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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JAYSON THOMAS SMITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 91-1-02697-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

On July 31, 1991, the State charged JAYSON THOMAS SMITH ("defendant"), with premeditated first degree murder for the shooting death of Willie Greenlee, Count I, and second degree assault with a deadly weapon for shooting and wounding Cynthia Davis, Count II. CP 34-35 (Information). On February 3, 1992, defendant pleaded guilty to an Amended Information charging second degree felony murder predicated on second degree assault, Count I, and second degree assault, Count II. CP 42-52 (Judgment and Sentence); CP 38-41 (Statement of Defendant on Plea of Guilty). On June 18, 1992, the trial court sentenced defendant to 298 months in prison on the murder charge, and 63 months in prison on the assault charge, to run concurrent. CP 42-52 (Judgment and Sentence).

Pursuant to the Washington Supreme Court's decisions in Andress and Hinton,¹ defendant moved for relief from his judgment and sentence. CP 53-59 (CrR 7.8 Motion for Relief of Judgment and Sentence). On November 7, 2005, the trial court granted the requested relief. CP 1-2 (Order Vacating Sentence Pursuant to Andress/Hinton).

A new Amended Information (Re-Filed Post-Andress/Hinton) was filed on September 2, 2005, charging defendant with premeditated first degree murder or, in the alternative, first degree murder by extreme indifference, Count I, and second degree assault, Count II. CP 10-12.

The Honorable Thomas J. Felnagle called the case for trial on November 7, 2005. RP1 at 3.² On December 1, 2005, the jury rendered a verdict of guilty as charged. RP13 at 12. The jury found defendant guilty on both prongs of first degree murder, premeditated and extreme indifference. RP 13 at 13. The jury also convicted him of second degree assault. Id. The trial court sentenced defendant to 548 months in prison on Count I, concurrent with 84 months on Count II. RPS at 6, 18.

¹ In re PRP of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002); In re PRP of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

² Citations to the Verbatim Report of Proceedings herein are identical to the citation format used in Appellant's brief: Pretrial motions held on September 2, 2005, shall be cited as RPM followed by page number. Trial proceedings beginning on November 7, 2005, are cited as RP followed by the volume number and then the page number, i.e., RP# at #. Sentencing proceedings on December 2, 2005, shall be cited as RPS followed by the page number.

2. Facts

During the summer of 1991, defendant was selling drugs for Travis Greenlee, a well-known drug dealer in the Tillicum area. RP7 at 74. On July 22, 1991, Travis Greenlee confronted defendant about \$300.00 that defendant owed him for drugs Travis had fronted him. RP7 at 75. The confrontation became heated and defendant told Travis to “go to hell”. RP8 at 86. Not long after that, Travis executed a drive-by shooting on defendant, firing one shot at him, but failing to hit him. RP7 at 78-80; RP8 at 85. Defendant’s girlfriend, Desiree Lee, witnessed the shooting and ran to defendant. RP8 at 60, 85. Defendant was angry and he told her: “I am going to take care of Travis before Travis takes care of me.” RP8 at 61, 86. Defendant then went back to Desiree’s apartment and put on a dark blue sweat shirt and blue pants. RP8 at 90. Defendant told Desiree he was going over to Travis’ house. RP8 at 92. He left heading in the direction of Desiree’s car. RP8 at 94.

Desiree lived next door to Travis’ girlfriend, Twana. RP7 at 103; RP8 at 86. After defendant left, Desiree went to Twana’s apartment to tell her what was happening. Desiree wanted to call the police, but instead, Twana called Travis to warn him. RP8 at 86-89. Twana was frantic and talking fast. RP7 at 84. She told Travis that Jayson (defendant) just left with a pistol and was coming to kill him. RP7 at 86.

Later on that day, defendant fired several shots at the Greenlee apartment. RP5 at 82, RP6 at 160, Ex #85. There were several people

present at the apartment, including Travis Greenlee and Willie Greenlee. RP7 at 87-88. Willie Greenlee was fatally shot in the back of the head. RP7 at 29, RP7 at 113-15. Cynthia Davis was shot through her left shoulder. RP5 at 39. After the shooting, Cynthia Davis was leaning against a parked car, bleeding profusely and crying. RP5 at 39; RP6 at 12.

