

NO. 36565-1

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

STUART J. HARRIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 06-1-04999-5

Brief of Respondent

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

1. Was there sufficient evidence to convict defendant of unlawful possession of a firearm when defendant was driving the vehicle in which the weapon was found, the weapon was under the front of defendant's seat, the weapon was large and easily accessible, and defendant showed consciousness of guilt by giving the officer a false name?
2. Was defendant able to show the trial court admitted improper opinion evidence when the officers were not making a direct comment on defendant's guilt and the testimony was in the context of responding to defense counsel's questions regarding the officer's decision not to test the gun for fingerprints?
3. Was Officer Schultz's testimony that he would have seen bullets through the cylinder of the gun if it had been pulled on him relevant when it was confined to the issue of the firearm's operability?
4. Does defendant fail to establish that he is entitled to relief under the cumulative error doctrine?

The trial court ruled that the State had produced sufficient evidence to convict. 3RP 181-82. In ruling that the State had presented sufficient evidence, the trial court held, “[Defendant] clearly possessed the car... And the jury at this point can clearly make a reasonable inference that if you possess the car you possess the contents of the car... So possession is simply a question for the jury to decide, whether [defendant] actually possessed not only the car but the – contents of the car.” 3RP 182.

After hearing the evidence, the jury found defendant guilty as charged. 3RP 229, CP 43. The court sentenced defendant to 50 months in prison, to be served in the Department of Corrections. 3RP 243, CP 50-61. The court also ordered defendant to pay monetary penalties. *Id.* From entry of this judgment, defendant filed a timely notice of appeal. CP 66-76.

2. Facts

At 2:00 am on October 21, 2006, Officer Steven John Rosmaryn was on patrol, driving eastbound on South 12th Street from South Proctor. 3RP 52, 54. Officer Rosmaryn noticed a 1990 Buick Regal coupe, with three occupants, protruding well out into westbound traffic at a stop sign on South 12th Street and South Adams Street. 3RP 54, 59, 61. Neither of the passengers were on the driver’s side of the vehicle. 3RP 101. Officer Rosmaryn waited for the car to turn left, and then initiated a traffic stop. 3RP 55. The vehicle pulled over in the 1100 block of South Washington. 3RP 56. Officer Rosmaryn made contact with the driver, later identified

as defendant. 3RP 56. Officer Rosmaryn told defendant why he had pulled him over, and asked defendant for his driver's license, registration, and proof of insurance. 3RP 56. Defendant did not give Officer Rosmaryn a driver's license or any other piece of identification. 3RP 57. Defendant also told Officer Rosmaryn that his name was Jerrell Jeffrey Johnson. *Id.*

Officer Rosmaryn returned to his own vehicle and ran a records check on the name defendant had given him. 3RP 58. There was no driver's license or other form of Washington State identification under the name Jerrell Jeffrey Johnson. *Id.* Officer Rosmaryn went back to defendant and asked him for his real name, and defendant eventually told him his name was Stuart Jeffrey Harris. 3RP 58-59. Officer Rosmaryn learned that defendant did not have a valid driver's license because it had been suspended, and placed defendant under arrest. 3RP 59.

Officer Rosmaryn's partner, Officer Albert Schultz, arrived roughly during the time Officer Rosmaryn was arresting defendant. 3RP 59. Following the arrest, both officers got the passengers out of the vehicle. 3RP 101. Officer Schultz searched the vehicle and found a .357 Magnum revolver under the "forward portion of the driver's seat." 3RP 62, 103-04. Officer Schultz then brought the gun to the trunk of the car, unloaded the gun, and both officers inspected it at the scene. 3RP 63. Officer Rosmaryn then secured the gun by making sure all of the bullets were out of the gun and placing zip-ties through the barrel and the

cylinder. 3RP 63, 74. Officer Rosmaryn submitted the gun to the property room at the police station. 3RP 63-64.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF UNLAWFUL POSSESSION OF A FIREARM BECAUSE DEFENDANT WAS DRIVING THE VEHICLE IN WHICH THE WEAPON WAS FOUND, THE WEAPON WAS UNDER THE FRONT OF DEFENDANT'S SEAT, THE WEAPON WAS LARGE AND EASILY ACCESSIBLE, AND DEFENDANT SHOWED CONSCIOUSNESS OF GUILT BY GIVING A FALSE NAME TO THE OFFICER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278,

401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Anderson*, 72 Wn. App. 453, 458, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.3d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). This is because the written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations. The trier of fact, who is best able to observe the witnesses and evaluate their testimony, should make these determinations. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial courts factual findings. *In re Sego*, 82 Wn.2d 736, 513 P.2d 831 (1973); *Nissen v. Obde*, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

Therefore, when the State has produced evidence of all elements of a crime, the decision of the trier of fact should be upheld.

