

67946-5

67946-5

NO. 67946-5-I

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

STATE OF WASHINGTON

Respondent

v.

MICHAEL N. BENJAMIN,

Appellant

2012 JUL -9 PM 2:13
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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I. ISSUES

1. Was there sufficient evidence to support the second degree murder conviction?

2. Is the defendant entitled to a new trial on the basis of prosecutorial error in closing argument?

3. Did the police unlawfully obtain evidence of the defendant's purchase history from Safeway when they obtained that evidence by a search warrant supported by probable cause?

4. Was the search warrant for the defendant's purchase record from Safeway for a specific period of time overbroad?

5. If the search warrant was overbroad, was the overbroad portion severable from the portion that was supported by probable cause?

6. Was admission of evidence the defendant bought bleach on the morning of the murder harmless?

7. Did the trial court abuse its discretion when it ruled certain evidence was admissible and other evidence was inadmissible?

8. Did cumulative error deny the defendant a fair trial?

II. STATEMENT OF THE CASE

In August 2010 Angela Pettifer lived in Monroe, Washington at the Savoy Building. That building is located in old downtown

Monroe and houses some commercial and some residential units. Ms. Pettifer lived on the third floor in apartment 303. 9-20-11 RP 43-44, 66, 71-72; 9-22-11 RP 164-66.

The defendant, Michael Benjamin, was also a resident of the Savoy Building. He lived on the second floor in apartment 211. Jerome Keating was the building manager who rented the unit to the defendant. The defendant was not employed in any capacity at the Savoy, including as a security guard or night watchman. 9-22-11 RP 166-68, 170-72.

On August 14, 2010 Ms. Pettifer began drinking alcohol sometime in the afternoon. Ms. Pettifer had been taking Antabuse for her drinking problem, but has stopped taking it by that day. By 9:30 p.m. she ended up on the Eagle's club doorstep. The bartender called police at 9:30 p.m. to report an intoxicated female. It was a low priority call so the officer did not arrive until 10:11 p.m. Before the officer arrived two patrons, Karla and Kerry Prosser decided to help. Ms. Pettifer told Ms. Prosser that she wanted to go home. Ms. Prosser decided she and her husband would walk her home because she was so intoxicated. 9-21-11 RP 108-110, 118-124, 170-76, 199-03; 9-22-11 RP 29-31.

When Ms. Pettifer and Mr. and Ms. Prosser arrived at the Savoy Ms. Prosser heard someone announce themselves as a security guard. She did not pay attention and they proceeded up the back stair case. At the top of the stairs on the third floor the defendant came out the door as Ms. Pettifer was getting her keys out. He told the Prossers that he needed to check her keys to make sure that she lived there, stating that he did not know Ms. Pettifer. The defendant took her keys from her and checked them in the lock. The defendant then let Ms. Pettifer and the Prossers in the building. They walked to her apartment where Ms. Pettifer let herself in. The Prossers then left the way they came and the defendant walked in the opposite direction down the hallway. At no time during this encounter did the defendant touch Ms. Pettifer. 9-21-11 RP 176-84, 200-05; 9-22-11 RP 9-14.

Andrea Estep and her fiancé Stephen Parchman lived in the apartment next door to Ms. Pettifer's apartment. Their living room and Ms. Pettifer's bedroom shared a wall. Between midnight and 12:30 a.m. on August 15 they heard a loud thump coming from Ms. Pettifer's bedroom. When the thump sounded the pictures on their living room wall shook. 9-22-11 RP 117-21, 134-37.

Lauren Chapman also lived at the Savoy in apartment number 216. She was standing out on the back stairs closest to her apartment smoking a cigarette between midnight and 12:30 a.m. While standing there she saw the defendant come down from the stairs from the third floor. He appeared to be hurrying and he was sweating profusely. Although it was warm, it appeared he was sweating more than the weather warranted. As he went to go in the door to the second floor the defendant saw Ms. Chapman. She mentioned that it was a really hot night. The defendant responded that it was a hot night for having sex. Given the nature of their relationship, Ms. Chapman thought that was an inappropriate comment. She was so disturbed that she did not finish her cigarette and instead went inside. 9-22-11 RP 149-153.

In the week leading up to the weekend of August 14-15, 2010 Ms. Pettifer invited her father, Mike Pettifer, to come to Monroe to visit her. Mr. Pettifer lived in Shoreline. He also had a bad drinking problem. Mr. Pettifer had been dry for about 20 years but started drinking again in 2007. Ms. Pettifer wanted to try and help her father get sober. Ms. Hartzell was Ms. Pettifer's sister. Ms. Hartzell told Ms. Pettifer she thought it was a bad idea since Ms. Pettifer had just begun to stay sober and their father was still

drinking. Nevertheless Mr. Pettifer came to stay with Ms. Pettifer on Thursday, August 12. 9-21-11 RP 113-14, 116-17; 9-23-11 RP 82-84.

Ms. Pettifer was dating Jason Chapman at the time. Mr. Chapman lived about 3 or 4 miles from the Savoy. He did not drive. Mr. Chapman also stayed with Ms. Pettifer and Mr. Pettifer at the Savoy on August 12 and 13. Mr. Pettifer slept in a small room off of the back room. Mr. Chapman slept with Ms. Pettifer in her bed. Late Friday night Mr. Chapman and Ms. Pettifer had sexual relations. Ms. Pettifer offered him sex the next morning, but he declined as it was too hot in the apartment. 9-21-11 RP 115-16; 9-23-11 RP 9, 35, 39, 43-44, 47, 85.

As Ms. Hartzell feared, Mr. Pettifer's presence was a catalyst for Ms. Pettifer to start drinking again. That caused a rift between the sisters. Ms. Hartzell called Ms. Pettifer later, encouraging her to break up with Mr. Chapman and send their father home. Ms. Pettifer became angry and rang off, telling Ms. Hartzell she would call later. Ms. Hartzell then turned off her phone. 9-21-11 RP 118-124.

