fact that the State's evidence is unreliable and untrustworthy.

Cloud's argument, however, supports the State's purpose of impeaching Ross. The State offered impeachment evidence to convey to the jury that Ross's testimony was not reliable. There

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[11] To the extent that Cloud argues that the jury was unable to make "the subtle distinction between impeachment and substantive evidence," his argument fails. SAG at 2. The trial court gave a proper limiting instruction, and we presume that the jury follows the court's instructions. *State v. Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007).

[12] Cloud also claims that the State relied on Officer May's testimony as substantive evidence. This claim is belied by the record. In closing argument, the State cited Ross's in-court testimony, and referenced impeachment evidence in reminding the jury to weigh Ross's credibility.

is no evidence in the record that the State knew that Ross would be an unhelpful witness or that the State called Ross as a witness solely to introduce inadmissible hearsay. Cloud's claim fails.

b. 911 call

Cloud argues that the trial court erred by admitting the excerpts of the 911 call for purposes of identification. Specifically, Cloud argues that he was unable to cross-examine Fortuna, as the declarant, because Fortuna testified that he did not remember calling 911. Further, Cloud argues that the 911 call was not authenticated and it could have been fabricated. We disagree.

"A pretrial identification of the accused is admissible as substantive evidence of identity despite the witness's inability to make an in-court identification." *State v. Grover*, 55 Wn. App. 923, 930, 780 P.2d 901 (1989) (quoting *State v. Hendrix*, 50 Wn. App. 510, 514, 749 P.2d 210 (1988)), *review denied*, 114 Wn.2d 1008 (1990). A statement is not hearsay if "[t]he declarant testifies at the trial . . . and is subject to cross examination concerning the statement, and the statement is . . . (iii) one of identification of a person made after perceiving the person." ER 801(d)(1). Furthermore, "admission of testimony concerning an out-of-court identification of the defendant by a witness who could not remember making the identification" does not violate the Sixth Amendment right of confrontation or ER 802. *Grover*, 55 Wn. App. at 933 (citing *United States v. Owens*, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988)). The Sixth Amendment "guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Grover*, 55 Wn. App. at 933 (quoting *Owens*, 484 U.S. at 559). "The weapons available to impugn the witness's statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." *Owens*, 484 U.S. at 560.

In *Grover*, the witness testified that she did not remember identifying the defendant at the scene. 55 Wn. App. at 931. A detective testified that he had interviewed the witness at the scene of a robbery and that the witness identified the co-defendants "as the robbers." *Id.* at 931. The trial court admitted the detective's testimony under ER 801(d)(1)(iii). The *Grover* court held that "extrajudicial statements of identification are not hearsay even though the declarant fails to identify the defendant at trial." *Id.*. Such evidence "does not present the dangers of hearsay as long as the witnesses are 'present in court and subject to . . . cross-examination.'" *Id.* at 932 (alteration in the original) (quoting *State v. Simmons*, 63 Wn.2d 17, 22, 385 P.2d 389 (1963)).

Here, the 911 recording was offered as identification of the shooter and the description of the car at the time of the shooting. Fortuna's inability to recall the events does not render the 911 call inadmissible. Fortuna testified and was subject to cross-examination by Cloud. Accordingly, Cloud's claim that the 911 call violated his right to confrontation fails under *Grover*.

At trial, Cloud did not object to the 911 call based on lack of authentication. Therefore, Cloud waived the error on appeal. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009); RAP 2.5(a)(3). "We will not reverse the trial court's decision to admit evidence where the trial court rejected the specific ground upon which the defendant objected to the evidence and then, on appeal, the defendant argues for reversal based on an evidentiary rule not raised at trial." *Powell*, 166 Wn.2d at 82; RAP 2.5(a)(3). Accordingly, Cloud's claim that the trial court erred by admitting the 911 call because the 911 call was not authenticated fails.

2. Ineffective assistance of counsel

Cloud contends that he received ineffective assistance of counsel because defense counsel failed to investigate Egeler as an alternative suspect, order independent testing of the DNA gathered from the gun, or test for gunshot residue. We disagree.

We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Id.* at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Id.* "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)). "To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different." *Id.*

Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *In re the Matter of Pers. Restraint of*

*Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). Defense counsel must "'at a minimum, *conduct a reasonable investigation*'" to make informed decisions about his representation of his client. *Id.* at 721.

