

67247-9

67247-9

NO. 67247-9-1

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

STATE OF WASHINGTON

Respondent

v.

JEROME J. BLAKE,

Appellant

BRIEF OF RESPONDENT

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STATE OF WASHINGTON

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I. ISSUES

1. Two witnesses to a murder made specific observations from which they individually concluded the defendant shot the victim.

a. Has the question of whether those witness's opinions were properly admissible been preserved for review?

b. If so, were the opinions properly admissible?

2. Was there sufficient evidence the witness was speaking from his personal knowledge to admit evidence of statements he made to another witness within seconds after the murder as either a present sense impression or an excited utterance?

3. Were any of the prosecutor's arguments in closing and rebuttal closing arguments improper?

4. If the prosecutor's arguments were improper, has the issue been waived where the defendant did not object to any argument and the arguments were not so flagrant and ill intentioned that an instruction could have cured any possible prejudice?

5. Did the trial court abuse its discretion in excluding evidence the defendant sought to introduce to impeach a witness when the defendant failed to show that evidence was relevant on that issue?

6. Is the defendant entitled to a new trial as a result of cumulative error?

II. STATEMENT OF THE CASE

On June 22, 2010 the defendant, Jerome Blake (JG or J)¹, Arthur Cooper (Coop), and Brandon Lewis (B-Lew) decided to buy some oxycontin. A friend of Cooper's, Quinlin Bess (Q), called Ivor Williams (Pine) on their behalf. Williams knew Marquise Brown (YG) had some oxycontin for sale for a "good price." Williams arranged a sale from Brown to Bess and ultimately the defendant and the others. Bess collected \$800 each from the defendant, Cooper, and Lewis. 4 RP 619-25; 5 RP 847-51.

Bess went to a radio station in south Everett where he met Williams and Brown. The three men then went to a north Everett neighborhood. Brown got out of the car and got the oxycontin from his friend Quincy LeFall. When Brown returned to the car Bess expressed concern the pills Brown sold him were fake. Brown told Bess that if the pills turned out to be fake to return and Brown would make the deal good. On the way back to the radio station Bess stopped to buy some foil to test the pills. Bess then dropped

¹ Many of the people involved went by a street name which was used interchangeably with the legal name in the transcript. The street name is in parenthesis. A glossary identifying each person is set out in Appendix A.

Brown and Williams off at the radio station. 3 RP 364-66; 4 RP 626-32, 6405 RP 854-56, 858-63.

After dropping Williams and Brown off, Bess contacted a friend who smoked oxycontin to see if he could verify the pills were able to be smoked. After testing them Bess learned the pills could not be smoked. Bess called the defendant and Cooper to tell them the pills were fake and he would try to get their money or good pills. He then picked up his girlfriend, Tricia Hawthorne, and went back to the radio station where he met Brown and Williams. 4 RP 641; 5 RP 856-57, 863, 869-70; 6 RP 1017-19.

Hawthorne drove the three men back to north Everett. On the way Brown tried calling the person he said sold him the pills, but could not get an answer. Brown had earlier called and text messaged his brother James Baskins and instructed him not to pick up if he called. Baskins did as his brother requested. 3 RP 404-06; 5 RP 870; 6 RP 1020-22.

Brown told Williams and Bess that he got the pills from a "Mike" in a nearby park. Once they arrived in the neighborhood the three men got out of the car and tried to locate the man on foot. They could not find him so they got in the car and Hawthorne drove around for a while. Brown tried to call "Mike" again using both his

phone and Bess' phone. Bess was also calling, reassuring the defendant and Cooper that it would be all right. At one point Brown pointed out a truck that pulled away from a residence and said that was the man he bought the pills from. They followed the truck to Marysville, but ultimately turned around and returned to the north Everett neighborhood. 4 RP 644-48; 5 RP 869-73; 6 RP 1024-26; 7 RP 1199-1203.

The defendant and Cooper arranged to meet Bess at a market on Marine View Drive. When Bess and the others got back from Marysville they met at the market. From there the group went back up into the neighborhood where the drug deal had been done. The defendant, Cooper, Bess, Williams and Brown walked to Pilchuck Path. Brown continued to make calls in a purported attempt to get the money back for the fake pills. Bess began knocking on the door where the truck they had followed to Marysville had been parked. 2 RP 138-41; 4 RP 649-52, 655; 5 RP 875-77; 6 RP 1037-43.

The defendant has his hands under his shirt when he got out of the car. Williams heard a metallic clicking sound coming from the defendant. Williams was concerned, although he was unsure if the sound was a belt buckle or a round being chambered in a gun.

As Bess was knocking on the door the others were walking down the street. Cooper was talking to Brown. After Bess turned from the home Cooper moved away from Brown and the defendant started talking to Brown. Brown was terrified. He was on his knees with his pockets turned out. Brown explained to the defendant that he did not have his money, but offered to rob some stores to get it back. The defendant told Brown to put his things back in his pockets and get up. Brown and the defendant were within three to four feet of each other, with Cooper, Bess, and Williams some distance away. 2 RP 141-42; 4 RP 656-58; 5 RP 879-82, 731; 6 RP 904-07.

Bess turned his back to Brown and the defendant as he tried to call "Mike" again. Just as he did that a gunshot was fired. Bess turned around and saw Brown lying on the ground. He then ran to Hawthorne's car and they drove off. Based on the defendant's behavior and proximity to Brown, Bess thought the defendant had shot Brown. As they drove away Bess told Hawthorne "J shot that boy." 5 RP 883; 6 RP 904-05, 975-77, 1038.

