NO. 36979-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALAN ROBERT BRAZEE, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 05-1-04782-0

BRIEF OF RESPONDENT

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

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B. STATEMENT OF THE CASE.

1. Procedure

On September 29, 2005, the Pierce County Prosecutor's Office filed an information charging appellant, Alan Brazee ("defendant"), with

attempted murder in the first degree, assault in the first degree, unlawful possession of a firearm, eluding a pursuing police vehicle, and hit and run attended. RP 1-5. The State also alleged firearm enhancement on the counts alleging attempted murder and assault. *Id.* The State later filed an amended information but it did not alter the number or nature of the charges filed against defendant. CP 14-17. It did, however, allege an aggravating circumstance on the counts alleging attempted murder and assault in the first degree; the aggravating circumstance was that the offenses were committed against a law enforcement officer who was performing his official duties. *Id.*

On October 19, the court signed an order directing that defendant undergo a competency evaluation at Western State Hospital ("WSH"). CP 6-9. On the basis of the report received from WSH, it signed an order finding defendant competent on January 5, 2006. CP 127-134, 135-136.

The matter came on for trial before the Honorable Frederick Fleming. RP 3-5. After the jury heard the evidence, it found defendant not guilty of attempted murder in the first degree and the lesser crime of attempted murder in the second degree. CP 32, 33. It found defendant guilty of assault in the first degree, unlawful possession of a firearm, eluding, and hit and run attended. CP 34, 36, 37, 38. The jury also returned special verdicts that defendant was armed with a firearm at the time of the assault and that he committed the assault against a law enforcement officer engaged in his official duties. CP 39, 40-41.

At sentencing the court imposed an exceptional sentence of 397 months based upon the jury's finding of an aggravating circumstance on the assault in the first degree, and concurrent standard range sentences of 102 months on the firearm conviction, 29 months on the eluding, and one year on the hit and run. CP 97-109, 110-111. The court imposed an additional 60 months for the firearm enhancement to run consecutively to the sentence imposed on the assault. CP 97-109. The court entered findings of fact and conclusions of law on the exceptional sentence. CP 112-114.

Defendant filed a timely notice of appeal from entry of this judgment. CP 89.

2. Facts

On September 21, 2005, Washington State Patrol Trooper Whalen was on duty in a white Tahoe equipped with emergency lights, siren, and a State Patrol License plate, but which was otherwise unmarked as a State Patrol vehicle. RP 235- 239. He noticed a red Blazer occupied by two individuals who were not using seatbelts and attempted to stop the car by activating his emergency lights. RP 237- 240, 243. The driver of the Blazer did not stop but began driving erratically, including braking suddenly, changing lanes abruptly, driving on the shoulder, and turning suddenly into a parking lot. RP 240. The driver of the Blazer did not stop

in the parking lot but accelerated rapidly and left the lot turning back onto the roadway. RP 241. Trooper Whalen activated his siren and began pursuit. RP 242. At a four-way stop at 121st Street and A, Trooper Whalen observed the red Blazer slow but not stop as it went through the intersection, then accelerate to speeds of 60-70 in a 35 mile an hour zone. RP 243. At the intersection of 121st and Golden Given, the Blazer clipped the left rear of a vehicle stopped at the stop sign before it proceeded through the intersection without stopping as required. RP 247-248, 560-569.

Trooper Whalen stopped at this intersection, yielding the right of way to the traffic on Golden Given, then proceeded on 121st in pursuit of the Blazer; he could see a large dust cloud up ahead. RP 248. The Blazer had gone off the road, sheared off a telephone pole, gone through a fence and came to rest after hitting the corner of a house. RP 249, 252, 255. Trooper Whalen could see the occupants of the Blazer fleeing; the driver appeared to be male and was wearing powder blue pants and shirt; the female passenger was wearing jeans and a dark colored blouse. RP 249-250, 256.

Trooper Whalen chased the driver and passenger through a field and into a wooded area; when he was within 30-40 feet he commanded them to get on the ground. RP 252-253, 256-260. The female passenger,

who was barefoot, stopped; the driver hunkered down in some thick brush and ignored the trooper's commands to surrender. RP 260-262. While Trooper Whalen was dealing with the passenger, the driver slipped away. RP 261. Trooper Whalen walked the passenger back to his vehicle where he found that another Trooper was waiting. RP 263-264. He handed custody of the passenger over to that trooper; a short time later he heard gunfire. RP 264.

The shots sounded nearby so Trooper Whalen headed in the direction of the sound. RP 266. He saw several patrol cars parked further down the road. RP 266. When he got to their location, he saw a man on his side on the ground facing toward a nearby house and Trooper Alexander trying to talk him out of the weapon the man was holding. RP 267. About two minutes later the man surrendered himself and Trooper Whalen placed him in handcuffs. RP 269. Trooper Whalen did not see the man point the gun at himself, at any officer or at any civilian during that time. RP 267-268. 270-271. Trooper Whalen identified the defendant as the driver of the car that he had chased and as the man that he had handcuffed. RP 271, 277.

Pierce County Sheriff's Deputy Kevin Fries testified that on September 21, 2005, he was on routine patrol in a marked police vehicle when a red Blazer went over a curb and box hedge and past the front of his

car. RP 169-178, 181. He soon saw that a State Patrol vehicle was in pursuit behind the Blazer. RP 178-179. Deputy Fries joined in the pursuit turning eastbound onto 121st Street from Pacific Avenue. RP 179-182. Deputy Fries learned from dispatch that the Blazer had crashed in the area of 121st and 6th Avenue, so he stopped his car for containment purposes on 121st east of the incident site. RP 183-186. About ten minutes later he heard the sound of gunfire. RP 186. Deputy Fries testified that based upon information coming over the radio, he got into his vehicle and moved it to the location where the shots had been fired. RP 190-192. When he arrived he saw a patrol car parked in front of a residence; Deputy Guerrero was standing on the south side of his car with his gun drawn and talking to a man twenty-five feet away, who was lying on the ground on his right side, with his back to Deputy Guerrero. RP 191-194. Deputy Fries could see the man on the ground had something in his hand but at first could not discern what it was; as the man continued to talk with the two deputies, Deputy Fries could see that the man was holding a handgun. RP 192-193. For a couple of minutes, Deputy Fries kept instructing the man to put the gun down. RP 195. Deputy Fries described this man as acting unstable, he was wriggling around, yelling, and refusing to follow the officers commands. RP 211. The man yelled that he didn't want to go back to prison and that he wanted to die. RP 212. At some point, Deputy Fries saw Trooper Alexander come up on the other side of the man, so that the trooper would be in a position to see the front side of the man. RP

214-215. Eventually, the man released the magazine from the gun and dry fired it into the air to demonstrate that it was empty. RP 195-196. Deputy Fries also saw a cartridge or casing fall from the gun after the magazine was ejected. RP 218-219.

