

63936-6

63936-6

NO. 63936-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FILMON T. HABTEMARIAM,
Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the court err by not suppressing some of the defendant's pre-trial statements where the court found the defendant, after having been properly advised of his rights, waived those rights and did not unequivocally request counsel?

2. Was any error in not suppressing some of the defendant's statements harmless beyond a reasonable doubt?

3. Did the defendant receive ineffective assistance of counsel, where counsel failed to impeach the State's primary witness with a misdemeanor conviction?

4. Did the court abuse its discretion by declining to grant a mistrial when, after defendant admitted that he and the victim were drug dealers, the State asked defendant if he was mad at the victim for selling drugs to defendant's clients?

5. Where there is no possibility that any error individually or combined with other errors affected the outcome of the trial, does the cumulative error doctrine warrant granting a new trial?

II. STATEMENT OF THE CASE

On July 7, 2008, defendant was at McCabe's bar in Everett, Washington. His cousin, the victim, and Joseph Cobbs, a close friend of the victim's, met defendant there. When the bar was

ready to close on July 8 at about 2 a.m., the victim agreed to give defendant a ride back to defendant's residence. The victim got behind the wheel of his car, defendant got in the rear seat behind the victim, and Mr. Cobbs got in the front passenger seat. 6/2 RP 60-68.

When the car approached the Tamaron Ranch Apartments in Lynnwood where defendant was staying, defendant said, "you can drop me off here." The car slowed down. Defendant fired three shots into the back of his cousin's head, killing him. Defendant jumped out of the still moving car. Mr. Cobbs saw a gun in defendant's hand as he got out of the vehicle. The vehicle then crashed into a fence near the apartment complex. 6/2 RP 72-73, 75.

Mr. Cobbs saw defendant run off. 6/2 RP 74. One of the residents of the apartment complex, hearing the crash, looked out his window. He saw a slender black man, wearing a blue button-up shirt, walking away from the crashed car. The man appeared to be crouching down behind parked cars. When the resident yelled at him, the man stood up straight and walked into the apartment complex. 6/3 RP 122-24.

When the police arrived on the scene, they found the victim was dead. Mr. Cobbs gave them defendant's name and description as the person who had murdered the victim. The resident who had seen someone walking away pointed the officers in the direction that person had gone. 6/3 RP 130.

A K-9 unit began tracking in the direction defendant had gone. On the track, they discovered a "9 x 18 Makarov" handgun hidden in a bush at the entrance to defendant's apartment building. 6/3 RP 252. That gun was identified as the one that killed the victim. 6/8 RP 599. It belonged to defendant's roommate. 6/3 RP 181. The roommate was keeping the gun in the trunk of his car. Defendant used the car several times a week. On the morning of July 5, 2008, the roommate reported to the police that the gun had been stolen. 6/3 RP 179-81. Defendant testified that earlier on July 7, the gun was still in the trunk of the car, and defendant loaded it to take with him on a drug deal. 6/9 RP 723, 730.

A short time after the gun was discovered, one of the containment officers saw defendant walking in the vicinity of the murder. Since he matched the general description the officer had been given, the officer stopped defendant and talked to him. Defendant provided the officer with identification. The officer

received a more detailed description, which defendant fit, so he arrested defendant. The officer told defendant he was a suspect in a murder investigation. 12/4 RP 40.

Mr. Cobbs was brought to defendant's location. He positively identified defendant as the murderer. The officer then took defendant to the scene of the murder. When they arrived, the officer advised defendant of his Miranda¹ rights using his issued rights warning card. A copy of the card was admitted as Exhibit 1. 12/4 RP 62, 2 CP.² Defendant said he understood his rights. 12/4 RP 30-31. Defendant did not request an attorney at that time. 12/4 RP 41-42, 43.

Defendant was taken to the Snohomish County Sheriff's Office, South Precinct, where he was interviewed by two detectives. The lead interviewer read defendant his Miranda rights again from his issued rights warning card. Defendant said he did and did not understand his rights. Defendant then said he did understand his rights, but did not understand why he was in custody. 12/4 RP 62-

¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1996).

