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STATE OF WASHINGTON  
BY  DEPUTY

No. 37259-II  
IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION II

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STATE OF WASHINGTON,  
Respondent

v.

ABEL EDUARDO CONTRERAS  
Appellant

---

OPENING BRIEF OF APPELLANT

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Appeal from the Superior Court of Pierce County,  
Cause No. 06-05904-4  
The Honorable Beverly G. Grant, Presiding Judge

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**A. ASSIGNMENTS OF ERROR.**

Assignment of Error No. 1.

The trial court erred in failing to give defense offered limiting instructions on the limited use of inconsistent statements thus permitting the State to argue such statements could be considered as substantive evidence. The proffered instructions are as follows:

Evidence has been introduced in this case that a witness has made prior inconsistent statements for the limited purpose of impeachment, in deciding what weight or credibility should be given to the testimony of that witness. You may not consider this evidence for any other purpose; and

Impeachment is challenging or discrediting the truthfulness of a witness. CP 102-109.

Assignment of Error No. 2.

The trial court abused its discretion in denying Contreras's motion for dismissal following testimony elicited by the State in violation of the court's order on defense motion in limine precluding questions re defendant's gang affiliation.

Assignment of Error No. 3.

There was insufficient evidence of "premeditation" to support the conviction for murder in the first degree.

Assignment of Error No. 4.

The court erred in permitting the State to improperly bolster its witnesses' credibility.

Assignment of Error No. 5.

Testimony that the canine tracking dog followed a scent produced by the fear of apprehension and thus located Contreras was an impermissible comment on Contreras' guilt.

Assignment of Error No. 6

The trial court denied Contreras a fair trial when it impermissibly conveyed its opinion regarding witness testimony, evidence and the defense case.

Assignment of Error No. 7.

Cumulative Error deprived Contreras of a fair trial.

**Issues Pertaining to Assignments of Error**

1. Whether the trial court erred in failing to give defense offered limiting instructions on the limited use of inconsistent statements thus permitting the State to argue such statements could be considered as substantive evidence? (Assignment of Error No. 1; CP 106-109)
2. Whether Contreras was denied a fair trial when the trial court denied Contreras's motion for a dismissal following testimony elicited by the State in violation of the court's order on defense motion in limine precluding questions re defendant's gang affiliation? (Assignment of Error No. 2)
3. Whether the evidence was sufficient to establish Contreras acted with premeditation? (Assignment of Error No. 3)
4. Whether the court erred in permitting the State to improperly bolster its witnesses' credibility? (Assignment of Error No. 4)
5. Whether testimony that the canine tracking dog followed a scent produced by the fear of apprehension and thus located Contreras was an impermissible comment on Contreras' guilt? (Assignment of Error No. 5)
6. Whether the trial court denied Contreras a fair trial when it impermissibly conveyed its opinion regarding witness testimony, evidence and the defense case? (Assignment of Error No. 6)
7. Whether the cumulative affect of error denied Contreras a fair trial? (Assignment of Error No. 7)

**B. STATEMENT OF THE CASE.**

Procedural Facts

Abel Contreras was charged by Information on December 15, 2006

as follows: Count I–Murder in the first degree (RCW 9A.32.03)(a) while armed with a firearm; Count II – Felony Murder in the second degree (RCW 9A.32.050(1)(b) while armed with a firearm; Counts VI and VII – Unlawful Possession of a Firearm in the second degree (RCW 9.41.040(2)(a)(i)) on Dec. 11, 2006; Counts VIII – Unlawful Possession of a Firearm in the second degree (RCW 9.41.040(2)(a)(i)) on Dec. 13, 2006; and Count IX – Attempting to Elude a Pursuing Police Vehicle (RCW 46.61.024(1). CP 1-4. Anthony Sakellis was charged as a co-defendant under Pierce County Superior Court Cause No. 06-1-05885-4.

Pretrial motions commenced on November 9, 2007. Contreras opposed the State’s Motion for Dual Juries and requested severance from co-defendant Anthony Sakellis (CP 54-62; 65-73). The court granted severance from co-defendant Sakellis (RP 296) and the State withdrew its motion for dual juries. RP 390. The court denied defendant’s request that Counts VIII and IX be severed from the other charges. RP 290. In his trial brief, Contreras asked the court to rule on a number of motions in limine regarding prior convictions, bad acts and alleged gang association. CP 20-30. The court rule it would admit testimony that Contreras was dealing drugs to decedent and that the decedent owed him \$1100.00 as proof of motive for the shooting. RP 454, 456. The State stipulated to the exclusion of gang association testimony. RP 361. The court ruled that

each party would be responsible for controlling their own witnesses. RP 357. Contreras also requested the State to identify any ER 404(b) and state the purpose for which it would be offered. CP 20-30. Over defense objection, the court excluded the decedent's toxicology report which showed the presence of illegal drugs. RP 339-344, 351. Contreras stipulated to his underlying offense of assault 4 (DV) for purposes of the unlawful possession of a firearm charges (CP 63-64) , stipulated to the admissibility of his custodial statements (CP 11-13, RP 111) and to the admissibility of fingerprint evidence. CP 110-111.

The Court denied Contreras' motion for a mistrial/dismissal. CP 79-89; RP

As requested by Contreras, on Count I, the court instructed the jury on the lesser included offense of intentional murder in the second degree. CP 95-97; 125-127. Contreras objected to the Court's denial of the defense request for limiting instructions regarding impeachment evidence<sup>1</sup>. RP 1594-96, CP 106-109. The jury returned guilty findings on all Counts (CP 160, 161,-164-67) and returned special verdict on

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<sup>1</sup> Defense offered the following 2 instructions that the court refused to give:

Evidence has been introduced in this case that a witness has made prior inconsistent statements for the limited purpose of impeachment, in deciding what weight or credibility should be given to the testimony of that witness. You may not consider this evidence for any other purpose; CP 106-07;and

Impeachment is challenging or discrediting the truthfulness of a witness; CP 108-09.