Pierce County Sheriff's Deputy Guerrero testified that he was on duty on September 21, 2005, when he heard a dispatch regarding a State Patrol Unit in pursuit of a red Blazer in his area and asked to be put on the call. RP 376-387. He went southbound on Golden Given until the intersection of 121st street; there he was directed by another deputy to assist in containment so he drove eastbound on 121st Street until he was flagged down by a gentleman from a nearby residence. RP 389-390. Deputy Guerrero saw another person about eight feet behind the man who was signaling him to stop; this second person matched the description that had been broadcast of the suspect. RP 390-391. Deputy Guerrero identified the defendant as being this second man. RP 394.

Deputy Guerrero got out of his car; initially it looked to him as if the defendant were going to surrender. RP 391-396. Then the defendant pulled a gun from the back of his waistband and pointed it at the deputy's torso; as soon as the defendant started reaching for his waistband, the deputy responded by pulling his own gun. RP 391-396. Deputy Guerrero testified that the defendant got his gun out first and "had the drop" on him, but when the defendant pulled the trigger, the defendant's gun malfunctioned and the cartridge "stovepiped." RP 395-399. Deputy

Guerrero testified that he fired his gun twice at the defendant before his own gun "stovepiped." RP 400. Deputy Guerrero cleared his stovepipe by doing what is called a "universal clearing." RP 400. At least one of the deputy's shots hit the defendant, who fell to the ground. RP 400-404. Deputy Guerrero took cover and watched as the defendant cleared the "stovepiped" cartridge from his gun. RP 404-405. Once defendant cleared his malfunction, he pointed his gun at the deputy again; Deputy Guerrero responded with some additional shots. RP 405-406.

Deputy Guerrero testified that other law enforcement officers began to arrive at this scene. RP 407-408. The defendant was saying "Just kill me. I just shot a cop. Just kill me." and making indications that he might shoot himself in the head. RP 410. Eventually Trooper Alexander was able to convince the defendant to surrender. RP 408-411. Defendant kept repeating that he didn't want to go back to prison. RP 413. Per departmental policy on officer involved shootings, Deputy Guerrero immediately left the scene and was taken to the precinct where he surrendered his weapon to a forensic officer. RP 229-234, 413-414. The gun, a .40 caliber Glock with a capacity to hold 15 cartridges in the magazine and one in the chamber, had a live round in the chamber and eleven cartridges loaded in the magazine. RP 229-234, 384-385.

Trooper Alexander testified that he initially responded to the area of 121st and Golden Given to help with containment, but while he was setting up for containment he heard a dispatch regarding shots fired and

went to that location to assist. RP 475- 482. When he arrived he estimated that there were already about five other units on the scene and several deputies were behind their vehicle with guns drawn focusing on a suspect who was lying in the driveway. RP 482-484. Trooper Alexander identified the defendant as being this suspect. RP 486-487. He testified that he began to talk to the defendant who was indicating that he wanted to die because he had shot at a cop. RP 488. Trooper Alexander indicated that defendant indicated that he didn't want to go back to prison and would point his gun at his own head. RP 488-490. Eventually defendant agreed to surrender; he took the magazine out of his gun using his mouth then held his gun up in the air. RP 492. Deputy McDonald, who also had responded to the scene after hearing gunshots, specifically recalled that the defendant had removed the magazine and cleared the gun of the "stovepiped" round before throwing the gun down. RP 571, 581-582, 585-586.

Kevin Copeland was helping his friend Gary Sandoval put in a fence at Sandoval's home at 11391 121st Street East, Pierce County Washington, on September 21, 2005. RP 303-305, 503-506, 574. At one point they heard sirens and saw a fire truck and other police vehicles responding to a nearby location down the road; Mr. Copeland walked down the road a short ways to see what was going on. RP 309-311, 506-511. When Copeland returned to the yard, a man came out from between the house and a nearby garage and stated: "I need help. I won't hurt you."

RP 311-312, 511. Mr. Sandoval was able to identify the defendant at trial as being the man he saw with Mr. Copeland that day. RP 511-512. Mr. Sandoval did not see anything in the defendant's hands as he was conversing with Mr. Copeland. RP 514. Mr. Copeland went back out into the road and flagged down an approaching State Patrol vehicle. RP 314, 513-514. Mr. Copeland observed the trooper get out of his car and draw his weapon, when he turned around the man had a gun as well and it was pointed at the officer; he heard the trooper tell the man to drop his gun. RP 315-317, 326. Mr. Sandoval saw the defendant draw out a semiautomatic gun, point it at the trooper and try to squeeze the trigger. RP 515-516. Mr. Copeland ran over and took cover with Mr. Sandoval behind Sandoval's truck. RP 318. Mr. Copeland heard the trooper direct the man to drop his gun about three more times; he then heard gunfire-three shots; after that the man was on the ground and the trooper was still telling him to drop the gun. RP 319, 323, 516-517. Both men testified that several other officers arrived on the scene and within a short time the man was taken into custody. RP 321-322, 519.

A forensic specialist recovered four spent .40 caliber casings at the Sandoval residence crime scene. RP 346-358. He also recovered a Ruger P89 .9mm pistol, a magazine containing eight live rounds, as well as one live .9mm Luger round, which was found loose on the driveway. RP 358-361. The red Chevy Blazer, license no. 460 MVV, that defendant had been driving was impounded and searched pursuant to a warrant. RP 594-

595. A black side-kick hand gun holster was recovered from the floorboard of the front passenger area. RP 595-596.

A ballistics expert from the Washington State Patrol Crime Lab testified that she examined the four spent.40 caliber casings recovered from the driveway and determined that they had been fired from Officer Guerrero's Glock pistol. RP 613-624. She also examined the defendant's gun and found it to be a fully functioning weapon capable of discharging a projectile by means of gunpowder. RP 625-642.