Deputies were close by and arrived on the scene within seconds. RP5 at 32. There was a group of people pointing to a black man crossing the street with a gun in his hand. RP5 at 32-33, 36. Desiree Lee's car was in the middle of the road. RP5 at 37; 46. Witnesses told deputies that the car belonged to the shooter. RP5 at 39. Chief Bisson (formerly Deputy Morrision) described the person running with the gun as a black male wearing a blue baseball cap, blue jacket, and light colored pants. RP5 at 35.

Defendant fled the area and went to stay with his grandmother. RP10 at 73. He spoke on the phone to his mother and told her that someone had shot at him. Ex #85, page 3. He told her he had time to obtain a gun and go to Tillicum and shoot at the guy who did it. Id. He said, "Mom, it's premeditated so, you know, I'm in real, I'm in big trouble." Id. Defendant told his mother he "threw" the gun. Ex #85, page 4.

On July 30, 1991, defendant turned himself in to Pierce County Sheriff's detectives. RP9 at 50. After being advised of his rights, detectives asked defendant about the location of the gun. RP9 at 57.

Defendant told them he didn't have the gun anymore and that, "It's been destroyed." Id. Defendant declined to make a statement about the shooting. RP9 at 58. Defendant spontaneously asked how much time he would get; he stated he thought it would be a long time. RP9 at 59. Defendant elaborated by saying that he had been spending a lot of time at the beach and outdoors because he knew it would be a long time before he got to do that again. RP9 at 60. He also told detectives it had been eating away at him. RP9 at 60.

Defendant testified at trial. RP10 at 64-140. He said he did not know if he told his then-girlfriend Desiree that he was going to take care of Travis before Travis took care of him. RP10 at 108. He denied confessing to his mother, saying she had misconstrued his words. RP10 at 124-25. For the first time in 14 years, defendant claimed he had an alibi in that he spent the afternoon and night with a "Tina Smith". RP10 at 72. Defendant admitted he did not tell any law enforcement officer about "Tina Smith". RP10 at 119. He also admitted that when his grandmother called the police on him to turn him in, he fled rather than telling them about "Tina Smith". RP10 at 116.

At the time of defendant's trial in 2005, 14 years had elapsed since the time of the shooting. Defendant's appearance changed considerably over the years. RP9 at 51. The trial court ruled that the prosecutor could

show eyewitnesses the photograph taken of defendant during his July 30, 1991, booking for identification purposes, but subject to proper foundation. RP4 at 44; Ex #4.

During the State's case in chief, eyewitness Patsy Mooney (formerly known as Hardy) testified that she saw the shooter with the gun in his hand and saw him shooting. RP5 at 76. Ms. Mooney was asked if she recognized defendant in court, she stated, "Kind of.... The person I remember was younger, but he does look familiar." RP5 at 81. When shown Ex #4, the incident booking photo of defendant, she stated, "That was the shooter." RP 5 at 82. She had no doubt about her identification. Id. During the defense case, Ms. Mooney was again very confident in her identification of defendant through Ex #4, stating, "I know who I saw, and that was him." RP10 at 57.

Eyewitness Catherine Weisenbach did not see the actual shooting. RP6 at 149. But she heard the shots and saw a man walking with a gun. RP6 at 144. She did not recognize defendant in court. RP6 at 159. When shown Ex #4, she testified that she recognized him by his hair and his light skin tone. "He was the one walking through the parking lot with a gun in his hand." RP6 at 160. When challenged on cross-examination, she reaffirmed her identification stating that she was not just recognizing the hairstyle: "I'm recognizing that's the person I seen." RP6 at 160.

Travis Greenlee, who was well acquainted with defendant, also saw him at the scene of the shooting that night. He testified that after he

had seen that his brother was shot, he looked out the window and saw defendant running past. RP7 at 89.

Seven people testified who saw either the actual firing of shots or saw the man running with the gun in his hand: Mooney, Broughten, Richard, Kline, Weisenbach, Greenlee, and Bisson. Five out of the seven testified the shooter was wearing blue, the same color Desiree Lee said defendant had on when he left her apartment saying he was going over to Travis'. RP5 at 35 (Bisson); RP5 at 78 (Mooney); RP6 at 102, 119 (Broughten); RP6 at 110 (Richard); and RP6 at 138 (Kline).