Counts I and II. CP 162-63. Count II was vacated for double jeopardy. CP 168. Contreras was sentenced on January 11, 2008 on the murder in the first degree conviction to a high end sentence of 416 months with a firearm enhancement of 60 months for a total of 476 months, 3 counts of unlawful possession of a firearm in the second degree of 28 months each and one count of attempting to elude a pursuing police vehicle for 14 months. Sentences on all counts were run concurrent to each other, and the weapon enhancement was run consecutive to the sentence on the murder in the first degree conviction.

This appeal was timely filed. CP 169.

#### Substantive Facts

On December 11, 2006 Luis “Taco” Bernal was shot 3 times in the back (RP 1342 – Dr. John Howard) after being pistol whipped by Anthony Sakellis and Abel Contreras, ostensibly due to his failure to pay for drugs he received from Sakellis and Contreras. RP 1408, 1412, 1424. Kelly Kowalski, Jonathan “Lanky” Mayhall, Roman Atofau, Anthony Sakellis and Contreras had been socializing at Bernal’s apartment on Dec. 11, 1106. RP 1199-1200. Kowalski, Mayhall and Atofau describe seeing Contreras with a small shiny gun that is later used by Sakellis to hit Bernal. RP 736-737; 1204; 1418. According to Kowaski, he did not

threaten anyone with it, but rather it appeared to her he was showing it off.  
RP 737-38.

Ms. Kowalski described the relationships of the individuals present that day. She described herself as a close friend of Bernal's and a daily visitor. (RP 728 -729) She had her own set of keys and sometimes spent the night there (RP 729), even though she lived in a home in Lakewood at 64<sup>th</sup> and Huson with, among several others, her friend Anthony Sakellis. RP 730. She indicated that Bernal's mother, Libby Wagner, also came over on a regular basis. RP 738. Likewise, Roman Atofau was described as not only her friend, but a good friend of Bernal's. RP 734. He was at the apartment on December 11, 2006 when she woke up. RP 734. She also described Contreras as a friend of Bernal's who came over every couple of days, however, she did not consider him her friend. RP 732, 736. Mayhall also indicated he was not well acquainted with Contreras. RP 1201.

Kowalski testified Bernal's mother came over to the apartment and Contreras helped with the garbage. RP 739. She indicated she left and visited another tenant for a while, but came back to the Bernal apartment when her friends Mayhall and Sakellis showed up. RP 739, 742. When she returned to the apartment Atofau and Contreras were no longer there. RP 743. By this time she had done methamphetamine two times, once

when she woke up and once with Mayhall and Bernal. RP 746. She had not started drinking yet and Sakellis gave her his car keys so she could go to the liquor store. RP 742, 745, 746. On her way out she saw Atofau and Contreras and asked them for a ride. RP 747. They took her to the liquor store where she bought vodka and tequila. RP 747-48. Once back at the apartment, she dropped off the liquor and left again to go to a nearby 7-11 store. RP 750. She estimates she was gone approximately 5 to 10 minutes.

Contreras suggested to Atofau that he needed to have a talk about Bernal's failure to take care of his business obligations. RP 1412. The evidence presented at trial was that Sakellis is the one who went to the Bernal apartment with Mayhall with the intent to have a physical altercation regarding Bernal's failure to pay Sakellis money Bernal owed him. RP 1250. Mayhall went to the Bernal apartment as back up in the event of a physical confrontation RP 1250. Sakellis took Contreras' gun and escalated an otherwise mundane afternoon of partying into a personal attack on Bernal and Roman. RP 754-55; 1209, 1213, 1420. Much to the surprise of all the occupants in Bernal's apartment, the readily available handgun, either provided to Mr. Contreras by Roman Atofau (RP 1214) or suddenly appearing out of nowhere (RP 1421, 1437-38), accidentally discharged when Mr. Contreras hit Mr. Bernal on the head with the butt of the handgun. RP

1217. Everyone testified that they were surprised by this and panic ensued. RP 760 (Kowalski ran for the door); RP 1219 (Mayhall ran for the door); RP 1425 (Atofau took off running). Witnesses testifying for the State said they began fleeing from the apartment as soon as the gun accidentally discharged. RP 760, 1219, 1425. According to the State's witnesses, they hear additional shots as they run out of the apartment building. RP 762, 1226, 1430. The shots came in rapid succession. Mayhall describes them as fast as a person could pull a trigger. RP 1226. Kowalski said her memory was impaired by drugs and alcohol, but shots were quick. RP 777-78.

Johann Schoemin, a ballistics expert from the Washington State Patrol Crime Lab testified that the accidentally discharged bullet casing and the 3 shell casings from the scene of the shooting were all fired from the same gun. RP 1142, 1156-57.