In his case, defendant called Christopher Boger, a physician's assistant with Tacoma Trauma Service, who prepared the discharge summary on defendant when he was treated for gunshot wounds at Tacoma General Hospital. RP 682- 984. Preparation of a discharge summary required Mr. Boger to review all of defendant's medical charts relating to his hospital stay. RP 694. Mr. Boger testified that defendant was admitted for treatment of gunshot wounds to his right forearm and left thigh on September 21, 2005. RP 694-699. Defendant's records showed that he voiced suicidal thoughts during his stay and that the psychiatric nurse practitioner recommended that he be kept on close observation. RP 696-697. Lab tests showed the presence of methamphetamine in his system. RP 701-702. His records showed that he admitted to shooting at police. RP 708.

Defendant also called Rachelle Norman to testify. RP 714. She testified that she was defendant's girlfriend at the time of the incident and was the female passenger in the Blazer. RP 714- 729. According to Ms. Norman, defendant frequently used methamphetamine and occasionally used heroin. RP 716-717. He would consume drugs several times a day and several times throughout the week. RP 717. Despite the fact that Ms. Norman used drugs herself, she was bothered by defendant's drug consumption and thought it made him depressed. RP 718. She testified that defendant was frequently in jail during their relationship on probation violations. RP 718-720. Defendant would continue his drug usage after getting out of jail. RP 719. In August of 2005, defendant showed her the gun that he was later arrested with, but she didn't see it again until September 21, 2005. RP 722-724, 739-740. Ms. Norman testified that defendant was released from a several week incarceration about a week prior to September 21, 2005. RP 720. Although defendant was not working, he purchased a Chevy S10 blazer shortly after being released. RP 718, 720, 741. Ms. Norman testified that she was with defendant when he purchased this car from a friend of his. RP 720-721, 741.

Ms. Norman testified that defendant had used methamphetamines on September 20, 2005. RP 725-726. The next morning she awoke around 10:00 a.m. and she and defendant left in the Blazer to go get a car

wash near 121st and Pacific Avenues. RP 726-727. As they were pulling out of the car wash, a police officer pulled in behind them and signaled them to pull over with his emergency lights. RP 727. The defendant immediately sped off. RP 727-728. Ms. Norman testified that they eventually hit a car, spun into a utility pole, and crashed into a fence and a house. RP 728-729. Defendant immediately grabbed the gun from the center console of the truck, got out, and began running. RP 730. She testified that she got out and began to run after him because she "didn't want to stay and talk to the police." RP 731. According to Ms. Norman she did not get very far before she was tackled to the ground by an officer; the defendant kept running. RP 731-732. Ms. Norman admits that she was asked by the officers to identify the man that had been with her and that she lied and said that she did know who he was. RP 732, 736-739.

The defendant testified that he left home at age 15 and that he had used drugs since the age of 12. RP 745-749. During his teen years he acted as a go between in drug transactions to support himself. RP 749-750. He acknowledged that he was convicted of burglary when he was 18 years old and that he knew that he could not legally possess a firearm after that. RP 750-751. He was also convicted of possession of stolen property in the first degree in 2003 and received an 18 month prison sentence. RP 751-752. Being in prison caused him to have panic attacks and he ended

up in special housing for six months because of this. RP 752-755, 759. Defendant testified that he was on antipsychotic medication the entire time of his prison term. RP 761. He was released on January 5, 2005. RP 761. He testified that upon release, he went to his mother's house; his mother welcomed him home with a party of crystal methamphetamine and Grey Goose Vodka. RP 762. Defendant acknowledged that he was on probation after being released and was supposed to submit to urinalysis and not consume drugs among many other requirements, but that he did not comply with any of the requirements. RP 764-765. He was found to be in violation of his sentence and was returned to jail for 20 days. RP 766-767.

Defendant testified that he began a sexual relationship with Rachelle Norman on July 4, 2005 and that he began to feel better about himself, except that when he moved into her apartment, he felt humiliated that he was living off of her. RP 771-773.

Defendant received a second probation violation sentence of thirty days and was incarcerated from approximately August 14 until his release on September 14, 2005. RP 774. Just prior to this incarceration a friend that he calls "Moi" –defendant cannot pronounce his first or last name – gave him a gun to hold onto until he came back to get it. RP 776-777. According to defendant, "Moi" came back and picked up the gun that

night. RP 778. When defendant was released from jail on September 14, he started using methamphetamine "with a vengeance," because he felt that "something bad was coming." RP 780-781. Defendant had a feeling in the back of his head that he was going back to prison. RP 781.

Defendant testified that he purchased the red mid '80s Blazer on September 21st or the day before from his friend "Zac." RP 782-783. He does not know Zac's last name because he doesn't ask people their last names. RP 782. He was at a friend's house when Zac drove up in the Blazer and indicated that he wanted to sell the truck. RP 783. Defendant testified that he had just gotten some money from his friend Catherine and had $400.00 in his pocket. RP 782-783. He offered Zac the cash and Zac agreed to sell the Blazer for that amount. RP 783. Before purchasing, defendant testified that he specifically asked Zac "Is it legit?" and that Zac indicated that it was. RP 783. He received some paperwork that he believes was a title to the truck. RP 784. Because he had paperwork, he assumed that it was a legitimate transaction. RP 785.

Defendant testified that later that day he received a call from "Moi's" girlfriend who indicated that "Moi" was in jail; defendant went by and picked up "Moi's" gun from the girlfriend with the intention of taking it to Moi's dad. RP 787. Defendant put the gun in the center console of the Blazer. RP 788.

Defendant testified that he and Ms Norman spent the night of September 20th at a friend's house in Puyallup and that they woke up in the afternoon of the 21st. RP 791. He and Ms Norman drove to a car wash; upon leaving he saw that a law enforcement vehicle was behind him. RP 794. When the officer activated his lights, defendant testified that he hit the gas and tried to elude the officer because he did not want to go back to prison. RP 796. Defendant testified that in his efforts to elude ended when he hit a car stopped at the Golden Given intersection, spun into a utility pole, and crashed into a fence and a house. RP 797-799. When the truck came to a stop defendant grabbed the gun from the console and immediately began running. RP 799. Defendant admitted that at this point he knew that he had broken laws prohibiting eluding, possession of a firearm by a felon, hit and run accidents, and driving without a license. RP 799-800.