Just before the gunshot fired Williams was concerned about the tension that had developed. He heard the conversation between the defendant and Brown in which Brown was promising

to get the defendant his money. The defendant asked Williams what was going on with Brown. Williams assured the defendant that Brown was ok, but the defendant's comment concerned Williams. Williams started to leave the scene when he saw the defendant's shirt come up and a muzzle flash. Although Cooper and the defendant had been to Williams' right, Williams could only see the defendant out of his peripheral vision as Cooper was farther behind him. As Williams ran he turned and saw Brown on the ground. 4 RP 658-61; 5 RP 707-14.

Bess and Hawthorne went to Jamie Mayer's home in Mill Creek after the shooting. Once there the defendant, Cooper and Lewis also arrived. Bess had an injury to the right side of his neck after the shooting. Bess thought he had been grazed by a bullet so he told the defendant that the defendant has shot Bess. The defendant responded "my bad, my bad." A few days later the defendant went to see Bess and told him they were in this together. Bess told the defendant that they were not. 5 RP 884-92; 6 RP 1039-42.

The defendant was a member of a music group called FAAM mob. Cooper and Lewis were also in the group. The group recorded in a studio named 206 Entertainment owned by Trace

Bartoli and Aaron Gazes. On June 22 the group had a recording session that lasted from about noon to nine p.m. The defendant arranged with Bartoli and Gazes to come back the next day for another session. When no one showed up Bartoli called the defendant. The defendant told Bartoli and Gazes that he was out of town and the group would not make it. The defendant sounded uncharacteristically flustered. 4 RP 617; 5 RP 767-72, 779-80.

Several neighbors heard the shooting and called the police. Police arrived within minutes, but only Brown was left at the scene. He was dead from the gunshot wound. Police located a bullet casing in front of Brown's head and a bullet behind his head. There was stippling on Brown's face indicating the gun had been less than one foot from him when he was shot. The bullet path was from front to back, right to left, and slightly downward. 2 RP 142, 146, 183, 199; 3 RP 239, 264-65, 436, 444-45.

Just before the shooting Bess had been calling the number Brown had dialed for "Mike." It was in fact Baskin's number. When Baskin listened to the voice mail message he became concerned for his brother. Baskin called hospitals asking if anyone had died from a gunshot wound. Eventually he called 911 and was contacted by Detective Allen. Baskin confirmed Brown's identity

from a photo the detective showed him of the body. 3 RP 276-77, 407-09.

Baskin called Bess' number and left threatening messages. A few days later Bess and Hawthorne called police to seek protection because they had been getting several threatening phone calls. Bess identified the defendant as the person who shot Brown. Bess also showed Detectives Allen and Friesen the injury to his neck. The two detectives agreed that based on their experience it appeared to have come from a hot shell casing when it was ejected. 3 RP 413-14; 4 RP 491-501, 510-12; 7 RP 1239-40.

Police also talked to Williams. Based on information Williams gave police Williams also identified the defendant from a photo montage. 4 RP 448-54; 7 RP 1235.

Police located a safe that belonged to the defendant. They searched the safe pursuant to a search warrant. Inside they found documentation belonging to the defendant and FAAM mob. They also found a partially full box of PMC 9mm Lugar ammunition. That ammunition was similar to the shell casing found in front of Brown. 7 RP 1122-28, 1241-51; 8 RP 1389-99.

The defendant was charged with one count of first degree murder while armed with a firearm. 1 CP 119-20. The jury found

the defendant guilty of the charge and found he was armed with a firearm at the time of the crime. 1 CP 32-33.

III. ARGUMENT

A. WHETHER WITNESSES WERE PERMITTED TO TESTIFY TO IMPROPER OPINIONS WAS NOT PRESERVED FOR REVIEW. THE WITNESSES WERE PROPERLY PERMITTED TO TESTIFY TO THE IDENTITY OF THE SHOOTER.

1. The Defendant Did Not Object To Evidence He Now Argues Was Improper Opinion Testimony.

a. Motions In Limine and Testimony of Witnesses.

The defendant argues that Bess and Williams' identification of him as the person who shot Marquise Brown constituted an improper opinion. His argument is based on evidence introduced through Bess and Williams' testimony, testimony from detectives who interviewed Bess and Williams, and a recording of statements Bess made to Tricia Hawthorne right after the shooting. BOA at 20-21, 25.

Before trial defense counsel made a motion in limine "to preclude any witness from offering any testimony in the form of an opinion regarding the guilt or veracity of the defendant." The defense specifically moved to exclude the opinions of detectives that Hawthorne's and Bess's account was consistent with each other. The defense did not move to exclude Bess or William's

testimony regarding the identity of the shooter on the theory that it constituted an improper opinion or on any other theory. 1 CP 73; 1 RP 73-74.

The defense also moved to exclude the contents of a voice mail message left on James Baskin's cell phone when Bess called that number right before the shooting. The defense argued the conversation between Bess and Hawthorne did not qualify as either an excited utterance or present sense impression exception to the hearsay rule. The defense did not argue the contents of the voice mail message constituted improper opinion evidence. 1 CP 70-71; 1 RP 55-60.

Williams testified without objection that as he was turning to leave the scene he saw a muzzle flash and heard a sound from a gun come that came from the defendant. He based that statement on the relative location of all the men present at the scene. 4 RP 659-60; 5 RP 714-15. The defense objected to a question about who Williams picked in a photo montage on the basis that the question was leading, but not on any other basis. 5 RP 717-18.

Bess testified to the relative positions of people prior to the gunshot, and that after the gunshot fired he felt a burning on his neck. Bess also testified that when they met up later Bess accused

the defendant of shooting Bess. The defendant responded “my bad.” 5 RP 880-89. Bess was not asked on direct examination who he believed fired the shot that killed Brown. On cross examination Bess explained that based on the relative location of people there was only one person that could have “made that bang;” that person was the defendant. 6 RP 975-76.

Detective Friesen testified that based on information he received from Bess he prepared a photo montage. The defense objected to introduction of the montage on the basis that it contained booking photos that were unfairly prejudicial² and it was cumulative. The defense argued that since identity was not an issue the montage was unnecessary. The defense stated it had no objection to testimony about who Bess identified in the montage. 4 RP 501-06.