Ms. Klepach was the State's most crucial witness (RP 1050) and, the only witness who testified Mr. Contreras said he shot Bernal. RP 1484. None of the other State's witnesses could testify they saw Mr. Contreras shoot Bernal. A neighbor, Mr. Valesquez testified he was inside his apartment and only heard shots. RP 30. Mayhall describes hearing shots as he is running down the hall outside the apartment. RP 1226, 1249.; 1425 Atofau indicates he takes off running when Bernal falls out of chair after being struck and hears several shots as running down hall. RP 1425,

1430 Kowalski does not know whose gun went off, she testified she was running out the door when she heard 3 more shots. RP 761-62. Kowalski, Mayhall and Atofau all had conflicting recollections of who left in what order, with whom and what was the source of the gun supposedly used by Mr. Contreras. RP 761-62 (Kowalski says Atofau in front of her and Sakellis next to her; Mayhall and Contreras inside the apartment); RP 1220-23 (Mayhall says Atofau in front of him and Sakellis, he does not know where Kowalski is) and RP 1426-27 (Atofau says saw Kowalski in hallway as running out of apartment but did not see Mayhall or Sakellis); RP 1217(Mayhall said Contreras obtained gun from Atofau); RP 1437-38 (Atofau says Contreras obtained gun from some unknown location, denies having gun). Additionally, Mr. Contreras did not admit to the shooting but rather urged the police to look at the video surveillance cameras he believed recorded the events inside the apartment. RP 1080. The mere presence of a gun was a common place thing for these individuals. RP 1206, 1402. The whole incident is estimated to have taken seconds. RP 1226, 777-78.

Contreras was apprehended on December 13, 2006 after a high speed chase down city streets. RP 914-21. He fled from his crashed vehicle and was tracked by a canine dog. RP 986-89. Inside his vehicle there was a disassembled assault rifle. RP48-52. After his arrest, he agreed to give a

statement to Detectives Dave Devault and John Ringer. RP 1011-12,  
12/17/07 p. 62.

### **C. ARGUMENT**

#### **Issue No 1: The Court Erred In Failing To Give Proposed Defense Limiting Instructions On Prior Inconsistent Testimony And By Doing So Permitted The Jury Consider Prior Inconsistent Statements As Substantive Evidence.**

Defense proposed the following two instructions:

Evidence has been introduced in this case that a witness has made prior inconsistent statements for the limited purpose of impeachment, in deciding what weight or credibility should be given to the testimony of that witness. You may not consider this evidence for any other purpose; and

Impeachment is challenging or discrediting the truthfulness of a witness.

CP 102-109.

Evidence of prior inconsistent statements made by Jennifer Klepach was admitted during trial, on direct examination, concerning her taped statement made to police officers in 2006. RP1482-1491. Ms. Klepach was Mr. Contreras' girlfriend. RP 1476. This is significant because the statement the jury was able to consider without any limitation from the court related to statements she made to law enforcement officers at the police station after a late night of heavy drinking in which she

purportedly relays statements she attributed to Mr. Contreras. 1482. Furthermore, she described the atmosphere in which she provided the statements as one in which she felt under the threat of arrest herself and feared that law enforcement would take her away from her children, her life and her work if she did not comply to their investigative demands. RP 1496.

The statement was tape recorded, but was not under oath. She did not sign the taped statement. RP 1591. Ms. Klepach was identified by the State as their most crucial witness, and had her thrown in jail over the holidays because she did not wish to testify. RP 1050. Even though the State knew Klepach did not want to testify they conducted her refusal in front of the jury. RP 1047-48, 1089. The State argued this evidence was admissible as substantive evidence. RP 1484 (not impeachment unless “disavowed”, 1498, 1504 (critical State gets to argue is substantive so can tell jury Contreras admitted to shooting Bernal) . Contreras strongly disagreed, and argued that the evidence was properly admissible only for impeachment. RP 1500-02. Initially court agreed the testimony was only admissible as to her credibility (RP 1484, 1507) however, reversed its decision on the basis a witness must “disavow” the statement before it can be considered an prior in consistent statement. RP 1514-15. Defense requested the jury be given limiting instructions regarding her prior

unsworn inconsistent statements made to law enforcement officers. RP 1594-96, CP 102-09. The Pierce County Prosecuting attorneys argued that the jury should be able to use her prior unsworn inconsistent statements as substantive evidence because they were not “impeachment” but rather only conflicting statements. RP 1597. The Pierce County Prosecuting attorneys conceded the statements did not meet the requirements of ER 801(d)(1)(i), however, argued they should be considered as substantive evidence because she did not “disavow” the statement. RP 1598. The court found that her unsworn statements made in response to law enforcement questioning that differed from her statements while made under oath at trial were somehow a “hybrid” and despite the fact that this court had previously rejected these arguments in *State v. Sau, infra*, refused to give the requested limiting instructions on the proper use and consideration of prior inconsistent statements, thus permitting the jury to consider her prior inconsistent statements as substantive evidence. RP 1597, 1603. Part of the court’s rationale was the jury would not understand the difference between substantive and impeachment evidence anyway. RP 1502. In closing, the State argued as substantive evidence Ms. Klepach’s unsworn statement to police that she Contreras admitted to shooting Bernal. RP 1654.

This Court addressed this very issue in *State v. Sau*, 115 Wn. App. 29, 40-49, 60 P.3d 1234, 1239 - 1243 (Div. 2, 2003). In *Sau*, the reviewing court held the trial court has a duty to instruct a jury on the limited use of prior inconsistent statements when requested by the party against whom it is admitted. *Sau*, 115 Wn. App at 40. Moreover, the rule is mandatory. *Sau*, 115 Wn. App at 40, citing *State v. Konrath*, 61 Wn.2d 588, 591-91, 379 P.2d 359 (1963); ER 105; 5 K. Tegland, Wash.Prac. § 24, at 64 (1982).

In *Sau*, the reviewing court declined to adopt the arguments of the Pierce County Prosecuting Attorney's office that would have allowed the Pierce County Prosecuting Attorney's office to use out of court statements to prove the truth of the matters asserted that do not meet ER 801(d)(1) requirements that such a statement be "given under oath and subject to [the] penalty [of] perjury[.]" *State v. Sau*, 115 Wn. App. at 48-49. Nor was the reviewing court willing to create a catchall provision that would require only a showing of particularized guaranties of trustworthiness for the out-of-court statements of an in-court witness. The federal courts adopted the catchall concept, but Washington expressly declined to do so. *Sau*, 115 Wn. App at 48 (footnotes omitted). Specifically, the *Sau* court found that tape recorded statements that a witness made to law enforcement officers that were not made under oath subject to the penalty

of perjury were not authorized under ER 801(d)(1). *Sau*, 115 Wn. App. at 48-49.