Defendant went over a fence, through a field then into woods or heavy brush and blackberry vines before coming out at the back of a house; at some point he got separated from Ms. Norman. RP 800-811.

According to defendant's testimony, he didn't stop to think about taking the gun with him when he ran from the Blazer, but did think that "I got to take this and I got to get away so I don't get caught with it." RP 809. He testified that he didn't think about throwing the gun away in the

blackberry bushes. RP 812. When he came upon the house, he decided that he needed to hide the gun so that he wouldn't cause panic if people at the house saw it. RP 812. He hid it by taking off his shirt and wrapping it around the gun; he claimed that he was holding it in his right hand the entire time he approached the house and while he was speaking to Mr. Copeland. RP 813-815. When Mr. Copeland ignored his request for help and started flagging for an officer, defendant testified that he was too exhausted to try to escape, and decided that he wanted to die because he was finally tired of the lifestyle that he had been living. RP 816-817. He did not, however, have the courage to take his own life. RP 819.

According to defendant, the officer that arrived got out of the car and reached for his weapon; the defendant dropped the shirt covering his gun and brought his gun up level and closed his eyes; then he was hit by the officer's shots. RP 818-822. Defendant testified that he was trying to commit suicide; that he expected to get shot; and assumed that he would die. RP 822. Defendant acknowledged that a statement that he gave to a detective in the hospital, five days after he was shot, differed from his testimony as to who was the first to get his gun out; in the statement defendant stated that he had his gun out first but that he let the officer get his gun out. RP 875-879. Defendant testified that he never pulled the slide mechanism back and did not pull the trigger or try to pull the trigger.

RP 822-823. Defendant denied having any intention of trying to kill Officer Guerrero or to shoot him. RP 823, 842. Defendant testified that he was shot in the leg and this caused him to fall to the ground; he realized that he wasn't dead, but the pain he was experiencing gave him the courage to finish his life. RP 826. Defendant testified that he pulled the slide back on his gun when the officer shot him a second time in the arm; he stated that he dropped the gun but then picked it back up with his left hand, put it to his head, and pulled the trigger. RP 829-830. When nothing happened he looked at the gun and realized that it had jammed. RP 830-831. Defendant testified that he tried to clear the jam so he could kill himself, but never pointed the gun at another officer. RP 831. Eventually he decided to give up the gun and surrender to the surrounding officers. RP 831-836.

In the State's rebuttal case the court allowed the following evidence, but the jury was instructed to consider it only when assessing the credibility of Rachelle Norman and defendant's credibility and not for any other purpose. RP 904. Jeffrey Dickerson testified that he owned a 1985 red Chevy Blazer in 2005. RP 906-907. He drove it home from work on September 19, 2005 and parked it in front of his home in South Tacoma, near Manitou Park, sometime between 6:00 and 9:00 p.m.; the car was gone the next morning and he called the police and reported it

stolen. RP 906-908. On September 20, 2005 between 7:30 and 8:00 a.m., Officer Budinich of the Tacoma Police Department responded to Mr. Dickerson's home to take the report regarding the stolen Blazer. RP 910-912.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING DEFENDANT COMPETENT FOR TRIAL WITHOUT A FORMAL EVIDENTIARY HEARING WHEN IT HAD A REPORT GENERATED UNDER THE PROVISIONS OF RCW 10.77 INDICATING DEFENDANT WAS COMPETENT AND WHEN DEFENDANT WAS NOT CONTESTING HIS COMPETENCY.

A trial court is vested with broad discretion in determining whether a competency examination should be ordered. ***State v. Osborne***, 102 Wn.2d 87, 98, 684 P.2d 683 (1984). A motion to determine competency must be supported by facts and will not be granted merely because it was filed. ***State v. Lord***, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). The facts that a trial judge may consider in determining whether or not to order a formal inquiry into the competence of an accused include the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports, and the statements of counsel. ***In re Fleming***, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). If the trial court is not provided with sufficient information regarding the defendant's

competency, or there is no reason for the trial judge to doubt the defendant's competency, the court does not abuse its discretion by declining to order a mental examination and convene a hearing. *Id.* at 863-864.

The trial court's determination of competence to stand trial is a matter within its discretion, reversible only upon a showing of abuse of that discretion. ***State v. Benn***, 120 Wn.2d 631, 662, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S. Ct. 3825, 126 L. Ed. 2d 331 (1993). Deference is given to the trial court's determination because of the court's opportunity to observe the defendant's behavior and demeanor. ***State v. Hicks***, 41 Wn. App. 303, 305, 704 P.2d 1206 (1985). The court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

RCW 10.77.050 provides that "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." A criminal defendant is not competent to be tried if he or she is incapable of properly appreciating the nature of the charges and their consequences, and of rationally assisting in the defense. ***State v. Marshall***, 144 Wn.2d 266, 278, 27 P.3d 192 (2001). The issue of a criminal defendant's competency is a mixed question of law and fact. *Id.* at 281.

Failure to comply with procedures designed to ensure that only competent defendants are tried and convicted is a violation of due process. ***In re Fleming***, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). In Washington, the statutes governing the procedures to be employed when there is a question as to whether a criminal defendant is competent to stand trial are found in RCW Title 10.77. RCW 10.77.060(1)(a) mandates that the trial court appoint qualified experts to examine and report upon the defendant's competency to stand trial whenever "there is reason to doubt his or her competency." The statute allows for a criminal defendant to obtain an independent evaluation and for that expert to file his own report to the court. RCW 10.77.060(2). The statute also sets forth required contents of any report generated by the experts evaluating competency. RCW 10.77.060(3). A copy of the completed report and recommendation is supplied to the court, the prosecuting attorney, defense counsel, and local mental health officials and jail professionals. RCW 10.77.065. Nothing in RCW Title 10.77 mandates that a hearing be held if the initial report and recommendation indicates that a defendant is competent to stand trial and defendant is not contesting that conclusion and has no contrary information to put before the court.