² The State has designated Exhibit 1 from the CrR 3.5 hearing.

64. After several attempts to clarify whether defendant was willing to talk to the officers, defendant said he would talk. 12/4 RP 66.

It then appeared that defendant was “having a dialogue with himself.” He asked “Do I have warrants.” Defendant then answered his own question, “Well, no. I just got out of jail. I know I don’t have any warrants.” Defendant then asked, “did you find any dope in my pockets?” He answered, “No, I know I didn’t have any dope in my pockets.” 12/4 RP 66-67.

After spontaneously telling the officers that he was “coming down off his drunk,” he “had a mental disorder,” and that “the current situation was in violation of [his] rights,” defendant asked, “is there an attorney I can talk to or something.” The officer asked defendant if he was requesting an attorney at that point. Defendant responded, “Why would I want to talk to a lawyer?” The detectives did not believe defendant was requesting a lawyer at that time. 12/4 RP 63, 69, 71-72.

The detectives stopped the interview and got defendant the food and cigarettes he had asked for. Another officer watched defendant while the detective went to get the food. After defendant ate, he went outside and smoked a cigarette. 12/4 RP 73-77. While outside, defendant denied being involved in a murder. 6/4

RP 427. When asked if someone could prove he wasn't there when the murder happened, all defendant said was that he was with a good friend. When pressed for the friend's name, defendant said, "all he was going to tell me was that his friend's name was Kevin and that he didn't want me talking to him." 6/4 RP 427-28. When the detective confronted defendant with the fact that he had been identified as the murderer by Mr. Cobbs, defendant said "I don't care, go ahead and do whatever it is you need to do." 6/4 RP 429.

Defendant then asked, "Can I speak to my lawyer, please." The detectives understood that as an unequivocal request for counsel and stopped the interview. Defendant was then placed in a holding cell and put in contact with the after-hours public defender. 12/4 RP 48-79.

Defendant was charged with first degree murder while armed with a firearm, Count I, possession of a stolen firearm, Count II, second degree unlawful possession of a firearm, Count III, and tampering with a witness, Count IV. 1 CP 169.

Before trial, the court held a hearing on the admissibility of defendant's statements to the police. In addition to the statements set out above, the State introduced evidence that on July 5, 2008,

defendant was arrested for first degree driving while license suspended. After defendant was arrested, he was advised of his Miranda rights and waived them. 12/4 RP 68. A second officer then interviewed defendant with a view towards having him become a confidential informant. He told defendant he had information that defendant was dealing drugs. Defendant became visibly angry and stopped the interview. 12/4 RP 12.

The court entered oral findings of fact and conclusions of law. In discussing defendant's question about speaking to an attorney, the court concluded:

at best this was an equivocal request for an attorney on the part of the defendant. The detective did not need at that point in time to stop; the interrogation, and in fact the detective made certain that the defendant was not asking for an attorney, and the defendant, as I've indicated, emphatically said that he was not.

12/9 RP 149. The court ruled that all statements made to the detectives were admissible. 12/9 RP 151.

The court entered written findings of fact and conclusions of law. It found as an undisputed fact that defendant asked "Is there an attorney I can talk to or something?" 1 CP 164. The court concluded the question "Is there an attorney I can talk to or

something?” was an equivocal request for counsel, under the circumstances. 1 CP 166.

When the trial started, the State moved, in limine, to introduce evidence from the victim's brother that defendant was upset with the victim because another family member was “purchasing his drugs from the deceased instead of purchasing them from the defendant.” 6/2 RP 13. The court deferred ruling until it heard the basis of the witness's knowledge of the dispute. 6/2 RP 20.