The *Sau* court explained:

[w]e must examine ER 801(c) and ER 801(d)(1). Each was taken verbatim from the corresponding Federal Rule of Evidence, so its drafters were, in effect, the Advisory Committee that wrote the Federal Rules.

ER 801(c) embodies the basic definition of hearsay. It has three clauses, which we differentiate as follows:

[1] “Hearsay” is a statement, [2] other than one made by the declarant while testifying at the trial or hearing, [3] offered in evidence to prove the truth of the matter asserted.

[1] The middle clause is the one pertinent here. It provides in effect that the out-of-court statement of an in-court witness is generally hearsay. By hypothesis, an out-of-court statement is not made at the present trial or hearing. Necessarily then, an out-of-court statement is hearsay when offered to prove the truth of the matter asserted—even if it was made by someone who is now an in-court witness (i.e., even if it was made by someone who is presently under oath, observable by the trier of fact, and subject to cross-examination).

This effect can be confirmed by considering how ER 801(c)'s middle clause could have been worded. It could easily have said that hearsay is a statement, “other than one made by a declarant *who testifies* at the trial or hearing,” offered in evidence to prove the truth of the matter asserted. Instead, it says that hearsay is a statement, “other than one made by a declarant *while testifying* at the trial or hearing,” offered in evidence to prove the truth of the matter

asserted. The effect is to bring within the definition of hearsay any out-of-court statement offered to prove its truth, even if made by a witness at the present trial or hearing.

If ER 801(c)'s middle clause provides as just indicated, it must have a purpose that is additional to, and not satisfied by, the declarant's being under oath, observable, and subject to cross. And indeed it does. It is founded, according to the federal Advisory Committee that drafted it, "upon an unwillingness to countenance the general use of prior prepared statements [.]"

*Sau*, 115 Wn. App at 40-41 (*See* Footnote 30.)<sup>2</sup>.

Because Ms. Klepach's unsworn taped statements were not admissible as substantive evidence, Contreras requested the court instruct the jury on the use of prior inconsistent statements as impeachment. RP

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<sup>2</sup> Footnote 30 states: 56 F.R.D. 183, 295. We take this remark from the Advisory Committee's Note to Fed.R.Evid. (FRE) 801(d)(1), but it applies equally to ER 801(c)'s middle clause. Indeed, the Committee's "unwillingness to countenance the general use of prior prepared statements" is a theme that runs throughout the rules it proposed. In addition to ER 801(c) and ER 801(d)(1), examples include ER 803(5), the hearsay exception for past recollection recorded, and ER 804(b)(1), the hearsay exception for depositions and other prior testimony. ER 803(a)(5) precludes the use of an in-court witness' pretrial statement unless the proponent shows that the witness "now has insufficient recollection to enable the witness to testify fully and accurately[.]" ER 804(b)(1) precludes the use of an in-court witness' pretrial statement, even if made in deposition or at an earlier trial, unless the proponent shows that the witness is unavailable to testify at the present trial or hearing. Speaking about ER 803(a)(5), the federal Advisory Committee commented: "[T]he absence of the requirement [of insufficient recollection], it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters." 56 F.R.D. 183, 307.

1593-96, CP 102-09. ER 607 governs impeachment of witnesses, providing that “[t]he credibility of a witness may be attacked by any party, including the party calling the witness.” One of the methods of impeachment is showing that the witness made prior inconsistent statements. 5D K. Tegland, Wash. Practice, *Courtroom Handbook on Washington Evidence*, Rule 607, Author’s Comments, p. 288 (2007 ed.). There is not requirement the witness “disavow” the statement. And even if it did, , here the witness did say she believes she was mistaken in what she told the police during her December 2006 interview. RP 1482, 1518, 1525.

Impeachment by prior inconsistent statements is governed by ER 613. Id. at 289. ER 613 provides that a witness may be examined concerning a prior inconsistent statement, whether written or not, provided that the contents of the statement is shown or its contents disclosed to the witness at that time. Tegland, supra, explains that “[i]mpeachment by prior inconsistent statement should not be confused with what is sometimes called ‘impeachment by contradiction.’” Tegland, supra, Rule 613, Author’s Comments, at p. 317. The former “is the process of introducing the witness’s *own* inconsistent statements for impeachment” whereas the latter is “introducing a statement made by someone else, to contradict the witness.” Id. (emphasis in the original). The latter is

“simply rebuttal and is subject to all the normal rules regarding the admissibility of substantive evidence.” Id.

Tegland, supra, also notes that “the rules for impeachment should not be confused with the hearsay exception for prior inconsistent statements. As discussed above, Rule 801 does allow an exception to the hearsay rule for such statements, but only under narrowly defined circumstances.” Id. Those circumstances are set forth in ER 801(d)(1), which provides in pertinent part here that a statement is not hearsay if the declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, other proceeding, or in a deposition.

The State conceded that Ms. Klepach’s statements do not meet the requirements of ER801(d)(1)(i) because they were not made under oath subject to the penalty of perjury.

“A prior inconsistent statement that is admissible under ER 613 but not ER 801 is not substantive evidence and will not support a verdict or finding.” Id. citing *State v. Clinenbeard*, 130 Wn.App. 552, 123 P.3d 872 (2005) (where the only evidence that the defendant had prior sexual relations with another person was a prior inconsistent statement by that person but the statement was not under oath, held it was not admissible as

substantive evidence under Rule 801 but was admissible for impeachment under Rule 613).