The State may use evidentiary devices such as permissive inferences to assist in meeting its burden of proof. *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). A permissive inference permits the jury to find a presumed fact from a proven fact, but does not require them to do so. *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996) (citing *State v. Hanna*, 123 Wn.2d at 710). When permissive inferences are only part of the State's proof supporting an element, due process is not offended if the evidence shows that the inference more likely than not flows from the proven fact. *State v. Deal*, 128 Wn.2d 693, 700, (quoting *State v. Burnson*, 128 Wn.2d 98, 905 P.2d 346 (1995)).

A person is guilty of the crime of unlawful possession of a firearm in the first degree if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter. RCW 9A.040(1)(a). A defendant must knowingly possess the firearm. *State v. Anderson*, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000). Possession may be actual or constructive. *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000) (citing *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997)). A defendant constructively possesses a firearm when he exercises dominion or control over the premises in which the firearm is found. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001) (citing *Echeverria*, 85 Wn. App. at 783). A vehicle can be considered

“premises,” for the purpose of this inquiry. *Turner*, 103 Wn. App. at 521. The ability to reduce the firearm to actual possession is one aspect of dominion and control. See *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). Dominion and control is established based on the “totality of the circumstances” surrounding the possession, and no single factor is dispositive. *Alvarez*, 105 Wn. App. at 221 (citing *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243 (1995)).

In the present case, defendant asserts that the trial court abused its discretion when it denied defendant’s motion for a mistrial on the grounds of insufficient evidence. Br. of Appellant at 8. “A trial court’s power to dismiss charges is reviewable under the manifest abuse of discretion standard.” *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997) (citing *State v. Warner*, 125 Wn.2d 876, 882, 889 P.2d 479 (1995)). “Discretion is abused when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons.” *Michielli*, 132 Wn.2d at 240 (quoting *State v. Blackwell*, 120 Wn.2d 822, 830 845 P.2d 1017 (1993)).

The State presented sufficient evidence to convict defendant of first degree unlawful possession of a firearm. Defendant was driving the vehicle in which the firearm was found. 3RP 56. The firearm was directly under the driver’s seat of the vehicle and easily within defendant’s reach. 3RP 62, 103-04. The firearm was a .357 Magnum, a weapon that is difficult to carry on one’s person, thus providing a rationale for why the

firearm was under the driver's seat. 3RP 106. It is reasonable to infer that defendant had more than a merely fleeting interest in the vehicle because he was driving at a very late hour. 3RP 54, 59, 61. Furthermore, defendant gave a false name to Officer Rosmaryn, and it is a reasonable inference that defendant gave the false name because he knew he was unlawfully possessing a weapon. 3RP 57. Given the totality of the circumstances, taking all reasonable inferences in favor of the State, and viewing the evidence in the light most favorable to the State, a reasonable jury could have found defendant guilty of first degree unlawful possession of a firearm, and the trial court did not abuse its discretion in denying defendant's motion to dismiss.

This Court's discussion in *Turner of State v. Cantabrana*, 83 Wn. App. 204, 921 P.2d 572 (1996), is instructive. *Turner*, 103 Wn. App at 523-24. Cantabrana successfully challenged the trial court's jury instruction that constructive possession occurs when the defendant has dominion and control over either the drugs themselves or the premises where the drugs are discovered. *Cantabrana*, 83 Wn. App. 06-07. The *Cantabrana* court held that this instruction went too far because it amounted to a directed guilty verdict if the jury found the defendant exercised dominion and control only over the premises. *Id.* at 208. The *Cantabrana* court held instead that a defendant's dominion and control over the premises creates a rebuttable inference that he had constructive possession of the drugs. *Id.*

Although *Cantabrana* dealt with unlawful possession of heroin and cocaine, *Turner* was an unlawful possession of a firearm case, and this Court in *Turner* cited *Cantabrana* extensively. *Cantabrana*, 83 Wn. App. at 206; *Turner*, 103 Wn. App. at 523-24. In fact, this Court in *Turner* quoted *Cantabrana* directly:

When the sufficiency of the evidence is challenged on the basis that the State has shown dominion and control only over premises, and not over drugs, courts correctly say that the evidence is sufficient because dominion and control over premises raises a rebuttable inference of dominion and control over the drugs.

Id. at 523 (quoting *Cantabrana*, 83 Wn. App. at 208).

