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COURT OF APPEALS

NO. 34138-7

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

COMM

STATE OF WASHINGTON, RESPONDENT

v.

STEPHEN DEMETRIUS BOONE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Katherine M. Stolz

No. 04-1-03028-7

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**BRIEF OR RESPONDENT**

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

1. Was the defendant's motion to sever, brought on the day of trial after voir dire, untimely and therefore properly denied?
2. Can the defendant establish that defense counsel was ineffective in failing to timely request severance when a timely request would have been denied?
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5. Was the State's rebuttal closing argument proper, and alternatively, was it so flagrant and ill-intentioned that it requires reversal when no objection was made below?

6. Is any claim that Washington's "automatic decline" statute violates international treaties waived as it was not raised below, and alternatively, does the defendant fail to establish any direct violation of a treaty?

B. STATEMENT OF THE CASE.

1. Procedure

On June 18, 2004, Stephen Demetrius Boone, hereinafter "defendant," was charged by information with murder in the first degree of Dong Won, robbery in the first degree of Dong Won, robbery in the first degree of Yong Yi, attempted kidnapping in the first degree of Yong Yi, robbery in the first degree of Ericka Dillman, robbery in the first degree of Jin Kim, kidnapping in the first degree of Jin Kim, attempted robbery in the first degree of Jin Kim, and unlawful possession of a firearm in the second degree. CP 197-199.

On September 7, 2005, both parties appeared for trial. RP<sup>1</sup> 4. A CrR 3.5 hearing was conducted, and the court concluded that the statements made by the defendant were freely and voluntarily made after the defendant was advised of his rights. CP 197-199; RP 33-64. During

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<sup>1</sup> There are eight volumes of VRPs that are labeled as volumes 1-8. There is a volume dated August 17, 2004, that is not labeled. There is one volume, dated September 8, 2005, which is labeled volume 1A. Unless otherwise noted, all citations reference VRP volumes 1-8.

trial, defendant stipulated to having a prior juvenile felony conviction. CP 87; RP 715.

On September 28, 2005, the defendant was convicted as charged. CP 136-143.

2. Facts

a. Defendant's Statements

A CrR 3.5 hearing was conducted on September 7, 2005. RP 33. Detective Daniel Davis testified that he contacted the defendant after his arrest. RP 36. The defendant was advised of his Miranda warnings, which the defendant indicated he understood. RP 39-41. The defendant's demeanor during the interview was "not good." RP 41. The defendant did not want to listen or talk. RP 41-42. Detective Davis told the defendant that there had been a murder and that the defendant had been identified as being involved. RP 44.

Detective Davis asked the defendant if he had anything to say about the incident, and the defendant denied that he had robbed anyone. RP 45. The defendant then leaned back in his chair and crossed his arms against his chest. Id. He appeared disinterested. Id. The defendant told Detective Davis that he had "smoked a few sticks" with his "homegirl" on the day of the murder. RP 46. The defendant told Detective Davis that he had nothing to say and that he wanted to just be booked for his warrant. RP 47.

The defendant was confronted about how the investigation had lead the police to him, and the defendant responded by stating, “explain it to someone who cares.” RP 54. The court found that all of the statements were made freely and voluntarily. RP 63-64.

The defendant moved to suppress the defendant’s statement that he “smoked a few sticks” with his “homegirl” on the basis that jurors may believe that the statement was in reference to drug use. 1-A 18-19. The court denied the motion to suppress the statement after concluding that it would not be unduly harmful to the defendant. 1-A RP 23. The State never sought to introduce the statement. The State indicated to the court that the only statement of the defendant it was seeking to admit was the statement the defendant made after being confronted with the police investigation that had lead to the defendant of, “Explain it to somebody who cares.” RP 73.

After the trial had begun, the State sought to readdress the defense motion to suppress the defendant’s statements. RP 641. Defendant again indicated that he wanted to be permitted to cross-examine the officers on the additional statements made by the defendant that the State did not introduce. RP 642-643. Defendant also argued that the statement “explain it to someone who cares” made the defendant seem callous or insensitive. RP 644. The court excluded the statement on the grounds that it “created more problems than necessary.” RP 645. The court did not find that the statement was irrelevant, but that it was “marginal” to the

State's case. Id. The court also stated, "it might add something, but I don't think it adds much." RP 645-646. The court then made the following ruling:

But Mr. Jones wants this in, and it's admissible under 801, 802. Whether it's a good idea for him to get it in, I guess, is another question. So I will allow him to elicit the statement "explain in to someone who cares." From Detective Davis if he decides to do that. I will also allow Mr. Graves, if he wishes, to ask Davis if he didn't make this other statement too.

RP 649-650.