Mr. Chapman was still at Ms. Pettifer's apartment during the day on August 14. He left the apartment for about 30-45 minutes

around 1:00 p.m. Before that time Mr. Chapman did not see Ms. Pettifer drinking. When he got back to the apartment it was apparent Ms. Pettifer had been drinking. She continued to drink before they left for the river located about 5 blocks away at Al Borlin Park. On the way they stopped at Keg-n-Cue where Ms. Pettifer had another drink. After that drink Ms. Pettifer appeared intoxicated. She was stumbling and acted belligerent. Mr. Chapman feared she would not make it across the busy street they needed to cross to get to the park so he convinced Ms. Pettifer to turn around and go back to the apartment. On the way back Ms. Pettifer lifted her shirt a couple of times to "flash" cars that went by. Mr. Chapman told her that he did not want to be with someone who was that drunk all the time, and that he wanted a break. When they got back to the apartment Ms. Pettifer passed out. Mr. Chapman packed up his belongings and called his sister to pick him up. Mr. Chapman spent the night at home with his sister and her family. 9-23-11 RP 12-17, 45-51.

Ms. Pettifer was upset about what had happened with Mr. Chapman. She and Mr. Chapman exchanged phone calls and text messages throughout the evening after he left. Mr. Chapman told Ms. Pettifer he cared for her, but he wanted her to straighten up.

He encouraged her to take care of herself that evening. The last time Mr. Chapman tried calling her on August 14 was at 10:38 p.m. She did not answer. 9-23-11 RP 58-60, 93, 163-66.

Throughout the evening Mr. Pettifer and Ms. Pettifer were seen on various surveillance cameras at stores and ATM machines in downtown Monroe. She was last seen on a video surveillance at 8:53 p.m. A little before 8:50 p.m. Mike Brady, a tenant at the Savoy, left to deposit some checks at an ATM a short distance away. He saw Mr. Pettifer and Ms. Pettifer trying to get in the front door, which was locked. Mr. Brady did not know either of them, and did not let them in the building. Ms. Pettifer was unable to unlock the door. She became frustrated and told her father to wait at the front of the building. She then walked around the corner. She did not come back so Mr. Pettifer tried to look for her. He was unable to locate her so he ultimately called a cab and went home to Shoreline. The cab picked him up at 1:30 a.m. and dropped him off at 2:20 a.m. 9-22-11 RP 75, 79-82, 101-07; 9-23-11 RP 90-97, 105.

When Mr. Pettifer got home he tried calling Ms. Pettifer, but could not get a response. He tried calling her the next morning, again with no answer. He then tried calling Ms. Hartzell but did not reach her. He then called Joel Smith, the father of Ms. Pettifer's 13

year old son. Mr. Pettifer explained to Mr. Smith he had been drinking with Ms. Pettifer and got separated from her. Mr. Pettifer sounded worried and asked Mr. Smith to go check on her. Mr. Smith agreed to do so. When Mr. Smith arrived the door to the building were locked. He tried calling Ms. Pettifer and Ms. Hartzell, but could not reach either one. He went to the back door which was open. He went up to Ms. Pettifer's door and knocked but there was no answer. Mr. Smith knew Ms. Pettifer usually kept her door unlocked so he walked in. There he found her on the bed, dead. He then called 911. 9-20-11 RP 18, 23-31; 9-23-11 RP 98, 167; Ex. 46, 64.

Police arrived and found Ms. Pettifer mostly naked laying face up on her bed. Her shirt had been pushed up above her collar bone and her bra was pushed up, exposing her breasts. There was a scarf under the bed that appeared to be bleach stained. The bed clothing has been pushed up toward the headboard. There was a band of discolored skin around her neck. There was broken glass and an orange spicy smelling substance police later determined was from a bottle of Frank's RedHot hot sauce on Ms. Pettifer's head, body, clothes and floor. There was no hot sauce on Ms. Pettifer's legs, torso, and eyes. Ms. Pettifer's pants were found

laying face down on the ground. The front portion of her pants was also covered in hot sauce. This showed she was clothed at the time she was struck. It was clear that a portion of the bottle had been removed from the apartment. The only hot sauce found in Ms. Pettifer's apartment was Tabasco sauce. The police were also unable to locate Ms. Pettifer's keys in her apartment. 9-20-11 RP 46-49, 87-95; 9-21-11 RP 24, 28; 9-22-11 RP 56-63; 9-23-11 RP 132-37, 147-57, 171-75; 9-26-11 RP 59-60; Ex. 46, 50, 53, 62, 64, 72, 74.

The medical examiner conducted an autopsy. He noted Ms. Pettifer had some bruising on her hands which could have been, but were not necessarily defensive wounds. Most of Ms. Pettifer's injuries were to her head and neck. He also noted a significant blow to the top of Ms. Pettifer's head. He opined that it could have been caused by a bottle of Frank's RedHot hot sauce. Her blood alcohol level was .28 gm/100 ml. The medical examiner concluded Ms. Pettifer had been strangled. He classified her death as a homicide. 9-21-11 RP 57-65, 69-71, 74.

Mr. Chapman had continued to try to reach Ms. Pettifer throughout the day on August 15. None of those calls were answered. He finally left a message in the early afternoon for Ms.

Hartzell, asking her to let him know if Ms. Pettifer was alive or dead.
9-21-11 RP 142; 9-23-11 RP 62-64, 164-65.

Police contacted Mr. Chapman in the late afternoon on August 15 at his sister's home. Mr. Chapman became emotional when he learned of Ms. Pettifer's death. He agreed to help police in any way he could. He gave police a recorded statement and agreed to be photographed. He had no injuries to his face or hands. Police did notice a crusty orange substance on the left pocket of Mr. Chapman's cargo pants pocket. When police asked him about it Mr. Chapman stated he had been eating Cheetos and had wiped his hands on his pants. He stated he had been wearing the same thing he wore the day before. Police agreed it looked like Cheetos, but collected and photographed it anyway. There was no indication by his physical appearance that Mr. Chapman had been involved in Ms. Pettifer's death. 9-22-11 RP 42-54; Ex. 130.

Police also arranged to have Mr. Pettifer brought to the police station. When he arrived at the police station he appeared feeble; he walked and talked slowly and was very confused. He was wearing the same clothing he wore in surveillance photos the day before. There was no indication of any hot sauce on his clothing. He has some minor injuries, which he described as

coming from a fall one week earlier. 9-22-11 RP 78-80, 191-95; 9-23-11 RP 101.

Police served a search warrant on the defendant's apartment on August 26. Inside police located one large bottle of Frank's RedHot Cayenne Pepper Sauce that was two-thirds empty. The contents of the bottle had the same odor as the hot sauce in Ms. Pettifer's apartment. Police also found a T-shirt that appeared to have a bleach stain on it and a bottle of bleach. 9-23-11 RP 122, 127-132, 134; Ex. 102-05.

