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NO. 65703-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DION JOHNSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court exercised sound discretion in limiting the scope of cross-examination of the victim regarding matters that were only minimally relevant and far more prejudicial than probative.

2. Whether the defendant's prosecutorial misconduct claims should be rejected because the remarks in question were proper, not flagrant and ill-intentioned, and not prejudicial.

3. Whether the defendant's claim of instructional error should be rejected because the defendant proposed the instruction he now claims was erroneous, and thus, any error was invited.

4. Whether the defendant's federal bank fraud conviction was properly included in his offender score because the SRA expressly provides that any federal felony conviction should be included in a defendant's offender score.

5. Whether this Court should decline to consider the defendant's claim regarding his wife's outburst during opening statements because the defendant did not request a mistrial or a curative instruction at the time, and because the defendant cannot show manifest constitutional error under RAP 2.5.

6. Whether the defendant's cumulative error claim should be rejected because he has failed to demonstrate error, whether individually or cumulatively.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Dion Johnson, with the following crimes based on his long-term abuse of the mother of his two children, Denise Hunter:

Count I: Felony Violation of a Court Order (11/18/08)

Count II: Felony Violation of a Court Order (2/14/09)

Count III: Felony Harassment (2/14/09)

Count IV: Tampering with a Witness (8/3/09)

Count V: Felony Violation of a Court Order (8/23/09)

Count VI: Tampering with a Witness (8/23/09)

Count VII: Bail Jumping (9/11/09)

Count VIII: Felony Violation of a Court Order (9/18/09)

Count IX: Tampering with a Witness (9/18/09)

Count X: Felony Violation of a Court Order (12/8/09)

CP 1-27, 40-47. Every crime charged except bail jumping included a domestic violence allegation and an alleged aggravating

circumstance that the crimes were part of an ongoing pattern of psychological, physical or sexual abuse of the victim. CP 40-47.

A jury trial on these charges was held in January and February 2010 before the Honorable Douglass North. At the conclusion of the trial, the jury convicted Johnson of all counts except count VI as charged, including the domestic violence aggravating circumstances. Johnson was acquitted of count VI. CP 84-101.

The trial court imposed an exceptional sentence totaling 120 months in prison. CP 123-34. Johnson now appeals.

2. SUBSTANTIVE FACTS

Denise Hunter began dating Dion Johnson when she was 18 years old and quickly became pregnant with their first child. Johnson became physically abusive when Hunter was approximately 4 months pregnant. RP (2/1/10) 145-46. In fact, when Hunter and Johnson's daughter was born on December 13, 2001, there was a no-contact order in place protecting her from Johnson. RP (2/1/10) 146. Johnson talked Hunter into asking the judge to lift the no-contact order so he could be present for the birth of the baby. Shortly after Hunter gave birth to the baby, Johnson

slapped her when she complained about the behavior of Johnson's sister's children in her hospital room. RP (2/2/10) 84-85. Johnson also slapped Hunter when she was holding their daughter about 3 weeks after she was born. RP (2/1/10) 146. Although Hunter sometimes called the police regarding Johnson's abuse, she did not cooperate with prosecution because she was afraid. RP (2/1/10) 146-47.

In the fall of 2002, Hunter was living in her father's house with her toddler-age daughter. RP (2/1/10) 148. Johnson came over and raped Hunter in front of their daughter, who was screaming on the bed. Hunter called the police, but again, she did not cooperate with the prosecution. RP (2/1/10) 149.

In November 2005, Hunter went with a friend to a party at a restaurant that Johnson's cousin was hosting. Johnson became jealous and punched Hunter so hard that he knocked her unconscious. RP (2/1/10) 150-51. Hunter suffered a broken nose and her eyes were swollen shut. RP (2/1/10) 151. Hunter still refused to cooperate with the prosecution of her own accord; instead, she had to be arrested on a material witness warrant. RP (2/1/10) 152. After Hunter was arrested as a material witness, Johnson pled guilty to assault in the second degree, and an order

prohibiting contact was entered as a result of that conviction.

RP (2/1/10) 152; RP (2/2/10) 9-10; RP (2/3/10) 77-78.

Nonetheless, when Johnson got out of prison in 2008, he and Hunter began seeing each other again, and Hunter became pregnant with their second child, a son, who was born on February 19, 2009. RP (2/1/10) 153. Johnson continued to abuse Hunter both physically and psychologically; he would burglarize Hunter's home, steal her belongings, and move things around to make her feel "crazy." RP (2/1/10) 154; RP (2/2/10) 50.

