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STATE OF WASHINGTON

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NO. 34115-8-II

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

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STATE OF WASHINGTON, Respondent

v.

KRISTAL DIANE GIOVANNONI, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE JOHN F. NICHOLS  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 04-1-02230-4

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BRIEF OF RESPONDENT

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Attorneys for Respondent:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869  
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (360) 397-2261

*pm 11/16/20*

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I. STATE OF FACTS

The State accepts the statement of facts as set forth by the Appellant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is that she received ineffective assistance of counsel. The claim is that the defense attorney did not object to the admission of the defendant's confession without first having the corpus delicti established.

Ineffective assistance of counsel is "a mixed question of law and fact" and is reviewed by this court de novo. Strickland v. Wash., 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must show: (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687.

The appellate court approaches an ineffective assistance of counsel argument with a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of

all the circumstances." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)

The corpus delicti is proof that someone committed a crime. State v. Ray, 130 Wn.2d 673, 679, 926 P.2d 904 (1996); 2 Wayne R. La Fave & Austin W. Scott, Jr., Criminal Law section 1.4 at 18 (2d ed. 1986). If there is sufficient evidence to establish the corpus delicti with proof independent of the confession, the court may consider the confession as well. City of Bremerton v. Corbett, 106 Wn.2d 569, 574-75, 723 P.2d 1135 (1986) (quoting State v. Meyer, 37 Wn.2d 759, 763-64, 226 P.2d 204 (1951)). The independent evidence is sufficient if it prima facie establishes the corpus delicti; it need not be evidence beyond a reasonable doubt or even a preponderance of the proof. Corbett, 106 Wn.2d at 574-75. Prima facie in this context means evidence of sufficient circumstances to support a logical and reasonable inference of criminal activity. State v. Smith, 115 Wn.2d 775, 783, 801 P.2d 975 (1990) (citing Corbett, 106 Wn.2d at 579).

In assessing the sufficiency of the proof of the corpus delicti, the reviewing court must assume the truth of the State's evidence and all reasonable inferences therefrom in a light most favorable to the State. Corbett, 106 Wn.2d at 571; State v. Neslund, 50 Wn. App. 531, 544, 749 P.2d 725, review denied, 110 Wn.2d 1025 (1988). Corpus delicti can be

established by either direct or circumstantial evidence. State v. Lung, 70 Wn.2d 365, 371, 423 P.2d 72 (1967).

In a homicide case, the corpus delicti rule requires the State to present evidence independent of the defendant's confession to prove (1) the fact of death and (2) a causal connection between the death and a criminal act. State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996).

In our case, the defendant must show that the trial court would have sustained a corpus delicti objection, causing her statement to be excluded. State v. Baxter, 134 Wn. App. 587, 596, 141 P.3d 92 (2006). As indicated in the statement of facts, at least three physicians testified that the injuries were not consistent with the history provided by the defendant and were not consistent with an accident. Dr. Cliff Nelson, MD, the pathologist who performed the autopsy on Theresa Caballero (RP 642), talked about a forcible type of injury which is inconsistent with a fall from a couch. His conclusions were as follows:

QUESTION (Scott Jackson, Deputy Prosecutor): The kind of injuries we have here, where there's also a fracture and (inaudible) - -

ANSWER (Dr. Nelson): Fracture, deep scalp hemorrhage, because obviously, given those, we have to have had a severe impact.

QUESTION: Well, based on the autopsy performed on Theresa within the bounds of reasonable medical certainty,

have you formed an expert opinion concerning the cause of death?

ANSWER: Yes.

QUESTION: And what's your opinion?

ANSWER: I listed - - and so I'm specific - - (reviewing report) - - I listed the cause of death in Theresa Caballero as closed head injuries.

QUESTION: And can you further explain what's meant by closed head injuries.