Detective Allen testified without objection that throughout the course of the interview Bess was consistent on his identification of the shooter. 4 RP 545. In addition he testified without objection that based on information provided by Williams a photo montage was created containing the defendant’s photo which Williams

² The asserted prejudice was that the persons depicted in the photos all appeared to be wearing jail jumpsuits. The prejudice was exacerbated by the notation “King County Sheriff’s Office” on the montage.

identified. The defense objected to the detective's testimony that Williams identified the defendant as the one who shot Brown on the basis that Williams had not testified yet. The court sustained an objection and instructed the jury to disregard that response. In a hearing outside the presence of the jury the court held that Detective Allen could testify regarding who Williams identified as the shooter after Williams testified. 4 RP 551-56.

b. Whether The Challenged Evidence Was Improper Opinion Testimony Has Not Been Preserved For Review. Alternatively, If Testimony From Bess Was Error, It Was Invited.

Generally a party may only assign evidentiary error on appeal on the specific ground made at trial. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007), RAP 2.5. The purpose of the rule is to allow the trial court the opportunity to correct any error, thereby avoiding unnecessary appeals and retrials. State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), review denied, 129 Wn.2d 1007 (1996). It is also based on consideration of fairness to the opposing party. Id. A general objection is not sufficient to inform the trial court of the actual alleged issue to preserve the issue for review. Seattle v. Carnell, 79 Wn. App. 400, 402-03, 902 P.2d 186 (1995), review denied, 128 Wn.2d 1020 (1996).

Defense motion in limine number 8 was a general objection. 1 CP 73. It did not specifically identify what proposed testimony was in issue, and therefore did not adequately preserve for review whether the specific evidence identified on appeal was improper opinion testimony. By specifically referencing certain evidence in motion number 8(a), and arguing for exclusion of only that evidence on the basis of opinion evidence at trial, the defense signaled to the court and the State that it was not moving to exclude any other evidence on the basis it was improper opinion testimony. That position was reinforced when no objection was raised when Williams testified that the defendant shot Brown. By failing to assert Williams' and Bess' in court and out of court identifications constituted improper opinion testimony the defendant has waived that issue for review.

The defense claims that an adequate objection was made during trial. However the defense made no objection to William's testimony based on any claim that it was an improper opinion. The defense only objected on the basis that the question was leading when Williams' testified regarding the photo montage. 5 RP 717.

Bess did not directly testify the defendant shot Brown until he was asked that question on cross examination. 6 RP 975-76.

The defense also affirmatively agreed Detective Friesen could testify that Bess identified the defendant as the shooter from the montage. 4 RP 501-06. As to that specific evidence, if it was improper opinion evidence, the defense invited any error. A party who sets up an error waives the issue on appeal. State v. McPherson, 111 Wn. App. 747, 763-64, 46 P.3d 280 (2002).

Similarly, the defense either affirmatively agreed evidence identifying the defendant as the shooter could come in through the detectives, or did not object to it, or did not object on the basis that it was improper opinion testimony. Under these circumstances the defendant has failed to preserve the issue for review.

c. Whether Evidence The Defendant Was Identified As The Person Who Shot Brown Was An Improper Opinion Is Not A Manifest Error.

A party who fails to preserve an issue for review may seek review on the basis that the claimed error is a manifest error affecting a constitutional right. RAP 2.5(a)(3). Error is “manifest” when the defendant shows how the alleged error actually affected his rights at trial. Kirkman, 159 Wn.2d at 926-27.

Evidence that constitutes an improper opinion raises a constitutional question because it violates a defendant’s right to an independent determination of the facts by a jury. State v. Demery,

144 Wn.2d 753, 759, 30 P.3d 1278 (2001). The Court construes the question of whether improper opinion is manifest narrowly because the decision not to object may be tactical. State v. Elmore, 154 Wn. App. 885, 898, 228 P.3d 760, review denied, 169 Wn.2d 1018 (2010). Allegedly improper opinion testimony is not “manifest” unless it is an “explicit or almost explicit statement on an ultimate issue of fact.” Kirkman, 159 Wn.2d at 936. The challenged testimony involves the witness’s identification of the defendant as the person who shot a firearm at Brown. That testimony was not an explicit or almost explicit statement that the defendant was guilty.

The defendant was charged with First Degree Murder with a Firearm allegation. 1 CP 119-20. In order to find the defendant guilty the State was required to prove that the defendant acted with intent to cause the death of Marquise Brown, that the intent was premeditated, that Marquise Brown died as a result of the defendant’s acts, and that an of the acts occurred in Washington State. 1 CP 43. The jury was also instructed on the lesser included offense of Second Degree Murder which required the jury to find the defendant intended to cause Brown’s death and that Brown died as a result of the defendant’s acts. 1 CP 46-47. The

witnesses' statements identifying the defendant as the shooter does not address his mental state as it relates to Brown, nor is it an opinion that Brown died as a result of the defendant shooting him. Because it was not an explicit statement that the defendant was guilty of the crime, the testimony was not a manifest error.

Finally, the error was not manifest because the jury was properly instructed that it was the sole judge of the credibility of the witnesses. 1 CP 36. Defense counsel devoted a considerable amount of her argument to the suggestion that Bess was lying and Williams was mistaken. 9 RP 1481-1502. The jury was entitled to accept or reject those arguments.

d. The Testimony Identifying The Defendant As The Person Who Shot Brown Is Not Improper Opinion Evidence. Even If Improper, It Was Harmless.

If the Court finds the alleged error is manifest then it must address the merits of the constitutional issue. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). If an error of constitutional import has been committed, it may nonetheless be harmless. Id. Here no constitutional error occurred.