Johnson told Hunter he would kill her if she ever left him, and Johnson's family members threatened Hunter as well. RP (2/1/10) 154-55. After nearly a decade of abuse, Hunter finally decided that if she did not start cooperating with law enforcement, Johnson would make good on his threats to kill her. RP (2/1/10) 155. Hunter moved to a confidential shelter for domestic violence victims and began receiving services and advocacy. RP (2/1/10) 156. The crimes charged in this case occurred after Hunter took these steps to try to end all ties with Johnson.

Count I (FVNCO): On November 18, 2008, Hunter was about 7 months pregnant with her son, and she went to Columbia Health Center for a prenatal checkup. RP (2/1/10) 157. Hunter's

grandmother drove her to the appointment, and she waited in the car while Hunter and her young daughter were inside the clinic. RP (2/2/10) 108. While Hunter's grandmother was waiting in the car, Johnson pulled up and asked where Hunter was. RP (2/2/10) 109. Johnson then confronted Hunter outside the clinic and tried to grab her. Johnson also showed Hunter a fake out-of-state identification card he was using that bore the name Terrell Williams. RP (2/2/10) 159-60. Hunter wrote down the license plate number of Johnson's car, and Johnson's cousin convinced Johnson to leave at that point. RP (2/2/10) 159.

Hunter went back into the clinic and told the intake nurse that she had seen her ex-boyfriend. Hunter was "very upset." RP (2/13/10) 15, 17. The nurse encouraged Hunter to call the police, but she refused; instead, the nurse walked Hunter back to her grandmother's car. RP (2/3/10) 17-18.

Count II (FVNCO) and Count III (Felony Harassment): On February 14, 2009, Hunter was only a few days away from giving birth to her son. Hunter and her cousin went to Champ's restaurant and bar, where they met Hunter's friend, Mary Rodgers. RP (2/1/10) 163. When they arrived, Hunter saw that Johnson's sister and cousins were there, so she stayed outside. RP (2/1/10)

165. Johnson came up to her and grabbed her by the hair and tried to pull her around a corner, but Hunter told him she did not want to go with him. RP (2/1/10) 166, 168. Johnson then returned with his sister and cousins and they surrounded Hunter. Johnson's sister pulled a knife. Johnson told Hunter that he had "something for" her in the car. From past experience, Hunter knew that Johnson meant that he had a gun. RP (2/1/10) 168. Hunter feared that Johnson was going to kill her. RP (2/1/10) 168-69; RP (2/2/10) 14.

Mary Rodgers pulled her car around, picked up Hunter, and drove away. RP (2/1/10) 169; RP (2/4/10) 18. Hunter tried to call the police when she got in the car, but her cell phone broke. RP (2/1/10) 170; RP (2/4/10) 19. Instead, Hunter and the others called the police from a bowling alley. RP (2/4/10) 18.

King County Deputy Randall Potter was dispatched to Champs to look for Johnson. RP (2/2/10) 116-17. Potter located Johnson and asked for identification; Johnson handed Potter what appeared to be a Georgia identification card, which bore the name "Terrell Williams." RP (2/2/10) 120-21. Potter arrested Johnson. RP (2/2/10) 122.

Count IV (Witness Tampering): On August 3, 2009, when Hunter was living in the confidential shelter, she received a call

from a blocked number. Hunter answered the call because she assumed it was her victim's advocate. RP (2/2/10) 16-17. Instead, it was Johnson, who begged her, "Don't let the police get me[.]" He tried to manipulate her by talking about their children. RP (2/2/10) 17-18. When Hunter told Johnson she was calling the police, Johnson offered to give back all of the things he had stolen from her if she stopped cooperating with law enforcement. RP (2/2/10) 18. He also offered her \$5000 and a car. RP (2/2/10) 18-19. Hunter called her advocate, and she provided the police with her phone records, which showed Johnson's call from a blocked number. RP (2/2/10) 19, 21.

Count V (FVNCO):¹ On August 23, 2009, Johnson called Hunter twice from a blocked number. Johnson sounded "frantic," and tried to give Hunter his phone number. RP (2/2/10) 23. He also offered her \$3000 and a car. RP (2/2/10) 22.

Count VII (Bail Jumping): On September 11, 2009, Johnson was scheduled to appear for an omnibus hearing on the FVNCO charge that had been filed as a result of the incident at the clinic in November 2008. RP (2/3/10) 66-67, 72. The defendant failed to

¹ Johnson was acquitted of count VI (witness tampering), which was alleged to have occurred on the same date as count V (FVNCO).

appear, despite having been informed that a condition of his bond was that he was required to appear for all court hearings.

RP (2/3/10) 70-71, 73-74.