Police determined the hot sauce found in the defendant's apartment was sold at the Safeway in Monroe. Police then obtained a search warrant for the defendant's purchase history at that Safeway. Those records showed the defendant purchased Franks RedHot sauce approximately once a month from April 2009 to August 2010. The last two times the defendant purchased that item was on July 17 and August 11, 2010. Those records also showed the defendant bought Clorox bleach at 7:36 a.m. on August 15. Bleach is effective in washing away blood, tissue, and DNA. The Safeway records indicate that was the only purchase of bleach. 9-23-11 RP 137-46; Ex. 232.

During the autopsy the medical examiner swabbed various parts of Ms. Pettiffer's body, including the area around the nipple of her breasts. Police obtained DNA samples from every male who had access to the Savoy on August 14 and 15, including the defendant, Jason Chapman, Joel Smith, and Kerry Prosser. The crime lab detected traces of male DNA on the swabs from Ms. Pettiffer's breasts and fingernails. Due to the small amount the lab conducted Y-STR testing. In preliminary testing of the swab from Ms. Pettiffer's right breast the lab could not include or exclude the defendant due to an insufficient profile. Mr. Chapman and Mr. Smith were excluded as a contributor. Mr. Pettifer was included as a possible contributor. As to that sample one in 29 persons was a potential contributor to that sample. 9-21-11 RP 77-81; 9-22-11 RP 40, 199; 9-26-11 RP 12-14, 38, 62-65.

Y-STR testing showed the defendant was a contributor to the DNA found on Ms. Pettiffer's left breast. His profile would not occur more than once in 1300 male individuals in the United States. Lorraine Heath who conducted the analysis considered that a strong statistic for Y-STR testing. The most that could be found under Y-STR testing is a profile that occurred once in every 2800 men. The defendant's profile on her left breast was consistent with

directly touching her. A partial profile for the defendant was found on the right breast swab. It was calculated that profile to occur no more than one in 5 men in the United States. The lab considered that a weak evidence. 9-27-11 RP 7-26, 29-30.

The defendant was charged with one count of Second Degree Murder. 1 CP 150-51. He was convicted of the charge after jury trial. 1 CP 34.

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CHARGE OF SECOND DEGREE MURDER.

The defendant challenges the sufficiency of the evidence to support his conviction for Second Degree Murder. Because there was sufficient evidence to find the defendant guilty this argument should be rejected.

Evidence is sufficient to support the charge if after viewing the evidence in the light most favorable to the State any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence are drawn in favor of the State and most strongly against the defendant. State v. Garbaccio, 151 Wn. App. 716, 742, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027 (2010). When

evaluating the sufficiency of the evidence a reviewing court will treat circumstantial evidence as probative as direct evidence. Id. When a defendant challenges the sufficiency of the evidence he admits the truth of the State's evidence and all reasonable inferences that could be drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court gives deference to the trier of fact who resolves conflicting testimony, evaluates the credibility of the witnesses, and weighs the persuasiveness of the evidence. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157, review denied, 130 Wn.2d 1008 (1996).

In order to convict the defendant of the charge the State was required to show that (1) the defendant acted with intent to cause the death of Angela Pettifer, and (2) he did cause the death of Angela Pettifer. 1 CP 46, 150. The defendant concedes that there was sufficient evidence to prove someone caused Ms. Pettifer's death. BOA at 13. He does not contest that it was intentionally done. Rather he argues there was insufficient evidence of identity; that there was not enough evidence to prove that he perpetrated the crime.

The defendant did not know Ms. Pettifer. He challenged her and the Prossers when they tried to enter the building through the rear. During that encounter the defendant learned where Ms. Pettifer lived and that she was in a compromised state. Although Ms. Pettifer apparently unlocked her door in the defendant's presence, she routinely kept her door unlocked. At no time during that encounter did the defendant touch Ms. Pettifer.

When she was found Ms. Pettifer was splayed out face up on her bed. She was nearly naked, wearing only a shirt and her bra, both of which had been shoved up above her breasts.

Even though the defendant never touched her during the encounter with the Prossers the defendant's DNA was found on Ms. Pettifer's left nipple. The forensic expert who testified to that opined that it was the result of directly touching her, and not from secondary transfer. The statistics for the Y-STR testing on that DNA strongly indicated that it was the defendant, and not some other person's DNA on her body.

The rational inference from evidence of the manner in which Ms. Pettifer had been found was the murder was sexually motivated. The rational inference from evidence the defendant's

DNA was found on an intimate part of Ms. Pettifer's body was that he was the one that had committed the murder.

The defendant's DNA was not the only evidence that linked him to Ms. Pettifer's murder. The defendant clearly had the run of the building. He was seen using both the interior and exterior stairwells. Ms. Pettifer's neighbors heard a loud bang come from her bedroom. Whatever had been struck had been done with such force as to rattle the pictures on their wall adjoining her bedroom. In the same time frame another neighbor saw the defendant come down the exterior stairway from the third floor where Ms. Pettifer lived to the second floor where the defendant lived. The defendant was excessively sweaty although the temperature at the time was in the low 70's. 9-26-11 RP 127-28.

The autopsy showed Ms. Pettifer had suffered a tremendous blow to the head. The glass in her hair showed the blow came from smashing the hot sauce bottle on her head. It would have taken at least 4 to 5 minutes of applying pressure to Ms. Pettifer's throat to cause her death. Additionally the mattress topper was shoved up to the top of the bed. Ex. 72, 77. It would require some significant effort to move that fairly heavy and

unwieldy item, particularly if someone were still on top of it like Ms. Pettifer was.

Considering the sound heard by the neighbors and the injuries observed on Ms. Pettifer it is rational to conclude that whoever killed her expended a lot of energy doing so. The rational inference from the defendant's sweaty condition was that he had been vigorously exerting himself. The defendant did not live on Ms. Pettifer's floor, and had no business being there, particularly in the middle of the night. He was not a security guard as he led the Prossers to believe. Despite that he had been seen coming from there sometime after midnight. The rational inferences from that evidence are that the defendant was coming from Ms. Pettifer's apartment, after having bludgeoned and strangled her.