Here, Klepach's statement to police fails the tests set forth in ER 801(d)(1)(i); *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982)(Smith Affidavit) and *State v. Thach*, 126 Wn. App. 297, 106 P.3d 782 (2995); it was not given under oath, not voluntary, lacks minimal guarantees of truthfulness, was not taken as standard procedure for probable cause (Contreras was already arrested), and Klepach's own testimony indicates it was coerced with the threat of jail and the concomitant loss of her children, job and life. Therefore, at most this evidence was admissible *only* under ER 613 for impeachment purposes, not as substantive evidence. Accordingly, the Court was mandated to give the defendant's proposed limiting instruction so instructing the jury on its proper purpose, and the State should not have been allowed to argue in closing that it was substantive evidence of guilt. Significantly, this was the only evidence the State had that Contreras admitted to shooting Bernal as no other witness testified they saw him actually shoot Bernal nor did Contreras admit to law enforcement in his interrogation to doing the shooting.

For the reasons enumerated by the *Sau* court, the trial court erred by admitting Ms. Klepach's out of court unsworn taped statements given to law enforcement officers as substantive evidence. As the State argued

to the trial court when it had her arrested for contempt of court, Ms. Klepach was their most crucial witness (RP 1050) and, the only witness who testified Mr. Contreras said he shot Bernal. None of the other State's witnesses could testify they saw Mr. Contreras shoot Bernal RP 30 – Valesquez in side apartment only heard shots; 1226 Mayhall running down hall outside apartment; 1249 heard shots while running; 1425 Atofau – takes off running when Bernal falls out of chair after being struck, 1430 hears several shots as running down hall; 761-62 – Kowalski does not know whose gun went off, running out the door when hears 3 more shots) and, in fact, the lay witness testimony was inconsistent on who left when, with whom and what was the source of the gun supposedly used by Mr. Contreras. (RP 761-62 Kowalski says Atofau in front of her and Sakellis next to her; Mayhall and Contreras inside the apartment; RP 1220-23 – Mayhall says Atofau in front of him and Sakellis – does not know where Kowalski is and RP 1426-27 Atofau says saw Kowalski in hallway as running out of apartment, did not see Mayhall or Sakellis, RP 1217 Contreras gets gun from Atofau; 1437-38 Atofau says Contreras obtained gun from some unknown location, denies having gun). Additionally, Mr. Contreras did not admit to the shooting but rather urged the police to look at the video surveillance cameras he believed recorded the events inside the apartment. RP 1080. Defendant Contreras was

entitled to his proposed limiting instructions, and the trial committed error by failing to do so.

**Issue No 2: The Trial Court Abused Its Discretion In Denying Contreras's Motion For Dismissal Following Testimony Elicited By The State In Violation Of It's Agreed To Court Order On Defense Motion In Limine Precluding Questions Re Defendant's Gang Affiliation.**

Prior to empanelling a jury, defendant Contreras sought, the State agreed with, and the trial court granted an Order excluding any evidence relating to his alleged gang affiliations. RP 357, 361. The court granted the motion because of the acknowledgement of the limited relevance and extreme prejudice associated with gang membership. *Id.* The court instructed the State to inform all of its witnesses of the Court's rulings. RP 557. The State intentionally elicited from Detective Krause that his "specialty" was gang crimes and homicide. RP 1278. Significantly, the State, represented by two experienced deputy prosecuting attorneys, admits it did not inform Officer Shafner of the Court's Order forbidding mention of gang affiliation, despite the fact they knew this witness had documented in his police report that defendant claimed some gang affiliation. RP 1557. The State had a copy of the report marked for Officer Shafner's use and repeatedly directed his attention to his report during his direct examination. RP 12/20/06 p.46, 51,52, 53, 54. The

report contained statements attributed to Mr. Contreras, including that Mr. Contreras said he belonged to a gang out of California. In the course of the direct examination, the State systematically elicited all of the statements in the order they appeared in the report. RP 52-54. Despite the court's ruling, and the State's knowledge of the contents of the report and their failure to admonish the witness that some statements were not admissible, the State solicited the forbidden testimony. RP 54.

Defense counsel objected and asked that the answer be stricken, which the court did. RP 54, 60. Moreover, Contreras asked for a mistrial and dismissal. RP 1549. Defense argued a curative instruction was not a sufficient remedy. RP 1553.

The jury was left for almost two weeks to ponder this improper evidence and speculate in on the nature of the evidence and how it fit in with the State's voir dire questioning regarding criminal activity on the east side, Det. Krause's "specialty" and the questions posed to lay witnesses regarding their fear of harm or retaliation. RP 12/20/06 58 (court references State attempts during voir dire.); RP 1278 specialty gang crimes); RP 1397, 1399 – T. Luhtala; 1178 – Mayhall; RP 12/20/07 p. 42 – Kowalski).

The trial court acknowledged the State violated the court's order and had an obligation to apprise its witnesses of the court's rulings. RP

12/20/06 p.57; 58; RP 1565 (Court has a “problem” with the States disregard of the court order.) However, the court found Contreras was not prejudiced based on her faulty recollection of her prior rulings. Her rationale included her mistaken belief that photographs were admitted showing Mr. Atofau, looking menacing and in possession of a number guns. The defense moved to admit these photos but when the State objected, the court sided with the state and excluded them. Additionally, the court did not find prejudice based on its belief that the juror’s had already “connected the dots” despite what she characterized as the court’s attempts to sanitize the proceedings. The court’s attempts at sanitizing the proceedings were to exclude evidence of *Bernal’s* criminal enterprises and activities and *Atofau’s* criminal activities. RP 641, RP 12/20/07 p. 5 photos of Atofau with guns with laser sights printed from stolen camera pawned by Bernal; RP 12/20/07 p. 14 - UPOF conviction 1 month after events). The court precluded defense from countering testimony that portrayed Bernal as a gentle person who never got mad, and had a legitimate job as the apartment manager, with evidence that his apartment was strewn with stolen electronics and he sold stolen items on Ebay as a career. RP 641. Nor did the sanitization process extend to objections made by defense on the irrelevant cumulative evidence of unfounded

witness fears. See Argument 4, or police officer's opinion that his canine dog tracked the scent of fear of apprehension. See Argument 5.