Defendant asserts that once there is a reason to doubt competency and an evaluation has been ordered that an evidentiary hearing is constitutionally required. None of the authority cited by defendant supports this contention. In ***Pate v. Robinson***, 383 U.S. 375, 385, 86 S.

Ct. 836, 15 L. Ed. 2d 815 (1966), the United States Supreme Court held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent violates due process. In that case the Supreme Court noted that the trial court had failed to follow Illinois' statutory procedure for assessing competency, which included a formal hearing with a jury; implicit in the Court's ruling is that, had the trial court complied with the state statutory provisions, the due process clause would have been satisfied. *Id.* at 385-387. In a later decision, the Supreme Court clarified that the ***Pate*** case does not stand for the proposition that the procedures set forth in the Illinois statutes are constitutionally mandated. *See* ***Drope v. Missouri***, 420 U.S. 162, 172, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). The Supreme Court has not articulated "a general standard with respect to the nature or quantum of evidence necessary to require resort to an adequate procedure." *Id.*

More recently, the United States Supreme Court has noted that when it is faced with a due process challenge to state procedural rules for determining competence, the court must give great deference to the state provisions and should find that they satisfy the Due Process clause unless the procedure offends "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. ***Medina v. California***, 505 U.S. 437, 445, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), quoting ***Patterson v. New York***, 432 U.S. 197, 201-202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). In ***Medina***, the Court found no violation of due

process by a California enactment placing the burden of proving incompetence on the defendant. The Court found that while the principle that an incompetent criminal defendant should not be forced to stand trial has deep roots in our common-law heritage, "there is no settled tradition regarding the allocation of the burden of proof in a proceeding to determine competence. ***Medina***, 505 U.S. at 446. Thus, defendant's contention that the federal constitution requires a formal evidentiary hearing on the defendant's competence to stand trial is without merit. All the due process clause requires is that when a court has reason to doubt a defendant's competence, that it employ some procedure to ensure that an incompetent person is not subjected to criminal proceedings.

Defendant also relies upon lower federal court cases for the proposition that there must be a competency hearing whenever there is reason to doubt a defendant's competency. *See* Appellant's brief at p 18. A review of these cases, however, reveals that while the appellate courts may use the phrase "competency hearing," the courts are really referring to a "competency inquiry." Put another way, due process requires that once a trial court has reason to doubt a defendant's competency, the court must ensure that this issue is further explored before the criminal proceedings continue. No court has held that the only way to constitutionally explore this issue is by means of a formal evidentiary hearing.

No Washington case has held that a formal evidentiary hearing is required before a court enters an order finding a defendant competent. Consistent with federal law, the Washington Supreme Court held that once a trial court has reason to doubt the competency of a defendant that it must employ the procedures of RCW Title 10.77. ***State v. Marshall***, 144 Wn.2d 266,279, 27 P.3d 192 (2001). In this decision the Court used the term "competency hearing" to refer to the process of starting an inquiry into a defendant's competency under the provisions of RCW 10.77.060. The opinion did not hold that a trial court must hold a formal evidentiary hearing upon receipt of a report issued to comply with RCW 10.77 060 and .065 when neither party is contesting the conclusions of the expert regarding the defendant's competency. Thus, defendant's assertion that due process is violated by entry of an order finding competency without a formal evidentiary hearing is wholly unsupported by any authority.

In the instant case the record shows that the trial court acted in compliance with the provisions of RCW Title 10.77 and did not abuse its discretion in entering an order of competency. The first indication that there might be a concern about defendant's competency was two weeks after arraignment when a hearing was noted for entry of an order for a 15 day evaluation. CP 118. The scheduling order indicates that the defendant was not present to sign the order because he was "in hospital." *Id.* On the scheduled date, the court signed an order for a 15 day evaluation at Western State Hospital; the order was approved as to form

by defendant's counsel. CP 120-123. That same day, the court signed a scheduling order setting a competency hearing for November 9, 2005. CP 119. This hearing date was set over three times, until January 5, 2006. CP 124, 125, 126. On January 5, 2006, the court signed and order finding defendant competent based upon a report dated January 4, 2005, submitted by a psychologist at Western State Hospital which found "no functional deficits in [defendant's] knowledge, judgment, ability, or decision making ability that would be expected to interfere with competency." CP 135-136, 127-134. Apparently this competency order was signed without any formal argument or hearing on the record and was approved by defendant's attorney. CP 135-136. After entry of this order, defendant does not direct the court to any other point in the record where anyone raises any further concern over defendant's continued competency to stand trial. Defendant testified at trial at length; yet he points to no point in the record where his testimony would raise a concern over his competency. RP 745-802, 808-884.

The issue in this case is whether the trial court abused its discretion in finding defendant competent. The record shows that the court properly ordered an evaluation under RCW 10.77.060 and waited until an expert's report had been submitted to it under the provisions of RCW 10.77.065 before entering an order of competency. As the report from Western State Hospital indicated that there were no concerns regarding the defendant's competency, the court did not abuse its discretion in entering the order of

competency based upon this report. CP 135-136. The record is completely devoid of any information that would dispute the conclusions of the Western State Hospital examination. There is no indication in the record that defense counsel wanted to contest a finding of competency or that he requested a formal evidentiary hearing and was denied an opportunity to present evidence. Most importantly, there is nothing to suggest that defendant's competency throughout the remainder of his trial was ever in doubt. The trial court's finding of competency should be affirmed.

2. DEFENDANT HAS FAILED TO SHOW ERROR IN THE TRIAL COURT'S EVIDENTIARY RULINGS.

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, *review denied*, 120 Wn.2d 1022 (1992). 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). Failure to object precludes raising the issue on appeal. ***Guloy***, 104 Wn.2d at 421. 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. ***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.

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); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

In the case now before the court, defendant claims that the trial court made two errors in the admission of evidence. The above case law is applicable to all evidentiary claims while the specific claims will be addressed in the following sections.

a. Defendant failed to preserve any claim of error to the challenged testimony of Officer Guerrero by failing to object to it in the trial court.