The witness testified out of the presence of the jury. He testified defendant was mad at the victim because the defendant's brother David, or Dawit, stopped buying drugs from defendant and started buying them from the victim. The witness denied hearing about the dispute from either the victim or defendant. Instead, he testified he knew about David's switching to the victim “Because David always was around us and not around his brother.” 6/3 RP 103-04. The court ruled that evidence of defendant's drug dealing as a motive for the murder was inadmissible. The court then said, “Now, if, for instance, the defendant testifies and brings into issue the fact that he says he was dealing crack around or during the time of the murder, my opinion would change.” 6/3 RP 109-110.

Defendant moved, in limine, to be permitted to ask Mr. Cobbs about some felony convictions and a gross misdemeanor conviction for filing a false statement. 6/2 RP 49. The court ruled the felony convictions were not relevant on the issue of the witness's credibility. The court also ruled the gross misdemeanor conviction was admissible and could be inquired into. 6/2 RP 52-53. When cross-examining Mr. Cobbs, defendant's counsel asked if he was on parole. The witness answered he was on probation. 6/2 RP 83. The witness was not asked about the filing a false statement conviction.

The witnesses testified as set out above. In addition, the victim's brother testified that a couple of weeks before the murder, he, the victim, and other family members were in a bar in Shoreline. Defendant was also there. He told the victim, the testifying brother, and defendant's own brother that he was going to kill them because they "was a disgrace to the Habtemariams." 6/4 RP 331-32.

An expert in blood splatter also testified. It was his opinion that Mr. Cobbs was not the shooter, because the splatter pattern on the coat worn by Mr. Cobbs showed he was facing the front, his left arm was down, and his right side was towards the passenger window. 6/8 RP 578-79.

Defendant testified that he loaded his roommate's gun on July 7, 2008, to protect himself during a drug deal. The gun was in the trunk of his roommate's car when he loaded it, and he left it there. He denied stealing the gun. 6/9 RP 723.

Defendant testified that he went to McCabe's on July 7-8. He said he got a ride to and from McCabe's from Bob. 6/9 RP 709, 712. Defendant paid Bob with crack cocaine for the rides. 6/9 RP 713. Defendant said Bob took him home so he could pick up "my drugs, crack cocaine and powder cocaine." He picked up the drugs because he intended to sell them. 6/9 RP 714-15, 738. Defendant did not know Bob's address or last name. 6/9 RP 727, 731. Defendant did have Bob's phone number, but he did not call him or ask anyone else to call him. 6/9 RP 727-28, 733-34.

Defendant testified that he sold drugs out of Nate's apartment after getting the drugs out of his apartment. 6/9 RP 739. He said Kevin was with him, but they were not at Kevin's apartment. 6/9 RP 742. Defendant said that the victim "was a drug dealer, too[.]" 6/9 RP 743. The State then had the following colloquy with defendant:

Q: Isn't it true that you were mad at [the victim] because he was taking away some of your customers by selling drugs to them?

A: No, that's not true.

Q: He was doing that, wasn't he?

A: No, he wasn't.

Q: A couple weeks before [the victim] was murdered, you went in and threatened his life –

6/9 RP 744.

At that point, defendant objected and asked for a mistrial. The court read back the last question and asked “Was it to that question [counsel], or to the previous questions about whether or not there was a disagreement about –” Defendant responded “there were questions about disagreement between [defendant] and [the victim].” 6/9 RP 744-45.

Defendant argued that since the State could not prove the disagreement between the victim and defendant over customers, defendant's denial of the disagreement “the question becomes misconduct when the State rests and they fail to prove it up.” 6/9 RP 746. The court did not directly rule on the motion for a mistrial. Instead, it asked the State, “Is there going to be continued discussion about the threat and the connection with any disagreement about their drug dealing?” After the State said “No.” the court brought the jury back in and had the State ask its last question again. Defendant denied he had threatened the victim.

6/9 RP 747. Defendant did not request a curative instruction, ask for the questions and answers to be stricken, ask for a ruling on his mistrial motion, or ask for any other relief.