Within days of the shooting, some witnesses may have been shown a photo montage containing a prior booking photo of defendant. RP9 at 32. The montage was not preserved in the property room or LESA Records files. RP9 at 29. The lead detectives on this investigation, Detectives Knabel and Rouseff, were both deceased at the time of trial. RP8 at 127, RP9 at 31. Detective Barnes reconstructed, as best he could, the photo montage using information contained in the deceased detective's reports. RP9 at 33-41. See Ex #92. (Defendant's photo appears in the second row down, on the left hand side.)

The photograph of defendant believed to have been used in the photo montage had been taken a few months prior to the shooting. RP3 at 56. Defendant's head is tilted back in the photograph and he is laughing. Ex #92. No one was able to make an identification that they were 100% sure of from this montage. RP10 at 54 (Mooney); RP6 at 158

(Weisenbach); RP 6 at 116 (Miller). However, the photograph identified by witnesses Mooney and Weisenbach in court was the booking photo of defendant from this incident. Ex #4. Defendant is not smiling in this photo and his head is not tilted back, providing a different view of his hair, forehead and face. Id.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO SHOW EYEWITNESSES AN INCIDENT BOOKING PHOTO WHERE THE WITNESSES WERE UNABLE TO IDENTIFY DEFENDANT IN COURT AND 14 YEARS HAD ELAPSED SINCE THE INCIDENT.

The trial court's admission of evidence regarding identification procedures is reviewed by this Court for an abuse of discretion. State v. Kinard, 109 Wn. App. 428, 431-32, 36 P.3d 573 (2001), *review denied*, 146 Wn.2d 1022, 52 P.3d 521 (2002). An appellate court will only disturb the trial court's ruling if it is manifestly unreasonable or based on untenable grounds or untenable reasons. Id. Defendant incorrectly asserts the standard of review is “de novo”. Brief of Appellant (“BOA”) at 3.

The defendant bears the burden of showing that an identification procedure was impermissibly suggestive. State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999)(*citing* State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984)). When a defendant fails to show impermissible

suggestiveness, the inquiry ends. Vaughn, 101 Wn.2d at 609-10. Only after the defendant first shows impermissible suggestiveness does the inquiry turn to whether the identification was nevertheless reliable. Id. 610-11. The court then reviews the totality of the circumstances to determine whether that suggestiveness created a substantial likelihood of irreparable misidentification. State v. Taylor, 50 Wn. App. 481, 485, 749 P.2d 181 (1988); *see* Simmons v. U.S., 390 U.S. 377, 384, 88 S. Ct. 967, 19 L.Ed.2d 1247 (1968).

However, this law pertaining to identification procedures is inapplicable to this case. Defendant relies on cases involving *pretrial* identification procedures, such as photo montages and line-ups. The policy behind these decisions seems to be an effort to curtail the use of impermissibly suggestive pretrial procedures which then taint or corrupt the witness's memory resulting in an irreparable misidentification of the defendant in court. *See* State v. Taylor, 50 Wn. App. at 485. *See also* Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977).

Here, pretrial identification procedures are not applicable because there was no identification of defendant, and therefore, there could be no "misidentification". Eyewitness Patsy Mooney was first asked if she recognized defendant as he sat in court. RP5 at 81. She stated, "The person I remember was younger, but he does look familiar." Id. Ms. Mooney was then shown Ex #4 and she said she recognized him: "That

was the shooter.” RP5 at 82. She testified she had no doubt about that. Id. In closing argument, the prosecutor commented on Ms. Mooney’s physical reaction when she saw the photo of defendant and identified him as the shooter: She “broke down in tears.” RP12 at 33.

There could be no irreparable misidentification here because the in-court identification was negative, or equivocal at best. Further, it was only after being asked whether she recognized defendant that Ms. Mooney was shown Ex #4. Therefore, the photograph of defendant in Ex #4 could not have tainted Ms. Mooney’s memory thereby causing irreparable misidentification.