The lack of hot sauce on Ms. Pettifer's torso and legs, and the presence of hot sauce on the front of her pants that were found laying face down showed that Ms. Pettifer had been bludgeoned before she was stripped. The nature of the glass shards and hot sauce found in her hair and on the bedclothes and surrounding area showed it came from a bottle of Franks RedHot sauce manufactured from a certain run in May 2010. The amount of hot

sauce sprayed over the crime scene suggested that the bottle had been full or almost full at the time she was clubbed with it.

The defendant's grocery records showed that he routinely bought that brand of hot sauce on an approximately monthly basis. There was only one bottle of that brand of hot sauce in the defendant's apartment 11 days after the murder. That bottle was two thirds empty. The defendant had purchased a bottle of that hot sauce on July 17 and again on August 11, just 3 to 4 days before the murder. These circumstances suggest that the defendant used the new bottle of hot sauce as a club when Ms. Pettifer was hit with the hot sauce bottle.

Photographs of the defendant's apartment showed he had a bottle of bleach and a bleach stained T-shirt. Given the condition of the defendant's apartment it was reasonable to believe that he did not buy it to clean his own place. Ex. 102-105. It was circumstantial evidence the defendant used it for some other reason, such as to clean up the murder scene. That inference is supported by evidence the scarf found under Ms. Pettifer's bed had what appeared to be a bleach stain on it. Ex. 74.

There was evidence in Ms. Pettifer's apartment that an effort had been made to clean up. The major portions of the bottle used

to club her had been removed from the scene. It was reasonable to believe that given the amount of hot sauce sprayed around the crime scene that the killer would have some of that sauce deposited on him. There was no indication in her apartment that her killer cleaned himself up there. However the defendant did have access to a bathroom in his apartment where he could clean himself up after the murder.

Taking all of these facts and circumstances together, a rational trier of fact could have reasonably concluded the defendant caused Ms. Pettifer's death. The defendant's arguments to the contrary largely ignore this evidence. Instead he focuses on evidence which he argues suggests that others caused her death. His arguments fail to consider the standards for evaluating whether the evidence was sufficient to support the charge.

The defendant first suggests that Mr. Pettifer killed his daughter. He cites the lack of corroboration for Mr. Pettifer's testimony regarding his actions between the time he and his daughter were separated and the time he was picked up by the cab. The jury was entitled to believe Mr. Pettifer's testimony on that point. That determination is not subject to review.

The defendant also argues evidence Mr. Pettifer's DNA and not his DNA was found under Ms. Pettifer's fingernails is "virtually dispositive" of whether the evidence was sufficient to convict him. BOA at 16-17. However there was evidence that fingernail DNA is "hit and miss" and used as "a last resort" because generally what is found is DNA from the people the victim co-habits with. 9-27-11 RP 31-32. Mr. Pettifer was living with Ms. Pettifer for a few days. The defensive wounds the medical examiner noted was bruising on her hands, not scratches. 9-21-11 RP 57. The jury was entitled to discount any DNA under her fingernails as evidence that would exonerate the defendant.

The defendant also suggests there was evidence that Mr. Chapman killed Ms. Pettifer. He cites the orange stain on Mr. Chapman's pants and the presence of Mr. Chapman's DNA on Ms. Pettifer's body and clothing. The police agreed the stain looked like Cheetos dust, not hot sauce. The photo of Mr. Chapman's pants shows a bright orange dust that is dissimilar to the hot sauce found at the scene. Ex. 50, 53, 130. Mr. Chapman lived with Ms. Pettifer and was intimate with her. The jury was entitled to believe this evidence did not mean Mr. Chapman committed the crime rather than the defendant.

The defendant speculates that his DNA may have dripped on Ms. Pettifer's breast as he stood over her while she fumbled with her keys. But speculation is not the basis on which to overturn a conviction where there was evidence the jury was entitled to believe and which supported the charge. Moreover the evidence does not support his speculation. Ms. Prosser said everyone was sweating, but not more than normal. 9-21-11 RP 186. Mr. Prosser said he could not say the defendant was sweating. 9-22-11 RP 18. Since neither noticed the defendant was dripping sweat, the suggestion that his DNA got on her clothed breast in that fashion is unsupportable.

The remainder of the defendant's arguments fail to consider the evidence, and all rational inferences drawn from that evidence, in the light most favorable to the State. When the proper standard is applied to the evidence at trial there was sufficient evidence to conclude the defendant caused Ms. Pettifer's death.

B. SOME PROSECUTORIAL ERROR IN CLOSING ARGUMENT WAS NOT PRESERVED FOR REVIEW. OTHER INSTANCES OF ERROR WAS CURED BY THE COURTS INSTRUCTIONS.

The defendant argues he is entitled to a new trial as a result of five instances of prosecutorial error in closing argument where the prosecutor's argument shifted the burden of proof. A defendant

who seeks a new trial on the basis of prosecutorial error must show that the conduct complained of was both improper and prejudicial. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Prejudice is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1206 (1996). Allegedly improper remarks are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

Here the defendant cites three arguments in the prosecutor’s opening closing argument and two arguments in his rebuttal argument which he asserts entitles him to a new trial. BOA at 25-27. The defendant objected to the third and fourth arguments that he challenges. The prosecutor argued:

The evidence that you’ve heard, everyone who testified on this particular issue, is the defendant and Angela did not know each other. They had no romantic relationship. They had no interaction other than that at the door of the third floor at the Savoy Building. And the reason this is important is you have to come up with some explanation for his DNA on her left nipple.

9-27-11 RP 77.

Defense counsel objected. The Court sustained the objection and instructed the jury to disregard that argument. It further instructed "I will remind the jury that the State alone bears the burden of proof in this matter." 9-27-11 RP 77.

In rebuttal closing the prosecutor argued:

What essentially you were just told by the defendant's lawyer is that neither the police nor I care that we get the right guy. Apparently we are just so zealous that we are going to convict a ham sandwich, or in this case, Mr. Benjamin.

One thing that I kept waiting for throughout out the entirety of the defendant's lawyer's closing argument was an explanation for one bit of evidence. How do you account for the DNA on her left nipple?

9-27-11 RP 122.

The defense objected. The Court sustained the objection and instructed the jury to disregard that argument. The Court reiterated: "[t]he jury's reminded that the State bears the burden of proof solely in this case." 9-27-11 RP 122-23.