At trial, Detective Davis testified that he and Detective Devault interviewed the defendant. RP 661. The defendant was confronted with information regarding the robbery and the homicide. RP 662. The defendant stated that he had never robbed anyone and had not been in a green mustang. Id. The focus by the detectives then narrowed, as they spoke to the defendant specifically about the crimes and how the investigation lead to him. RP 662-663. The defendant then told the detectives to, "explain it to someone who cares." RP 663. Defendant did not seek to introduce any other statements made during the interview.

b. Motion to Sever

After the CrR 3.5 hearing, the defendant made a motion to sever counts VI, VII, and VIII, which were the counts relating to victim Jin

Kim. 1-A<sup>2</sup> RP 1. The motion occurred after voir dire. Id. The State argued that if the counts were severed, the evidence admitted in both trials would be duplicative. 1-A RP 4-5. The State also argued that the motion to sever was untimely as it was made the day of trial. Id. The State represented to the court that of the 40 witnesses who were to be called, if the court were to sever the counts, 15 to 18 of the witnesses would have to be called in both cases. 1-A RP 8. The court then made the following ruling:

However, I am going to deny the motion to sever in this case partly because it is very late in the game. I glanced real quickly through the file, I don't note this being brought before. This is a fairly old case, 440 days or something. The State has prepared, I assume with the anticipation that it would be going forward with all nine counts. This is a little late.

Mr. Odell assures me that—or tells me that identity's not an issue, and that, if, in fact, identity is real strong on the Kim incidents from Friday or Saturday and identity was real weak on the other cases, I would be concerned about the jurors thinking, well, a guy who did the Kim incidents probably did the other ones, too.

1-A RP 11.

The defendant never requested that the counts relating to Ericka Dillman be severed from the Kim or Won incidents.

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<sup>2</sup> 1-A references volume 1-A, dated September 8, 2005.

After the State rested, the defendant renewed his motion to sever. RP 726. The court denied the motion, stating that it was more efficient to try the cases together. RP 726.

c. Facts Adducted at Trial

i. **The Kim Robbery**

On the evening of June 11, 2004, or early morning on June 12, 2004, Jin Kim was at outside his apartment checking his mail. RP 167-170. He was approached by two men who asked Kim for a ride to the Hilltop area. RP 171. The defendant was one of the men who approached Kim, and was the one in charge. RP 181, 188. Kim later identified the defendant from a photo montage. RP 345. The defendant then pointed a gun at him. RP 172, 181. The defendant threatened to kill Kim and demanded that Kim give him money. RP 175. The defendant searched Kim and took his wallet and cell phone. RP 176-177, 221. The defendant demanded that he be taken to Kim's car, and the defendant, the other man, and Kim all got into Kim's car. RP 179-181. As they were leaving, Kim intentionally dropped his mail on the ground so that someone would realize what had happened to him. RP 179.

The defendant told Kim to go to the Hilltop area, and to take back roads to get there. RP 185. The defendant directed Kim on where to turn. RP 186. He also told Kim that he was going to kill him if he did not

follow his directions. RP 187. The defendant “bumped” Kim with the gun several times and laughed at him. Id.

As they were driving the defendant made a call to someone and it appeared that he was agreeing to meet that person somewhere. RP 188. They arrived at the 76 gas station and the defendant directed that Kim enter the store. RP 189. He told Kim to get money out of the ATM machine. RP 191. The defendant was joined in the store by a man and woman, whom Kim believed were related to the defendant. RP 191. Kim told the defendant that he had no money in his account. RP 192. The defendant told Kim that if he found any money in the account he was going to kill him. Id. Kim was unable to get any money out of the ATM. RP 193. While they were in the store the defendant told Kim several times to keep quiet and not to do anything foolish or he was going to kill him. RP 194. The female who was with the defendant ultimately told Kim to leave. RP 195.

On June 12, 2004, Ronne Tamang was working as a cashier at the 76 Station at 1901 Martin Luther King Way. RP 136-138. Tamang saw an Asian man and an African American man enter the store. RP 138. At the time, the surveillance equipment was recording. RP 140-141.

## **ii. The Dillman Robbery**

On June 13, 2004, Ericka Dillman was walking toward a bus stop when she was approached by two individuals in a teal green Mustang. RP

298. The defendant demanded money. RP 299, 306. Dillman told him that she did not have any money, and the defendant exited the car. RP 299. He then told Dillman, “Well, let’s see what you do have,” and searched her jacket and jeans. RP 300. He took Dillman’s purse. Id. Shortly after the defendant went through Dillman’s pockets, he produced a gun, which he aimed at Dillman’s head. RP 300-301. When the defendant took Dillman’s purse, he pointed the gun at her ribs. RP 302. Dillman had \$5.00 in her purse. RP 303. The defendant got back into the car and left. Id. Dillman’s purse was ultimately returned to her, but her social security card and nursing certificate were missing. RP 305. Dillman was able to get a “good look” at the person who robbed her, and she identified the defendant. RP 306. Dillman later selected the defendant from a photo montage. RP 347. She was also able to get the license plate from the mustang. RP 305.