Eyewitness Catherine Weisenbach was asked: “Ms. Weisenbach, do you recognize the defendant here in the courtroom?” She responded, “No.” RP6 at 159. When shown Ex #4, she indicated that was the person she saw “walking through the parking lot with the gun in his hand.” RP6 at 159-60. Again, Ex #4 could not have influenced Ms. Weisenbach’s in-court identification of defendant because she failed to identify him in court.

Neither eyewitness was influenced or tainted by being shown a single photo prior to being asked to make an in-court identification. Neither witness was influenced by the sheer suggestiveness of being asked to identify a single defendant on trial for the crime. Their identification of the man in Ex #4 was based on their recollection of the incident and not on pretrial procedure or suggestiveness of the in-court procedure. See State

v. Abernathy, 31 Wn. App. 635, 638, 644 P.2d 691 (1982) *disapproved insofar as inconsistent with* State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984) (fact that defendant was only black man in the courtroom was not a bar to witness in-court identification).

Because the eyewitnesses did not identify defendant as the perpetrator, this Court need not decide whether there was a misidentification. Rather, the question is one of credibility. The eye witnesses could not identify defendant as he sat in court 14 years after the incident. They could, however, identify the man in the photo as the shooter. The State introduced other evidence that the man pictured in Ex #4 was defendant. RP9 at 61, RP8 at 27, RP 7 at 94. The witness credibility on this issue is within the province of the jury. An appellate court does not disturb a fact finder's credibility determinations on appeal. State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004). Defendant's argument fails.

2. THE TRIAL COURT PROPERLY DENIED THE GIVING OF DEFENDANT'S PROPOSED INSTRUCTIONS ON LESSER-INCLUDED OFFENSES AS THEY WERE UNSUPPORTED BY ANY EVIDENCE.

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give

instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by* State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. Id.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, *reversed on other grounds*, 141 Wn.2d 448, 6 P.3d 1150 (2000), *citing* Herring v. Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

A defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser crime is a necessary element of the charged crime, and (2) the evidence supports an inference that the lesser crime--and only the lesser crime--was committed. State v. Hurchalla, 75 Wn. App. 417, 421-23, 877 P.2d 1293 (1994) (*citing* State

v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978)). As to this second prong, there must be some affirmative evidence from which the jury could conclude that the defendant committed the lesser included crime. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *disapproved on other grounds*, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

Manslaughter is a legal lesser included of murder by extreme indifference. State v. Pastrana, 94 Wn. App. 463, 470-471, 972 P.2d 557 (1999); State v. Pettus, 89 Wn. App. 688, 700, 951 P.2d 284 (1998), *review denied*, 136 Wn.2d 1010, 966 P.2d 904 (1998).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. State v. Rahier, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), *citing State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963).

Here, it is undisputed that the legal prong of the Workman test is met for both proposed lesser-included offenses. BOA at 38. However, the

trial court did not abuse its discretion in finding that the factual prong was not met.

At trial, defendant requested lesser-included instructions for second degree murder and first degree manslaughter. RP10 at 144.

a. Second degree murder

Both on appeal and at trial, defendant fails to point to any specific evidence that affirmatively supports an inference that the killing was intentional, but not premeditated. At trial, defendant argued that the earlier drive-by shooting executed by Travis Greenlee provoked his crime, said provocation thereby negating the element of premeditation. RP11 at 8.

On appeal, defendant merely states that defendant “could have gone to the apartment intending to threaten or warn Travis off, but then the earlier provocation resulted in an intent to kill.” BOA at 41. This argument is purely speculative and not supported by any evidence in the record. It is illogical to assume that the provocation of the prior drive-by shooting by Travis did not affect defendant until after he arrived at the apartment complex.

Defendant relies heavily on language contained in State v Gallagher, 4 Wn.2d 437, 103 P. 2d 1100 (1940). However, Gallagher pre-dates Workman, a 1978 Washington Supreme Court case which established the current legal standard for the giving of lesser included offenses. See State v. Workman, 90 Wn.2d 443.

b. First degree manslaughter

At trial, defendant also asserted to the trial judge that provocation also supported a lesser-included instruction on manslaughter with regard to the extreme indifference alternative of first degree murder:

[DEFENSE COUNSEL]: With regards to the, I'm sorry, extreme indifference, I believe that the provocation does have a fact basis for this being considered to be only a willful, wanton disregard for the safety of others, rather than the depraved mind sequence as required when you are talking about extreme indifference.