The State's Misconduct In Violating The Court's Order  
Denied Mr. Contreras A Fair Trial, Requiring Dismissal.

CrR 8.3(b) reads:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

To support a CrR 8.3(b) dismissal, a defendant must show both "arbitrary action or governmental misconduct" and "prejudice affecting [his or her] right to a fair trial." *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997) (citing *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). A trial court's decision under CrR8.3(b) is reviewed under the abuse of discretion standard that is whether a trial court has abused its discretion by making a decision that is manifestly unreasonable or based on untenable grounds. *Michielli*, 132 Wn.2d at 240 (citing *Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

The trial court erred when it found defendant was not prejudiced by the State misconduct when they failed to comply with the trial court's order precluding gang evidence, to which the State had stipulated. RP 1565. It is an unreasonable and manifestly untenable ruling in this case to hold that disregard of a court's ruling does not constitute prejudicial

misconduct. See e.g. *State v. Ra*, 144 Wn. App. 688, 700, 175 P.3d 609 (2008); *State v. Gregory*, 158 Wn.2d 759, 866-67, 147 P.3d 1201 (2006) (Pierce County prosecutor closing argument regarding prison conditions and possibility of escape in violation of court order issued on prosecutor's own motion, was reversible misconduct.) Governmental misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient." *Michielli*, 132 Wn.2d at 239 (emphasis omitted) (quoting *Blackwell*, 120 Wn.2d at 831).

"Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial." *State v. Farr-Lenzini*, 93 Wn. App. 453, 470, 970 P.2d 313 (1999) quoting *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Thus, if the reviewing court finds misconduct, the determination to be made is whether it prejudiced the jury thereby denying the defendant a fair trial. *Farr-Lenzini*, 93 Wn. App. at 470; *Davenport*, 100 Wn.2d at 762; *State v. Fleming*, 83 Wn. App. 209, 215-16, 921 P.2d 1076 (1996) (flagrant prosecutorial misconduct constitutes manifest constitutional error warranting reversal of a criminal conviction if an appellate court cannot say that the misconduct is harmless beyond a reasonable doubt.) Here, deliberate disregard for the trial court's pre-trial ruling on the exclusion of gang evidence and failure to inform its

law enforcement witness of the exclusion requires this court to reverse Contreras' convictions.

At minimum there was prosecutorial mismanagement in that neither prosecuting attorney informed the State's witness that the Court had precluded discussion of gang affiliation. *State v. Ra*, 144 Wn. App. 688, 175 P.3d 609 (2008)(deliberate disregard of court ruling). Additionally, the State intentionally walked the witness through each statement reported in his police report, culminating in the excluded information. CP 197 (Shafner's report). Both the prosecutor and the officer referred to copies of the officer's report during the direct examination, thus the fact that the forbidden information was contained in the report and that it would be elicited by the next question requesting recitation of what was said by the defendant was inevitable. Such misconduct, even if characterized as "mismanagement" more than satisfies the misconduct required by CrR 8.3(b). *Blackwell*, 120 Wn.2d at 831.

In 1990, Division One of the Court of Appeals affirmed a trial court's finding of prosecutorial misconduct and dismissal. *State v. Sherman*, 59 Wn. App. 763, 801 P.2d 274 (1990). The *Sherman* court found that the State had agreed to undertake production of the Internal Revenue Service (IRS) records of one of its witnesses, as reflected on the omnibus order, but the State failed to produce the records by the court-

imposed deadline even though the State was given several weeks to comply. *Id.* at 765-66, 768. Although the records were not in the State's possession, they were available to the State's chief witness, who failed to find them in his files. *Id.* at 769. The State did not follow up to ensure that the records would be available in time for trial and copies were not requested from the IRS until long after the court-imposed deadline. The *Sherman* court held that such mismanagement amounted to prosecutorial misconduct. *Id.* Although the Sherman trial court gave four reasons for its CrR 8.3(b) dismissal, the Court of Appeals held that the State's failure to produce the IRS records was enough "in and of itself" to support dismissal. *Sherman*, 59 Wn. App. At 786.

The prosecutor's solicitation of defendant's statements regarding gang affiliations was a serious irregularity amounting to misconduct because, as the prosecutor well knew, they had stipulated to the exclusion of the evidence and the Court had already forbidden such evidence under ER 401, 402, 403 and 404(b). The court chastised The State for disregarding the court's ruling, but found that the defendant was not prejudiced by the violation. RP 1565.