Count VIII (FVNCO) and Count IX (Witness Tampering): On September 18, 2009, Johnson called Hunter and begged her not to let the police "get" him. RP (2/2/10) 29. Johnson was "[v]ery frantic"; he told Hunter that he knew the police were looking for him, and he again offered to return Hunter's belongings if she would help him by not going to court. RP (2/2/10) 30-31. Johnson also told Hunter that his family would be angry with her if she went to court. RP (2/2/10) 31.

Count X (FVNCO): On December 8, 2009, Hunter received a call from her cousin, Toni Washington. Washington has a child in common with one of Johnson's cousins. RP (2/2/10) 32-33. Washington told Hunter that she had just received a call from Johnson from the jail, and that he had asked Washington to ask Hunter to stop cooperating with law enforcement so that the case would be dropped and he could get out of custody. RP (2/2/10) 33. Hunter was angry that Washington would agree to contact her on Johnson's behalf, and reported the incident to the case detective. RP (2/2/10) 41-42.

A recording of Johnson's call to Washington was introduced as an exhibit at trial and played for the jury. RP (2/2/10) 39; CP 153-55. Nonetheless, Washington testified at trial that Johnson had not asked her to convey a message to Hunter, and that she had not called Hunter that day. RP (2/4/10) 29-30.

Additional facts will be discussed further below as necessary for argument.

C. ARGUMENT

1. THE TRIAL COURT EXERCISED SOUND DISCRETION IN LIMITING JOHNSON'S CROSS-EXAMINATION OF THE VICTIM TO RELEVANT MATTERS.

Johnson first claims that the trial court abused its discretion in ruling that he would not be allowed to cross-examine Denise Hunter about her use of "sherm" or PCP. This claim should be rejected because there was no evidence that Hunter was using drugs at the time of any relevant events in this case, and the trial court acted within its discretion in disallowing cross-examination on a collateral matter that was only minimally relevant and far more prejudicial than probative.

A criminal defendant has the right to confront the witnesses against him through cross-examination. Delaware v. Van Arsdall,

475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). But this right is not unfettered. To the contrary, the trial court retains broad discretion to set limits on cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Id. at 679. Put another way, "[a] trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative." State v. Classen, 143 Wn. App. 45, 58, 176 P.3d 582, rev. denied, 164 Wn.2d 1016 (2008). The trial court should exclude impeachment evidence if it is only marginally relevant and the potential for prejudice is great. State v. Carlson, 61 Wn. App. 865, 875-76, 812 P.2d 536 (1991), rev. denied, 120 Wn.2d 1022 (1993).

In sum, the trial court is vested with considerable discretion to limit the scope of cross-examination for impeachment purposes, and the trial court's decisions are reviewed only for manifest abuse of that discretion. State v. Aguirre, 168 Wn.2d 350, 361-62, 229 P.3d 669 (2010). A reviewing court will find a manifest abuse of discretion only if no reasonable person would have ruled as the

trial judge did. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

The facts of Carlson are instructive. In Carlson, the defendant was convicted of raping and molesting his young granddaughter. The defendant alleged at trial that the victim's mother had fabricated the allegations of abuse in order to retain custody of the child and to obtain money in a civil suit against the defendant. Carlson, 61 Wn. App. at 868. Among various claims raised on appeal, the defendant contended that the trial court erred by not allowing him to cross-examine the victim's mother about her cocaine use. Id. at 875. In rejecting the defendant's claim, primarily on grounds of waiver, this Court observed that the mother's alleged cocaine use occurred before the allegations came to light, "and thus had little, if any, bearing on her motive to make those allegations." Id. at 876. Therefore, "the evidence's probative value was vastly outweighed by its unduly prejudicial effect." Id. The same is true in this case.

In this case, after substantial argument from both sides regarding the scope of cross-examination, the trial court decided to hear testimony from Denise Hunter outside the presence of the jury in order to determine whether Hunter's drug use and/or mental

health issues had potentially affected her ability to perceive or recall the events in question, and thus, whether these topics were appropriate for cross-examination. RP (1/27/10) 43-61. The day that Hunter was scheduled to testify, Johnson also argued he should be allowed to call an expert witness to testify regarding the effects of PCP. RP (2/1/10) 100-02. The trial judge reiterated that he would rule on these issues after hearing Hunter testify outside the presence of the jury. RP (2/1/10) 102.

During this preliminary testimony, Hunter testified that she suffered from anxiety attacks, nightmares, and flashbacks due to post-traumatic stress disorder. However, she stated that she was fully able to distinguish between a nightmare or a flashback and reality. RP (2/1/10) 116. Hunter also testified that she had used "sherm"² once in late November 2009, and that the last time she had used the drug was approximately a year and a half prior to that, before her second pregnancy. Hunter stated unequivocally that she was not under the influence of PCP or "sherm" during any of the relevant events involving the defendant. RP (2/1/10) 116-17.