RP11 at 9.

The case law does not support this position. In State v. Pastrana, the defendant fired one shot at another car on the freeway, killing one of the three occupants. 94 Wn.App. at 468. The jury convicted Pastrana of first degree murder by extreme indifference. Id. Pastrana argued that he was unaware that anyone else was in the line of fire and that he aimed at the tire. Id. at 561-62. This Court held that indiscriminately shooting a gun from a moving vehicle was precisely the type of conduct proscribed by the statute and that Pastrana acted with much more than mere recklessness. Id. Therefore, the trial court in Pastrana did not err in refusing to give a manslaughter instruction. Id. at 562. See also State v. Pettus, 89 Wn. App. at 688 (no error for failure to instruct the jury on manslaughter as a lesser offense of first degree murder by extreme indifference where defendant fired 4+ shots from a moving vehicle in a residential area near a school play ground).

As in Pastrana and Pettus, defendant exhibited extreme indifference to human life when he fired numerous rounds into the crowd outside the Greenlee apartment. Willie Greenlee and Cynthia Davis were struck by defendant's bullets. Also present at the Greenlee apartment at the time were Travis Greenlee, Casey Greenlee, Tyrone (Taz) and Thomas Kennedy. RP RP5 at 68, RP7 at 25, RP7 at 87. In close proximity were Patsy Mooney, Michelle Broughten, Alanda Miller, Jack Kline, and Catherine Weisenbach. RP5 at 77, RP6 at 106, RP6 at 127, RP6 at 142. Many of these people had children playing outside at the time of the shooting. Id. This scenario, firing into a group of people, manifests an extreme indifference to human life, not mere recklessness.

c. Trial court ruling

In making its ruling, the trial court fully considered all of the evidence, the case law, and counsel's arguments:

THE COURT: Okay. Earlier, the State had provided me with State v. Pettus, with State vs. Barstad, with State vs. Pastrana, and then the defense provided the case of State vs. Van Zante. And we talked, I guess, first about the question of whether or not there ought to be a lesser-included for the alternative of premeditated murder, and that lesser would be Murder in the Second Degree. The defense suggested that the Van Zante case was a situation similar to ours and justified a Murder in the Second Degree instruction on the theory of provocation, the provocation being the shooting by Mr. Greenlee at Mr. Smith earlier in the day and that that, combined with Mr. Smith's later statement to police that he gets so mad when things happen that he can't remember things, gives the linkage that would suggest that there wasn't premeditation, that there may have been

murder in the Second Degree because he did, in fact, have the intent, which the State has proven, but that the provocation would knock out the premeditation.

My belief is that, while I do accept the theory that you can use a combination of the defendant's testimony and the State's evidence and the evidence presented by the defense and pick pieces of each of those, **if there is a viable theory of Second Degree Murder in those combinations of fact patterns, that the Court can instruct, but I didn't see that was the case in this circumstance.**

There's ample evidence, from the State's perspective, of premeditation. There is ample evidence from Mr. Smith's testimony that he just didn't do this at all, that somebody else did, but in between, **there is not sufficient evidence, in the Court's mind, of intent without premeditation.**

To get there, you'd have to suggest that there's a fact pattern here that Mr. Smith goes over, without the intent to kill, still under the provocation of the earlier shooting, that that provocation leads him to flare up at some point and kill without premeditation, but with intent, and he denies that happened.