“A witness may not offer opinion testimony by direct statement or by inference regarding the defendant’s guilt, but testimony is not objectionable simply because it embraces an

ultimate issue the trier of fact must decide.” State v. Hayward, 152 Wn. App. 632, 649, 217 P.3d 354 (2009), ER 701, 704. The reason for the rule is to avoid having the witness tell the jury what result to reach. State v. Cruz, 77 Wn. App. 811, 815, 894 P.2d 573 (1995).

Testimony that does not directly comment on the defendant’s guilt, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. Seattle v. Heatley, 70 Wn. App. 573, 577-78, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011(1994). In Heatley a police officer properly testified in a DUI prosecution that based on his observations of the defendant’s physical appearance and his performance on various tests the defendant was obviously intoxicated and he could not drive a vehicle in a safe manner. Id. at 576. This Court reasoned that the opinion was supported by an adequate foundation, was helpful to the jury, and was not framed in conclusory terms which parroted the legal standard. Id. at 581.

In other circumstances witnesses were permitted to testify to an opinion about a fact even when that fact bears on the defendant’s guilt. A presumptive death certificate was not an improper opinion by the medical examiner. State v. Mason, 160

Wn.2d 910, 932, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008). The certificate was based on specific facts observed by the doctor and the witness did not testify the victim was dead or that the defendant was guilty of murdering him. Id. Similarly, an opinion was properly admitted when it did not answer questions regarding an affirmative defense. State v. Sanders, 66 Wn. App. 380, 388-89, 832 P.2d 1326 (1992). In contrast, testimony from a CPS worker she believed the victim in a child molestation case was an improper opinion that the defendant was guilty of the charged crime. State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

Here the witness's testimony and out of court statements identifying the defendant as the person who shot Brown constituted proper opinion testimony. The opinion was based on specific, articulated facts which rationally led to the conclusion that the defendant was the shooter. Both witnesses testified to the relative location of all five men, placing the defendant closest to Brown. Both testified regarding the defendant's behavior just before the shooting. From the time he got out of the car the defendant had his hands concealed under his shirt. William's heard a clicking sound

coming from the defendant which could have been the sound of a gun. Both testified to a conversation between the defendant and Brown in which Brown appeared frightened and he promised to get the defendant's money back. Just before seeing the flash of the gun Williams saw the defendant's shirt move up. Each witness stated these facts led to his belief that the defendant fired the shot. 4 RP 655-60; 5 RP 702-14, 879-82; 6 RP 903-08, 975-76.

The foregoing demonstrates the witness's opinion was based on rational inferences from events that each witness directly observed. The testimony was not a direct comment on the defendant's guilt. Neither witness stated the defendant acting with premeditated intent murdered Brown. Lastly, it was otherwise helpful to the jury because it clarified what the witnesses saw.

The defendant argues the opinions were improper because they were not based on the witnesses' personal knowledge but rather inferences from where people were standing, their demeanor, and the location of the muzzle flash. BOA at 25. The witnesses were present and personally saw objective facts from which they were entitled to draw reasonable inferences. That claim should fail.

The defendant next argues the opinions were improper because (1) they addressed the only question for the jury to decide, and (2) the opinions were unnecessary. The identity of the person was not the only question for the jury. Premeditation and intent, and whether Brown died as a result of the gunshot wound were also jury questions. Additionally, the jury had to consider the witnesses' credibility. The defendant cites no authority for the proposition that a lay opinion is improper because the witnesses had already testified to the objective facts from which the witness formed his opinion. That rule would contradict ER 701 which permits lay opinions if they are "rationally based on the perception of the witness."

Moreover, the claim that the opinions were unnecessary undermines the defendant's argument that the alleged error was not harmless. Constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). To determine if error is harmless the court looks at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. Id. at

426. There is no claim that Bess and Williams' objective observations were improper. Thus the jury was likely to have drawn the same inferences from the direct observations Williams' and Brown testified to.

The witnesses' testimony was corroborated by other evidence. Witnesses other than Bess and Williams and phone records corroborated their movements both before and after the shooting. 5 RP 743-46, 758-64, 782, 824; 6 RP 1013-45, 1100-02, 1109; 7 RP 1199-1205; 8 RP 1348-60, 1367-73. Bess's testimony that the defendant admitted firing the gun was not contradicted. Police also found ammunition in the defendant's safe which matched the ammunition found at the scene. Although the defendant claims there was a lot of evidence from which the jurors could reasonably infer that either Cooper or Bess shot Brown, he fails to identify that evidence. In fact the physical evidence showing Bess was burned by the ejected shell casing would eliminate him as a potential shooter.

The defendant's argument that other alleged errors compounded the prejudice should likewise be rejected. The defense did not object when Detective Allen characterized William's identification of Blake as a "good pick." 4 RP 553. The failure to

object suggests that the alleged error was not so prejudicial in the context of the case. Cf. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Despite the objection to the “big fish” comment, defense counsel repeated that phrase in her closing argument. The detective’s testimony was later used to support the defense theme that Detective Allen was a rookie homicide detective who prematurely concluded that the defendant caused Brown’s death, and then conducted his investigation to fit that hypothesis. 9 RP 1509-18. This challenged testimony ultimately helped, and did not hurt the defense.

Finally, Detective Allen’s testimony that Williams identified the defendant as the shooter when he viewed a photo montage was harmless. The Court sustained an objection and instructed the jury to disregard that statement. 4 RP 554. Jurors are presumed to have followed the court’s instructions. State v. Foster, 135 Wn.2d 441, 572, 957 P.2d 712 (1998). The court later held that the error was in the order of proof; Williams had not yet testified. 4 RP 556. Williams did identify the defendant as the shooter. 4 RP 659-60;5 RP 708-13, 717-18. Had there been no instruction to disregard that evidence the detective’s testimony on that point only

highlighted the defense theory that he was an inexperienced investigator.