ANSWER: Closed head injuries being injuries inflict - - or received to the head that do not involve a penetrating injury where essentially I have an opening to the brain itself, which would be an open head injury. It just means that basically the skull and the overlying skin isn't open to the outside world.

QUESTION: Do you have an opinion as - - within a reasonable degree of medical certainty as to whether or not a fall off a couch, say thirty-two, thirty-six inches, or whatever, eighteen inches, whatever it might be, in that range, would have caused those injuries?

ANSWER: I think I've discussed that, but no.

QUESTION: No, that wouldn't have done it?

ANSWER: That wouldn't do it. Not the injuries that Theresa has.

QUESTION: Okay. Within a reasonable degree of medical certainty, do you have an opinion as to whether hypothetically mildly shaking and then - -

MR. LOWE: Your Honor, I'm gonna object to that characterization, that hypothetical, I think that's not relevant.

THE COURT: Well - - let's take a sidebar.

*(Bench conference; not recorded.)*

THE COURT: Okay. You may continue.

BY MR. JACKSON: (Continuing)

QUESTION: So I'll just rephrase that again. So within a reasonable degree of medical certainty, do you have an opinion as to whether hypothetically a shaking and then some kind of impact such as slamming, pushing violence on a child such as the height and weight of Theresa Caballero against a solid object, say door jamb, could have caused the injuries that you saw?

ANSWER: That - - that's a possibility. What I can't do - - what I can say is that Theresa impacted, and because I have two contusions, more than once a hard surface.

And she impacted it very forcefully.

If there is shaking also involved in this, there very well may be, I don't know. I have nothing to say that I can add that on from the autopsy findings.

I can't - - at the same time, I can't say that if somebody said that that's what happened, I can't say that there's any scientifically - - anything scientifically that I can say that that's not the way it happened.

QUESTION: Could a short fall off a couch, okay, have caused the - - the kind of fracture you saw here?

ANSWER: I don't - - I don't believe and have not seen in the literature where a short fall from that distance has caused a fracture with this characteristics in this location.

Now, short falls, as we explained earlier, have been associated with simple linear parietal skull fractures, but

that's to a different area of the head, to a thinner part of bone. It's not the characteristic skull - - there is not the same characteristics of the skull fracture that we have in this case.

QUESTION: Could such a fall be responsible for both points of impact that you have shown us?

ANSWER: Not unless the head for some reason bounces and then impacts again forcibly.

- (RP 675, L.9 – 678, L.9)

Dr. John Stirling , MD, a pediatrician, testified that he did not believe a short fall from a couch could have caused the type of forced injury that he was made aware of. (RP 614-624). Dr. Stirling spent a lot of time with the jury examining studies done concerning short falls (RP 609-621) and concluded as follows:

ANSWER (Dr. Stirling): . . . There's your bottom line. Another way to look at this stuff is, well, if somebody's watching, you know that it's not likely to be abuse unless you're a big believer in conspiracies, so we look at public witnessed short falls where you have a witness, you figure this isn't somebody lying to you about what happened. 368 kids. 53 out of the 283 had physical evidence of head impact, so bruises, skull fractures, what-have-you.

But no subdurals and not deaths. So I think that's it for the falls.

So if you look at what we know about short falls, we can conclude that people do die from falls, they die from a significant proportion of long falls, and we said 4 percent.

With short falls it's extraordinarily unusual. There are a couple of cases, a couple of papers out there that talk about

children falling three feet or less and dying. Some of the data is hard to challenge. But those are unusual situations usually related to a swing set with a high-velocity rotation kind of a fall. So that's not really the same category as what we saw with Theresa.

In her case, she had evidence of angular acceleration-deceleration and sudden impact against something. It was hard enough to break her skull and cause blood to bleed a centimeter deep on the opposite side of the skull, of the brain.

So you would conclude from the brain injuries that she had a significant swing and impact, more than one swing and impact, against something hard. That doesn't discuss the other injuries, the eyes and so forth.