Defendant asserts that the court erred by allowing Officer Guerrero to testify on re-cross examination that he wanted to forget how he met the defendant, to put the whole incident behind him, and to be able to fulfill his Christian duty by telling the defendant that he forgave him. RP 464-

465. Defendant contends that this testimony was inflammatory and improper. *See* Appellant's brief at p. 37. The record reveals that defendant did not object to any of this testimony or move to strike it. The trial court was never asked to rule on the admissibility of this evidence and this claim of evidentiary error was not properly preserved for review.

Defendant asserts that he did object because in the midst of this cross examination, defense counsel interrupted the witness and asked the trial court to direct the witness to answer his question. RP 464. The court declined to so direct the witness and allowed him to finish his answer. RP 465. No further objection was raised regarding the content of the witness's answer. Defendant now asserts that this request to direct the witness to answer was the "functional equivalent" to an objection on the grounds of an answer being "unresponsive." Appellant's brief at p. 39. The flaw with this argument is that at no point when this challenged evidence was being adduced at trial did defendant assert an objection as to the content of any of Officer Guerrero's testimony as being prejudicial, inflammatory, or irrelevant, claims he now asserts on appeal. Asking the trial court to direct a witness to answer does not put the trial court on notice that defendant is asserting error to the admission of the substance of what that witness has said. To preserve this claim for appeal, defendant needed to ask the trial court to strike the challenged testimony. He failed to do this and, thus, any claim of error regarding the content of Officer Guerrero's testimony was not preserved for appellate review.

b. The Court did not abuse its discretion in allowing rebuttal evidence that directly contradicted testimony of a defense witness as to whether defendant had purchased the car that he was driving at the time he started to elude a pursuing officer.

Rebuttal evidence is admitted to allow a plaintiff to answer new matter presented by the defendant. ***State v. White***, 74 Wn.2d 386, 394-95, 444 P.2d 661 (1968). Rebuttal evidence should not simply reiterate evidence presented in the case-in-chief, but should consist of evidence offered in reply to new matters. ***State v. Burns***, 53 Wn. App. 849, 851, 770 P.2d 1054 (1989). Reply or rebuttal evidence, however, may overlap with evidence presented in the case-in-chief, and may even be cumulative in part; the decision with regard to the admissibility of rebuttal evidence rests largely on the discretion of the trial court. ***White***, at 395. Any error in denying or allowing the evidence can be predicated only upon a manifest abuse of discretion. *Id.* The admission of improper collateral evidence or rebuttal testimony is harmless if the appellate court concludes that it did not affect the outcome. ***State v. Allen***, 50 Wn. App. 412, 423, 749 P.2d 702, *review denied*, 110 Wn.2d 1024 (1988)(finding improper impeachment evidence on a collateral matter to be harmless error).

In the defense case, defendant called Rachelle Norman to the stand and asked her questions regarding how defendant acquired the Chevy Blazer he was driving the day of the incident. Ms. Norman testified that she was with defendant when he purchased this car from a friend of his

shortly after being released from jail and about a week prior to the incident. RP 718, 720-721, 741. Defendant also testified as to how he acquired the Blazer; defendant testified that he purchased the red mid '80s Blazer on September 21st or the day before from his friend "Zac." RP 782-783. In rebuttal, the State, over the objection of the defendant, called the owner of the Blazer, Jeffery Dickerson, to testify that his vehicle had been stolen from in front of his house sometime between 6:00 p.m. on September 19 and the 7:30 a.m. on September 20, 2005; he called the police and reported it stolen. RP 906-908. The State also called, over defendant's objection, Officer Budinich of the Tacoma Police Department who testified that on September 20, 2005 between 7:30 and 8:00 a.m., he responded to Mr. Dickerson's home to take the report regarding the stolen Blazer. RP 910-912.

Defendant argued that the rebuttal evidence should not be allowed because it was impeachment of Ms. Norman on a collateral matter, irrelevant under ER 402 and a waste of time under ER 403. RP 893. Alternatively, defense counsel argued that she had already been sufficiently impeached upon cross-examination. *Id.* He argued that the rebuttal evidence was not relevant to the impeachment of the defendant as it did not contradict anything in his testimony, but it was unfairly prejudicial. RP 894, 898-899. Ultimately, the court allowed the evidence

to come in but instructed the jury only to consider it for the purpose of assessing Rachelle Norman's and the defendant's credibility. RP 905. Defendant now contends that admission of this evidence was error.

Defendant has waived any objection as to relevance of this evidence by opening the door to the State's rebuttal evidence through the testimony of Ms. Norman and defendant as to how defendant acquired the Blazer. As noted by this court:

> The "opening the door" doctrine is an evidence doctrine that pertains to whether certain subject matter is admissible at trial. The term is used in two contexts: (1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008) citing Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.14, at 66-67 (5th ed. 2007). While a defendant has a right to present a defense, he does not have right to do so free from cross-examination or rebuttal evidence. The right to present a defense guarantees the opportunity to present the defendant's version of events along with the State's version so that the fact finder may decide where the truth lies. ***State v. Maupin***, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

Defendant asserts that this issue was first raised by the State in its case-in-chief. He cites to a reference in the State's opening statement. RP 133. Counsel's remarks are not evidence. ***State v. Blair***, 117 Wn.2d 479, 492, 816 P.2d 718 (1991). There is conflicting authority as to whether something said by counsel during opening statement provides a basis for a claim of opening the door. *Compare* ***State v. Whelchel***, 115 Wn.2d 708, 801 P.2d 948 (1990)(defense did not open the door to otherwise inadmissible evidence by referencing two taped statements that it expected the State to admit in its case and which the trial court had determined, in limine, would be admitted) with ***State v. Rivers***, 129 Wn.2d 697, 921 P.2d 495 (1996)(defendant sought to exclude his booking photograph after his attorney indicated in his opening statement that proper identification was an issue, but court found that the booking photograph was admissible because defense counsel raised the issue of improper identification in his opening remarks, and the photograph tended to confirm the victim's description of the robber to the police). The only evidence adduced in the State's case in chief that remotely pertains to this issue occurred during the testimony of Officer Whalen. RP 262. Defendant characterizes this as testimony that "Brazee told Norman to run because the vehicle was stolen." Appellant's Brief at p.35 citing RP 262. The evidence did not state this. Rather Officer Whalen testified that when he took Ms. Norman

into custody, he asked her who she was with in the car and her response was that she didn't know his name, but that he said to run because the vehicle was stolen.[1] RP 262. This testimony did not identify the defendant as the source of the information. There was no evidence adduced in the State's case regarding how defendant had acquired the Blazer he was driving that day.