This Court in *Turner* also distinguished “dominion and control” over the premises from “mere proximity” to the weapon. *Turner*, 103 Wn. App. at 520-22. Turner was driving his truck with one other passenger, and the passenger’s gun was on top of the backseat. *Id.* at 518. This Court held that Turner exercised dominion and control over the vehicle because he owned the truck and was driving it when the police discovered the gun. *Id.* at 522. Mere proximity, this Court held, only occurs when a defendant is not exercising dominion and control over the premises. *Id.* “[W]here there is control of a vehicle and knowledge of a firearm inside it,” this Court held, “there is a reasonable basis for knowing constructive possession, and there is sufficient evidence to go to the jury.” *Id.* at 524.

Defendant has essentially argued on appeal that the State did not provide sufficient evidence to convict him even though he exercised dominion and control over the vehicle. Br. of Appellant at 7. Defendant does not argue that the State failed to prove he exercised dominion and control over the premises where the gun was found, in this case the vehicle. Instead, defendant argues that the trial court abused its discretion when it ruled that “possession is simply a question for the jury to decide, whether [defendant] actually possessed not only the car but the... contents of the car.” Br. of Appellant at 7-8, 3RP 182. This Court, however, has held that showing dominion and control over the premises is sufficient to prove constructive possession. *State v. Potts*, 1 Wn. App. 614, 617, 464 P.2d 742 (1969). In *Potts*, the defendant had the keys, was driving the vehicle, and was the sole occupant of the vehicle. *Potts*, 1 Wn. App. at 617. This Court held that evidence sufficient to uphold the inference that defendant therefore exercised dominion and control over the contents of the vehicle. *Id.*

Like *Potts*, defendant had the keys and was driving the vehicle in which Officer Schultz found the gun, and neither side presented evidence to the jury that any of the other passengers were registered owners of the car or exercised dominion and control over the car in some other way. 3RP 54, 62, 103-04. The trial court therefore correctly ruled that the State had established defendant had dominion and control over the car, and that

whether knowledge of the gun should be inferred from defendant's driving the vehicle was a question for the jury.

The jury was also properly instructed of the elements that the State must satisfy in order for the jury to convict defendant. The trial court paid particularly close attention to the knowledge element, and several jury instructions discussed knowledge as an element of unlawful possession of a firearm. Jury Instruction No. 7 instructed the jury, "A person commits the crime of unlawful possession of a firearm in the first degree when he... knowingly owns or has in his possession or control any firearm." CP 8-25 (Jury Instruction 7). The court included Jury Instruction No. 10, which defined knowledge for the jury thusly: "A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime," even though defense counsel argued that the instruction was unnecessary. CP 8-25 (Jury Instruction 10), 3RP 189-90. Jury Instruction No. 9 also alerted the jury that "mere proximity to an item is insufficient to establish possession of that item." CP 8-25 (Jury Instruction 9), 3RP 185-86. These detailed and explicit instructions avoided the pitfall, articulated in *Cantabrana*, that finding defendant had dominion and control over the vehicle necessitated a guilty verdict. *Cantabrana*, 83 Wn. App. at 208. They also fully informed the jury that, in order to find defendant guilty, they had to find that he knew he was in possession of the firearm, and

juries are presumed to follow the instructions of the trial court. *State v. Kirkman*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007).

The facts in the present case are also strikingly similar to those in *Echeverria*. Echeverria, 15 years-old at the time he was arrested, was driving a vehicle that was not his, driving that vehicle late at night, without a license, and with several passengers in the car. 85 Wn. App. at 780. Echeverria pulled the vehicle into a parking lot and got out of the car. *Id.* Officer Donna French, who had initially noticed the vehicle because its taillights were not operating properly, told Echeverria to stop where he was. *Id.* After Echeverria yelled an obscenity at her, Officer French placed Echeverria under arrest. *Id.* Officer French then searched the vehicle and found a weapon underneath the driver's seat, with the barrel sticking out about three inches from underneath the seat. *Id.* Division Three held that defendant's ability to reduce the weapon to actual possession, that it was under the driver's seat of the vehicle, and that the trial court's finding that the gun was in plain sight was not challenged, provided sufficient evidence to convict Echeverria of unlawful possession of a firearm. *Id.* at 783.

The similarities between the present case and *Echeverria* are striking. Just as in *Echeverria*, the State did not produce evidence at trial that defendant was the registered owner of the vehicle². Defendant and Echeverria both drove at a very late hour with other passengers in the vehicle. 3RP 54, 59; *Echeverria*, 85 Wn. App. at 780. Both defendant and Echeverria gave false names to police, and both were arrested. 3RP 57-59; *Echeverria*, 85 Wn. App. at 780. Police searched both vehicles and found guns under the driver's seat of each vehicle. 3RP 62, 103-04; *Echeverria*, 85 Wn. App. at 780.