BY MR. JACKSON: (Continuing)

QUESTION: Were you satisfied through looking through the record that by a reasonable degree of medical certainty that natural causes were ruled out?

ANSWER: Yes. She appeared to be a healthy child. Reviewing the history as obtained by medical personnel and the police record, there was apparently ample evidence that Theresa looked healthy, ate well that morning, she seemed to be a child who had no significant medical history. She wasn't a hemophiliac, for instance, didn't have a brain disease, the medical examiner has concluded that her brain looked normal before the trauma, it didn't show any signs of being malformed or anything that would predispose her to having this kind of an injury from trivial insult.

QUESTION: The hematoma described on the back of her head, the bruise that you could see - - ?

ANSWER: Uh-huh.

QUESTION: - - was that circular, or how would you describe that?

ANSWER: It was described, again, with precise medical terminology, as a goose egg, by a number of people. It didn't have any linear - - it didn't have an obvious linear shape.

QUESTION: All right.

ANSWER: Skull - - skull injuries rarely do. If - - if you hit somebody on the leg or on the arm with a linear thing, if I whacked you with a stick, you might see a stick-shaped bruise.

The skull being round, it typically bruises only on the tangent, it only bruises on the part that hits the - - the object, and so the bruises typically are round, they aren't typically linear.

QUESTION: So they don't typically reflect the surface that they either struck or the - - struck them?

ANSWER: They all look like flat surfaces. So it's hard to say whether in this case the child hit a door jamb, a two-by-four or the flat floor.

QUESTION: Okay.

ANSWER: But we know she hit it with significant force.

- (RP 621, L.4 – 624, L.2)

Dr. Grafe, MD, a pathologist and professor at OHSU (RP 339), examined the brain and concluded that it was a blunt trauma forced injury which was consistent with perhaps multiple blows and inconsistent with

the history provided. (RP 348-349). This information was shared with Dr. Cliff Nelson. (RP 342).

This type of information is to be distinguished from the type of evidence produced in the Aten case. In Aten, the court was faced with an autopsy of an infant who had died of Sudden Infant Death Syndrome (SIDS). It was impossible to conclude from the autopsy whether any type of criminal activity was involved or whether this was just merely a tragic accident. No experts called in the Aten case were able to identify any type of potential criminality or inconsistencies in the history that had been provided to them. Here, at least three physicians had testified for the jury that, based on reasonable medical probabilities, the cause of death was not as originally stated in the history of a short fall from a couch, but was consistent with one or more traumatic blows to the head. In Aten, there was no inference of human action raised until the defendant admitted to suffocating the infant. Here, there was an inference being raised that there was some type of criminal agency that had caused the injuries before the defendant's confession was brought into play.

In evaluating the corpus delicti evidence, the appellate court accepts the State's evidence and views all reasonable inferences in a light most favorable to the State. Aten, 130 Wn.2d at 658. The State submits that there was ample evidence to support a finding of corpus delicti in this

case. With that in mind, the claim of ineffective assistance of counsel by not raising corpus delicti fails. There is nothing in this record to support the idea that the court would have granted any motions dealing with corpus delicti.

### III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error is a claim of prosecutorial misconduct and a further claim that the prosecutor at the time of trial was asking witnesses to comment on the truthfulness of other witnesses' testimony.

Prosecutorial misconduct requires reversal only when there is a substantial likelihood that the jury's verdict was affected. State v. Stith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993). Some of the factors considered in determining whether the misconduct likely affected the verdict include whether the prosecutor was able to provoke the defense witness to say that the State's witness must be lying, whether the State's witness' testimony was believable and/or corroborated, and whether the defense witness' testimony was believable and/or corroborated. State v. Padilla, 69 Wn. App. 295, 301, 846 P.2d 564 (1993); State v. Suarez-Brovo, 72 Wn. App. 359, 366-367, 864 P.2d 426 (1994). Testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness is otherwise helpful to the jury and is based on inferences from the evidence

is not improper opinion testimony. City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

A trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced the defendant's rights to a fair trial. State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). If the defendant objects or moves for a mistrial on the basis of alleged prosecutorial misconduct, the appellate court will give great deference to the trial court's ruling on that matter. Luvene, 127 Wn.2d at 701. However, if no objection is made by the defense at the time of trial, the reviewing court will be reluctant to find reversible error, which requires misconduct "so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice." State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996).