The evidence showing how defendant came into possession of the Blazer was adduced by the defendant in his own case; he made it an issue in the case. Having presented testimony from Ms. Norman that defendant was in possession of the Blazer for approximately a week before his arrest, the court did not abuse its discretion in allowing the State to present rebuttal evidence which directly refuted this evidence. The evidence also tended to rebut the defendant's own testimony. Defendant testified that he purchased the car from his friend Zac and believed it to be a legitimate purchased because he was given paperwork. RP 782-785. The State's evidence was that any title to the car would have had the name of Jeffery Dickerson on it and not "Zac's."

Moreover, how defendant came into possession of the vehicle was connected to issues before the jury even though defendant was not charged

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[1] Later, when Ms. Norman testified, she acknowledged that she was lying to officer when she made this statement. RP 732, 736-739.

with stealing or possessing stolen property. In assessing whether a matter is collateral, the reviewing court asks whether "the fact, as to which error is predicated, [could] have been shown in evidence for any purpose independently of the contradiction." ***State v. Oswalt***, 62 Wn.2d 118, 121, 381 P.2d 617 (1963). It was not disputed that defendant, while driving this Blazer, immediately tried to elude the officer when first signaled to stop. Under defendant's version, he was so despondent that a traffic stop might lead to his return to prison should the officer find the gun in his car that he panicked and everything he did from that point on was to escape capture or commit suicide by cop. Evidence showing that the car he was driving was stolen leads to a reasonable inference that defendant ran from the police less out of panicked despair that the officer might find the gun than the certainty that the officer would discover the fact the car was stolen as was reflective of his consciousness of guilt that he was driving a stolen car. Generally, evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence; flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution. ***State v. Blanchey***, 75 Wn.2d 926, 936-937 (Wash. 1969). A driver of a stolen car realizes that even a traffic stop for a minor infraction

would lead to a showing of the vehicle's registration and discovery of the fact the car had been reported stolen. This might cause a jury to question defendant's representation that his crime spree was the result of despondency and depression rather than him simply acting in his own best interest in trying to escape capture for new crimes using whatever means he could.

The rebuttal evidence directly refuted Ms Norman's testimony and tended to rebut the defendant's version of events. Defendant cannot show an abuse of discretion in the admission of this evidence.

3. DEFENDANT HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

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. Cronic***, 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 of the United States Constitution has occurred. *Id.* "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 was rendered unfair and the verdict rendered suspect." ***Kimmelman v.***

Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also* ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also* ***Strickland***, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that

defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decided and "so admissions of deficient

performance by attorneys are not decisive." ***Harris v. Dugger***, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." ***Strickland***, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. ***Mickens v. Taylor***, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); ***Campbell v. Knicheloe***, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. ***Kimmelman***, 477 U.S. at 375; ***United States v. Molina***, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. ***Cuffle v. Goldsmith***, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the ***Strickland*** test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, defendant seeks to show ineffective assistance of his trial counsel for his: 1) failure to object during the prosecutor's opening statement and to when Trooper Whalen testified regarding Ms. Norman's statements to him after she was taken into custody; 2) his failure to raise "proper" objections to the introduction of the rebuttal evidence; and 3) his failure to seek a limiting instruction on Officer Guerrero's testimony, which defendant characterizes as irrelevant and inflammatory.

Defendant asserts that his attorney was ineffective for failing to object when the prosecutor stated in opening that the evidence would show that defendant was driving a stolen vehicle, *see* RP 133, or later when Trooper Whalen testified regarding Ms. Norman's statements[2] to him upon arrest. He does not articulate what objections defense counsel should have made at these points or provide any authority to show that any

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[2] While the State can see that defense counsel could have objected on hearsay grounds to Trooper Whalen's testimony, defense counsel would have been aware that Ms. Norman would later acknowledge that she was lying when she was talking to the trooper and presume that by the end of the trial the jury would be unlikely to give any credence to anything she said to the trooper upon arrest. Counsel may have considered an objection unnecessary given these circumstances.

such objection would have been meritorious. As such he has failed to show deficient performance or resulting prejudice from this alleged error.

Defendant further contends that defense counsel was ineffective for failing to object on ER 608 grounds to the State's rebuttal evidence and that had this proper objection been raised, the court would not have admitted the evidence. ER 608(b) provides, in the relevant part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.

Defendant's reliance on this rule is misplaced. The State's rebuttal evidence did not pertain to "specific instances of the conduct of a witness." It pertained to evidence showing in what time frame the Blazer was stolen from its lawful owner when that theft was reported to law enforcement. The evidence was not about either Ms. Norman's or the defendant's conduct and so application of ER 608(b) is inapposite. The rebuttal evidence was relevant to show that Ms. Norman's testimony as to the timing of defendant's acquisition of the Blazer was unreliable and that defendant's testimony as to the supposed legitimacy of his transaction was not credible. This is proper rebuttal evidence unaffected by ER 608(b). Defendant has failed to show that the lack of objection on ER 608(b) grounds constituted deficient performance.

Finally, defendant contends that defense counsel was ineffective because he should have objected to Officer Guerrero's testimony that he

was a "Christian" who was trying to forgive the defendant as being irrelevant under ER 401and 402 and unduly prejudicial under ER 403. *See* RP 464-465. While the State would agree with the proposition that the religious orientation of the victim is generally irrelevant, that particular comment came out during an exchange addressing the general state of the officer's memory. It is important to put the comment into context of how this information was disclosed.