² "Sherm" is generally a marijuana cigarette dipped in embalming fluid. See RP (2/1/10) 120.

Based on Hunter's testimony and arguments from both parties, the trial court ruled that Hunter's drug use was not admissible because it could not be connected with any of the events at issue in the trial. On the other hand, the court ruled that Hunter could be cross-examined about her anxiety attacks, nightmares, and flashbacks because that information could be relevant to her perception and recall of relevant events.

RP (2/1/10) 142-43.

This ruling constitutes a sound exercise of discretion by the trial court. As in Carlson, there was no evidence of a connection between Hunter's occasional use of PCP and the relevant events in this case. Accordingly, as in Carlson, Hunter's drug use was only marginally relevant and far more prejudicial than probative. Moreover, the trial court allowed the defense to question Hunter about her PTSD symptoms and their possible effect on her perception and ability to recall. In sum, Johnson cannot show a manifest abuse of discretion based on this record, and therefore, his claim should be rejected.

Nonetheless, Johnson suggests that the trial court's ruling constitutes reversible error, and asserts that Hunter's PCP or "sherm" use resulted in an arrest "for driving under the influence of

phencyclidine ("PCP")[.]" Appellant's Opening Brief, at 14. The only support for this assertion in the record is a passing remark by defense counsel; there is no documentation in the record and no mention of when this alleged arrest may have taken place in relation to the relevant events. RP (2/2/10) 104. Johnson further suggests that Hunter's alleged DUI arrest and drug use were the basis for a dependency action regarding Hunter and Johnson's daughter. Brief of Appellant, at 15. Again, however, this vastly overstates the record, which does not establish with any reasonable degree of clarity exactly why the dependency was filed or what role the defendant's conduct may have played in it.

But in any event, even taking the overstated facts asserted in Johnson's brief at face value, Johnson still fails to show an abuse of discretion. Given the record established at trial, Hunter's occasional drug use was not connected to the charged crimes or other acts of domestic violence to which she testified, and thus, it is a collateral matter that was far more prejudicial than probative. And again, the trial court allowed questioning regarding Hunter's PTSD symptoms, which provided an adequate alternative basis for potential impeachment.

Nevertheless, Johnson cites State v. Brown, 48 Wn. App. 654, 739 P.2d 1199 (1987), and State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974), for the proposition that it was error to preclude him from cross-examining Hunter regarding her occasional drug use. Appellant's Opening Brief, at 18-19. Neither case is on point. In Brown, although the victim denied it, there was evidence showing that the victim had used LSD *on the night of the crime*. Brown, 48 Wn. App. at 654-55, 659. In such circumstances, the victim's use of a hallucinogen certainly could have affected her ability to perceive and recall what occurred when the crime was committed. In this case, by contrast, there was no evidence that Hunter was under the influence of PCP during any of the relevant events in question.

Renneberg also does not support Johnson's position. In fact, although the Renneberg court upheld the admission of evidence of drug use because it rebutted the defendant's character evidence, the court also recognized that evidence of drug use and drug addiction is highly prejudicial and should not be admitted to attack a witness's credibility absent evidence of a connection between the addiction and the witness's veracity:

In view of society's deep concern today with drug usage and its consequent condemnation by many if not most, evidence of drug addiction is necessarily prejudicial in the minds of the average juror. Additionally there is no proof before the court connecting addiction to a lack of veracity. If such medical or scientific proof were made, it might well be admissible as relevant to credibility. Absent such proof its relevance on credibility or veracity is an unknown factor while its prejudice is within common knowledge.

Renneberg, 83 Wn.2d at 737. Johnson's reliance on this case is misplaced.

Further, Johnson attempts to distinguish State v. Tigano, 63 Wn. App. 336, 818 P.2d 1369 (1991), rev. denied, 118 Wn.2d 1021 (1992), a case the State cited to the trial court in support of its ruling excluding Hunter's drug use. But Tigano is directly on point. As in this case, there was no evidence in Tigano that the witness in question was under the influence of drugs when the events he testified about had occurred. Accordingly, this Court held that the trial court exercised sound discretion in excluding evidence of the witness's "general drug use over a period of years," and evidence that the witness had used LSD at some undetermined point in time around the events in question. Tigano, 63 Wn. App. at 344-45. The evidence of drug use by the witness in Tigano was more substantial than the evidence produced in this case, which

consisted of Hunter's admission that she had smoked "sherm" twice in a 2-year period. Accordingly, the trial court exercised sound discretion in this case, as Johnson failed to make a connection between Hunter's occasional drug use and her ability to perceive and recall the events to which she testified.