The State's evidence suggests premeditation or nothing, and in between, there is just simply no scenario that the Court can identify that suggests that the provocation led itself to an intentional murder, if there was indeed provocation. And in the Court's mind, provocation and motive can blend together. In this case, there is clearly motive from the earlier events. **Whether that provocation is legally sufficient at the later time is open to question, and I think, under the right fact pattern, from some set of facts, from somebody's testimony, or from circumstantial evidence, and in this case, that is simply lacking.**

Now, the second proposed lesser-included had to do with the other arm, which was extreme indifference, and the case law suggests that extreme indifference is a form of

aggravated recklessness, and the cases cited by the State are similar, in the Court's mind, to the situation we have here. There's a showing that multiple shots were fired in close quarters with a number of people present, with apartment buildings that were occupied, with a freeway in the background, some, I believe, 400 feet away was the testimony, and that the time of day suggests that there would be a number of people present, that there were people visible in the parking lot just a short time before, and that that combination is something more than recklessness, that it's extreme indifference. And, again, trying to find some fact pattern from the combination of what the defendant testified and what other witnesses said that would suggest that there's simple recklessness just – **I can't identify a fact pattern that supports the theory.**

So, while I agree that the legal prongs of Workman have been shown, the factual prongs are missing for both Murder in the Second Degree and Manslaughter in the First Degree.

RP11 at 5-8 [emphasis added]. The trial court further noted that there was a long period of time between the provocation and defendant's criminal act. RP11 at 10.

The trial court evaluated all of the evidence in the case in an effort to find some evidence that would support defendant's theory, but was unable to do so. Thus, the trial court correctly concluded that the lesser included offenses were not appropriate due to lack of factual basis. Defendant fails to demonstrate how the trial court abused its discretion.

3. THE ADMISSION OF SERGEANT STRIHL'S TESTIMONY CONCERNING A WITNESS'S PRIOR INCONSISTENT DESCRIPTION IS NOT GROUNDS FOR REVERSAL WHERE DEFENDANT DID NOT PRESERVE THE ISSUE FOR APPEAL AND WHERE THE CLAIMED ERROR DID NOT MATERIALLY EFFECT THE OUTCOME OF THE TRIAL.

When no objection is made to evidence at trial, an evidentiary error is not preserved for appeal. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1995). However, when evidentiary rulings are made pursuant to motions in limine, the losing party is deemed to have a standing objection where the judge has made a final ruling on the motion, "unless the trial court indicates that further objections at trial are required when making its ruling." State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (citing State v. Koloske, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761, P.2d 588 (1988)).

There is a difference between final rulings and those that are only tentative or advisory:

If the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial. When the trial court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.

State v. Koloske, 100 Wn.2d at 896. “When a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.” State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991). See also State v. Riker, 123 Wn.2d 351, 369, 869 P.2d 43 (1994) (no error where trial court issued tentative ruling excluding witness testimony after offer of proof where defendant did not call witness nor did he seek a final ruling, thus waiving objection).

Here, the prosecutor sought permission to call the witness, Sergeant Strihl, out of order to testify regarding the prior inconsistent statement of witness Alanda Miller. RP9 at 4. Ms. Miller had described the shooter in her testimony as a dark-skinned black male. RP 6 at 116. The prosecutor sought to introduce evidence that Ms. Miller had originally described the shooter as light skinned, under the Evidence Rules as “an identification of a person after perceiving them.” RP9 at 4. Defense counsel objected to the testimony on the grounds of hearsay. Id. at 5. The trial court asked defense counsel if he had authority which would distinguish this case from the exception cited by the prosecutor. Defense counsel indicated he did not. Id. At that point, the trial court asked if the prosecutor was ready to proceed and if defense had an objection to calling the witness out of order. Id. Defense counsel indicated no objection to calling her out of order. Id. The court then heard argument and ruled on an unrelated issue prior to the calling of Sergeant Strihl. RP9 at 5-9.

There was no definite, final ruling on the merits of the admissibility of the evidence. Sergeant Strihl then testified that on the night of the shooting, Ms. Miller described the shooter as a light-skinned, black male. RP9 at 16. Defense counsel did not renew his objection to this evidence. Id.

Defendant had the duty to raise the issue at the time the prosecutor asked Sergeant Strihl for the description given by Ms. Miller on the night of the fatal shooting because the trial court had not made definite, final ruling. Therefore, this issue has not been properly preserved for appeal.

However, even if this Court finds that the error was properly preserved, it does not require reversal. An evidentiary error which is not of constitutional magnitude, requires reversal only if the error, within reasonable probability, materially affected the outcome. State v. Everybodytalksabout, 145 Wn.2d 456, 469, 39 P.3d 294 (2002) (citing State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997)). The error is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." Id. (citing State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole. See Bourgeois, 133 Wn.2d at 403.