The only substantive difference between *Echeverria* and the present case is that the firearm was in plain sight in *Echeverria*, while the weapon was fully under the seat in the present case. *Echeverria*, 85 Wn. App. at 783. This difference alone is not enough to separate the two cases. Constructive possession requires more than mere proximity to a firearm in order to be established, and does not require the item to be in plain view. In the present case, the State established that defendant was more than merely proximate to the weapon. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). The State established that defendant had dominion and control over the premises in which the weapon was found, in this case the

² In *Echeverria*, the court cites evidence that the police contacted the registered owner of the vehicle to confirm that the vehicle was not stolen. *Echeverria*, 85 Wn. App. at 780. In the present case, Officer Schultz stated during the CrR 3.5 hearing that defendant was not the registered owner of the vehicle he was driving, and the issue of ownership was not presented to the jury during trial. 3RP 20.

vehicle defendant was driving. Like *Echeverria*, defendant could easily reduce the firearm to actual possession because the weapon was well within defendant's reach. Cf. *Echeverria*, 85 Wn. App. 783. The trial court therefore did not manifestly abuse its discretion when it ruled, "It's pretty reasonable for a jury to decide that he's the one who put the gun under the seat of the car that he was driving." 3RP 183.

Defendant cites to *Anderson* and *Turner* to support his argument that the State failed to produce sufficient evidence to convict. Br. of Appellant at 8-10; *Anderson*, 141 Wn.2d at 357; *Turner*, 103 Wn. App. at 515. Using these cases, defendant attempts to create a minimal standard of evidence needed to convict a defendant of unlawful possession of a firearm. *Id.* However, in neither case did the court hold that the evidence presented at trial was minimally sufficient, or that a defendant could not be convicted with different or "less" evidence than was presented at trial.

In *Anderson*, the Supreme Court overturned Anderson's conviction because the jury instructions had failed to include the knowledge element of unlawful possession of a firearm. *Anderson*, 141 Wn.2d at 367. The present case is easily distinguishable from *Anderson* because here the trial court properly instructed the jury on the knowledge element. CP 8-25 (Jury Instructions 7, 9, 10). In *Anderson*, the Supreme Court reached its decision by holding that the Legislature had intended knowledge to be an element of unlawful possession of a firearm. *Anderson*, 141 Wn.2d at 366. The Court believed that the State "would

have encountered few problems” in convicting Anderson if it had included knowledge as an element of unlawful possession in the amended information. *Id.* Contrary to defendant’s argument, the Court did not create a minimal standard that the State must reach in order to prove knowing constructive possession. Br. of Appellant at 8-9. However, because the trial court did not put the knowledge element before the jury, the Court felt compelled to reverse Anderson’s conviction. *Id.* at 367.

As for *Turner*, this Court explicitly held that the evidence presented went well beyond the minimum necessary for a reasonable jury to convict. *Turner*, 103 Wn. App. at 524. This Court held that control of a vehicle and knowledge of a firearm inside provides “a reasonable basis for knowing constructive possession.” *Id.* This Court then went on to hold that “there was *even more* to convict Turner, the proximity of the firearm, the extended duration of the time the firearm was in the truck, and that Turner did nothing to reject the presence of the firearm in the truck.” [Emphasis added] *Id.*

The State presented evidence that defendant was driving the vehicle and that the weapon was in the vehicle and could be quickly reduced to actual possession. That defendant had dominion and control over the vehicle in which the gun was found, and that the State’s evidence in this regard is not challenged on appeal provides a sufficient basis to uphold the jury’s verdict. Additionally, given the totality of the circumstances, including defendant showing consciousness of guilt by

giving a false name to Officer Rosmaryn, construing all reasonable inferences in favor of the State, and viewing the evidence in the light most favorable to the State, there was sufficient evidence presented at trial for a reasonable jury to find beyond a reasonable doubt that defendant unlawfully possessed a firearm. Therefore, defendant's conviction should be affirmed.

2. DEFENDANT IS UNABLE TO SHOW THE TRIAL COURT ADMITTED IMPROPER OPINION EVIDENCE BECAUSE THE OFFICERS WERE NOT MAKING A DIRECT COMMENT ON DEFENDANT'S GUILT AND THE TESTIMONY WAS IN THE CONTEXT OF RESPONDING TO DEFENSE COUNSEL'S QUESTIONING OF THE OFFICERS' DECISION NOT TO TEST THE GUN FOR FINGERPRINTS.

“Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” ER 704. However, it is improper for a witness to give an opinion on a defendant's guilt, as doing so “invades the exclusive province of the finder of fact.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting, *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). Improper comments are not deemed prejudicial unless “there is a substantial likelihood the misconduct affected the jury's verdict.” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown* 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

“RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). If not objected to at trial, witness opinion testimony may be reviewed only if it rises to the level of a manifest constitutional error where the witness makes “... an explicit or almost explicit... statement on an ultimate issue of fact.” *Kirkman*, 159 Wn.2d at 936. Failure of a defendant to object for tactical reasons does not constitute reversible error. *Id.* at 937.

The issues regarding opinion testimony in the present case are similar to those in *Kirkman*. In *Kirkman* and its consolidated case, *State v. Candia*, both defendants challenged testimony given at trial that pertained to the credibility of the victim in their trials of first degree child rape. *Kirkman*, 159 Wn.2d at 922. In each case, a detective who interviewed the victim, and Dr. John Stirling, who examined both victims, testified about statements the victims made to them. *Kirkman*, 922-25. The detective in *Kirkman*’s trial testified that he had determined the victim’s ability to tell the truth through the preliminary competency protocol, and the victim had promised to tell him the truth. *Id.* at 923. The detective in *Candia*’s trial also testified that she had given the victim the preliminary competency protocol, and that she asks the victims to tell her the truth. *Id.* at 925. Dr. Stirling testified in both trials about the results of the physical examinations, the statements the victims

made to him, and how the examinations and the statements compared. *Id.* at 923-25.

The Supreme Court held that none of the aforementioned witnesses offered improper opinion testimony. *Id.* at 938. Part of the rationale for the Court's ruling was that neither defendant could show actual prejudice that resulted from the testimony at issue. *Id.* at 937. In order for a claim of constitutional error to rise to the level of being "manifest," defendant must show actual prejudice. *Id.* at 935. The Court noted, "It also appears from the respective records that defense counsel for both Kirkman and Candia chose not to object to the testimony for tactical reasons." *Id.* Particularly in regards to Candia, the Court held that the defendants were appealing testimony that they found beneficial at trial, and implicitly held that testimony which defendant found favorable at trial did not rise to the level of manifest constitutional error. *Id.*

In the present case, the officers did not give opinion evidence as to defendant's guilt. Neither officer mentioned their determination of who possessed the weapon until defense counsel challenged the thoroughness of the officers' investigation. During direct examination, Officer Rosmaryn did not mention whom he believed to be the owner of the gun. 3RP 51-77. On cross-examination, defense counsel asked Officer Rosmaryn if he had learned "proper preservation of evidence" when he trained at the academy. 3RP 79. Defense counsel then asked Officer Rosmaryn about a letter he had sent the Officer requesting that the Officer

test the seized gun for fingerprints. 3RP 92. Defense counsel questioned Officer Rosmaryn regarding whether he had acquiesced to defense counsel's request, and Officer Rosmaryn replied that he had not tested the gun for fingerprints. 3RP 92.

On redirect, the prosecutor asked Officer Rosmaryn why he had not had the weapon fingerprinted:

PROSECUTOR: [Defense counsel] just asked you about the fingerprints on the gun and you said that you didn't send it in to be tested for fingerprints, why is that?
...

ROSMARYN: Well, for one my partner and I, as I stated earlier, had already touched the gun so much that I think if there was any processible evidence we would have probably ruined it when we were manipulating, or, you know, working with the gun. In my mind I had no doubt who it belonged to. And when I got the letter it just seemed inappropriate to me.

RP 93.

Defense counsel did not object to the above testimony from Officer Rosmaryn. *Id.* The prosecutor then asked Officer Rosmaryn how he determines whether he should handle a weapon or preserve any potential fingerprints on it. 3RP 93-94. Officer Rosmaryn answered that there are several factors that go into his determination, "And sometimes it makes sense that it belongs to one person and sometimes it don't. Sometimes

you generally just don't know and so you treat it a little bit differently I guess when you don't know." 3RP 94. Defense counsel again did not object. *Id.* The prosecutor then asked Officer Rosmaryn if he had made a determination as to whom the weapon in question belonged to, and Officer Rosmaryn answered that he was "confident" at the scene that the weapon belonged to defendant. *Id.* Defense counsel again did not object. *Id.* On recross-examination, defense counsel asked Officer Rosmaryn if he recalled one of the passengers of the vehicle, Corbin Barbour, stating that the gun belonged to Tyron James. 3RP 96. Officer Rosmaryn answered that he did not remember Mr. Barbour saying that. *Id.*

Officer Schultz testified after Officer Rosmaryn. 3RP 97-125. On direct, the prosecutor asked Officer Schultz about his protocol or thought process when handling evidence. The Officer replied:

SCHULTZ: Well, it depends on the nature of the crime. If we found a bloody knife at the scene of a stabbing or something, that would be processed forensically. Blood that was on it would be tested, there would be fingerprinting, that type of thing. But a weapon just lying around may not necessarily get processed. As far as we know, it hadn't been used in a crime. Other than when we find a weapon we conduct a check on the serial number, and in this case this one was reported stolen, this serial number.