Lastly, Johnson's arguments based on the "open door" doctrine should be rejected. The "open door" doctrine is an equitable evidentiary principle whereby a party may "open the door" to the introduction of otherwise inadmissible evidence by the adverse party. 5 K. Tegland, Wash. Prac., Evidence § 103.14, at 66-67 (5th Ed. 2007). Under this doctrine, the trial court has the discretion to admit evidence that otherwise would have been inadmissible when a party raises a material issue and the evidence in question bears directly on that issue. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). Put another way, "once a party has raised a material issue, the open door doctrine dictates that the opposing party is permitted to explain, clarify, or contradict" the evidence regarding that issue. Berg, 147 Wn. App. at 939.

As these authorities make clear, however, the issue in question must be material, and the trial court retains the discretion whether to allow additional evidence. In this case, the dependency

action regarding Hunter and Johnson's daughter was not a material issue. To the contrary, it was a collateral matter. Therefore, the trial court did not abuse its discretion in ruling that Hunter did not "open the door" to questioning about her occasional drug use when she testified that her daughter was living with her grandmother at one point due to Johnson's abusive behavior. RP (2/2/10) 96, 103-05. As the trial prosecutor observed before Hunter's trial testimony began, further inquiry into these matters would have led to "a mini-trial on the issues that are involved in the dependency," leading to confusion of the issues, misleading the jury, and waste of time under ER 403. RP (2/1/10) 135. In sum, the trial court exercised its discretion appropriately in finding that the door had not been opened to collateral evidence, and therefore, Johnson's claim to the contrary should be rejected.

2. JOHNSON CANNOT SHOW THAT THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT WERE FLAGRANTLY IMPROPER OR INCURABLY PREJUDICIAL.

Johnson next argues that he was deprived of a fair trial because the prosecutor committed misconduct in closing argument. More specifically, he claims that the prosecutor personally vouched

for Hunter's credibility as a witness, and that these remarks resulted in incurable prejudice. Appellant's Opening Brief, at 25-32. This claim should be rejected because Johnson cannot show that the remarks in question were improper or prejudicial, let alone so flagrant and ill-intentioned that a jury instruction would not have been sufficient to cure any possible prejudice. Accordingly, this Court should affirm.

In order to prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's conduct was both improper and prejudicial in light of the entire record and all of the circumstances present at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), rev. denied, 151 Wn.2d 1039 (2004) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A defendant who claims that prosecutorial misconduct during closing argument deprived him of a fair trial "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Moreover, a defendant who did not make a timely objection has waived any claim on appeal unless the argument in question is "so flagrant and ill-intentioned that it causes an enduring and resulting

prejudice that could not have been neutralized by a curative instruction to the jury." Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. Stenson, 132 Wn.2d at 727. Also, arguments in rebuttal that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). Moreover, the prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561. Johnson's claims of misconduct fail in light of these standards.

As a preliminary matter, Johnson did not object to the first two remarks that he now claims were improper. Accordingly, he bears the burden of showing flagrant and ill-intentioned misconduct that resulted in incurable prejudice with respect to these claims.

Johnson first takes issue with the following remarks, claiming that they constitute improper vouching for Hunter as a witness:

Denise's testimony is corroborated by the other witnesses' testimony and by other evidence you may have heard in this case. Because of that there is no reason to doubt her.

RP (2/8/10) 36. Although it is improper for a prosecutor to personally vouch for the credibility of a witness,³ that is not what occurred here. Rather, the prosecutor simply argued that Hunter's testimony was corroborated by other evidence produced at trial, and on that basis, the jury should find Hunter's testimony credible. The prosecutor did not express a personal belief in Hunter's veracity; instead, the prosecutor asked the jury to find Hunter believable *based on the evidence*. As such, these statements are not improper at all, let alone ill-intentioned, flagrantly improper, and incurably prejudicial. This claim is specious, and it should be rejected.

Johnson next takes issue with the following remarks, which he argues also constitute improper vouching:

In opening, defense told you that Denise was a scorned woman. I don't believe Denise is scorned and I believe that hell hath no fury like a woman who's gone through nine years of physical and emotional abuse and has come out on the other side through domestic violence support advocacy.

³ See State v. Jackson, 150 Wn. App. 877, 883, 209 P.3d 553, rev. denied, 167 Wn.2d 1007 (2009).

RP (2/8/10) 43. Again, as is true of the previously quoted passage, nothing in these remarks can be construed as the prosecutor's statement of personal belief in the truth of Hunter's testimony. Indeed, these remarks do not concern any of the crimes charged, or any elements of those crimes. Although the use of phrases such as "I don't believe" and "I believe" should be avoided, the prosecutor was not arguing a personal belief in Hunter's veracity. Rather, when viewing these remarks in context as required, it is apparent that the prosecutor was arguing that the jury should not hold Hunter's assertive demeanor on the witness stand against her in evaluating the credibility of her testimony. In any event, Johnson certainly has not demonstrated that these remarks were ill-intentioned and flagrantly improper, or that an instruction from the trial court could not have cured any possible prejudice. This claim is without merit as well.