Defendant then testified that he had lied to an officer on July 5, 2008, "to avoid going to jail over a driving while suspended ticket[.]" The State asked "So you'll lie to get out of a misdemeanor driving while suspended, will you lie about a murder?" Defendant answered, "I did not murder him, so --" 6/9 RP 748.

Defendant remembered getting arrested after the murder, but initially said he did not remember being questioned by the police. 6/9 RP 724. During cross-examination, defendant said he remembered that "a couple of police officers talked to me but I don't know what was said." 6/9 RP 741.

The jury convicted defendant as charged. It found defendant was armed with a firearm when he committed the murder. 1 CP 105, 106, 107, 108, 109. The court sentenced defendant to a standard range sentence of 390 months confinement for first degree murder, plus a 60 month firearm enhancement, followed by 48 months of community custody, 43 months confinement for possession of a stolen firearm, 22 months for second degree unlawful possession of a firearm, and 79 months for tampering with

a witness. The sentences for possession of a stolen firearm and second degree unlawful possession of a firearm were to run consecutive to each other, but concurrent with the sentence for murder and witness tampering. 7/30 RP 15-18, 2 CP ____.³

III. ARGUMENT

A. SUMMARY OF ARGUMENT.

While he was being questioned after having waived his Miranda rights, defendant made an equivocal request for counsel. The detective who was questioning defendant immediately asked if defendant wanted to talk to a lawyer. Defendant said he did not. There was no error in not suppressing the subsequent statements defendant made to the detective. Even if the request was equivocal, and admitting the statements was error, since the statements were exculpatory and there was overwhelming evidence of defendant's guilt, the error was harmless beyond a reasonable doubt.

When the State's primary witness testified, counsel had him admit he was on probation, but did not enquire into a previous misdemeanor conviction for filing a false statement. The decision on whether and how to impeach a witness is a matter of trial

³ The State has designated the judgment and sentence as

strategy and tactics. In this case, it was reasonable to not ask about the conviction. Had counsel asked about the conviction, there is no reasonable probability that the outcome of the trial would have been different.

The State asked whether defendant was mad at the victim for stealing his drug clients. In the context of the trial, that question did not warrant a mistrial. That counsel at the time did not believe the question prejudiced his is indicated by his failure to re-new his request for a mistrial or request other relief.

There were no errors that individually or together prejudiced defendant's right to a fair trial. Given the overwhelming evidence of guilt, the judgment and sentence should be affirmed.

B. DEFENDANT'S EQUIVOCAL REQUEST FOR COUNSEL DID NOT REQUIRE SUPPRESSION OF HIS STATEMENTS.

After asserting that some unspecified rights were being violated, defendant asked, "Is there an attorney I can talk to or something?" 1 CP 166. When the officer asked if defendant was requesting counsel, defendant said "Why would I want to talk to a lawyer?" 12/4 RP 72. As the trial court concluded, this was an equivocal request for counsel.

part of the clerk's papers. It has not yet been paginated.

A request for counsel is equivocal if, in light of the circumstances, “a reasonable officer . . . would have understood only that the suspect might be invoking the right to counsel.” Davis v. U.S., 512 U.S. 452, 459, 114 S.Ct. 2350, 2355 (1994).

As we have observed, “a statement either is such an assertion of the right to counsel or it is not.” Although a suspect need not “speak with the discrimination of an Oxford don,” he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect.

Id.

Findings of fact in a suppression hearing are verities on appeal if they are supported by substantial evidence in the record. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Conclusions of law are reviewed de novo. In re Personal Restraint of Brooks, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009).

Defendant assigns error to the findings of fact as to what he said and the clarification asked for by the detective. Brief of Appellant 1. Those statements are undisputed in the record. They are supported by substantial evidence.

Defendant also assigns error to the legal conclusion that the request for counsel was equivocal. This legal conclusion is reviewed de novo. Brooks, 166 Wn.2d at 667.