### **iii. The Won Murder**

On June 13, 2004, Yong Yi and her husband, Dong Won, went to the 76 gas station in Tacoma to get gas. RP 675. Won was getting gas while Yi went into the store to get milk. RP 676. When Yi came out, she observed a man with a gun was standing next to Won. RP 676. He told Yi and Won to get into their car. RP 676. The man, whom Yi later

identified as the defendant, got into the back seat of the car. RP 676, 691. The defendant told Yi to give him her purse, and she complied. RP 677. He demanded Won's wallet, which Won gave to the defendant. RP 678. There was approximately \$15.00 in the wallet. RP 678. When the car reached the front of an apartment building, the defendant told Won, who was driving, to stop the car. RP 678. They had traveled approximately 10 meters. RP 679.

The defendant and Won exited the car. RP 679. When Yi tried to get out of the car, too, the defendant told her not to get out. RP 679, 685. The defendant had the gun aimed at Won. RP 685. Yi exited the car. Id. The defendant had the gun on Won's head. RP 685-686. Won looked at Yi and motioned with his eyes for her to run. RP 686. He grabbed the gun, and as Yi was running she heard a gunshot. RP 686. She saw the defendant get into a car. RP 687.

On June 13, 2004, Scott Williams was driving to the post office when he observed a green Mustang-type vehicle come through an intersection. RP 239-240. The occupants of the car threw cards out of the car and onto the street. RP 243. Williams followed the car to the Circle K gas station on South 47<sup>th</sup> and Oakes. RP 248. Williams stopped and watched the individuals because he thought they were going to rob the store. RP 249-250. After the shooting Williams collected the cards that

were thrown from the car. RP 263-264. Two of the cards that had been thrown from the Mustang had the name “Erika” or “Ericka” on them. CP 206-212 (Exhibit #57). Also thrown from the car were cards from “Cascade Park Gardens,” where Dillman worked. CP 206-212 (Exhibit #57); RP 263-264, 298. Dillman’s nursing certificate was recovered from the Mustang. RP 425.

Melvin Loomis was in his vehicle across the street from the gas station when he heard a gunshot. RP 352-353. He then saw a woman running up the street and into the gas station. RP 354. He observed an African American male get into a blue-green car and yell, “I just shot him in the head.” RP 358. The same male then stated, “We got to get out of here.” RP 359.

Officer Thiel responded to the shooting. RP 411. When she arrived at the scene she observed Dong Won lying in the middle of the street. RP 413. There was a large pool of blood coming from his head and he had a very, very faint pulse. RP 415-416. Won ultimately died from a gunshot wound to the head. RP 624.

#### **iv. Investigation and Defendant’s Arrest**

On June 15, 2004, Detective Tom Davidson searched the residence of the defendant’s sister. RP 285-287. After Detective Davidson received

consent to search the apartment, a second suspect, Demarco McGown was located inside. RP 287. The defendant was ultimately found inside the apartment. RP 288.

At the apartment, the defendant did not come out, despite demands made by officers that he exit. RP 450. OC gas canisters were deployed into the apartment, after which the defendant indicated he was coming out. RP 451.

After the defendant was located, one of the defendant's sisters, Amina Boone, approached Detective Davidson and requested that she be allowed to say good-bye to the defendant. RP 288. Detective Davidson agreed. RP 289. Ms. Boone returned to Detective Davidson and told him that he would not find the gun in the apartment. RP 289-290. She stated, "he already threw the gun away." RP 290. Detective Davidson asked Ms. Boone how she knew that, and she stated that she had just asked Stephen. RP 291. During her testimony, Ms. Boone denied being able to recall telling Detective Davidson that he already threw the gun away. RP 229.

After the defendant was placed under arrest, he was interviewed by Detective Davis and Detective Devault. RP 659, 661. When confronted with the facts of the crimes and how the investigation lead to him, the defendant stated, "explain it to someone who cares." RP 663. During the

interview the defendant slouched low in his seat, crossed his arms, and closed his eyes frequently. RP 662.

The green Mustang was ultimately recovered and processed. RP 369-373, 500-501. Inside the mustang was a nursing assistant registration card with Ericka Dillman's name and address on it. CP 206-212 (Exhibit #53); RP 373, 425.

Dr. Roberto Ramoso conducted the autopsy on Mr. Won. RP 610. He discovered that Mr. Won had a gunshot wound to the head. RP 617. The wound was a through and through injury. RP 623. The gunshot wound to the head was the cause of death, which was classified as a homicide. RP 624.