Johnson next argues that the prosecutor "compounded" the prejudice resulting from the arguments set forth above with an argument in rebuttal regarding Toni Washington, Hunter's cousin who testified as a defense witness:

And then December 8th, really, Toni Washington was going to get up on that stand and spill it for me, really, she was. I don't think so.

Because Toni is exactly where Denise was 14 months, 24 months, five years ago. She's hooked into a bad relationship --

[DEFENSE COUNSEL]: Objection, your Honor.

THE COURT: Sustained.

[PROSECUTOR]: Toni Washington, no. And you heard the jail call. That's a violation of the no-contact order.

RP (2/8/10) 60.

As a preliminary matter, the transcript of defense counsel's closing argument is rife with "inaudibles," including the portion of counsel's argument regarding Toni Washington's testimony.

RP (2/8/10) 53-54. Accordingly, it is not possible to determine whether the prosecutor's remarks in rebuttal were not a fair reply to the arguments of the defense.

In any event, Johnson is correct that the prosecutor's remarks to the effect that Washington was in a bad relationship are not supported by the trial record. Therefore, the remarks were not proper. However, Johnson must still demonstrate a substantial likelihood that the jury's verdict was affected in order to show prejudice. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The record does not support such a claim. Defense

counsel's objection was immediately sustained by the trial court,⁴ Toni Washington was not a central witness at trial, and the jurors had heard Johnson's phone call from the jail to Toni Washington for themselves. See CP 153-55. In light of the evidence, it is simply not reasonable to conclude that the jurors would have found Washington to be a credible witness but for the prosecutor's remarks about her being in a bad relationship. Accordingly, Johnson cannot show prejudice, and his claim fails on that basis.

Lastly, Johnson argues that the cumulative effect of the three instances of alleged misconduct discussed above merits a new trial, citing State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997). This argument is without merit. In Fleming, the prosecutor argued that in order to acquit the defendants, the jury would have to find that the victim was lying -- an argument that this Court had already repeatedly held to be improper. Fleming, at 213. In addition, the prosecutor in Fleming argued that there was no evidence that the victim was lying, and if there were such evidence, the defendants should have presented it. This argument built upon the previous improper

⁴ Johnson notes that the trial court did not give a curative instruction. Appellant's Opening Brief, at 31. However, none was requested. RP (2/8/10) 60.

argument, which misstated what the jury had to find in order to acquit, by shifting the burden of proof to the defendants. Id. at 214-15. What occurred in Fleming (*i.e.*, two clear instances of flagrant and ill-intentioned misconduct) in no way resembles what occurred in this case. This Court should reject Johnson's claim, and affirm.

3. JOHNSON'S CLAIM BASED ON STATE V. BASHAW IS BARRED BY THE INVITED ERROR DOCTRINE.

Johnson next claims that the trial court gave a "fatally flawed" unanimity instruction that requires reversal of the special verdicts on the domestic violence aggravating factor under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). Appellant's Opening Brief, at 32-36. But Johnson and the State jointly proposed the instruction he now claims was erroneous; therefore, any error was invited and the claim should be rejected.

The invited error doctrine dictates that a party may not set up a potential error at trial and then claim that the trial court erred on that basis on appeal. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Under the invited error doctrine, a

claim of trial court error cannot be raised "if the party asserting such error materially contributed thereto." In re K.R., 128 Wn.2d at 147. Such material contribution may include acquiescence as well as direct participation. See State v. Bailey, 114 Wn.2d 340, 787 P.2d 1378 (1990); State v. Lewis, 15 Wn. App. 172, 548 P.2d 587, rev. denied, 87 Wn.2d 1005 (1976). The invited error doctrine bars a claim even if that claim impacts a constitutional right. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002).

It is well-settled that the invited error doctrine applies to jury instructions:

The law of this state is well settled that a defendant will not be allowed to request an instruction or instructions at trial, and then later, on appeal, seek reversal on the basis of claimed error in the instruction or instructions given at the defendant's request. To hold otherwise would put a premium on defendants misleading trial courts; this we decline to encourage.

State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

In this case, the jury instruction at issue states that the jury must be unanimous to return a verdict on the aggravating circumstance, whether "yes" or "no." CP 83. But Johnson's trial counsel signed the State's proposed instructions to signify that the proposed instructions were "agreed" between the parties. CP 156.

Thus, Johnson proposed the instruction in question jointly with the State. CP 156, 188. Therefore, the invited error doctrine bars consideration of Johnson's Bashaw claim on appeal, and this Court should affirm.