Here, defendant unambiguously waived of his rights to silence and counsel. He then made somewhat rambling and unconnected spontaneous statements to the police. Thus, when defendant asked "Is there an attorney I can talk to or something?", and quickly followed that question with "Why would I want to talk to a lawyer?", it was not a clear invocation of his right to counsel. Accordingly, there was no requirement that subsequent statements made to the police had to be suppressed. State v. Radcliffe, 164 Wn.2d 900, 907-08, 194 P.3d 250 (2008).

Defendant attempts to isolate his first question, "is there an attorney I can talk to or something?" from his second question, "Why would I want to talk to a lawyer?" Brief of Defendant 29. He does this by asserting that since the first question did not include

“maybe” or “if”, it was unequivocal. Brief of Defendant 28. His argument lacks merit.

The issue for the court below and this Court is whether a reasonable officer would have understood defendant’s first question as an unequivocal request for counsel. Clearly the detective here did not see the request as unequivocal. That conclusion was reasonable given defendant’s comments and demeanor up to that point. To determine whether defendant was actually requesting counsel, the detective asked if defendant was requesting counsel. Defendant made it clear that he was not requesting counsel. In these two questions, defendant expressed some desire for counsel as well as a desire to continue talking to the detective without counsel. This was an equivocal request. See State v. Quillin, 49 Wn. App. 155, 159, 174 P.2d 589 (1987), review denied, 109 Wn.2d 1027 (1988).

Defendant next argues that his right to counsel under CrR 3.1 was violated. Brief of Appellant 29. His argument turns on (1) his not being informed of his “right to court-appointed counsel under the rule,” and his assertion that “Thus the standard of equivocality must necessarily be higher.” Brief of Appellant 32 (emphasis in the original). Defendant is wrong in both arguments.

Factually, the record shows that shortly after he was arrested, defendant was advised of his rights as follows:

You have the right at this time to talk to your lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent [you] before questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements.

12/4 RP 30, 2 CP Exhibit 1.

Defendant was properly advised of his CrR 3.1 rights.

As to his assertion that there is a higher "standard of equivocality," as a matter of law, defendant is incorrect. In the only reported case the undersigned found, Division II of this Court analyzed an equivocal request for counsel under CrR 3.1 using the cases that analyzed it under the fifth amendment. State v. Copeland, 89 Wn. App. 492, 500-01, 949 P.2d 458 (1998), overruled in part on other grounds, Radcliffe, 164 Wn.2d at 907. Defendant cites no authority for this assertion. "This court will not consider argument unsupported by citations to authority." Lindemann v. Lindemann, 92 Wn. App. 64, 78, 960 P.2d 966 (1998), review denied, 137 Wn.2d 1016 (1999).

To the extent defendant relies on State v. Templeton, 148 Wn.2d 193, 59 P.3d 632 (2002), that case does not support his

argument. The issue in Templeton was whether the Washington State Patrol DUI Arrest Report advice of rights was sufficient to satisfy CrRLJ 3.1. Templeton, 148 Wn.2d at 218. There the defendants were advised of their Miranda rights and waived them. Templeton, 148 Wn.2d at 201. Supreme Court did not have the issue of whether the waivers were equivocal before it.

CrR 3.1 requires the police to advise a suspect of his right to court appointed counsel at the earliest opportunity after he is arrested. State v. Kirkpatrick, 89 Wn. App. 407, 413, 948 P.2d 882 (1997), review denied, 135 Wn.2d 1012 (1998). Here, the arresting officer properly advised defendant of his rights under both Miranda, and CrR 3.1. Defendant unambiguously waived those rights. He then made an equivocal request for counsel. Defendant's rights under CrR 3.1 were not violated.

C. ANY ERROR IN ADMITTING DEFENDANT'S STATEMENTS TO THE DETECTIVE AFTER HIS REQUEST FOR COUNSEL WAS HARMLESS.

Defendant argues the violation of his constitutional and Court Rule rights to counsel requires a new trial. Should this Court conclude that there was a violation, a new trial is not required if any

error was harmless beyond a reasonable doubt.⁴ An error is harmless beyond a reasonable doubt “if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” State v. Watt, 160 Wn.2d 626, 636, 160 P.3d 640 (2007).