Cloud claims that defense counsel's performance was deficient because he did not interview Egeler or conduct additional testing on the evidence. Nothing in the record on appeal supports Cloud's claim that defense counsel did not interview Egeler or did not conduct additional testing. Further, the record does not show what steps defense counsel took in preparing for trial. For purposes of a claim of ineffective assistance of counsel raised in the direct appeal of a criminal conviction, we will not consider matters outside the record. *McFarland*, 127 Wn.2d at 338, n.5. Thus, the record is insufficient for us to make a determination as to whether defense counsel's performance was deficient.

However, even if we assume that defense counsel was deficient for failing to investigate and the decision not to investigate was not a legitimate trial tactic, Cloud fails to show that additional testing or testimony would have yielded more favorable results. Thus, Cloud fails to show that defense counsel's performance was deficient or that he was prejudiced by defense counsel's performance. Therefore, Cloud's claim of ineffective assistance of counsel fails.

3. Prosecutorial misconduct

Cloud contends that the State committed prosecutorial misconduct by (1) disparaging defense counsel; (2) misstating the reasonable doubt standard; (3) offering "IMPROPER OPINION"; (4) vouching for the credibility of the State's witnesses; and (5) arguing facts not in evidence. SAG at 39. We disagree.

To prevail on a claim of prosecutorial misconduct, Cloud must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Once a defendant has demonstrated that the prosecutor's conduct was improper, we evaluate the defendant's claim of prejudice under two different standards of review, depending on whether the defendant objected to the misconduct at trial. *Id.* at 760. If the defendant objected, he must "show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Id.* at 760.

"If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct" was flagrant and ill intentioned. *Id.* The defendant is presumed to have waived any error by not objecting because objections are required to prevent additional improper remarks and abuse of the appellate process. *Id.* at 762. Therefore, when there is no objection, we apply a heightened standard requiring the defendant to 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 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). When reviewing a prosecutor's misconduct that was not objected to, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762.

"In closing argument, a prosecutor is afforded wide latitude to draw and express reasonable inferences from the evidence." *State v. Reed*, 168 Wn. App. 553, 577, 278 P.3d 203, *review denied,* 176 Wn.2d 1009 (2012). When analyzing prejudice, we do not look at the comment in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions

given to the jury. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008).

A prosecutor commits misconduct when he or she uses the "'prestige of his public office . . . against the accused.'" *In re the Matter of Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 706, 286 P.3d 673 (2012) (quoting *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011)). Further, a prosecutor's statements that malign or impugn defense counsel are impermissible. *State v. Lindsay*, 180 Wn.2d 423, 432, 326 P.3d 125 (2014). Prosecutors are allowed to respond with remarks that would otherwise be improper when the response is invited by the defense counsel's argument, "unless the remarks are not a pertinent reply." *State v. Jones*, 144 Wn. App. 284, 300, 183 P.3d 307 (2008). A prosecutor's closing argument improperly vouches for a witness's credibility when it is clear the prosecutor is not arguing an inference from the evidence, but instead is expressing a personal opinion about credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

a. Disparaging defense counsel and misstating the reasonable doubt standard

Cloud claims that the State committed misconduct during its rebuttal closing argument because it disparaged defense counsel and "eroded" reasonable doubt. SAG at 37. Cloud did not object below to the comments he now complains of. Cloud's claims fail.

Cloud argued to the jury in closing that:

> You have to be convinced, each and every one of you, beyond a reasonable doubt in order to convict. You have to be convinced, each and every one of you, of each element of every crime in order to convict. Each crime—excuse me—you have to be convinced beyond a reasonable doubt for each element of a crime to convict for that crime.
>
> . . . .

> Any reasonable doubt based on any piece of evidence or lack thereof that causes you to question guilt is enough; and, in fact, you would then be required to find a not guilty verdict, and I thank you very much.

8 VRP at 655-56. The State started its rebuttal closing argument:

> [Defense counsel] just finished up explaining to you, and I—I don't think he intended to, but he's not telling you the law correctly. He's telling you that any piece of evidence may cause reasonable doubt or any lack of piece of evidence. There's a part missing from that analysis, there's a part that as jurors, as judges of the facts, that was not also included with that explanation, speaking of something missing.
>
> What's missing is that evidence needs to relate to a fact that must be proven. There are going to be many things that you may have issue with in the presentation of evidence, but whether or not it relates to an element that must be proven is what you must weigh, not simply that, well, that may or may not have happened. Like the issue about when Aaron Cloud got out of the car and there was a gunshot heard, could be a firecracker or could have been that gun. It doesn't matter. It doesn't matter. Does it help you in any of the elements of the possession of the firearm? No.
>
> . . . .
>
> Don't just decide, oh, well, that piece of evidence just doesn't quite fit the puzzle, so, therefore, the singular reason why I must find reasonable doubt. No. It must be compared to the elements of the crimes charged and relate.