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a dangerous person or a 'criminal type' and thus likely to have committed the crime for which he

or she is presently charged. The rule is based upon the notion that the defendant is being tried for the conduct giving rise to the charges, not for misconduct that may have occurred in the past. Misconduct that occurred in the past is likely to be more prejudicial than probative. *State v. Bowen*, 48 Wn. App. 187, 738 P.2d 316 (1987); Karl B. Tegland, *Courtroom Handbook on Washington Evidence* (1998 ed.), p. 199 (emphasis added). The testimony constitutes a “serious irregularity” because it falls precisely within the prohibitions of Rule 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

Second, the testimony was inherently prejudicial and is the type of evidence that only works to poison the jury in its duty to decide the case on the relevant facts. Washington courts have recognized that some types of evidence are “inherently” prejudicial. See, e.g., *State v. Scott*, Slip Op. 26790-3 ( Div. 3 Aug.11, 2009)(gang evidence); *State v. Asaeli*, \_\_ Wn. App. \_\_, 208 P.3d 1136, 1155-56 (2009)(gang evidence); *State v. Ra*, 144 Wn. App. 688, 700-01, 175 P.3d 609 (2009)(Gang evidence), *State v. Saltarelli*, 98 Wn.2d at 363, 655 P.2d 697 (“prejudice potential of prior [sex] acts”); *State v. Escalona*, 49 Wn. App. 251, 256, 742 P.2d 190 (1987) (evidence of conviction for having “stabbed someone” was “inherently prejudicial”); *State v. Crane*, 116 Wn.2d 315, 333, 804 P.2d

10 (1991)( the Washington Supreme Court recognized that “[a]s a general proposition, evidence of drug usage can be prejudicial.)”

Gang evidence is likewise inadmissible and excluded because of the grave danger of unfair prejudice unless the State establishes a sufficient nexus between the crime charged and the defendant’s gang affiliation. *State v. Scott*, Slip Op. 26790-3 ( Div. 3 Aug.11, 2009)(gang evidence); *State v. Asaeli*, 208 P.3d at 1155-56; *State v. Ra*, 144 Wn. App. at 700-01; *State v. Boot*, 89 Wn. App. 780, 788-89, 950 P.2d 964 (1998); *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995). In *State v. Johnson*, 124 Wn.2d 57, 873 P.2d 514 (1994), our Supreme Court held that affiliation with a gang may be an aggravating factor at sentencing when the crime that was committed was gang motivated. The court cautioned, however, that “[I]f the evidence were not relevant to the issues at trial and at sentencing, the punishing would then constitute a violation of the First Amendment right of freedom of association.” *Johnson*, 124 Wn.2d 57, 67 (1994) (citing *Dawson v. Delaware*, 503 U.S. 159, 165, 117 L. Ed. 2d 309, 112 S. CT. 1093 (1992) The *Dawson* court concluded that it was error to admit evidence of the defendant's gang membership because there was nothing to show that his beliefs and association with the group were in any way connected to the murder, and therefore, the evidence was irrelevant and was protected by the constitutional rights of

freedom of association and freedom of speech. *State v. Scott, supra*; *See United States v. Singleterry*; 646 F.2d 1014, 1018 (5<sup>th</sup> Cir. 1981) (a defendant's guilt may not be proven by showing he associates with unsavory characters, and admission of evidence of bad conduct of relatives or friends is error because it is a highly prejudicial attempt to taint defendant's character through "guilt by association"). *See also, United States v. Roark*, 924 F.2d 1426 (8<sup>th</sup> Cir. 1991)(Association with Hell's Angels Motorcycle Club not cured by instruction to jury to disregard, appellate court reversed and remanded for a new trial.)

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968); *cf State v. Green*, 71 Wn.2d 372, 373, 428 P.2d 540 (1967). In this case, Officer Shafner's testimony was not only irrelevant and thus inadmissible, but was so highly prejudicial that no curative instruction could have overcome the impression left upon the jury. Thus, the second requirement for dismissal was met in this case. The misconduct must cause "prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrR 8.3(b).

In another case involving crimes considered reprehensible by society, the court noted:

In the maintenance of government to the extent it is committed to the courts and lawyers in the administration of the criminal law it is just as essential that one accused of crime shall have a fair trial as it is that he be tried at all, whether he be guilty or not, has his picture in the rogue's gallery or not. . . [I]t must be remembered, as stated in *Hurd v. People*, 25 Mich.405, that:

'Unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community.'

*State v. Devlin*, 145 Wash. 44, 52, 258 P.826 (1927). The *Devlin* court ruled that the defendant had not received a fair trial where testimony elicited was "wholly disconnected from and foreign to the issues to be decided," and where the jury was led into the belief that they were dealing with a "notorious" criminal. *Id.* Here, Officer Shafner's testimony regarding gang affiliations of Mr. Contreras was also "wholly disconnected from and foreign to the issues to be decided."

Once misconduct is shown, the trial court may dismiss if there is prejudice to the accused's right to a fair trial. The remedy is extraordinary only in the sense that misconduct causing prejudice to the defendant's constitutional right to a fair trial authorizes dismissal. *See Blackwell*, 120 Wn.2d at 830 (citing *City of Spokane v. Kruger*, 116 Wn.2d 135, 144, 803 P.2d 305 (1991)). "Fairness to the defendant underlies the purpose of CrR 8.3(b). *State v. Stein*, 144 Wn.2d 236, 249, 27 P.3d 184 (2001); *State v.*

*Koerber*, 85 Wn. App. 1, 5, 931 P.2d 904 (1996). See also *State v. Boldt*, 40 Wn. App. 798, 801, 700 P.2d 1186 (1985) ("The purpose of the rule is to ensure that, once an individual is charged with a crime, he or she is fairly treated."). Moreover, "[t]he rule is intended to protect against governmental misconduct or arbitrary action." *State v. Wilke*, 28 Wn. App. 590, 596, 624 P.2d 1176 (1981). Dismissal of charges pursuant to CrR 8.3(b) is appropriate when the defendant shows (1) government misconduct and (2) prejudice. *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). Both are established in this case.

In both *Michielli* and *Sherman* the dismissals were supported by evidence of misconduct which prejudiced the defendants' right to a fair trial. The dismissals were therefore neither manifestly unreasonable nor exercised on untenable grounds. Such is the case here as well, not only was there insurmountable prejudice to the defendant by the improper introduction of gang evidence but the prosecutor also violated the Court's order specifically excluding the evidence and the obligation of the State to inform each and every of its witnesses of the Court's rulings.