Here, defendant’s statements were all exculpatory. The evidence of defendant’s guilt consisted of the testimony of an eye witness who knew defendant, the murder weapon belonged to defendant’s roommate, the weapon was found outside the building defendant lived in, defendant admitted at trial he knew where his roommate kept the gun, and he had loaded the gun on the day of the murder, defendant matched the description of the person a witness saw walking away from the murder scene, defendant was arrested in the vicinity of the murder, and defendant said he was with people who could have proved he was innocence, but he did not produce those people as witnesses. None of this evidence was tainted by the statements defendant made to the police. The evidence was harmless beyond a reasonable doubt.

The “overwhelming untainted evidence” test allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a

⁴ Since the analysis of both the constitutional right and the court rule right is the same, the State only conducts the more rigorous constitutional harmless error analysis.

conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.

State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182, 1191 (1985),
cert. denied, 475 U.S. 1020 (1986).

D. DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendant argues his counsel was ineffective for failing to impeach the State's primary witness with evidence of a prior conviction for a crime of dishonesty – filing a false statement, a gross misdemeanor. Brief of Appellant 35. To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that but for the deficient performance, the outcome of the trial would have been different. State v. McFarland, 127 Wn.2d 332, 334-35, 899 P.2d 1251 (1995). Defendant has shown neither.

“Deficient performance is not shown by matters that go to trial strategy or tactics.” State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). “The extent of cross-examination is something a lawyer must decide quickly and in the heat of the conflict. This, too, is a matter of judgment and strategy.” State v. Stockman, 70 Wn.2d 941, 945, 425 P.2d 898 (1967).

Defendant's counsel elicited that the State's primary witness was on probation at the time of the murder. It was thus clear to the jury that defendant had a prior criminal conviction. Counsel could have reasonably concluded that eliciting that the conviction was for a gross misdemeanor would lessen – not enhance – the impact of that conviction on the witness's credibility. Since that is a legitimate tactical decision, it cannot serve as a basis for a claim of deficient performance. See State v. Bander, 150 Wn. App. 690, 720, 208 P.3d 1242, review denied, 167 Wn.2d 1009 (2009) (if a tactical decision can be characterized as legitimate, it will not serve as a basis for a claim of ineffective assistance of counsel).

Defendant claims it was unreasonable for counsel to fail to impeach the witness with his prior conviction. Brief of Appellant 36. He does not explain why the nature of the crime, and its relatively low classification, would have impeached the witness more effectively than the evidence that he was on probation. Defendant fails to carry his burden of showing deficient performance.

Likewise, defendant fails to demonstrate that the outcome of the trial would have been different if the witness had been impeached with a misdemeanor conviction. As discussed above, the evidence of defendant's guilt was overwhelming. Even if the

jury knew the witness had been convicted of filing a false statement, there is no basis for concluding that it would have acquitted defendant in the face of the other evidence that corroborated the witness's testimony. Defendant has failed to carry his burden of showing prejudice.

E. THE COURT PROPERLY DECLINED TO DECLARE A MISTRIAL.

During the cross-examination of defendant, the State asked if he had threatened the victim. Defendant objected and requested a mistrial. The court clarified that the mistrial motion was not based on the question about the threat but the prior questions about whether defendant was mad at the victim for stealing his drug customers. The court did not directly rule on the mistrial, but allowed the State to ask further about the threats. Defendant did not request a curative instruction or other relief.

This Court reviews a decision to deny a mistrial for an abuse of discretion. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). A mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure that defendant will be tried fairly. State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979).

Here, defendant asserts the question as to whether defendant killed the victim because the victim was stealing his drug customers was improper and “scurrilous.” Brief of Appellant 37-38. He cites no authority for either assertion. Accordingly, this Court need not consider it. Lindemann, 92 Wn. App. at 78.