If a defendant does not object at trial, the defendant cannot challenge the testimony for the first time on appeal. RAP 2.5(a). The exception under RAP 2.5(a) for manifest error affecting a constitutional right is a narrow one. State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Requiring defendant's to meet a high threshold to raise issues for the first time on appeal ensures that parties give the trial court an opportunity to obviate error and prevent prejudice to the defendant. City of Seattle v. Heatly, 70 Wn. App. at 584-585. "The exception is not

intended to swallow the rule, so that all assertive constitutional errors may be raised for the first time on appeal. Indeed, criminal law has become so largely constitutionalized that any error could easily be phrased in constitutional terms.” State v. Trout, 125 Wn. App. 313, 317, 103 P.3d 1278 (2005).

Under RAP 2.5(a)(3), a defendant must also show how an alleged constitutional error actually affected his right at trial. State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). It is this showing of actual prejudice that makes the error “manifest”. McFarland, 127 Wn.2d at 333. A “manifest” error is “unmistakable, evident or indisputable as distinct from obscure, hidden or concealed”. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). “An appellant who claims manifest constitutional error must show that the outcome likely would have been different, but for the error.” State v. Jones, 117 Wn. App. 221, 232, 70 P.3d 171 (2003).

Finally, if the defendant does not object to alleged prosecutorial misconduct at trial, the issue of prosecutorial misconduct is waived unless the misconduct was so flagrant and ill intentioned that it evinces enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Stenson, 132, Wn.2d 668, 719, 940 P.2d 1239 (1997); State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

The defendant in our case equates the alleged misconduct claimed in our case with the misconduct that was found in the Suarez-Brovo case.

In the Suarez-Brovo case, the court gives a number of examples of where the prosecutor was asking the witness to basically call the police officers liars. (Suarez-Brovo, 72 Wn. App. at 362-365).

Here, not only did the prosecutor repeatedly attempt to get Suarez-Brovo to call the police witnesses liars, but he also misrepresented the testimony of those witnesses in order to create a conflict which did not exist. Palmer had testified he went to the trunk of his car; he never stated whether he opened the trunk. Detective Middleton testified Palmer opened the trunk which signaled the arrest to other officers in the area. When Suarez-Brovo corroborated Detective Middleton's testimony that Palmer opened the trunk, the prosecutor asks Suarez-Brovo if that meant Palmer was not telling the truth. Contriving this conflict on the collateral matter of opening the trunk was inappropriate. - - -

Suarez-Brovo did not object, request an instruction, or move for a mistrial. The question then is whether the prosecutor's misconduct was sufficiently flagrant to relieve Suarez-Brovo of the obligation to request a curative instruction. In making this determination, we consider the cumulative effect of (1) the questions concerning Suarez-Brovo's neighborhood, his Hispanic co-workers, his fears of deportation, and his status as a Hispanic non-citizen, as well as (2) the prejudicial nature of the prosecutorial misconduct.

- (Suarez-Brovo, 72 Wn. App. at 366-367).

In our case, the defendant did not object, did not ask for a mistrial nor ask for any type of curative instructions. As will be shown below, this is a far cry from the Suarez-Brovo scenario.

In our case, the defense maintains that there are two areas of prosecutorial misconduct. One of them deals with the cross-examination of the defendant and the other deals with the direct examination of a witness, Zara Soares.