...

PROSECUTOR: So how come you didn't try to preserve any types of prints on it?

SCHULTZ: Well, I think primarily because other than the active constructive possession of it being in the driver's – or below the driver's seat we weren't aware of it being used in a crime. And that's probably about the best I can – why we wouldn't have immediately assumed it needed to be fingerprinted.

RP 112-13.

Defense counsel did not object to any of the above testimony. *Id.*

On cross-examination, defense counsel asked Officer Schultz if had learned “how to preserve evidence” when he trained at the academy. 3RP 114. Defense counsel also asked Officer Schultz if he recalled one of the passengers of the vehicle, Corbin Barbour, stating that the gun belonged to Tyron James. 3RP 121. Officer Schultz answered that he did not remember Mr. Barbour saying that. *Id.*

Defense counsel's line of questioning strongly indicates, similar to the defense counsels in *Kirkman*, that he viewed the officers' testimony as favorable to defendant. *Kirkman*, 159 Wn.2d at 937. Both officers testified that the reason they handled the gun was that they had made the determination that the gun belonged to defendant. Defense counsel viewed this testimony as further evidence that the officers had not exercised proper care in their investigation. A poor investigation could

have left open the possibility that the gun belonged to someone else, including James.

Even if the officers' testimony was impermissible opinion evidence, there was no resulting prejudice because there was no manifest constitutional error. The trial court in the present case properly instructed the jury as to their role in weighing opinion evidence. The trial court instructed the jury, "You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness." CP 8-25 (Jury Instruction 1). The jury was also instructed that an expert witness may be allowed to express an opinion, but the jury was not bound by such an opinion, and it is up to the jury to determine how much weight and credibility to give opinion evidence. CP 8-25 (Jury Instruction 5). These instructions mirror those the trial court gave the jury in *Kirkman*, which the Washington Supreme Court cites as curative of any prejudice resulting from improper opinion evidence in that case. *Kirkman*, 159 Wn.2d at 937. It is presumed that jurors follow the instructions of the trial court. *Id.* The *Kirkman* Court pointed to these jury instructions as evidence that Kirkman and Candia did not suffer "actual prejudice" from any improper opinion testimony. *Id.*

Defendant paints a very different picture of the officers' testimony in his brief. Defendant argues that Officers Rosmaryn and Schultz were commenting directly on his guilt, and implies that the prosecutor elicited this testimony. Br. of Appellant at 12. Defendant also points to Officer

Rosmaryn's attire in the courtroom³ as additional evidence that the jury would be more swayed by allegedly improper opinion evidence. Br. of Appellant at 18. Defendant, however, acknowledges that Officer Schultz's testimony "... was given in the context of explaining the police decisions regarding the proper conduct of the investigation." *Id.*, 3RP 79, 92. Defendant also omits that it was defense counsel at trial, through his critical questioning of the officers' investigation, that invited the officers' testimony justifying their investigation through the determinations they made at the scene about possession of the gun.

Defendant also argues that the five-part balancing test from *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), is applicable to the present case. Br. of Appellant at 13. The five factors in the *Demery* balancing test are "(1) the type of witness involved, (2) the specific nature of the testimony," (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *Demery*, 144 Wn.2d at 759 (quoting *Heatley*, 70 Wn. App. at 579). Defendant, though, misinterprets which court is supposed to apply this balancing test. Defendant states, "This Court looks at the challenged testimony." Br. of Appellant at 13. In fact, it is the trial court that is supposed to apply the

³ The transcript indicates that Officer Rosmaryn wore his SWAT uniform for his second day of testimony. 3RP 71. Defendant does not cite to any authority in support of his assertion that a police officer wearing a standard issue SWAT uniform is somehow more prejudicial than that same officer wearing civilian attire or a regular police officer uniform. Br. of Appellant at 18-19.