Demarco McGown was placed under arrest as a suspect in the crimes. RP 287. At the defendant's sister's home, McGown came out of the residence before the OC canisters were deployed. RP 447-450. At trial, McGown stated that he was doing, "juvenile life, six years," but did not know how it happened. RP 721. He denied knowing the defendant, recalling June 12, 13, or 15, 2004, denied talking with Detective Graham, denied recognizing his own picture, denied wearing his hair in braids, denied wearing clothing seen by the individual at the time of the shooting, and denied giving a taped statement to detectives. RP 721-722. Detective Graham testified that he had an interview with McGowan.

**v. Identification of the Defendant**

Kim identified the defendant as the man who approached him with a gun. RP 180-181. Kim stated that he got a “good look” at the defendant and remembered that the defendant had big eyes and a mole on this face. RP 201. Kim selected the defendant from a photo montage. RP 345. Ericka Dillman stated that she got a “good look” at the person who robbed her, and indicated that it was the defendant. RP 306-307. She selected the defendant from a photo montage. RP 347. Yong Yi identified the defendant in court. RP 691. She did not select any photographs from a photo montage. RP 696-697.

C. ARGUMENT.

1. THE DEFENDANT’S MOTION FOR SEVERANCE BROUGHT ON THE DAY OF TRIAL, AFTER VOIR DIRE, WAS UNTIMELY, AND THEREFORE THE COURT PROERLY DENIED THE MOTION.

CrR 4.4(a)(1) states:

A defendant’s motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

A motion brought on the morning of trial is not “before trial” as the term is used in CrR 4.4(a). State v. Harris, 36 Wn. App. 746, 748-749, 677 P.2d 202 (1984); see also, State v. Hernandez, 58 Wn. App. 793, 794

P.2d 1327, disapproved on other grounds by, State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). A motion to sever brought on the morning of trial is deemed to have been waived. Harris, 36 Wn. App. 746 at 748-749.

In the present case, the defendant brought a motion to sever after voir dire had been conducted. 1-A RP 1. Under the analysis of Harris and Hernandez, the defendant's motion to sever, brought after a jury had been selected, was untimely. The court correctly ruled that the motion was brought "very late" and denied the motion to sever. 1-A RP 11.

2. DEFENSE COUNSEL WAS NOT INEFFECTIVE  
IN FAILING TO BRING A TIMELY MOTION TO  
SEVER BECAUSE SUCH MOTION WOULD  
HAVE BEEN DENIED.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. Id. The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.

Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

Defense counsel’s failure to make a motion does not support an ineffective assistance of counsel claim unless the defendant can show that the motion would properly have been granted. State v. Price, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005), citing State v. Jamison, 105 Wn. App. 572, 591, 20 P.3d 1010 (2001). The defendant has failed to establish that the trial attorney’s untimely motion for severance would have been granted if timely made. As argued below, the cases were properly joined and the defendant suffered no prejudice from the cases being joined. The defendant cannot establish that if defense counsel had made a timely motion for severance that it would have been granted.

3. THE TRIAL COURT PROERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT’S MOTION TO SEVER.

Severance of offenses is governed by CrR 4.4, which provides, in part:

The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence on each offense.

CrR 4.4(b). Washington has a liberal joinder rule and a trial court has considerable discretion in joining offenses. State v. Thompson, 88 Wn.2d 518, 525, 564 P.2d 315 (1977). Separate trials are not favored in Washington. State v. Grisby, 97 Wn.2d 493, 506, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1205 (1982). The policy was developed in order to minimize the potential burdens on the administration of justice, particularly those burdens placed on the courts and witnesses. State v. Ferguson, 3 Wn. App. 898, 906, 479 P.2d 114 (1970), review denied, 78 Wn.2d 996 (1991).

A trial court's denial of a motion to sever is reviewed for an abuse of discretion. State v. Watkins, 53 Wn. App. 264, 269, 766 P.2d 484 (1989). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). In assessing whether severance is appropriate, a trial court weighs the prejudice inherent in joined trials against the State's interest in maximizing judicial economy. State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). The defendant has the burden of demonstrating that a trial involving multiple counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. State v. Bythrow, 114 Wn.2d 713, 790 P.2d 154 (1990).

Severance is proper where the defendant will be prejudiced in his ability to present separate defenses on the several counts, or if a single trial invites the jury to cumulate evidence to find guilt or infer a criminal

disposition. State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), modified by, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1969).

As argued above, the initial motion to sever brought on the day of trial was untimely. The basis for the court's initial ruling was that identity was not going to be an issue in the case and that if the identity of the defendant was "real strong" on the Kim robbery and "real weak" on the other cases he would be concerned. 1-A RP 11. At the close of the State's case, however, the court was not faced with a situation of an extremely strong case and an extremely weak case. On the contrary, at the close of the State's case there had been three witnesses who had identified the defendant.