Concerning the direct examination of the witness, Zara Soares, the defense has submitted in its brief the areas where it maintains that the prosecutor was allegedly attempting to have her question the truthfulness of the police. However, all of the questioning that is given as examples deal with asking her to refresh her memory from review of police reports and information that she had previously supplied to law enforcement. (For example, RP 169). The State submits that this is not improper. Evidence Rule 612 specifically allows a writing to be used to refresh her memory while testifying. State v. Savaria, 82 Wn. App. 832, 919 P.2d 1263 (1996).

Concerning the other claim of prosecutorial misconduct in the cross-examination of the defendant, the State submits that this has been taken out of context.

The context of the cross-examination of the defendant begins with Exhibit No. 40 which is the hand-written statement by the defendant. The defendant spent a lot of time on direct examination explaining what was meant by what she had written and the circumstances surrounding the

giving of that statement. She told the jury that the questioning by the officers became aggressive and that they didn't want to listen to what she had to say but would merely go over and over areas. They further told her that they were frustrated with some of her answers and that they did not accept her explanations. (RP 954-956). She indicated to the jury that the interview took over three hours. (RP 958). She finally told the jury on direct examination as follows:

ANSWER (the defendant): Well, when they kept telling me that it couldn't have happened, that is when I was just trying to tell them anything that they wanted to hear. I felt if I told them what they wanted to hear, that we could go home and that they could help Theresa.

At this point in time, I still believed that Theresa was alive.

QUESTION (Mr. Lowe, defense attorney): And, now, did you realize – I mean – did you take that back?

ANSWER: After I told them that I had pushed Theresa on the shoulders, I did take it back, because at that moment in time I realized that I was there because they were blaming me and that I was there because she was dead, not because they needed to help her.

- (RP 959, L.13 – 960, L.1)

The defense spends a great deal of time going through Exhibit No. 40 and the defendant explaining to the jury what she meant and what was accurate and not accurate information. (RP 960-966). It is in this context, where the defendant has denied the written confession that she has made,

that the prosecutor cross-examines her. For example, in the cross-examination she distances herself from indications that she had not told the paramedics about the nature of the injuries (RP 969), she distances herself from the timeframe involved (RP 970) and she distances herself from the statements that she wrote out for the officers concerning her culpability (RP 976-978). In fact, she indicates to the jury that some of what she had written was not what she meant to say at all but had been put there at the suggestion of the police. For example:

QUESTION (Scott Jackson, Deputy Prosecutor): Okay. And when you - - you indicated you didn't say at the end after you heard that she had passed away - -

ANSWER (the defendant): Uh-huh.

QUESTION: -- that you're a murdered - -

ANSWER: That is correct.

QUESTION: - - and how - - however, did you say that you didn't mean to do it?

ANSWER: I - - well, you're - - they - - they convinced me that I had shaken her so hard, and that was the only way that her injury could have occurred, so that is, yes, it means saying the I did not mean to do it. However, I am not a murdered.

QUESTION: Okay, so you did say that you didn't mean to do it.

ANSWER: I - - I'm probably pretty sure I did.

QUESTION: (Pause.) The indications in your written statement that you - -

“I knew I was doing something I did not have any control over.”

ANSWER: Uh-huh.

QUESTION: “I did not feel I had control over myself.”

Again, is that - - you’re blaming that on the detectives suggesting that to you; is that - - ?

ANSWER: I’m not blaming it on anything.

QUESTION: Okay.

ANSWER: Yes, if I had shaken a child so hard and not realized that I have shaken her that hard to cause this injury to her, then I must have not been sane, I - - I must have not been in control of myself if that is the case.

However, I know that I did not shake this child hard. I was bouncing her to get her attention.

QUESTION: So we shouldn’t put any weight into your statement that you knew you were doing something that you didn’t have control over because you actually did have control?

ANSWER: What do you mean by putting weight? I can’t tell the jury how to take my written statement - -

QUESTION: Well - -

ANSWER: - - or how - - what to add to it or take from it. I do not - - you know, that’s their - - that’s gonna be their decision and their opinion.