8 VRP at 657-58.

Because Cloud did not object, he is presumed to have waived the error because objections are required to prevent additional improper remarks and abuse of the appellate process. *Emery*, 174 Wn.2d at 762. Therefore, because there was no objection, we apply a heightened standard requiring Cloud to 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 (quoting *Thorgerson*, 172 Wn.2d at 455).

Cloud does not offer argument or authority to support his assertion that the prosecutor's rebuttal argument disparaged defense counsel. Accordingly, we do not address his claim. *See* RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). To the extent that the prosecutor commented on defense counsel's statement of the law, the jury was properly instructed on the law, the applicable burden of proof, and that the parties' arguments are not evidence. We presume that the jury follows instructions. *State v. Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007), *review denied*, 163 Wn.2d 1041 (2008). Thus, Cloud's claims fail.

b. Improper vouching and opinion, and arguing facts not in evidence

Cloud claims that the prosecutor committed misconduct by vouching for facts not in the record and facts that he knew were false. Cloud did not object to any of the statements he alleges constitute improper vouching. Cloud's claims fail.

Cloud contends that during closing arguments, the prosecutor "opined on [Cloud's] state of mind and polluted the jury." SAG at 40. He argues that the prosecutor "vouched for facts not in the record" when the prosecutor argued that Cloud intended to cause great bodily injury when he fired a shot at Fortuna, that Cloud "lined a shot up" to "put a bullet in" Fortuna and fired at Fortuna, and that Fortuna was uncomfortable being in the same room as Cloud. SAG at 39. Cloud contends that "[n]o one ever testified" to these facts. SAG at 39.

A prosecutor is permitted to make arguments based on reasonable inferences from the evidence. *Reed*, 168 Wn. App. at 577. Here, the prosecutor was drawing on the evidence in the record to support the State's theory of the case that Cloud shot at Fortuna, not vouching for facts not in evidence as Cloud contends. The 911 call identified the shooter as a white male with a

shaved head. Police officers testified that Cloud was the only white male with a shaved head when they stopped Ross's Jetta. Ross testified that Cloud was in the front seat of the Jetta and that Cloud had a dispute with Fortuna at a stoplight. Police testified that they found the gun on the street where Cloud fell as he fled from the Jetta. Further, a bullet, matching the caliber of the gun found, was retrieved from the driver side door of Fortuna's truck. The prosecutor argued that based on the evidence, it is reasonable to infer that Cloud, sitting in the front seat of Ross's car, shot at Fortuna. It also is reasonable to infer that Fortuna was uncomfortable in court because Fortuna testified that he did not want to testify and that the shooting was a scary and traumatizing event. Cloud's argument that the prosecutor improperly vouched for facts not in the record fails.

Cloud also argues that the prosecutor committed misconduct during closing arguments when he said that "when it comes to identifying that person in court—[Fortuna] couldn't remember." SAG at 42 (citing 8 VRP at 593). Cloud contends that the "testimony in trial was that Mr. Cloud was definitely not the man who shot Mr. Fortuna." SAG at 42. However, Cloud's argument is not supported by the record and mischaracterizes Fortuna's testimony. The State asked Fortuna whether he recognized Cloud and he responded, "No." 3 VRP at 51. Fortuna testified that he did not recognize Cloud, and that he did not remember reporting that he had been shot at. Cloud did not testify definitively that Cloud did not shoot at him. Cloud's assertion that the prosecutor argued facts not in the record also fails.

Further, to the extent that Cloud argues that the prosecutor impermissibly relied on the 911 call as substantive evidence, that argument fails.[13] Cloud agreed that the 911 call could be admitted

[13] Cloud argues that the prosecutor "wrongly tells the jury that identification of [Cloud] . . . is substantive evidence to be considered." SAG at 44 (citing 7 VRP at 538). However, the State's argument that the 911 call information is substantive evidence was made outside of the presence

for identification purposes. The 911 call was admitted as a pretrial identification of Cloud, which "is admissible as substantive evidence of identify despite [Fortuna's] inability to make an in-court identification." *Grover*, 55 Wn. App. at 930.

Cloud does not present evidence that the prosecutor disparaged defense counsel, misstated the burden of proof, offered improper opinions, vouched for witnesses, or relied on facts not in evidence. Accordingly, his claim of prosecutorial misconduct fails.