A trial court deciding a motion to sever offenses should consider four factors, the presence of which tends to neutralize any prejudice that may result from the joinder of offenses. Those factors are: (1) the strength of the State's evidence on each count; (2) the clarity of defenses to each count; (3) whether the trial court properly instructed the jury to consider the evidence of each crime, (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined. State v. Hernandez, 58 Wn. App. 793, 798, 794 P.2d 1327 (1990), disapproved on other grounds by, State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991), citing State v. Watkins, 53 Wn. App. 264, 766 P.2d 484 (1989). However, even if evidence is not cross-admissible, severance is not mandated. Bythrow, 114 Wn.2d at 720. The defendant

must be able to point to “specific prejudice” resulting from the joint trial. Id. Given the jury’s ability to compartmentalize the evidence of the separate counts, the strength of the State’s evidence, and the strong public policy of judicial economy, a trial court can deny a motion for severance even if the evidence of the individual counts is not cross-admissible.

Even the fact that one of the charges requires admission of a prior conviction will not mandate severance. An appellate court affirmed the denial of a motion to sever offenses in a case in which the defendant was charged with two counts of assault and one count of being a felon in possession of a firearm. State v. Thompson, 55 Wn. App. 888, 781 P.2d 501 (1989), citing State v. Tully, 198 Wash. 605, 89 P.2d 517 (1939). The court in Thompson reiterated that the counts may be tried together unless the defendant can point to undue prejudice resulting from the joint trial. Thompson, at 893.

The defendant cannot point to a “specific prejudice” from all three incidents being joined. A review of the record, however, does indicate that the joinder of the cases was in the interest of judicial economy. There were multiple witnesses whom, if the cases had been severed, would have likely had to testify in both trials—Amina Boone, Detective Davidson, Detective Fredrickson, Detective Webb, Detective Davis, Detective Graham, and Demarco McGown. RP 225-231, 282-293, 336-349, 626-640, 657-666, 716-719, 721-723. The interests of judicial economy are satisfied by proper, permissive joinder.

- a. There was not disproportionate strength of the State's evidence between the Kim robbery and the Dillman robbery and Won murder.

First, the defendant's claim that the Kim robbery was a much stronger case than the Dillman robbery and the Won murder is without merit. Kim identified the defendant from both a photo montage and in court. RP 180-181, 201, 345. Similarly, Dillman identified the defendant from a photo montage and in court. RP 306-307, 347. Finally, Yi identified the defendant in court. RP 691.

Moreover, each case had corroborating evidence. In the Kim robbery, there was a videotape admitted which depicted the defendant in the convenience store with Kim. CP 2-6-212 (Exhibit #58, 107); RP 161, 205. In the Dillman robbery, there testimony that the evidence from the robbery being thrown out of the car that was used in the robbery. CP 206-212 (Exhibit #54, 57); RP 243, 263-264, 298. Dillman's nursing certificate was found in the Mustang used in the Dillman robbery and the Won murder. RP 258-262, 305, 371-373, 425. Finally, in the Won murder, which occurred approximately minutes after the Dillman robbery, multiple witnesses testified about Won getting shot and the assailants getting into the same car. RP 252-262, 297, 305, 358-361, 391-395, 403-406, 412, 414, 584-587, 675-692. Each case had its own strengths, and to now assert that one case was overwhelmingly stronger than the other would undermine the jury's determination on each case.

While the defendant now suggests that Kim's identification was stronger than Dillman's and Yi's, to so claim also undermines the credibility determination made by the jury. The jury was able to assess both Dillman and Yi's credibility, and clearly found their testimony credible. The defendant also erroneously suggests that because Dillman had incorrectly asserted that the defendant had braids in his hair that her identification was somehow weaker than Kim's identification. While Dillman was incorrect in asserting that the defendant had braids<sup>3</sup>, the jury could still have found her identification of the defendant credible, based on her demeanor and conviction in the manner in which she identified him—all factors the jury was able to observe. RP 309.

Defendant's reliance on State v. Hernandez, 58 Wn. App. 793, 798, 794 P.2d 1327 (1990), disapproved on other grounds by, State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991), is misplaced. In Hernandez, the witnesses identified the defendant as the perpetrator of different robberies, which occurred on different days, with varying degrees of certainty. Id. at 800. Hernandez was alleged to have committed (1) a robbery at a Baskin-Robbins store on January 25, 1988, (2) a robbery at a Baskin-Robbins store on February 1, 1988, and (3) a robbery at a Hallmark store on February 4, 1988. Id. at 795. The witness from the first

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<sup>3</sup> The State acknowledged in closing argument that the video footage of the defendant showed that his hair was not long enough to have braids. RP 836.

Baskin-Robbins robbery was initially reluctant to identify the defendant and, at trial, stated that he could be only “65 percent” certain in his identification. Id. The three witnesses from the second Baskin-Robbins robbery were all certain of their identification of the defendant, to different degrees—100 percent, 98 percent, and 75 percent. Id. The witnesses from the Hallmark store robbery was positive in her identification.