In addition to these instructions the Court had instructed the jury "The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists." 1 CP 39. "The lawyers' remarks, statements, and arguments are intended to

help you understand the evidence and apply the law... You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.” 1 CP 37.

It is improper for the prosecutor to misstate the burden of proof. State v. Warren, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008), cert. denied, ___ U.S. ___, 129 S.Ct. 2007 (2009).

To the extent these two arguments could be interpreted to mean either the jury or the defendant had to come up with some reasonably innocent explanation for the defendant’s DNA on Ms. Pettifer’s breast, it was improper. However the defendant fails to show any prejudice. The trial court immediately instructed the jury to disregard the statements and reiterated the State carried the burden of proof. The jury is presumed to follow the instructions of the court. State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987).

In Warren the prosecutor improperly argued the defendant was not entitled to the benefit of the doubt. However the Court held that the necessary prejudice had not been shown because the trial court had given the jury a curative instruction, reminding them of the defendant was entitled to the benefit of the doubt if the State had not proved the case beyond a reasonable doubt. Id. at 28.

In addition to the curative instructions, when considered in the context of the entire argument the defendant was not prejudiced. Where a prosecutor makes both proper and improper arguments, the defendant does not show the requisite prejudice to justify reversing his conviction. In Anderson where the prosecutor misstated the burden of proof, reversal was not required because the prosecutor also made arguments correctly stating the burden of proof and an instruction could have cured any prejudice from the improper remarks. State v. Anderson, 153 Wn App. 417, 220 P.3d 1276 (2009), review denied, 170 Wn.2d 1002 (2010).

Here the prosecutor began his closing argument by reminding the jury to base its decision on the evidence, and not on the remarks of counsel. 9-27-11 RP 72. The prosecutor told jurors that the jury instructions were “the rules you have to follow” when analyzing the evidence. 9-27-11 RP 73. In closing his initial remarks the prosecutor urged the jury to acquit if they were dissatisfied the State had proven its case. 9-27-11 RP 101. Throughout the prosecutor’s closing he relied on the evidence and reasonable inferences to be drawn from it to argue the State had satisfied its burden of proof. In closing the prosecutor urged the

jury to ignore personal attacks and rely on the evidence presented.

He stated:

I would suggest, again, when you look at this thing in total, when you look at everything in context, there's no one but the defendant that matches all the evidence that we have.

9-27-11 RP 129.

The defendant has not shown he was prejudiced by the two arguments that he did object to at trial. In the context of the prosecutor's entire argument and the instructions given by the court the State was held to its burden of proof. The court's instructions to the jury to disregard the improper arguments and to hold the State to prove the case beyond a reasonable doubt cured any potential prejudice from those arguments.

The defendant did not object to the three remaining arguments that he claims constituted misconduct entitling him to a new trial. The failure to object to an allegedly improper remark waives the error unless the remark is determined to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). A conviction should be reversed only

if there is a substantial likelihood that the alleged misconduct affected the verdict. Russell, 125 Wn.2d at 85. “Reviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” State v. Emery, ___ Wn.2d ___, 278 P.3d 653, 665 (2012). A defense attorney’s decision not to object to the alleged misconduct strongly suggests that it had little impact at trial. State v. Curtiss, 161 Wn. App. 673, 250 P.3d 496, 508, review denied, 172 Wn2.d 1012 (2011).

Like the two arguments that the defendant objected to, two of the remaining arguments that he now challenges for the first time on appeal could be characterized as shifting the burden of proof. In the first argument the prosecutor stated the defendant had the “means, the motive, the opportunity, and most importantly has no innocent explanation for his DNA being on her left nipple and areola.” 9-27-11 RP 72. The second argument was in the context of framing the contested issue at trial:

The real issue here is: Do we have the right guy sitting in front of you? Not whether this was intentional, reckless or something of that nature. This is clearly a murder. This is clearly an intentional murder. And the only issue for you folks to decide when you go back into the jury room is if this guy didn’t do it.

9-27-11 RP 74.

Had the defendant raised an objection to the remaining arguments, an instruction could have cured any potential prejudice as it did in regard to those arguments he did object to. In both Warren and Emery the Court addressed other arguments which also improperly shifted the burden of proof. In Warren the Court held that an instruction after a timely objection cured the prejudice. Warren, 165 Wn.2d at 28. Similarly in Emery the Court held that for this type of error, had the defendant timely objected an instruction could have cured any error. Emery at 666. Here had counsel objected it is clear the court would have given curative instructions. It is not likely those arguments had any effect on the verdict, given the court's instructions and the prosecutor's focus on the evidence throughout his arguments.

The argument "there is no innocent explanation for that DNA" was not improper. 9-27-11 RP 123. That statement was followed by a discussion regarding what the forensic witnesses testified to about the value of testing done on Ms. Pettifer's fingernails. It was in response to the defense suggesting that evidence the defendant's DNA was not present on her fingernails and others DNA was present there was a reason to find a

reasonable doubt. 9-27-11 RP 108-110. The prosecutor is entitled to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87. The argument, in context, was just that.

This Court has recently found that a similar argument that there is “no reasonable explanation” for certain evidence does not shift the burden of proof and is thus not improper. State v. Killingsworth, 166 Wn. App. 283, 291-92, 269 P.3d 1064, review denied, ___ P.3d ___ (2012). Like the argument in Killingsworth the argument here was that there was no evidentiary support for the defendant’s theory of the case. That argument was proper.

C. THE SEARCH WARRANT FOR THE DEFENDANT’S GROCERY RECORDS WAS SUPPORTED BY LAWFULLY OBTAINED EVIDENCE. ADMISSION OF EVIDENCE SEIZED FROM THE PART OF THE WARRANT THAT WAS NOT SUPPORTED BY PROBABLE CAUSE WAS HARMLESS.

Police served a search warrant on Safeway in Monroe for information related to the defendant’s Club Card purchases. 1 CP 94-105. In response Safeway sent the police records showing what the defendant bought from May 1, 2010 to September 9, 2010. Ex. 232. The defendant argues that evidence should have been suppressed for two reasons. First he argues that part of the information used to support the reviewing judge’s probable cause determination was unlawfully obtained, and therefore invalidated

the entire warrant. Second he argues the scope of the warrant was overbroad. The trial judge rejected both of these arguments. 9-16-11 RP 22-26.