Assuming the Court reaches the merits of this issue, there was no error. “A prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable.” State v. Babich, 68 Wn. App. 438, 444, 842 P.2d 1053, review denied, 121 Wn.2d 1015 (1993). Here, without objection, the prosecutor asked defendant, “You are a drug dealer, [the victim] is a drug dealer; right?” Defendant answered, “Yeah, we are.” 6/9 RP 744. Also without immediate objection, the prosecutor asked defendant, “Isn’t it true that you were mad at [the victim] because he was taking away some of your customers by selling drugs to them?” and “He was doing that, wasn’t he?” 6/9 RP 744.

The prosecutor then asked defendant about a threat he had made against the victim. At that point, defendant objected. When questioned by the court, defendant made it clear it was the earlier questions about his being mad at the victim he was objecting to.

6/9 RP 744-45. Defendant then argued that since there was no admissible evidence to prove he was mad at the victim for stealing his drug customers, asking the question was grounds for a mistrial. 6/9 RP 746. Defendant cited no authority for this argument.

Whether the question was improper turns on whether the prosecutor was trying to impart to the jury information for which there was no evidence. Babich, 68 Wn. App. at 444. Without objection, the State had introduced evidence that both the victim and defendant were drug dealers. It had also introduced evidence that defendant had threatened the life of the victim, the victim's brother, and defendant's own brother. It is a reasonable inference that the threat may have been in connection with their competing drug businesses. Accordingly, there was circumstantial evidence in the record supporting the questions. They were not objectionable.

Even if the questions were objectionable, any error in asking them was harmless. "An error [in asking a question that imparts knowledge to the jury without the prosecutor testifying] is harmless unless the improper cross-examination was sufficient to affect the outcome of the trial. State v. Lopez, 95 Wn. App. 842, 855, 980 P.2d 224 (1999).

Here, there was overwhelming evidence that defendant murdered his cousin. Asking or not asking the questions about why he might have murdered him was not sufficient to affect the outcome of the trial.

Defendant apparently recognized that the questions were not unduly prejudicial. While he did move for a mistrial, when that was denied, defendant did not ask the court to strike the questions and answers, give a curative instruction, or request other relief. After the trial, defendant did not renew his motion for a new trial. The failure to request other relief “suggests to a court that the argument or event in question did not appear critically prejudicial to the defendant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 770 P.2d 610, cert. denied, 498 U.S. 1046 (1990).

F. CUMULATIVE ERROR DOES NOT REQUIRE A NEW TRIAL.

Defendant last argues that “reversal is still required because of the cumulative effect of the trial court errors.” Brief of Appellant 39-40. Since the evidence of defendant’s guilt was overwhelming, and the effect of any alleged errors was slight, application of the cumulative error doctrine is not appropriate. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

As discussed above: (1) the statements defendant challenges were exculpatory -- their admission did not affect the outcome of the trial; (2) counsel's trial strategic and tactical decision not to further impeach the State's primary witness did not affect the outcome of the trial; and (3) the questions about defendant's possible motive for killing his cousin was a reasonable inference from evidence in the record.

Taken individually or together, there is no reasonable probability that the absence of these errors would have changed the outcome of the trial. Accordingly, there is no basis for applying the cumulative error doctrine. See State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995) (given the scope of the trial, "troublesome" comments by the prosecutor did not have a material effect on the outcome).

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on July 8, 2010.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
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Deputy Prosecuting Attorney
Attorney for Respondent

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COURT OF APPEALS
STATE OF WASHINGTON
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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON,

Respondent,

v.

FILMON T. HABTEMARIAM,

Appellant

No. 63936-6-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 8th day of July, 2010, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT
THE COBB BUILDING
1305 FOURTH AVENUE, SUITE 802
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 8th day of July, 2010.


THOMAS M. CURTIS, WSBA # 24549
Deputy Prosecuting Attorney
Attorney for Respondent