Here, Ms. Miller described the man who fired the fatal shots as wearing a blue hat and a blue shirt, which is consistent with other eyewitness accounts. RP6 at 110. Five other witnesses also testified the

shooter had on a blue shirt and four eyewitnesses identified a hat. RP5 at 78 (Mooney), RP6 at 103 (Broughten), RP6 at 138 (Kline), RP8 at 90 (Lee), RP5 at 35 (Chief Bisson f/k/a Deputy Morrison).

Additionally, the testimony that Ms. Miller had earlier described the shooter as light-skinned was merely cumulative of other testimony. Pasty Mooney, Jack Kline, and Catherine Weisenbach, all described the shooter as light-skinned. RP5 at 78, RP6 at 138, RP6 at 148. Thus, defendant's argument that Ms. Miller's testimony describing the shooter as dark-skinned "strongly bolstered Mr. Smith's defense" is without merit since three other witnesses contradicted the dark-skinned-shooter theory by describing the shooter as light-skinned. No other witness described the shooter as dark-skinned.

Further, the overall significance of the testimony that Ms. Miller had originally described defendant as light-skinned, as opposed to dark skinned, was minimal when viewed in the context of the overwhelming evidence pointing to defendant as the shooter. Three eyewitnesses, Patsy Mooney, Catherine Weisenbach, and Travis Greenlee, positively identified defendant's booking photograph as the man who did the shooting. RP5 at 82, RP6 at 159, RP7 at 89. The drive-by shooting executed by Travis Greenlee earlier in the day gave defendant a motive for the killing. Defendant told his girlfriend, Desiree Lee, that he was going to get Travis before Travis got him. RP8 at 86. The shooter abandoned Ms. Lee's vehicle at the scene. RP5 at 39 and 46. Defendant had admitted to his

mother that he shot into a crowd of people and that it was “premeditated”.
Ex #85. After the murder of Willie Greenlee, defendant fled the area.
RP10 at 73. When interviewed by detectives, defendant professed
knowledge about the murder weapon, telling police that he no longer had
it and that it had been destroyed. RP9 at 57. He admitted to police that he
knew he would be incarcerated a long time. RP9 at 59. This is more than
sufficient evidence to convict defendant based on properly admitted
testimony, even without the disputed testimony of Sergeant Strihl.
Defendant’s argument fails.

4. DEFENDANT MAY NOT CHALLENGE THE
COMPETENCY OF A WITNESS FOR THE
FIRST TIME ON APPEAL.

Appellate courts will not consider specific evidentiary objections
raised for the first time on appeal. State v. Ferguson, 100 Wn.2d 131, 138,
667 P.2d 68 (1983). “When the trial court overrules a specific objection
and admits evidence, we “will not reverse on the basis that the evidence
should have been excluded under a different rule which would have been,
but was not, argued at trial.” State v. Korum, 157 Wn.2d 614, 648, 141
P.3d 13 (2006) (quoting Ferguson at 138).

“[T]he trial court is under no obligation to rule on the competency
of **any** witness, absent a challenge by any party to the witness’s
competency.” State v. C.M.B., 130 Wn. App. 841, 843, 125 P.3d 211
(2005) [emphasis added]. In Washington, a witness is presumed

competent absent a determination by the court that the witness is incompetent. Id.; ER 601; CrR 6.12(c). Trial courts are given great deference over competency issues. State v. C.M.B. at 844 (citing In re Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998)). The C.M.B. court noted:

To allow criminal defendants to challenge the competency of a witness for the first time on appeal would make a game of the criminal justice system, as it would allow criminal defendants to wait and hear if a witness's testimony was harmful, or cross-examination unsuccessful, or the verdict unfavorable, before raising the issue.

C.M.B. at 847.