4. Jury Instruction 10

Cloud argues that jury instruction 10 lessened the State's burden of proof because it omitted an essential element of the charged offense. Specifically, Cloud contends that jury instruction 10 "omitted" the "knowledge requirement," and "failed to require consciousness of wrongdoing." SAG at 47. We disagree.

Cloud did not object to the jury instruction below. Generally, a defendant cannot challenge a jury instruction on appeal if he did not object to the instruction in the trial court. *State v. Salas*, 127 Wn.2d 173, 181-82, 897 P.2d 1246 (1995). A defendant can raise such an error for the first time on appeal if the instruction involves a manifest error affecting a constitutional right. *Id.* at 182. Instructing the jury in a manner that relieves the State of its burden of proof is an error of constitutional magnitude that a defendant can raise for the first time on appeal. *State v. Byrd*, 125 Wn.2d 707, 714, 887 P.2d 396 (1995). We review alleged errors of law in jury instructions de novo. *State v. Hayward*, 152 Wn. App. 632, 641-42, 217 P.3d 354 (2009).

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of the jury. Moreover, the 911 call was "admissible as substantive evidence of identity despite [Fortuna's] inability to make an in-court identification." *See Grover*, 55 Wn. App. at 930.

Generally, the State must prove every element of an offense charged beyond a reasonable doubt. *State v. Wheeler*, 145 Wn.2d 116, 120, 34 P.3d 799 (2001). To convict Cloud of drive-by shooting, the State had to prove that Cloud "recklessly discharged a firearm" and "[t]hat the discharge created a substantial risk of death or serious physical injury." CP at 107 (Instruction 14). Thus, the knowledge requirement for a drive-by shooting is "recklessly."

As a threshold matter, Cloud's claim that jury instruction 10 omitted the "knowledge requirement" is belied by the record. Jury instruction 10 was the definition of "recklessly," the knowledge requirement of the charged offense. CP at 103.

To the extent that Cloud argues that jury instruction 10 is invalid and relies on *Hayward*, Cloud's argument fails because *Hayward* is distinguishable. In *Hayward*, the defendant was charged with second degree assault. 152 Wn. App. at 639. There, the trial court instructed the jury that to convict the defendant, it had to find that he "intentionally assaulted" and "thereby recklessly inflicted substantial bodily harm" on the alleged victim. *Id.* at 640. The trial court's instructions in *Hayward* defined "recklessness" as:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> *Recklessness also is established if a person acts intentionally.*

*Hayward*, 152 Wn. App. at 640 (emphasis added). On appeal, the court concluded that the second statement in the recklessness jury instruction, that "[r]ecklessness also is established if a person acts intentionally," was defective and improperly collapsed the two discrete elements. *Id.* at 645 (alteration in original). The court found that the "instruction conflated the intent the jury had to find regarding [the defendant's] assault against [the alleged victim] with an intent to cause

substantial bodily harm" required by the recklessness mental state into a single element. *Id.*. The discrete elements—intentional assault and reckless infliction of substantial bodily harm—at issue in *Hayward*—are not at issue here.

Here, the recklessness jury instruction was given in conjunction with the drive-by shooting charge. The trial court instructed the jury that to convict Cloud of drive-by shooting, it had to find that he (1) "recklessly discharged a firearm" and (2) "[t]hat discharge created a substantial risk of death or serious physical injury to another person." CP at 107 (Jury Instruction 14). The mens rea required under the to-convict instruction is recklessness, which Cloud does not challenge.

Moreover, the recklessness instruction given here was not the same as the instruction at issue in *Hayward.* The instruction given here is more closely analogous to the instruction given in *State v. McKague*, 159 Wn. App. 489, 510, 246 P.3d 558 (holding that a trial court may avoid the problem in *Hayward* by giving a correct "recklessness" instruction, which does not create mandatory presumption), *aff'd*, 172 Wn.2d 802, 262 P.3d 1225 (2011). The "recklessness" instruction at McKague's trial provided: "When recklessness as to a particular fact is required to establish *an element* of a crime, *the element* is also established if a person acts intentionally or knowingly." *Id.* at 509. The *McKague* court expressly held that this instruction removed the problematic language in *Hayward. Id.* at 510. Because instruction 10 did not conflate the required elements, Cloud's challenge to jury instruction 10 fails.

5. Cumulative error

Cloud argues that his convictions should be reversed because of cumulative error. The cumulative error doctrine states: "'[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined

prejudicial effect.'" *Lindsay*, 180 Wn.2d at 443 (alteration in original) (quoting *In re Glasmann*, 175 Wn.2d at 707). Cloud's claim fails because he has failed to demonstrate any single instance of error.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, P.J.

Sutton, J.