Demery test. *Demery*, 144 Wn.2d at 759 (“In determining whether statements are in fact impermissible opinion testimony, the court will generally consider the circumstances of the case, including the following factors...”). If defense counsel would have objected to the officers’ testimony, it would be appropriate for this Court to apply the *Demery* test. However, by not objecting, defendant took the opportunity away from the trial court to apply the *Demery* test to the testimony of Officers Rosmaryn and Schultz. Defense counsel’s failure to object also takes away the opportunity for this Court to analyze the trial court’s reasoning in *Demery*, because none exists. Therefore, the standard on appeal is not the one articulated in *Demery*, but the manifest constitutional error standard articulated in *Kirkman*. Defendant cannot meet the *Kirkman* standard of manifest constitutional error, because defendant is unable to show actual prejudice that resulted from the Officers’ testimony.

In the context of their testimony, neither Officer Rosmaryn nor Officer Schultz was stating an improper opinion that defendant had possessed the firearm. Instead, both officers were explaining why they had handled the firearm the way they had following their arrest of defendant. The officers were also responding to defense counsel’s questions regarding the investigation and the officers’ decision not to test the weapon for fingerprints. Defense counsel’s failure to object to any of the allegedly improper statements is evidence that he viewed the officers’ testimony as favorable to defendant. Therefore, because neither officer

made “an explicit or almost explicit” statement on defendant’s guilt and defendant did not object at trial, defendant is unable to articulate a manifest constitutional error.

3. OFFICER SCHULTZ’S TESTIMONY WAS RELEVANT BECAUSE IT WAS CONFINED TO THE ISSUE OF THE OPERABILITY OF THE FIREARM.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004); *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). 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). “An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial.” *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to

do so precludes raising the issue on appeal. *Thomas*, 150 Wn.2d at 856; *Guloy*, 104 Wn.2d at 421.

A curative instruction will often cure any prejudice that has resulted from an alleged impropriety. See, *State v. McNallie*, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), *aff'd*, 120 Wn.2d 925, 846 P.2d 1358 (1993). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn.2d 284, 293-294, 902 P.2d 546 (1997). Moreover, "Jurors are presumed to follow the court's instructions." *Kirkman*, 159 Wn.2d at 937, 938. 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." *State v. Jerrels*, 83 Wn. App. 503, 508, 925 P.2d 209 (1996); *citing State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994) (*citing State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)).

In the present case, the trial court did not abuse its discretion when it ruled that Officer Schultz's testimony about what his observations would be if the gun was pulled on him was relevant. On redirect, the prosecutor asked Officer Schultz if he would have been concerned had the gun he found under defendant's seat been pointed at him. 3RP 124. Defense counsel objected to this question on the grounds of irrelevance, but Judge Tollefson overruled his objection. *Id.* Officer Schultz answered

that he would be concerned, and elaborated that he would be particularly concerned because he would have been able to see the bullets in the cylinder of the weapon. *Id.*

In context, the prosecutor's questions were clearly designed to elicit a response about what Officer Schultz noticed about the weapon. *Id.* The State has the burden of proving that the gun was "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." CP 8-25 (Jury Instruction 11). Both the prosecutor and defense counsel asked Officer Schultz about the operability of the gun he found under defendant's seat. 3RP 106-11, 115-19, 121-25. Officer Schultz testified that he handled and inspected the gun at the scene, and the prosecutor laid proper foundation at trial for Officer Schultz's expertise regarding firearms. 3RP 104-11. Although the prosecutor used the word "concerned" in his question, Officer Schultz's response related directly to his conclusion that the gun was operable, that he would be concerned because he would have been able to see bullets looking at a particular end of the cylinder of the gun. 3RP 124. Therefore, Officer Schultz's testimony would be very relevant to the issue of the operability of the gun.

Defendant argues that the prosecutor and Officer Schultz were commenting on "potential fears and the actions [Officer Schultz] would take if the gun was pointed at him." Br. of Appellant at 25. This is a mischaracterization of Office Schultz's testimony. The prosecutor was instead asking a question designed to give the jury a better picture of why

Officer Schultz would believe the gun was operable, and defendant concedes that the prosecutor was trying to prove that the gun was a “firearm” under RCW 9.41.040. 3RP 124.

Even if the trial court did abuse its discretion, the error was harmless⁴. The alleged error does not rise to the level of a constitutional error, and defendant does not argue that it does. Br. of Appellant at 21-28. Therefore, defendant must show that the alleged error “materially affected the outcome of the trial.” *State v. Russell*, 125 Wn.2d 24, 94, 882 P.2d 747 (1994) (citing *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). The context of Officer Schultz’s testimony was clearly related to the operability of the weapon, and had nothing to do with defendant grabbing or pointing the weapon at a police officer. All of the testimony was either directly tied to what Officer Schultz would observe, or his training that would assist him in his observations, and the testimony would not have unduly prejudiced the jury. The evidence presented at trial, discussed above, also ensures that there was more than a reasonable probability that the jury would have reached the same conclusion had the alleged error not

⁴ Defendant cites to several articles culled from the internet that are not in the appellate record to bolster his claim that the alleged error was not harmless and that Officer Rosmaryn’s testimony was highly prejudicial. Br. of Appellant at 27. Defense counsel at trial never objected to Officer Rosmaryn’s reference to the Tacoma Mall shooting, nor are any of these articles in the record on appeal. Therefore, these articles and any issues relating to the Tacoma Mall Shooting should not be considered.

occurred. Therefore, defendant is unable to show that Officer Schultz's testimony materially affected the outcome at trial, even if the trial court erred in admitting his testimony.