B. BESS POSSESSED ADEQUATE PERSONAL KNOWLEDGE OF EVENTS TO SUPPORT ADMISSION OF HIS EXCITED UTTERANCE.

Prior to trial the State sought to admit evidence of the voice mail message left on James Baskins' phone that was recorded at the time of the murder. The recording, containing statements from Bess to Hawthorne, was offered as an excited utterance pursuant to ER 803(a)(2) and as a present sense impression pursuant to ER 803(a)(1). 2 CP ___ (sub. 48). The defendant opposed the motion on the basis that Bess had no firsthand knowledge and they were in response to questioning. 1 RP 57-58. The court found the substance of the voice mail was admissible under both theories offered by the State. 1 RP 59-60.

The defendant now challenges admission of the evidence and Bess's statements to Hawthorne after the murder on the basis that Bess did not have firsthand knowledge that the defendant shot Brown under ER 602. BOA at 29-30. The trial court decision to admit evidence is reviewed for abuse of discretion. State v. Magers, 164 Wn.2d 174, 187, 189 P.3d 126 (2008). An abuse of discretion occurs when the trial court's decision is "manifestly

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

ER 602 prohibits a witness from testifying to a matter unless there is sufficient evidence to support a finding that the witness has personal knowledge of that matter. State v. Vaughn, 101 Wn.2d 604, 611, 682 P.2d 878 (1984). Likewise to be admissible under the present sense impression exception the declarant must have seen the event. Miller v. Crown Amusements, Inc., 821 F. Supp. 703, 705 (S.C. Georgia, 1993). If offered as an excited utterance the declarant must either have participated in the event or witnessed the act or fact concerning which the declaration or statement was made. Beck v. Dye, 200 Wash. 1, 10, 92 P.2d 113 (1939), State v. Bryant, 65 Wn. App. 428, 433, 828 P.2d 1121 (1992). The Court may infer personal knowledge from the circumstances of the case. Bryant, 65 Wn. App. at 435, n. 3. “The test is ‘whether a reasonable trier of fact could believe that the witness had personal knowledge.’” United States v. Tocco, 135 F.3d 116, 128 (2nd Cir.), cert. denied, 523 U.S. 1096 (1998).

In Bryant the Court found a 3 year old witness had personal knowledge of the acts she reported in part because she was found

in a place where she could see what happened. Bryant, 65 Wn. App. at 435, n.3. In Tocco the Court relied on circumstantial evidence to conclude the witnesses had sufficient personal knowledge that he was assisting the defendant in committing arson to admit his confession to setting the fire. Tocco, 135 F.3d at 128.

In contrast, personal knowledge is not shown where there is evidence which provides an articulable basis on which to believe the declarant did not witness the events. Brown v. Keane, 355 F.3d 82 (2nd Cir. 2004) (No showing of personal knowledge when an unidentified caller's description of event is contradicted by other witnesses and caller did not note those witnesses presence.) Bemis v. Edwards, 45 F.3d 1369, 1373-74 (9th Cir. 1995) (The circumstances suggested a 911 caller was repeating what someone else was relaying).

The defendant here argues Bess did not have personal knowledge because he did not actually see the defendant shoot Brown. But as argued above, Bess was present at the time of the murder. He personally observed objective facts from which a reasonable person would conclude that the defendant shot Brown. Given these facts a reasonable trier of fact could conclude that Bess had personal knowledge that the defendant shot Brown.

Even if it was error to admit the voice mail message recorded at the time of the shooting it was harmless. Erroneously admitted hearsay evidence is harmless where the declarant testifies to the same events covered by the hearsay statement. State v. Ramirez-Estevez, 164 Wn. App. 284, 293, 263 P.3d 1257 (2011), review denied, 173 Wn.2d 1030 (2012). Bess testified to the circumstances surrounding the shooting. In cross examination he responded affirmatively when asked “so that is why you think J is the shooter?” 6 RP 975. Thus he testified to the same thing at trial. If admission of Bess’s hearsay was error it was harmless.

It was also harmless because Williams also testified in that regard. Both witnesses were consistent in their description of where Brown and the defendant were standing and what they were doing just before Brown was shot. Their testimony was supported by evidence from other witnesses who corroborated what happened before and after the shooting. Thus there was reason to find Bess credible including when he testified to the defendant’s admission that he fired the gun that night. Contrary to the defendant’s claim, the State’s case against him was supported by substantial credible evidence.

C. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT. ALTERNATIVELY, IF THE ARGUMENTS WERE IMPROPER AN INSTRUCTION COULD HAVE CURED ANY POTENTIAL PREJUDICE.

When a defendant claims the prosecutor's argument was improper, he bears the burden of showing the impropriety of the arguments and their resulting prejudice. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). If the alleged error could have been obviated by a curative instruction that the defense did not request then reversal is not required. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

If the defendant did not object to an allegedly improper remark then he waives the error unless the remark is so flagrant and ill intentioned that it causes "an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Russell, 125 Wn.2d at 86. Failure to object strongly suggests that the argument did not appear critically prejudicial in the context of the trial as a whole. Swan, 114 Wn.2d at 661.

"The prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." State v. Stenson, 132 Wn.2d 668, 727, 940

P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Remarks that the defendant claims are improper are considered 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. Russell, 125 Wn.2d at 85-86.

The defendant asserts the prosecutor's closing argument was improper in four ways, each of which entitles him to a new trial. The defendant raised no objection to the prosecutor's closing or rebuttal closing argument. While the prosecutors arguments were all proper and therefore do not constitute misconduct, if this Court finds any argument was inappropriate the issue has been waived by the defendant's failure to object.

1. The Prosecutor Was Permitted To Discuss All Of The Evidence.

The defendant first charges that it was improper for the prosecutor to rely on lay opinions of guilt. BOA at 34-35. The defendant specifically identifies the prosecutor's statement that "the only evidence you have heard during the course of this trial is the defendant is the person who pulled the trigger." BOA at 35; 9 RP 1473-74. That was a proper argument when considered in the context of the entire closing argument.