The court held that because the evidence from the first and third robberies was weak, and evidence from each robbery would not have been cross-admissible, the cases should have been severed. Id. The case at bar is distinguishable from Hernandez. In the present cases, there were not varying degrees of certainty among the witnesses’ identifications. Kim, Dillman, and Yi all identified the defendant in court and did not express any uncertainty when doing so. RP 180-181, 201, 345, 306-307, 347, 691.

As argued above, the Kim robbery was not disproportionately stronger than the Dillman robbery and the Won murder. The only cases that the defendant requested severance of was the Kim robbery from the other two incidents. 1-A RP 1. In Hernandez, the second Baskin-Robbins robbery had three witnesses who were certain of their identifications to varying degrees. Id. at 800. The two other robberies each had only one witness, whose testimony was not corroborated. Id. In the present case, all identifications were comparable.

To baldly assert that Kim’s identification was stronger than Dillman’s or Yi’s identification ignores the credibility assessments the

jury was required to make. While the defendant may believe that Kim’s identification was stronger than Dillman’s or Yi’s identification, that may not necessarily be the case—it is for the jury to determine. It is not clear, simply from a reading of the record, that the identification on the Kim robbery is stronger than the identifications on the Dillman robbery or the Won murder. The defendant cannot establish any specific prejudice, and cannot establish that Kim’s case was prejudicially stronger than the Dillman robbery or the Won murder.

- b. There was clarity in the defenses between the Kim robbery and the Dillman robbery and Won murder.

When the defense to each charge is identical, the likelihood that joinder would cause the jury to be confused as to the accused defenses is “very small.” Hernandez, 58 Wn. App. at 799. The defense to all of the charges in this case was the same—general denial.

- c. The jury was instructed to consider the evidence of each crime separately.

In Hernandez, the court did not find prejudice under the third prejudice-mitigating factor because the court gave the instruction stating:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Id. at 799. The court found that the jury was properly instructed.

In the case at bar, the jury was given the identical instruction as the instruction given in Hernandez. CP 90-126 (Instruction #7). The jury was properly instructed to consider each count separately, and the presumption is that they did so. See, State v. Swan, 114 Wn.2d 613, 662, 790 P.2d 610 (1990).

- d. The record is not sufficient to determine if evidence in the cases would be cross-admissible, and severance is not required if the evidence was not cross-admissible.

After the defendant made his initial motion, the day of trial, the State presented argument to the court that, if severance was granted, the evidence would be cross-admissible in each case. 1-A RP 5. It is unclear from the record what evidence would be cross-admissible, because it was not articulated. It is possible that there was additional evidence linking the cases together, but the record is insufficient to make such a determination.

Based on the evidence that was presented at trial, it does not appear that it would have been cross-admissible if the cases had been severed. However, severance is not mandated when the evidence is not cross-admissible. See, State v. Bythrow, 114 Wn.2d 713, 720, 790 P.2d 154 (1990). As the court indicated at the close of the State's case, the court again indicates that it is in the interest of judicial economy to try the cases together. RP 726. Therefore, even if evidence was not cross-admissible as part of a common scheme or plan, severance was not

required, and, as argued above, the defendant cannot establish any specific prejudice.

4. THE TRIAL COURT ACTED PROPERLY  
WITHIN ITS DISCRETION WHEN IT  
ADMITTED A STATEMENT MADE BY THE  
DEFENDANT AFTER HE WAS CONFRONTED  
WITH EVIDENCE THAT HAD BEEN  
GATHERED WHICH IMPLICATED HIM.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); Rehak, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

The defendant asserts that the admission of the defendant's statement, "explain it to someone who cares," was evidence of a "bad act,"

presumably under ER 404(b). Br. of Appellant at 27. Such argument is without merit. First, the defendant's statement to the officers during the course of their investigation is not a "bad act." The evidence which was admitted was merely a statement by the defendant after being confronted with facts gathered from the investigation that lead to him. RP 663.

Second, even if this court were to find that the statement by the defendant fell within the scope of ER 404(b), the statement of "explain it to someone who cares" is admissible as *res gestae*. The statement made by the defendant was in direct response to being confronted with facts about the robberies and murder. The statement is not in relation to "other" crimes, wrongs, or acts, but was part of the crimes charged. His statement is an inseparable part of the crimes charged. See, State v. Tharp, 96 wn.2d 591, 637 P.2d 961 (1981).

Finally, the statement by the defendant was relevant evidence. As argued below, the statement was made to detectives after the defendant was confronted with facts about the robberies and the murder, and how the investigation had lead to him. RP 663. The statement was acknowledgement by the defendant that he did not care about the fact that the investigation had lead to him. As the trial court acknowledged, it is an admission of sorts by the defendant. RP 645.

If the evidence was erroneously admitted, the question then is whether there is harmless error. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Only if the outcome of the trial would have been

different had the errors not occurred is the error deemed reversible error.

Id. at 695.