**4. JOHNSON'S FEDERAL BANK FRAUD
CONVICTION WAS PROPERLY INCLUDED IN
HIS OFFENDER SCORE UNDER THE EXPRESS
TERMS OF THE SRA.**

Johnson argues that the trial court erred in including his prior conviction for federal bank fraud in his offender score at sentencing. Specifically, Johnson argues that the State failed to prove that this federal conviction is comparable to a Washington felony. Appellant's Opening Brief, at 37-41. But the Sentencing Reform Act (SRA) expressly provides that any federal felony should be included in a defendant's offender score whether it is comparable to a Washington felony or not. Accordingly, there is no need to address Johnson's comparability claim.

The SRA provides that federal convictions should be included in a defendant's offender score as follows:

Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law, or

the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). Thus, the SRA expressly provides that a prior federal felony conviction counts as at least one point whether or not it is comparable to a Washington felony.

In this case, the prosecutor provided a certified copy of Johnson's federal judgment and sentence and a copy of the federal bank fraud statute. CP 115-22. These materials show that Johnson received a sentence of 24 months in federal custody and 5 years of supervision, and that he was ordered to pay over \$47,000 in restitution. CP 116-17. The maximum penalty for bank fraud is 30 years and/or \$1 million. CP 122. Bank fraud is a felony, and this conviction was properly included as one point in Johnson's offender score, comparability or lack thereof notwithstanding. Johnson's claim is frivolous, and this Court need not address it further.⁵

⁵ The State is not conceding that bank fraud is not comparable to a Washington felony, but there is simply no need for the State or this Court to address the issue on the merits given the express language of the SRA.

5. JOHNSON DID NOT REQUEST A MISTRIAL OR A CURATIVE INSTRUCTION DUE TO HIS WIFE'S OUTBURST DURING OPENING STATEMENTS; THEREFORE, HE CANNOT RAISE THIS CLAIM ON APPEAL.

Johnson next claims that he should be granted a new trial because of his wife's outburst during opening statements.

Appellant's Opening Brief, at 41-44. But Johnson did not object, move for a mistrial, or request a curative instruction from the trial court as a result of his wife's behavior. Johnson also cannot demonstrate a manifest constitutional error under RAP 2.5. Therefore, he has waived any claim on appeal.

In order to preserve a trial irregularity issue for appeal, the defendant must request some form of relief at the time the irregularity occurs. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (failure to object, ask for a curative instruction, or move for a mistrial precludes appellate review). When a defendant has failed to ask for a curative instruction or a mistrial, "[s]uch inaction has been held to constitute waiver unless manifest constitutional error is found." State v. Lord, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007). If the defendant did not request a mistrial, this "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the

context of the trial." Swan, 114 Wn.2d at 661. Moreover, "[r]eversal is not required if the error could have been obviated by a curative instruction which the defense did not request." State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

This Court will not consider a claim for the first time on appeal unless it concerns a manifest error affecting a constitutional right. RAP 2.5. A defendant claiming such an error has the burden of showing that the alleged error actually affected his constitutional rights; it is "this showing of *actual prejudice* that makes the error 'manifest,' allowing appellate review." State v. McNeal, 145 Wn.2d 352, 357, 37 P.3d 280 (2002) (emphasis in original) (quoting State v. McFarland, 127 Wn.2d 322, 333, 988 P.2d 1251 (1995)).

Johnson cannot meet these stringent standards.

In this case, the record reflects that Johnson's wife, Hyet Yemmer,⁶ came into the courtroom crying during the prosecutor's opening statement and stated, twice, "This lady is scaring me." The trial court ordered her to leave. RP (2/1/10 - opening

⁶ Johnson asserts in his brief that the outburst involved a woman who "was unidentified to the jury." Appellant's Opening Brief, at 43. The record shows that the woman was clearly identified as Johnson's wife, both in the presence of the jury and otherwise.

statements) 11. Johnson's trial attorney did not request a curative instruction or move for a mistrial.

When Denise Hunter testified, the prosecutor asked her about the incident. RP (2/2/10) 36-37. Hunter testified that she was in the hallway outside the courtroom with her victim's advocate, and that she saw Yemmer lying on one of the benches in the hallway. Hunter said that Yemmer became "frantic" and exclaimed "I'm scared, she's scaring me." RP (2/2/10) 37-38. Hunter stated that she had not interacted with Yemmer in the hallway, and in fact, that this was the first time that Hunter had ever seen Yemmer. RP (2/2/10) 37-38. Aside from a hearsay objection to Hunter's testimony regarding Yemmer's statement that Hunter was "scaring" her, Johnson's trial attorney did not object to Hunter's testimony to the jury about what Yemmer had done. RP (2/2/10) 37-38. Later in the trial, defense counsel informed the court that she had spoken to Yemmer about the incident to ensure that "we didn't have another issue or outburst like we had previously."⁷ RP (2/3/10) 6.