Here, the State was offering the taped statement of Barbara Steele as a recorded recollection, to which defendant objected on the grounds that it would be a violation of defendant's right to confrontation. RP8 at 8. The trial court overruled the objection. RP 17-19. Defendant did not request a competency hearing regarding Ms. Steele. He did, however, want to challenge the accuracy of the statement and wanted permission to question the witness about her drug use at the time the statement was made. RP8 at 20. On cross-examination of Ms. Steele, defense counsel established that she used drugs, specifically cocaine, on a daily basis from 1986 until a few years prior to trial. RP8 at 49. He did not establish that she was under the influence of any drug at the time she made her tape recorded statement. Defendant waived any competency issue by failing to raise it below.

Defendant's assertion that his trial counsel was ineffective for failure to request a competency hearing is without merit because witnesses are presumed competent. See ER 601. The Sixth Amendment and article I, section 22 of the Washington Constitution require that criminal defendants have effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To demonstrate ineffective assistance of counsel in Washington, a defendant must satisfy the two-prong test laid out in Strickland. See also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he was prejudiced by the deficient representation. Id. To establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In determining the first prong, whether counsel's performance was deficient, there is a strong presumption of adequacy. McFarland, 127 Wn.2d at 335. Competency is not measured by the result. State v. Early, 70 Wn. App. 452, 461, 853 P.2d 964 (1993)(citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972), review denied, 123 Wn.2d 1004, 868 P.2d 872 (1994)). "[T]he court must make every effort to eliminate

the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." Personal Restraint Petition of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992)(citing Strickland, 466 U.S. at 689). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) citing State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

To satisfy the second prong, prejudice, a defendant must establish that "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. "This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. If either part of the test is not satisfied, the inquiry need go no further." Hendrickson, 129 Wn.2d at 78.

In the present case, defendant claims ineffective assistance of counsel for trial counsel's failure to request a competency hearing on an adult witness. BOA at 36-37. His claim is that because Ms. Steele testified that she was a daily drug user at the time of making her taped statement, she is automatically incompetent to testify. BOA at 35. Defendant cites no authority in support of this contention. The fact that a person regularly used drugs or consumes alcohol does lead to the

conclusion that that person is necessarily intoxicated at all times, or specifically, at the time of their production for examination.

Defendant has not met the first prong under Strickland because he cannot show his attorney's performance fell below an objective standard of reasonableness for failure to object to a witness's competency when witnesses are presumed to be competent. See ER 601. Neither has defendant met the second prong under Strickland, because he cannot show that he was prejudiced by the failure to request a competency hearing. Defendant assumes that had trial counsel done so, the court would have found the witness incompetent and would have suppressed the evidence. However, there is no basis in the record for the trial court to find Ms. Steele incompetent. Therefore, it is much more likely that had trial counsel challenged competency, he would not have prevailed. Thus, defendant has failed to meet the second prong because he cannot show that the lack of a competency hearing on this adult witness was so serious that it deprived him of a fair trial.

The trial court was not required to conduct a competency hearing absent the request of a party. Defendant cannot meet his burden under Strickland. The trial court made no error and trial counsel was not ineffective.

5. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE CUMULATIVE ERROR
DOCTRINE.

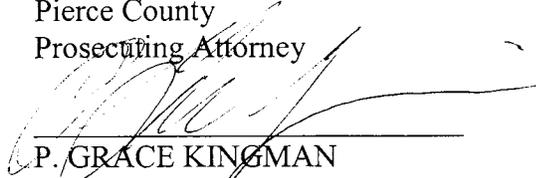
Under the cumulative error doctrine, a defendant may be entitled to a new trial or reversal where errors cumulatively produced a trial that is fundamentally unfair. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). This doctrine is employed where “the combined effect of an accumulation of errors ... may well require a new trial.” State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). The defendant bears the burden of proving an accumulation of errors of sufficient magnitude that retrial is necessary. Lord, 123 Wn.2d at 332. Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). As argued above, there was no prejudicial error in the proceedings below. Assuming, arguendo, that error occurred, it was not of such magnitude as to warrant a retrial or reversal. Defendant’s claims under the cumulative error doctrine thus fail.

D. CONCLUSION.

The State respectfully requests this Court to affirm defendant's convictions and sentence.

DATED: November 3, 2006.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



P. GRACE KINGMAN
Deputy Prosecuting Attorney
WSB # 16717

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Elek

11.3.06 *Theresa K...*
Date Signature

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