1. Police Use Of The Defendant's Telephone Number To Determine Whether The Defendant Had A Safeway Club Card Was Not A Search That Invaded Into His Private Affairs.

The search warrant affidavit stated in part that Sergeant Dunn completed a transaction at Safeway in Monroe using one of the defendant's two telephone numbers. The receipt he was provided stated the club card holder was Michael Benjamin. 1 CP 103. The defendant argues this violated his right to privacy under Washington Constitution Article 1, § 7.

The first question is whether the action complained of involves a disturbance of one's private affairs. State v. Puapuaga, 164 Wn.2d 515, 522, 192 P.3d 360 (2008). If no private affair is disturbed, there is no constitutional violation. Id. Whether something involves a private affair is determined by examining the historical treatment of the interest asserted. Id. If history does not reveal whether the interest is one which is entitled to protection under article 1, § 7, then the question is whether the expectation is one that a citizen of this state is entitled to hold. Id. The Court will look into the nature and extent of the information that may be

obtained as a result of the governmental conduct, and the extent to which the information has been voluntarily exposed to the public. Id. “The extent to which the information has been voluntarily exposed to the public is also a consideration because it may show, objectively, that there is no expectation of privacy.” State v. Surge, 160 Wn.2d 65, 72, 156 P.3d 208 (2007).

The information obtained by the Sergeant’s conduct was that the defendant was a club card member at Safeway. It does not appear that there has been any historical treatment of any privacy interest in the fact of membership in a rewards club such as the Safeway program. The type of rewards club at issue has become common in recent years. Typically the fact of membership in any retail rewards club is made known to the public at the time of purchase due to the manner in which the rewards are redeemed, either by using a card or the members’ phone number. 1 CP 132. In either case the next person in line, the checker, and anyone else in the near vicinity is exposed to the fact that the particular store patron is a member of that store’s rewards club. Viewed objectively, there is no expectation of privacy in the fact of membership because use of the card or phone number is necessarily exposed to the public. The trial court did not err when it

concluded using the defendant's club card to determine if he was a member was permissible. 9-16-11 RP 24.

The authority cited by the defendant does not undermine this conclusion. The cases he relies on all involved an intrusion into the contents of personal records which were not openly exposed to the public.

In Gunwall the police obtained telephone toll records without a warrant. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). The Court reasoned in part that telephone communication had been considered a private affair, and toll records were part of that communication. Id. at 66-67. The Court cited the reasoning in Gunwall to hold the contents of citizen's garbage can was a private affair within the meaning of Article 1, § 7 in State v. Boland, 115 Wn.2d 571, 581, 800 P.2d 1112 (1990).

In Jorden the Court considered whether a motel guest had a privacy interest in the motel's guest registry. State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007). The Court found there was a privacy interest in the contents of the registry because it contained information about one's life that may either be embarrassing, or affects one's personal security, or one's legitimate business dealings. Id. at 129. The Court later clarified the privacy interest in

motel guest registries was limited. In re Nichols, 171 Wn.2d 370, 377, 256 P.3d 1131 (2011). Where police had an individualized or particularized suspicion regarding a guest those records were not considered private. Id.

Unlike any of these cases the information obtained by the police was not the contents of the records themselves that could not be obtained absent assistance by some employee of the business that maintained them. The information was open to the public as soon as the defendant used his club card to obtain a discount. At the very least, this situation is more akin to Nichols. By the time police had used the defendant's phone number they had a particularized suspicion that he had been involved in Ms. Pettifer's death.

The defendant argues that use of the card by someone other than the cardholder, even if easily done, is still illegal. BOA at 35, n. 2. That argument also does not affect whether membership in the club is a "private affair." Whoever uses the card to access the account is readily visible to the public at the time it is used.¹

¹ In addition, it is not clear that use of the card by someone other than the account holder to get a discount is illegal. The defendant argues that it would violate RCW 9.35.020, Identity Theft, and RCW 9A.56.160(1)(c), Possession of a Stolen Access Device. Identity theft requires showing intent to defraud. No one would be defrauded if someone other than a store discount cardholder used the

2. The Search Warrant Was Valid Even Without Information Obtained From Using The Defendant's Phone Number.

If the Court concludes the detective's using the defendant's phone number while purchasing an item was an unlawful search, the remedy is to excise that portion from the warrant and consider whether the balance supports a finding of probable cause. Gunwall, 106 Wn.2d at 71, State v. Coates, 107 Wn.2d 882, 887, 735 P.2d 64 (1987). Probable cause is established when the affidavit in support of a warrant sets out facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

Notably, three other warrants had been approved to search for evidence of the murder. Two of those warrants were for the defendant's apartment and his car. 1 CP 95-96. In addition the affidavit sets out facts that link the defendant to Ms. Pettifer's death. A few hours after he first contacted Ms. Pettifer the defendant was seen coming from where her apartment was located to where his

card; the cardholder is not out anything and store intended to give the discount anyway. Possession of a stolen access device requires the device be stolen. Since the account can be accessed through a phone number, publicly available in a phone book, it is not likely the device would be considered stolen.

apartment was located. He was sweating profusely and made a weird comment that it was too hot for sex. The defendant was a registered sex offender who had a history of violence. There appeared to have been a struggle and Ms. Pettifer died violently. Evidence showed Ms. Pettifer was hit with a bottle of a particular brand of hot sauce which was found in the defendant's apartment, and which was only sold at the Safeway. 1 CP 97-102. Given the common use of rewards cards that capture customer purchase information it would be reasonable to believe that evidence of the defendant's hot sauce purchases would be found in the Safeway databases.

3. If The Scope Of The Warrant Was Overbroad Admission Of Evidence Unlawfully Obtained That Should Have Been Suppressed Was Harmless.

The search warrant ordered officers to search Safeway store number 537 located in Monroe and or the Safeway Loss Prevention office in Seattle and seize if located:

Records related to the purchase of "Franks' RedHot Cayenne Pepper Sauce" from a transaction on August 11, 2010 at 7:33 hours at store number 37, register number 3, transaction number 0142. To include all club card history under the name of Michael Benjamin and referencing telephonic number 253-709-8035, as well as any related surveillance video of said transaction.