4. DEFENDANT FAILS TO ESTABLISH THAT HE IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

The cumulative error doctrine applies when several errors occurred at the trial court level, none of which alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). Even so, “[a]bsent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial.” *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994).

In the present case, defendant has demonstrated no prejudicial errors, individual or cumulative. There was sufficient evidence for a reasonable jury to convict defendant, defendant is unable to show any prejudice resulting from alleged improper opinion testimony, and defendant is unable to demonstrate that allegedly irrelevant evidence unduly prejudiced the jury. Therefore, his claim of cumulative error fails.

In his cumulative error argument, defendant also argues two additional issues that he failed to raise in his other assignments of error, both alleging that the prosecutor committed misconduct when he failed to inform Officer Schultz that he may not testify that the gun was stolen. Br. of Appellant at 29-33. Defendant, however, does not assign error to the trial court's rulings on these issues. *Id.* Therefore, the issues are not properly before this Court. *Sheldon v. Am. States Preferred Ins.*, 123 Wn. App. 12, 17 [Note 10], 95 P.3d 391 (2004).

However, even if the issues are properly before the court, defendant's misconduct argument still fails. A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remark or conduct was improper and that it prejudiced the defendant. *Russell*, 125 Wn.2d at 85. Improper comments are not deemed prejudicial unless "there is a *substantial likelihood* the misconduct affected the jury's verdict." *McKenzie*, 157 Wn.2d at 52 (*quoting Brown*, 132 Wn.2d at 561) [italics in original]. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, 79 Wn. App at 293-94. 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. *Russell*, 125 Wn.2d at 85; *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). A curative instruction will often cure any prejudice that has resulted from an alleged impropriety. See *McNallie*, 64 Wn. App. at 111, *aff'd*, 120 Wn.2d 925, 846 P.2d 1358 (1993).

In the present case, defendant is unable to show that there is a substantial likelihood that the prosecutor's conduct affected the jury's verdict. Defense counsel at trial objected to Officer Schultz's testimony

that the gun found under defendant's seat was reported stolen after defense counsel had successfully moved before trial to exclude any evidence relating to the gun being stolen. 3RP 41, 113. Defense counsel also made a motion for a mistrial, but the trial court ruled that a curative instruction would be sufficient to undo any prejudice that resulted from Officer Schultz's testimony, and defendant does not argue that ruling was improper. 3RP 132, CP 8-25 (Jury Instruction 4). On appeal, defendant does not argue that the trial court erred in not granting defendant's motion for a mistrial, nor does he argue that the curative instruction failed to mitigate any prejudice from Officer Schultz's testimony. Br. of Appellant at 29-33. Nor does defense counsel argue that the prosecutor's conduct likely affected the jury's verdict. *Id.* Instead, defendant only argues that the prosecutor's conduct led to the introduction of "highly prejudicial" evidence. Br. of Appellant at 32. This argument falls well short of the standard defendant must meet, that there was a substantial likelihood that the prosecutor's conduct affected the jury's verdict. *McKenzie*, 157 Wn.2d at 52. Additionally, because jurors are assumed to follow the instructions of the court, it is assumed that the unchallenged Jury Instruction #4 cured any prejudice from Officer Schultz's testimony, and thus there was no error. CP 8-25 (Jury Instruction 4); *Kirkman*, 159 Wn.2d at 937. Defendant's arguments relating to prosecutorial misconduct therefore fail.

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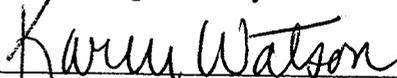
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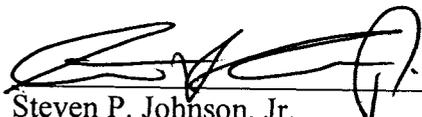
D. CONCLUSION.

For the foregoing reasons, defendant's conviction and sentence should be affirmed.

DATED: August 18, 2008.

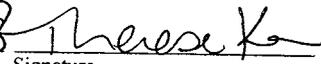
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Certificate of Service:

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.

8-18-08 
Date Signature