Based on this record, this claim is not preserved for review and Johnson has waived it. Johnson's failure to ask for a curative

⁷ Johnson's attorney stated that she had spoken with Johnson's other family members about their inappropriate courtroom behavior as well. RP (2/3/10) 6-7.

instruction or a mistrial at the time of his wife's outburst demonstrates that it did not seem especially prejudicial to his case at the time. To the contrary, the record suggests that Johnson's wife engaged in this odd behavior in order to benefit Johnson by disparaging Hunter, not to prejudice Johnson. In addition, Johnson cannot demonstrate how his constitutional rights were actually and manifestly prejudiced such that he could raise the issue for the first time on appeal under RAP 2.5. Accordingly, this claim merits no further consideration.

Nonetheless, Johnson suggests that the issue was preserved because his trial attorney mentioned it in a motion for new trial she filed shortly before she withdrew and was replaced by another attorney after Johnson was convicted. Appellant's Opening Brief, at 12; CP 102-04. But Johnson's substitute counsel did not ask the trial court to rule on the motion, and thus, it was never addressed. RP (5/14/10); RP (6/11/10). Johnson cites no authority for the proposition that this is sufficient to preserve an alleged error of this type for review, and the authorities set forth above hold that a contemporaneous request for relief is required. This Court should hold that the issue is not preserved.

Johnson also cites cases that he argues support his claim that what his wife did in this case warrants granting him a new trial. Appellant's Opening Brief, at 42-43. These cases are not on point.

For instance, in Lord, the murder victim's supporters wore buttons bearing the victim's photograph during trial. The defendant objected, and asked the trial court to disallow the buttons. Lord, 161 Wn.2d at 282 (noting that "[d]efense counsel objected and moved the judge to remove the buttons from the courtroom"). Accordingly, the issue was preserved for appeal, albeit ultimately unsuccessful. Lord, 161 Wn.2d at 284-91 (holding that the buttons did not deprive the defendant of a fair trial).

Johnson also cites cases regarding egregiously prejudicial behavior involving courtroom spectators -- behavior that in no way resembles what occurred in this case. See Woolfolk v. State, 81 Ga. 551, 8 S.E. 724, 727 (1889) (during prosecutor's closing argument, "from the crowd in the rear of the court-room came, in an excited and angry tone, the cry, 'Hang him!' 'Hang him!' 'Hang him!' and some of the crowd arose to their feet"); Manning v. State, 37 Tex. Crim. 180, 184-85, 39 S.W. 118 (1897) (courtroom spectators laughed and cheered throughout the prosecutor's opening statement; at the conclusion of the prosecutor's remarks, the crowd

"broke into a wild and uproarious applause, cheering, clapping their hands, and one throwing his hat into the air"); State v. Henry, 196 La. 217, 247-48, 198 So. 910 (1940) (prosecutor seated murder victim's widow and daughter near the jury for the express purpose of prejudicing jurors against the defendant in order to obtain a death sentence). These cases are simply not on point.

In sum, Johnson has waived this claim because he did not request a mistrial or a curative instruction when his wife came into the courtroom, and he has not carried his burden of showing a manifest constitutional error under RAP 2.5. The alleged error was not preserved, and this Court should affirm.

6. JOHNSON'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED.

Lastly, Johnson claims that even if none of the errors he has alleged warrants reversal individually, he should be granted a new trial due to their cumulative effect. Appellant's Opening Brief, at 44-45. This claim should be rejected.

The cumulative error doctrine is limited to cases where there have been several trial errors that, standing alone, may not justify reversal; when combined, however, they may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As argued above, Johnson's claims on appeal are without merit. Accordingly, there is no trial error to cumulate in this case. See State v. Hodges, 118 Wn. App. 668, 674, 77 P.3d 375 (2003) (where defendant has identified no errors, cumulative error doctrine does not apply). Johnson's cumulative error claim fails.

D. CONCLUSION

The trial court's evidentiary rulings were sound. Johnson was not deprived of a fair trial due to prosecutorial misconduct. The instructional error Johnson alleges was invited. Johnson's prior federal felony was properly included in his offender score. Johnson has not preserved his claim regarding his wife's outburst during opening statements. Finally, Johnson has not shown reversible error in this case, whether individually or cumulatively.

For all of the reasons set forth above, Johnson's convictions should be affirmed.

DATED this 24th day of August, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DION JOHNSON, Cause No. 65703-8-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

8/24/11
Date