On direct examination, Officer Guerrero testified that after the first time he shot and before the second time, while defendant was on the ground, defendant stated "You better" – "better fucking kill me." RP 404. On cross examination, defense counsel asks Officer Guerrero if he recalls the defendant making a statement to the effect "If you are a believer, kill me now," and the officer indicated that he did recall that statement. RP 437-438. When defense counsel characterized defendant's statement as "asking" to be shot, Officer Guerrero replied "Well, he's putting it in a way, 'you better fucking kill me' type of thing, yes." RP 438. Later defense counsel again tried to characterize the defendant's statements as saying "I want to die" or "Please kill me," but Officer Guerrero responds that defendant was not putting it that way. RP 440. Officer Guerrero reiterated that defendant stated "you better kill me" which is a lot different than saying "I want to die." RP 440. On redirect the prosecutor came back to this area and asked how Officer Guerrero interpreted defendant's statement "if you're a believer, kill me?" RP 459-460. Officer Guerrero

responded that he interpreted it as a challenge - that he better kill the defendant because the fight was still on. RP 460. The prosecutor then asked if that was how he had characterized defendant's statements –as a challenge – back in a defense interview in October of 2006 and Officer Guerrero thought that he had. RP 460, 462. On re-cross examination, defense counsel asked questions trying to adduce whether defendant's statement was made while defendant was on the ground with his back to Officer Guerrero or after defendant had rolled over to face him; Officer Guerrero testified that he didn't know at what point defendant rolled over. RP 462-463. Defense counsel then challenged Officer Guerrero's memory as to what defendant had said as follows:

> Defense Counsel: You don't really remember what he said; isn't that true?
>
> Officer: Yes, I do. I just—
>
> Defense Counsel: Well, you just had to have the prosecutor refresh your recollection about what you told me in an interview a year ago.
>
> Prosecutor: Your Honor, I'm going to object. That's argumentative.
>
> Court: It is cross-examination. Ask another question.
>
> Defense Counsel: Isn't that true?
>
> Officer: I'm sorry. Rephrase your question.
>
> Defense Counsel: You didn't remember earlier when I asked you about what Mr. Brazee said that he said "I'm

> going to kill you." You didn't remember that about an hour ago when I was asking you questions, did you?
>
> Officer: You know sir, I'm trying to put this behind me. I want to forget about how I met Mr. Brazee and how we had to cross paths. I want to forget it to the point where I want to be able to look him in the eye and tell him I forgive him for this.

RP 464. The exchange continued on after an interruption by defense counsel seeking the court's assistance, but the court allowing the witness to complete his answer as follows:

> Officer: I want to put this behind me, and it's affected me more than I thought it would. It's affected my family. When an officer is involved in a shooting, it doesn't only involve the officer. It involves his family. And, yeah, I want to forget about this. And I also want to tell him I forgive him. As a Christian I feel I owe him that.

RP 465. Defendant counsel them got Officer Guerrero to acknowledge that his memory of this event is probably not as good as it was two years earlier. RP 465.

Thus, the whole exchange was ultimately focusing on the witness's memory of the event and whether he had clear recollections of the defendant's statements to him. The officer's answer addressed why he could not recollect all of the details of the event or of what he had said during prior interviews. Essentially, the officer testified that his memory was not perfect and that one of the reasons was that he was trying to heal emotionally rather than try to keep the memories fresh and his anger

unabated. Ultimately, defense counsel obtained the witness's concession that his memory was probably not entirely accurate. RP 465.

This exchange does not reveal any ineffectiveness of counsel. Rather it reveals an attorney that got a key witness to acknowledge faults in his memory. Defendant asserts that the answer was inflammatory and highly prejudicial, but the record does not support this claim. The witness referred to his personal beliefs as one of the reasons that he was trying to forget this series of events. It was mentioned in passing and not dwelt upon. The fact that the jury acquitted defendant of attempted murder in the first and the second degree, indicates that the jury was not so inflamed by this testimony that it convicted on emotion and without weighing the evidence. CP 32, 33.

But to focus on these challenges to defense counsel's performance that occurred over the course of a few pages of transcript is to lead the court away from the proper standard of review under ***Strickland*** and its progeny. The standard of review for effective assistance of counsel is whether, *after examining the whole record,* the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). The Sixth Amendment guarantees reasonable competence, not perfection, and counsel can make demonstrable mistakes without being constitutionally ineffective. ***Yarborough v. Gentry***, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

The entirety of the record reveals that defendant received his Sixth Amendment right to counsel. He had an attorney that gave an opening statement that showed that he was well prepared and had a coherent defense theory to offer the jury. RP 153-168. He made objections, most of which were meritorious. RP 177, 245-246, 251-252, 262, 284, 397, 411, 412, 415, 457-458, 461, 466, 687. He cross–examined the State's witnesses, RP 208-218, 234-235, 273-283, 328-343, 354, 363-367, 371-375, 416-453, 463-467, 494-501, 502, 524-543, 646-654, 657-659, 680-686, 908, and presented witnesses on the defendant behalf, RP 691-713, 714-744, 744-802, 808-892. He made a motion to exclude much of the State's rebuttal evidence. RP 892-900. He made a coherent closing statement, 10/1/07 RP 73-117. Defense counsel obtained not guilty verdicts on the two most serious charges that defendant faced. CP 32, 33. It is clear that defendant had counsel and that his attorney tested the State's case. Looking at the entirety of the record, defendant cannot meet his burden on either prong of the ***Strickland*** test.

4. DEFENDANT HAS FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional

error was harmless beyond a reasonable doubt." ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ***Neder v. United States***, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999)(internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232, 93 S. Ct 1565, 36 L. Ed. 2d 208 (1973)(internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose***, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also* ***State v. Kitchen***, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also*

State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g.* ***Johnson***, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g.*, ***State v. Stevens***, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.").

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. *Compare*, ***State v. Whalon***, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with ***State v. Wall***, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did not amount to cumulative error), and ***State v. Kinard***, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g.*, ***State v. Badda***, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see e.g.*, ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child-rape victim's testimony was cumulative error

because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g.*, ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See* ***Stevens***, 58 Wn. App. at 498.

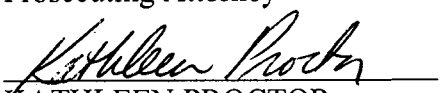
In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in the trial. He has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, this court should affirm the judgment and sentence entered below.

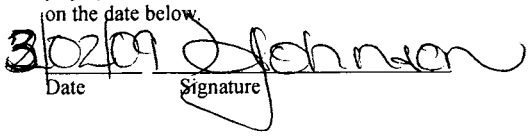
DATED: March 2, 2009

GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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.



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