The prosecutor started his argument by recognizing that the eyewitnesses, Williams, Bess, and Hawthorne, had some credibility problems. For that reason he suggested the jury begin with what was undisputed. 9 RP 1450. He pointed to phone records which showed Bess and Cooper were on the phone at the time of the murder. 9 RP 1452-53, 1455-57. He focused on the narrow distance between the shooter and Brown, as evidenced by the stippling on his face. 9 RP 1454-55. He pointed out the defendant missed a previously scheduled appointment the day of the homicide. He suggested that was consistent with someone who committed a murder and was lying low. 9 RP 1549. He also commented on the evidence that showed the gun used to shoot Brown was the defendant's. 9 RP 1460-61.

The prosecutor then talked about the three eyewitnesses, and suggested reasons why the jury should find them credible. 9 RP 1462-64. He argued the evidence from those witnesses showed only the defendant was close enough to Brown to have been able to shoot him within the distance indicated by the physical evidence. "Again, I strongly suggest to you that the reason for that is the defendant is the shooter. All the evidence we have points to that." 9 RP 1465.

The prosecutor reviewed the instruction regarding direct and circumstantial evidence in the context of both Williams' and Bess' testimony. The prosecutor acknowledged no witness directly saw the defendant shoot Brown. He suggested the eyewitnesses' testimony was credible because neither testified to more than he actually knew. "They are telling you what they saw and the inferences they drew immediately, I would suggest are the inferences that you ought to draw." 9 RP 1467-69.

The prosecutor is permitted to rely on all of the facts properly admitted into evidence. Stenson, 132 Wn.2d at 728. This is precisely what the prosecutor did when he referred to the inferences drawn by Williams and Bess. As noted above the defendant did not object to Williams' testimony identifying the defendant as the shooter. His counsel was the one that directly asked Bess about who he thought was the shooter. Other evidence showing Bess and Williams identified the defendant as the shooter shortly after the murder was admitted by the court. Under these circumstances the prosecutor did not commit misconduct.

2. The Prosecutor Did Not Impermissibly Vouch For The Witnesses.

The defendant next argues the prosecutor impermissibly vouched for the credibility of State's witnesses. A prosecutor may not personally vouch for a witnesses' credibility. State v Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S 1121 (1996). Vouching may occur when (1) the prosecution places the prestige of the government behind the witness or (2) when the prosecutor indicates that information not presented to the jury supports the witnesses' testimony. State v. Allen, 161 Wn. App. 727, 747, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011). Prejudicial error is not found unless it is clear and unmistakable that the prosecutor is expressing a personal opinion. Id.

A prosecutor does have wide latitude to draw reasonable inferences from the evidence and may freely comment on a witnesses' credibility based on the evidence. Id. When considered in the context of the entire argument none of the arguments identified by the defendant constitute improper vouching for the witnesses.

The first argument the defendant claims constitutes improper vouching occurred when the prosecutor was discussing the

eyewitnesses' credibility. 9 RP 1461-63.³ The prosecutor acknowledged that there were reasons to disbelieve each of the three witnesses. The prosecutor argued differences between the witnesses accounts were a reason to believe the witnesses stating "I would suggest the differences in their stories tell you that the general story they are giving you is accurate." 9 RP 1463. He followed up by talking about how the basic story from each witness was the same, and was corroborated by evidence from other witnesses. 9 RP 1463-67. The prosecutor was not telling jurors what he personally thought. Under similar circumstances the Court found that kind of argument was an invitation to draw the inference that the witness was telling the truth. State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Like Gregory, the prosecutor here was permissibly drawing reasonable inferences from the evidence.

The second argument the defendant claims constituted impermissible vouching occurred in the context of the prosecutor discussing direct and circumstantial evidence. The prosecutor pointed out that each witness testified to what he saw directly and then argued Bess and Williams were more credible because they did not overstate what they saw. The argument quoted by the

³ The defendant erroneously cites the quoted language at 9 RP 1452.

defendant was no more than suggesting that the circumstantial evidence, which was sufficient to lead Bess and Williams to believe the defendant shot Brown, should be sufficient for the jury to draw the same conclusion.

"In this case, that's not what you're getting [referring to an overstatement of what was observed] from Quinlin Bess. That's not what you are getting from Ivor Williams. They are telling you what they saw and the inferences they drew immediately, I would suggest, are inference you ought to draw. He pulled the trigger and we know that based on the location of everyone else.

9 RP 1469

Like the previous argument, this argument is not a clear statement of the prosecutor's personal opinion. Rather the argument drew rational inferences from the evidence presented, and was therefore permissible.

Finally the defendant challenges the prosecutor's summary statement in his opening closing remarks. In context it was no more than a statement that the evidence supported the conclusion that the defendant committed the charged crime. Even if it was improper the defendant did not object and thus any error was waived. In the context of the prosecutor's entire argument which was confined to discussing the credibility of the witnesses, the

evidence and the reasonable inferences from that evidence it cannot be said that one sentence was so flagrant and ill-intentioned that no instruction could cure any prejudice arising from it.

3. The Prosecutor's Arguments Were A Fair Response To The Arguments Of Defense Counsel.

The defendant next argues that the prosecutor disparaged defense counsel. He points to the prosecutor's rebuttal closing argument in which the prosecutor stated "When Ms. Kyle gets up with her push-pins and this proves Quinlin Bess is the shooter she is making it up out of whole cloth." He also takes issue with the prosecutor using the phrases "wild ass guesses" and "little play acting." BOA at 39. The defense did not object to any of these comments.

It is improper for a prosecutor to disparage defense counsel's role or impugn defense counsel's integrity. State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). However, the prosecutor is entitled to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87. Even if improper, an argument is not grounds for reversal if it was invited or provoked by defense counsel and is in reply to her acts and statements,

unless the remark is not a pertinent reply or is so prejudicial that a curative instruction would be ineffective Id. at 86.