In making such a determination, the court obviously looks to the strength of the State's evidence. If the evidence is strong on each count then the results of the trial would not have been different if the error had not occurred. On the other hand, if the State's evidence is weak on each count then the outcome of the trial would be different.

State v. Bythrow, 114 Wn.2d 713, 722 fn. 4, 790 P.2d 154 (1990).

In this case, the defendant cannot establish that the outcome would have been different, and therefore any error was harmless. In the Kim robbery, the jury was presented with evidence that the victim identified the defendant from both a photo montage and in court. RP 180-181, 345. The jury had video footage from the convenience store which depicted Kim and the defendant. CP 206-212 (Exhibit 58, 107), RP 161, 205. It is clear that the admission of the defendant's statement would not have changed the outcome of the case.

In the Dillman robbery, the jury was again presented with an in court identification of the defendant, and the fact that Dillman had obtained the license plate number from the vehicle that the defendant was in when he robbed her. RP 305-306, 347. In the same car was Dillman's nursing certificate. RP 425. The jury also heard testimony that the same vehicle, minutes later, was observed on the way to the Won murder, and that the occupants of the vehicle were throwing cards with "Erica" and

“Ericka” on them out of the car window. CP 206-212 (Exhibit #54, 57); RP 243, 263-266, 298.

Finally, the jury heard the third in court identification from Yi, who indicated that the defendant shot her husband after he grabbed for the defendant’s gun in an attempt to save his wife. RP 686-687, 691. The jury heard testimony that the defendant had directed Yi and Won into Won’s car and that the defendant had taken Yi’s purse and Won’s wallet. RP 677-678. When the defendant directed that Won get out of the car and Yi remain, Won motioned to Yi with his eyes to run, while Won grabbed for the gun. RP 686-687. As Yi was running, she heard her husband being shot. RP 686. The jury saw video footage of Yi running into the convenience store. CP 206-212 (Exhibit #59, 82-105); RP 573-579, 688-690. Won died from a gunshot wound to the head.

Finally, the jury heard about the investigation that lead to the defendant, who did not come out of the apartment when police arrived. They heard that the defendant only exited the apartment after it was gassed in an effort to extract him. The defendant stipulated at trial that he had a prior juvenile felony conviction.

The jury was presented with evidence that the defendant committed all of the crimes charged. While his statement to police was relevant, if it was admitted erroneously, it did not effect the outcome. The evidence was strong on all of the crimes charged.

5. THE PROSECUTOR'S STATEMENT IN  
REBUTTAL CLOSING ARGUMENT WAS  
PROPER ARGUMENT AND ALTERNATIVELY  
WAS NOT FLAGRANT OR ILL-INTENTIONED  
AND DOES NOT REQUIRE REVERSAL.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "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." Id.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985), citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed

against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. See, State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The court will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). In closing argument, a prosecutor is permitted reasonable latitude in arguing inferences drawn from the evidence admitted during testimony. State v. Papadopoulos, 34 Wn. App. 397, 401, 662 P.2d 59 (1983).

The State's comments in closing argument were proper. In the State's rebuttal closing argument, the State argued as follows:

What about Tennyson and the SWAT team? Who do they find first? Who surrendered immediately? You ask yourself, you know, who had more to lose? Mr. McGown tells us an awful lot what was going on that weekend without saying anything. Okay? He doesn't recognize himself. He doesn't know the defendant, Mr. Boone. He wasn't there. But you know what? He was. Mr. Boone's sister lets us know that Mr. Boon and Mr. McGown were

friends. Von Narcisse lets us know that Mr. McGown and Mr. Boone are friends.

Mc McGown (sic) has trouble recalling, you know, anything that happened in his life at that point, or during that weekend. You know what? Maybe he did truly forget what had happened that weekend, maybe he really would like to forget what happened that week, even, or maybe the fact that this gallery was packed fully of people caused him to lose some of his memory.

Doesn't remember or doesn't want to remember. . .

RP 840-841.

After the State's rebuttal, the court denied the motion for a mistrial on the basis of prosecutorial misconduct. RP 848. The court stated:

Well, Mr. McGown during his testimony had, my impression was fairly poor recall. He did not recognize a picture of himself, so one might wonder why he didn't remember this. And there is no direct evidence of that, of course, and Mr. Jones' comment might have been somewhat speculative as an explanation, certainly not a proven explanation for McGown, but I think it was simply a comment and argument in closing argument. I don't think it rises—if it's misconduct—I am not sure it is—it certainly I don't think rises to the level of requiring a mistrial. I am going to deny the motion for mistrial.

RP 848.

The State's argument in rebuttal was not misconduct. The comments made by the State were argument as to why McGown's testimony was so poor. The State is permitted reasonable latitude to argue inferences from the evidence. See, State v. Papadopoulos, 34 Wn. App. 397, 401, 662 P.2d 59 (1983). Possible explanations for McGown's

testimony were presented by the State. There was nothing in the State's argument to the jury to suggest which of several explanations was the correct one. Rather, the State merely presented possibilities for the nature of McGown's testimony. To do so is not misconduct.