1 CP 94.

The defendant challenges this language as overbroad asserting that there was no nexus between all of the defendant's grocery purchases and the crime. BOA at 38. A warrant is overbroad when it does not describe with particularity items for which probable cause exists, or when it describes with particularity items for which probable cause does not exist. State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003), affirmed, 152 Wn.2d 499 (2004). In any event the warrant is read in a commonsense and not hyper-technical manner, "keeping in mind the circumstances of the case." Id. quoting, Stenson, 132 Wn.2d at 693.

The defendant states that the warrant did not cover evidence that he had purchased bleach, stating the warrant should have been limited to recent hot sauce purchases. BOA at 38. The warrant affidavit contained facts and circumstances that supported the belief that a particular brand of hot sauce had been used in the murder, and evidence relating to that would be found in the Safeway records. 1 CP 99, 102, 104. The warrant did not recount any efforts to clean up the crime scene. To the extent that the

warrant covered evidence the defendant bought bleach, it was overbroad.

Although a portion of the warrant was overbroad evidence that was properly within the scope of the warrant need not be suppressed under the severability doctrine. Maddox, 116 Wn. App. at 806. The doctrine applies if the five requirements are met. First, the problem with the warrant must lie in either the intensity or duration of the warrant, and not with the intrusion itself. Second the warrant must particularly describe at least one item for which there is probable cause. Third the item particularly described which is supported by probable cause must be significant when compared to the warrant as a whole. Fourth, the disputed items must have been found and seized while executing the valid part of the warrant. Fifth, the police must not have conducted a general search. Id. at 806-09.

Applying these criteria to the warrant here the overbroad portion relating to the bleach could be severed from the otherwise valid search for hot sauce purchases. As demonstrated there was probable cause to search the defendant's grocery records for purchases of a particular brand of hot sauce, and it did particularly describe that brand of hot sauce. The request for hot sauce

purchases was the major focus of the warrant, and those purchases were found in the records that Safeway sent in response to the warrant. The warrant was not a fishing expedition for information that might prove useful; it was a specific request for evidence the defendant purchased an item associated with the murder.

Under the severance doctrine evidence seized pursuant to the valid part of the warrant need not be suppressed. State v. Perrone, 119 Wn.2d 538, 556, 834 P.2d 611 (1992). Thus, only the one purchase of bleach and not the hot sauce purchases should have been suppressed. While the court erred in permitting the grocery record of the defendant's bleach purchase, that error was harmless.

Admission of evidence in violation of the defendant's constitutional rights is harmless if the 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). When considering this question the court looks at the "overwhelming untainted evidence." Id. at 426.

Here the untainted evidence showed the defendant did not know Ms. Pettifer before the night she was murdered. On that same night he learned where she lived and that she was mentally and physically compromised due to intoxication. The defendant lived on the floor below Ms. Pettifer. The crime scene indicated whoever killed her greatly exerted himself; she had been hit with sufficient force to break the 23 oz. bottle of hot sauce on her head, the mattress topper had been bunched up under the victim toward the head of the bed, and her clothing had been partially removed and partially scrunched up leaving her torso and breasts bare. About the same time the neighbors heard a great thump coming from Ms. Pettifer's bedroom where the murder happened, the defendant was seen coming from the third floor where her apartment was located. He was sweating profusely. His condition was more consistent with having exerted himself than being due to the weather which was in the low 70's at the time. The manner in which Ms. Pettifer was left, partially nude facing up with her legs spread, suggested a sexual motive for attacking her. The defendant made an inappropriate comment to a neighbor about it being "too hot for sex" as he came downstairs. Finally two witnesses who had no connection with either the defendant or the

victim said the defendant never touched the victim yet his DNA was found on an intimate part of her body. This evidence presented a strong circumstantial case that the defendant murdered Ms. Pettifer.

In addition, evidence that the defendant possessed bleach was already properly before the jury. Police photographed the interior of the defendant's apartment during the service of a search warrant. The defendant does not contest the validity of that warrant. The photographs show a filthy apartment. It was littered with all kinds of clothing, equipment, dirty dishes, and food. It did not look like the kind of place that was regularly cleaned. In amongst the various items in the apartment was a single bottle of bleach and bleach stained T shirt. Ex. 102. The inference to be drawn from those items was that the defendant bought the bleach not to clean his home but to clean his crime scene.

D. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT ALLOWED INTRODUCTION OF EVIDENCE THE DEFENDANT NOW CHALLENGES AND EXCLUDED OTHER EVIDENCE.

The defendant challenges several of the trial court's rulings on the basis that they violated the rules of evidence. A court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. Kennealy, 151 Wn. App. 861, 886, 214 P.3d

200 (2009), review denied, 168 Wn.2d 1012 (2010). A court abuses its discretion when its 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).

1. Evidence The Defendant Bought A Bottle Of Bleach And Testimony Regarding The Use Of Bleach.

The defendant argues evidence the defendant bought bleach on the morning of the murder was irrelevant pursuant to ER 402 or more prejudicial than probative pursuant to ER 403. As argued above the bleach purchase should have been suppressed as unsupported by probable cause in the warrant. However, as shown, admission of that evidence was harmless in light of all the other evidence properly introduced.

The defendant also argues the detective's testimony regarding the use of bleach as a cleaning agent to remove evidence from a crime scene should have been excluded under ER 402 and 403. The defendant did not object to this specific testimony. 9-16-11 RP 90-91; 9-23-11 RP 145-46.

Generally appellate courts will not consider issues raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The Court will consider an issue if it

constitutes a manifest error affecting a constitutional right. RAP 2.5(a)(3). The first question is whether the alleged error suggests a constitutional issue. State v. Lynn, 67 Wn. App. 339, 344, 835 P.2d 251 (1992). Admission of evidence in violation of the rules of evidence does not raise a constitutional question. Stenson, 132 Wn.2d at 709. Thus whether the detective should have been permitted to testify regarding what the bleach could be used for has not been preserved for review.

If the Court does consider the question the evidence was properly admitted. Photographs showed the condition of the defendant's apartment within days after the murder. Ex. 102, 103, 104. The reasonable inference from the condition of his apartment was that he did not buy it to clean up his own place. Given other evidence that linked him to the murder, and evidence that some effort had been made to clean the crime scene since most of the hot sauce bottle had been removed, testimony that bleach can be used to clean up bodily fluids and DNA was relevant. It was not unfairly prejudicial because it was not inflammatory; it was a typical household item that could be used for other purposes as well.