Defense counsel devoted a significant portion of her closing argument suggesting Bess, or possibly Cooper, was the shooter. Counsel argued that Bess was the shooter based on the burn on his neck caused by the ejected shell casing and the final resting spot of the casing and the bullet in relation to Brown. She also relied on the location of the entrance and exit wounds on Brown. 9 RP 1498-1509.

In rebuttal the prosecutor challenged the defense theory placing either Bess or Cooper as the shooter. The prosecutor noted that based on evidence from the firearms expert and the medical examiner nothing could be discerned from the location of the shell casing and Brown's wounds in regards to what direction Brown was facing when he was shot. The only know facts were that he was shot at close range and the trajectory of the bullet. The prosecutor then followed that argument with the challenged "whole cloth" argument. 9 RP 1525-26.

The prosecutor's argument was supported by the evidence. Dr. Thiersch testified the only significance of any injuries was obvious stippling which would indicate a distance from which the

gun was fired and nothing else. The description of the wound path assumed the victim was standing, but was only for reference purposes, and did not imply he was in that position when he was shot. 3 RP 437-42; 4 RP 463-64. Ms. Geil, the firearms expert testified that the wound path could be affected by a number of variables. While the shell casing was generally ejected to the right and rear about six feet, where the shell casing landed when it was ejected was also dependant on a number of variables. One variable was that the casing could be kicked by someone after it came to rest. 8 RP 1389-90, 1410, 1413-18.

Consistent with that testimony the prosecutor then suggested other theories for why the shell casing ended up where it was, characterizing each of his theories as "wild ass guesses." The prosecutor continued by arguing what the known facts were, and that they did not support the defense theory that definitively positioned the shooter and the victim. "That's about it. Don't be drawn into that little play acting where we can recreate this based on location of bullet and shell casing." 9 RP 1526.

The arguments were a fair response to the defense arguments placing Bess as Brown's assailant. The defense claim that the scene could be reconstructed to determine who shot Brown

by looking at the wound path and placement of the bullet and shell casing was completely contrary to the evidence. The “whole cloth” argument is no different from the argument that a defense theory unsupported by the evidence was ludicrous in State v. Brown, 132 Wn.2d 529, 567, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). There the Court held the prosecutor’s characterization was reasonable in light of the evidence. Id. at 132.

Taken in context, the prosecutor’s arguments challenged defense counsel’s arguments, not her integrity. The prosecutor pointed out that evidence crucial to the defense theory was speculative. The known evidence did not support defense counsel’s argument that Bess shot Brown. They were a fair response to the arguments of counsel.

Even if the prosecutor’s remarks were improper, they were invited by defense counsel’s closing argument and were in reply to that argument. Reversal is required only if the remarks are so prejudicial that no curative instruction would have been effective. Russell, 125 Wn.2d at 86.

In Thorgerson the Court relied on the strength of the case to find an instruction could have cured the improper comments. Thorgerson, 172 Wn.2d at 452. Here, the evidence supported the

prosecutor's arguments, and not the defense attorney's. The medical examiner testified his description of the bullet path through Brown's head did not imply how Brown was positioned when he was shot. 4 RP 464. The firearms expert testified the general ejection path for shell casings but that the final resting spot for the shell casing was based on a number of variables. 8 RP 1389, 1413-15. The physical evidence showed Brown was shot from about six inches away. 3 RP 442. No one identified anyone but the defendant as being close enough to Brown to have shot him from that distance. Given this evidence, and other evidence that supported the conclusion the defendant shot Brown, any prejudice from the challenged argument could have been cured by an instruction.

4. "Do The Right Thing" In The Context Of The Prosecutor's Entire Argument Was Proper.

The prosecutor concluded his rebuttal closing argument by saying:

This is as tawdry as it sounds. Marquise Brown was killed over a bunch of little pills, period, for \$2,400. Do what you need to do. Do the right thing. Come back with a verdict of guilty.

9 RP 1533-34.

The defendant did not object to that final statement. He now argues the phrase “do the right thing” was improper and entitles him to a new trial despite his lack of objection.

The defendant cites four out of state cases in support of his argument that the phrase “do the right thing” constitutes improper argument. In each of those cases the court stated it was improper for the prosecutor to urge the jury to convict for some reason other than based on the evidence. State v. Musser, 721 N.W.2d 734, 755 (Iowa 2006), Jackson v. State, 791 So.2d 979, 1029-30 (Ala. 2000), Impson v. State, 721 N.E.2d 1275, 1283 (Ind. 2000), Lisle v. State, 937 P.2d 473, 482 (Nev. 1997)⁴.

This is the same standard applied by Washington courts. State v. Ramos, 164 Wn. App. 327, 340, 263 P.3d 1268 (2011) (holding it was improper for the prosecutor to argue matters outside the evidence presented), State v. Jones, 71 Wn. App. 798, 807, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018, 881 P.2d 254 (1994) (“a prosecutor may not make statements that are unsupported by the record and prejudice the defendant”). The

⁴ The defendant states that the court in Lisle held that a prosecutor’s statements to the jury that it must be “accountable” and “do the right thing” were improper. BOA at 41. In fact the court said the in that case the arguments did not constitute prosecutorial misconduct. Lisle, 937 P.2d at 482.

prosecutor does have latitude to make summation statements that remind jurors of their duty under the law. Thus it was not improper for a prosecutor to argue “you have to be able to sleep with that decision at night for both the Defendant and for [J.O.]. State v. Corbett, 158 Wn. App. 576, 596, 242 P.3d 52 (2010). In the context of the entire argument that statement simply urged the jury to be careful and deliberate in reaching its decision for the sake of all concerned. Id. at 597.