The defendant asserts that the State's comments somehow implied to the jury that the defendant or someone in the courtroom was intimidating McGown. Br. of Appellant at 22-24. There was nothing in the State's comments to suggest that McGown was being intimidated. The State only suggested that one possible explanation for McGown's testimony was that the courtroom was "packed," not that McGown was threatened or intimidated. Moreover, there was no argument by the State as to the racial composition of the audience in the courtroom. The State's comment was proper argument based on the testimony of McGown.

There was no curative instruction requested by the defendant after the State's rebuttal argument, despite the State's suggestion that the court could do so. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). A curative instruction could have corrected any error. Such instruction was not requested, and the defendant is not asserting that his counsel was ineffective for failing to request such an instruction.

When no curative instruction is requested, the defendant is required to demonstrate that the comment was so flagrant and ill-

intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by a curative instruction. In the case, the court stated that he did not believe misconduct had occurred, but if it had, it did not rise to the level of requiring a mistrial. RP 848. Taken in its context, the comment did not result in an enduring or resulting prejudice. The comments by the State as to the possible reasons for McGown's testimony were possibilities the jury could have deduced themselves. It was clear from McGown's testimony that he was not providing any information, and the State's comment suggested several possible reasons for it.

Finally, the jury was advised that the comments made by the attorneys is not evidence and that they were to disregard any remark, statement, or argument that was not supported by the evidence. CP 90-126 (Instruction No. 1). They are presumed to follow the court's instructions. State v. Swan, 114 Wn.2d 613, 662, 790 P.2d 610 (1990). The defendant cannot establish any prejudice and his claim is without merit.

6. ANY CLAIM THAT WASHINGTON'S "AUTOMATIC DECLINE" STATUTE VIOLATES INTERNATIONAL TREATIES IS WAIVED AS IT WAS NOT RAISED BELOW, AND, ALTERNATIVELY, THE DEFENDANT DOES NOT ESTABLISH A DIRECT VIOLATION OF ANY BINDING TREATY.

Failure to object precludes raising the issue on appeal. State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may

only appeal a non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). A violation of an international treaty does not translate into a violation of a defendant's Constitutional rights. State v. Jamison, 105 Wn. App. 572, 584-587, 20 P.3d 1010 (2001), citing Murphy v. Netherland, 116 F.3d 97, 100 (4<sup>th</sup> Cir. 1997). In Jamison, the defendants asserted violations of the Vienna Convention when they were questioned by police without being informed of their rights as foreign nationals. Id. at 576. The court held that one of the defendants, Acosta, was precluded from raising a violation of the Vienna Convention on appeal because he failed to object below. Id. at 584. The court found that because Acosta did not object below, he could not establish a manifest constitutional error and was thus barred from appellate review. Id.

The defendant asserts that the State's "automatic decline" statute, RCW 13.04.030 violates "binding international law." Br. of Appellant at 28. Such alleged violation, however, is non-constitutional in nature and must be raised below. Similar to Acosta, a consolidated case in State v. Jamison, 105 Wn. App. 572, 20 P.3d 1010 (2001), there was no objection to the defendant being tried as an adult by trial counsel below, therefore, this court cannot address the merits of the claim on appeal.

If this court were to reach the merits of the defendant's claim, it would still fail. The defendant asserts that the Convention on Civil Rights of the Child and the International Covenant on Civil and Political Rights

are irreconcilable with RCW 13.04.030. The defendant, however, never articulates specifically how RCW 13.04.030 violates any treaties, only insofar as to assert that juveniles should be segregated from adults and be accorded treatment appropriate to their age and legal status, and that courts should be taking juvenile defendants' age and rehabilitation into account. Br. of Appellant at 31. There is nothing in RCW 13.04.030 that runs contrary to those goals.

The automatic decline provision in RCW 13.04.030 reflects the legislature's intention to address the problem of youth violence by increasing severity and certainty of punishment for youth who commit certain acts. See, State v. Mora, 138 Wn.2d 43, 50, 977 P.2d 564 (1999). Clearly, the legislature has determined that the appropriate punishment for juveniles who commit certain offenses is the punishment that is given under the adult system. Such determination does not necessarily mean that considerations about protecting juveniles was not given.

The defendant's assertion is without merit and was not properly preserved below. Moreover, the defendant cannot establish a violation of any binding authority.

D. CONCLUSION.

For the above mentioned reasons, the State respectfully requests that this court affirm the defendant's convictions below.

DATED: NOVEMBER 13, 2006.

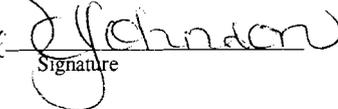
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Certificate of Service:

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.

11/14/06   
Date Signature

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