2. The Defendant's Odd Comment To Ms. Chapman Was Very Probative And Not Unfairly Prejudicial.

Over the defendant's objection the trial court admitted evidence the defendant commented to Mr. Chapman that "it was too hot for sex" as he was seen coming from Ms. Pettifer's floor sometime between midnight and 12:30 a.m. 1 CP 71; 9-16-11 RP 74-80. The defendant now argues the court erred because the defendant was not charged with a sex crime and there was no evidence sex was involved in the homicide. He relies on the lack of semen in or on Ms. Pettifer's body to make that claim.

The court concluded there was a sexual component to the crime. 9-16-11 RP 79. That conclusion was supported by evidence Ms. Pettifer's body was left partially nude, exposing her breasts and crotch. She was positioned face up with her legs apart, facing the door. Her position, and evidence the defendant's DNA was on an intimate part of her body, all supports the inference that this crime was at least in part sexually motivated. The lack of semen is not dispositive of this issue.

Further, the court was justified in finding the comment was not unfairly prejudicial. The comment related to the events that had just occurred, which circumstantially tied the defendant to that

crime. It was thus highly probative. It was not unfairly prejudicial because it was not prior misconduct that could lead to an inference of propensity to commit the murder.

The cases cited by the defendant present different facts, and are therefore not persuasive authority for his position. In each case the defendant was charged with a sex crime and evidence he committed other sex crimes was admitted against him. State v. Sutherby, 165 Wn.2d 870, 884-86, 204 P.3d 916 (2009) (trial counsel was found ineffective for failing to move to sever child pornography counts from child rape count where State used one crime to argue propensity to commit the other crime), State v. Saltarelli, 98 Wn.2d 358, 365, 655 P.2d 697 (1982) (Evidence the defendant had attempted to rape another woman four years earlier was improper in a rape case where the defense was consent because it had the tendency to show a propensity to rape). Here, the evidence did not present that same danger. The trial court acted within its discretion when it permitted that evidence.

3. The Trial Court Properly Excluded Evidence That Constituted Double Hearsay.

One week before the murder Ms. Pettifer told Ms. Hartzell that Mr. Chapman said that if he ever saw Ms. Pettifer with another

man that he would chop her (Ms. Pettifer) up. Ms. Hartzell did not confront Mr. Chapman about this statement, and Mr. Champan has denied making it. 1 CP 140. The State moved to exclude that evidence as double hearsay and because it was irrelevant. 1 CP 141; 9-16-11 RP 36-38. The defense argued the statements were first as an exception to the hearsay rule, to be offered as a present sense impression to explain why Ms. Hartzell asked Mr. Chapman to stop seeing Ms. Pettifer. Second, the evidence was not hearsay because it explained why Ms. Hartzell suggested to the police that they investigate Mr. Chapman. 9-16-11 RP 38-39. The court found it was not admissible as a present sense impression. It did permit the defense to inquire about the statement on cross-examination of Mr. Chapman. 9-16-11 RP 42-43; 9-26-11 RP 5-6.

The defendant argues this evidence should not have been excluded. He suggests that if the evidence was hearsay it was properly admissible under ER 803(a)(3), then existing, mental, emotional, or physical condition. He did not argue this exception applied at trial. He has not preserved this argument for review. State v. Powell, 166 Wn.2d 73, 82-83, 206 P.3d 321 (2009).

In addition, the exception the defendant now relies on does not apply to the proffered statements. The exception is generally

applicable only when the deceased's state of mind is at issue, or to prove the declarant acted in accordance with statements of future intent. State v. Powell, 126 Wn.2d 244, 266, 893 P.2d 615 (1995). Where the evidence constitutes multiple hearsay each level of hearsay must be independently admissible. State v. Alvarez-Abrego, 154 Wn. App. 351, 366, 225 P.3d 396, review denied, 168 Wn.2d 1042 (2010), ER 805. Ms. Pettifer's state of mind was not in issue. Nor was it a statement of what she planned to do. Each level of hearsay was not justified under ER 803(a)(3).

The defendant also argues that the evidence was not hearsay because it was a conditional statement. Hearsay is a statement, other than one made by the declarant, while testifying at trial, offered to prove the truth of the matter asserted. ER 801(c). "The matter asserted' is the matter set forth in the writing or speech on its face, not the matter broadly argued by the proponent of the evidence." In re Theders, 130 Wn. App. 422, 432, 123 P.3d 498 (2005), review denied, 156 Wn.2d 1031 (2006). .

On appeal the defendant does not suggest a reason the statement would be offered other than for its truth. At trial he suggested it could show why Ms. Hartzell was suspicious of Mr. Chapman, and directed police to him as a suspect. 9-16-11 RP 39.

Ms. Hartzell's suspicions did not have any tendency to make a fact in issue more or less probable than it would be without that evidence. It was therefore not relevant. ER 401, ER 402. A defendant has no right to introduce irrelevant evidence. State v. Weaville, 162 Wn App. 801, 818, 256 P.3d 426, review denied, 173 Wn.2d 1004 (2011). There was no error in precluding the defense from eliciting that evidence from Ms. Hartzell.

The trial court recognized that whether Mr. Chapman was jealous enough to commit homicidal violence on Ms. Pettifer was relevant to the defense that someone other than the defendant killed her. It properly permitted the defense to inquire of Mr. Chapman regarding whether he ever made that statement.

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

The defendant finally argues he is entitled to a new trial due to the accumulation of errors resulting from failure to suppress evidence and other evidentiary errors and prosecutorial misconduct. The cumulative error 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 require reversal even where there are some errors, if they had little or no effect on the outcome of the trial. Id.

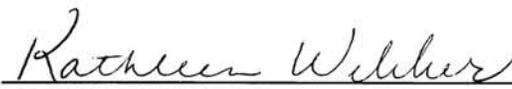
Here, as shown the trial court acted within its discretion when admitting or excluding evidence under the evidence rules. The trial court's instructions to the jury cured any misstatement by the prosecutor in closing argument. The defendant has waived any error as to remarks not objected to. The hot sauce purchases were encompassed within the probable cause set out in the search warrant affidavit. While the bleach purchase was not, admission of that evidence was harmless. Thus the cumulative error doctrine does not entitle the defendant to a new trial.

IV. CONCLUSION

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

Respectfully submitted on July 5, 2012.

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