Here, in the context of the prosecutor’s entire argument the challenged statement was proper. The prosecutor’s opening and rebuttal arguments were confined to the evidence presented at trial and the instructions given by the court. The prosecutor reminded the jury that “the critical thing to keep in mind when you go back into the jury room is to remember what is evidence is and what’s not.” 9 RP 1532. He continued by stating “[y]our job is to go back in there, synthesize the evidence, the law, and come to a proper verdict.” 9 RP 1533. In the context of the prosecutor’s entire argument the phrase “do the right thing” was an argument urging the jury to return a verdict that was supported by the evidence.

Finally, the defendant made no objection to the argument. The statement was at the end of lengthy closing arguments by both

the prosecutor and defense attorney. The prosecutor had reminded the jury that they were instructed to decide the case based on the evidence given to them and that the arguments of counsel were not evidence. 9 RP 1532. The State presented a compelling case wherein all the evidence suggested that the defendant shot Brown at close range. Any prejudice from the isolated “do the right thing” argument could have been cured by an instruction. It is therefore not a basis on which to grant the defendant a new trial.

D. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT EXCLUDED EVIDENCE THAT THE DEFENDANT SOUGHT TO INTRODUCE TO IMPEACH A STATE’S WITNESS.

Prior to trial the defendant sought to introduce evidence that Hawthorne had reported Bess for domestic violence and he had subsequently been convicted of at least one assault against her. The defense argued that it was relevant under ER 607 for impeachment on the theory that Bess may have not have been candid with Hawthorne when he named the defendant as the shooter right after the murder happened. 1 CP 67; 1 RP 19-23, 30.

The State objected on the basis that it was not relevant. The trial court agreed ruling that there had been an inadequate showing of relevance under ER 609 and ER 404(b). 2 CP __ sub 47; 1 RP

25-29. The defendant now argues the trial court erred in excluding the evidence. He asserts the evidence was relevant and any prejudice to the State could have been mitigated by limiting the scope of the evidence to an inquiry into Hawthorne reporting Bess to the police. BOA at 43-44.

ER 607 permits a party to attack the credibility of any witness. However, other rules may limit when a party may impeach a witness. State v. Allen S., 98 Wn. App. 452, 459, 989 P.2d 1222 (1999), review denied, 140 Wn.2d 1022 (2000). The court has discretion to permit inquiry in cross-examination into specific instances of a witnesses' conduct concerning the witnesses' character for truthfulness or untruthfulness if it is probative of that issue. ER 608.

When considering whether to admit evidence under ER 608 the court may consider whether the conduct is relevant to the witnesses' veracity on the stand and whether it is germane or relevant to the issues presented at trial. State v. O'Connor, 155 Wn.2d 335, 349, 119 P.3d 806 (2005). While the defendant does have a constitutional right to confront the witnesses against him, he has no constitutional right to admit irrelevant evidence. Id. The trial court did not abuse its discretion when it determined evidence of

domestic violence between Bess and Hawthorne was not relevant to whether he would have been truthful with her right after the murder was committed.

Evidence is relevant if it has any tendency to make more or less probable than otherwise a fact of consequence to an action. ER 401. Evidence of conduct which gives a witness motive for saying what she said may be relevant to assess the witnesses' credibility. State v. Spencer, 111 Wn. App. 401, 408-11, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009 (2003), State v. Wilder, 4 Wn. App. 850, 854, 486 P.2d 319, review denied, 79 Wn.2d 1008 (1971). Here, no such motive was apparent from the proposed evidence. There is no suggestion that Bess had reason to make the defendant look bad in Hawthorne's eyes, or to make himself look less culpable to her. The evidence simply did not make it more likely that Bess lied to Hawthorne about the defendant moments after the murder. Nor does it make it more likely that Bess was lying to the police or jurors in the days and months after the murder when he repeated what he saw.

The defense argues that excluding the evidence was prejudicial to his case because Bess' statement to Hawthorne that "J shot that boy" was crucial to the State's case. There was much

more evidence linking the defendant to the murder, including Williams' and Bess' in court testimony about the relative positions of people and the defendant's acts right before the murder and the defendant's admissions to Bess afterwards. In addition the defense was not prevented from exploring Bess' truthfulness with Hawthorne. Counsel elicited from Bess that he did not always tell her the truth and withheld information from her. Hawthorne came from a good family and enjoyed a good reputation, and his drug dealing was inconsistent with that. 6 RP 915-18.

E. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL UNDER THE CUMULATIVE ERROR DOCTRINE.

The defendant claims he is entitled to a new trial under the cumulative error doctrine. That doctrine applies when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where there are few errors and they have little or no effect on the outcome of the trial. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1173 (2007).

Although the defendant has raised a number of claims of error, no error actually occurred. Even if this Court found some of the claims raised constituted error they had little effect on the outcome of the case. The State presented a strong case. Two eye-witnesses identified the defendant as being the only one close enough to Brown to cause the stippling observed on his face. Each independently described the defendant hiding his hands under his shirt and lifting his shirt just before the shot was fired. The defendant admitted to Bess he was the one who fired the shot. Other witnesses and phone records corroborated Bess and William's testimony regarding their activities before the murder. Other evidence tied the gun used to commit the murder to the defendant. Given the weight of the evidence the defendant suffered no prejudice by any claimed error.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on May 15, 2012.

MARK K. ROE
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Appendix A

<u>Legal Name</u>	<u>Street Name</u>	<u>Citation</u>
Marquise Brown	YG	3 RP 356
Jerome Blake	JG or J	4 RP 615; 6RP 1006
Ivor Williams	Pine	4 RP 610
Quinlin Bess	Q	4 RP 613
Arthur Cooper	Coop	5 RP 842-43.
Brandon Lewis	B-Lew	5 RP 843
John Spencer	J the 4 th	5 RP 750
Wiley Simth	Tone Black	5 RP 750