QUESTION: You indicate here:

“I did not feel I had control over myself.”

Are you indicating that you feel now that you did have control over yourself?

ANSWER: Yes, I did.

QUESTION: You did have control over yourself. Okay.

And you were not feeling any stress that day.

ANSWER: No. As a matter of fact, I just refinanced my house, paid off all of our debt. I was trying to get pregnant for three months and I just found out about four weeks prior to this that I was pregnant. It was the happiest time in my life until this day - - or, excuse me, till the 14<sup>th</sup>.

QUESTION: Okay, so you were very happy. No spat or anything with Zara that day?

ANSWER: That wasn't that day, actually.

QUESTION: It was another day (inaudible).

ANSWER: It was, it was on Friday. It was when all the children were there and Zara had made the comment to me that I didn't love her anymore. It's not a serious comment, it's a comment of playing. If you knew our relationship, you would know that that's just how we played.

I did grab her like this (indicating) and I was gonna give her a kiss and tell her I love her, and that hurt her neck and so she pinched me underneath my arm, because my arm was up over her neck (indicating).

At that point in time that's when it became an argument and I would not say goodbye, I would not say, I love you, and I would not give her a kiss goodbye, and she left. That was the end of that.

QUESTION: (Pause.) At one point in time Detective Holladay indicates you told him that you had been lying to him and that you in fact did not push - -

ANSWER: Theresa

QUESTION: - - Theresa - -

ANSWER: That is correct.

QUESTION: - - into the door.

ANSWER: That is when I realized that what I was really there for was not to help Theresa that it was that they believed that I had hurt her and that's what they were questioning me for.

QUESTION: And this was before you wrote your statement; right?

ANSWER: It was right before I wrote my statement.

QUESTION: And then you wrote your statement, and then you asked about Theresa's condition - -

ANSWER: Uh-huh.

QUESTION: - - after you wrote the statement.

ANSWER: Because I had to know from his own mouth that yes, indeed, she did pass away and it wasn't just my intuition, 'I guess you could call it, that she was gone.

QUESTION: And then after you told them that you had lied to them, they asked if anybody else was responsible for the injuries and you said no; is that right?

ANSWER: That was an open-ended question. They asked me, "Was anybody else at your house at the time of the accident?" The answer was no.

I didn't elaborate, I just said no.

Then they asked me, "Could anybody else be responsible for Theresa's injury?"

QUESTION: Uh-huh.

ANSWER: I said no. No one else was at my house, no one else could have grabbed her, no one else could have done anything to her.

- (RP 976, L.9 – 980, L.17)

The State submits that this was not a prosecutor committing flagrant and ill-intentioned misconduct, but a prosecutor asking the defendant to explain the inconsistencies that she was attempting to raise with the jury concerning her written confession (Exhibit No. 40) and the claims she was making at trial that she either hadn't said some of these things, that they had been misinterpreted, or that they were planted by the police. This was an area that she had opened up on direct examination and was part of a trial strategy. She admitted that she had been lying to the police in certain areas of the questioning. The prosecutor was merely clarifying with her these areas of concern and why it came about that she was intentionally attempting to mislead the police. This is a far cry from the type of activity that took place in the Suarez-Brovo case.

The State further submits that this was proper cross-examination of the defendant. The defense did not object to the testimony, ask for a

curative instruction, or ask for a mistrial because there was nothing inappropriate that was being done by the deputy prosecutor in the questioning of the defendant.

IV. CONCLUSION

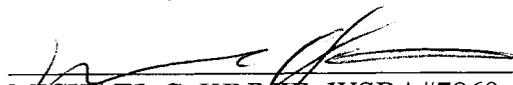
The trial court should be affirmed in all respects.

DATED this 16 day of November, 2006.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:

  
MICHAEL C. KINNE, WSBA#7869  
Senior Deputy Prosecuting Attorney