#### The Curative Instruction Did Not Un-ring The Bell

Here the Court's admonition to the jury to disregard the last answer was insufficient to protect Contreras' right to a fair. In this case no reasonable fact finder could find that a curative instruction would have

“un-rung” the bell. Here the State labored long and hard to systematically undercut the Court’s ruling excluding gang affiliation evidence. That this was an enduring theme and strategy in their case presentation is apparent from voir dire regarding crime associated with the gang riddled east side, to the repeated questioning of lay witnesses regarding their fear of harm or retaliation by Mr. Contreras, despite the fact not a one was ever contacted by Mr. Contreras nor reported any threats made by him. Moreover, the State’s case is weak, not a single witness for the State testified they saw Mr. Contreras kill Mr. Bernal. The semi-automatic weapon used to kill him apparently belonged to Mr. Roman Atofau and has not been recovered. The state’s eye witnesses all have longstanding friendships and business relations with one another and not with Mr. Contreras. RP 728, 730, 739(Kowalski – friends with Bernal, Sakellis and Mayhall); RP 1175, 1178, 1250, 1251, 1201-(Mayhall – friends with Bernal and business associate of Sakellis, Sakellis pays for his lawyer, did not know Contreras closely), RP 1310 (Atofau – friends with Bernal.)

Officer Shafner’s testimony is the type of evidence which is “inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors” despite the lack of any physical evidence linking Mr. Contreras to the crime or any eye witnesses who could testify

he actually killed Mr. Bernal. *State v. Suleski*, 67 Wn.2d 45, 51, 406 P.2d 613 (1965).

While ordinarily an error in the admission of evidence is remedied by an instruction directing the jury to disregard it, the rule is by no means of universal application. Each case must rest upon its own facts, and in some instances the error may be so serious that an instruction, no matter how framed, will not avoid the mischief.

*State v. Morsette*, 7 Wn. App. 783, 789, 502 P.2d 1234 (1972), quoting *State v. Albutt*, 99 Wn.253, 259, 169 P.584 (1917).

In this case, the jury had been told by Officer Shafner that Mr. Contreras is a gang member. After the defense objection the jury was then excused. When the jury returned, they were simply told, “Ladies and gentlemen, the last question and last response are stricken. The objection is sustained.” RP 19. Further, as the Court had already ruled on Defendant’s motion in limine, the information was the type of inherently prejudicial information which “could not be expected to be erased by an instruction to disregard it.” *Morsette*, 7 Wn. App. at 789.<sup>3</sup>

It is far more likely that the testimony of Officer Shafner was imbued in the minds of the jury with a perverse credibility, since he is a

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<sup>3</sup> As stated by the *Morsette* Court, “To think that the jury could have forgotten is a strain on credulity and highly dubious. . . . We conclude . . . that the testimony of the officer and expert in this case ‘was so prejudicial in nature that its effect upon the minds of the jurors could not be expected to be erased by an instruction to disregard it.’ Further, any doubt as to whether the error was cured must be resolved in favor of the accused.”

law enforcement officer supposedly recounting statements made by the defendant and because the testimony now explains the voir dire questioning, (RP 267,269, 273-74), Det. Krause's "specialty" and the context of the lay witnesses otherwise unexplained fear of harm. Such information would appear "logically relevant"<sup>4</sup> to a jury, even though not "legally relevant." See *State v. Escalona*, 49 Wn. App. 251, 256, 742 P.2d 190 (1987). As in *Morsette*, the State's questioning and Officer Shafner's testimony "was so prejudicial in nature that its effect upon the minds of the jurors could not be expected to be erased by an instruction to disregard it." *Morsette*, 7 Wn. App. at 789, 502 P.2d 1234.

In *State v. Miles*, 73 Wn.2d 67, 436 P.2d 198 (1968), a Spokane police officer was asked to relate the message that was contained in a Teletype which had been received from the Yakima County sheriff's office, on the basis of which the arrest of the defendant had been made. *Id.* at 68, 436 P.2d 198. Over defense counsel's objection that the answer would be hearsay, the court allowed the officer to answer, stating that the testimony was not offered to prove the truth of the matter contained therein. *Id.* The officer then testified that the Teletype described two

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<sup>4</sup> "Logical relevance" of a statement tends to "impress itself upon the minds of the jurors," and is a factor that tends to show that an instruction cannot cure the prejudicial effect of a statement. See *Escalona*, 49 Wn. App. at 256, 742 P.2d 190.

wanted subjects out of Yakima County and a wanted car, and stated that they were headed for Spokane to duplicate the robbery committed in Grandview. *Id.* The defense moved for a mistrial, and the trial court denied the motion, instructing the jury:

You are instructed to disregard that last portion of the testimony of this officer, other than that relating to two subjects in an automobile. That's the only part you may consider. The rest of it has no bearing in this trial and no bearing upon any outcome of this trial, and it really has no bearing on this man's testimony. All we are concerned with is that he had information concerning two people in a car, and from there you may proceed.

*Id.* at 69, 436 P.2d 198. The defense contended, inter alia, that no instruction could erase its effect from the minds of the jury. The Miles court noted that a defendant must be tried for the offense charged in the indictment or information, and that to introduce evidence of an unrelated crime is "grossly and erroneously prejudicial" unless such evidence is admissible under ER 404(b). *Id.*, quoting *State v. Dinges*, 48 Wn.2d 152, 154, 292 P.2d 361 (1956).

The *Miles* court stated:

[A]lthough it was incompetent to prove the matter which it asserted, it cannot be supposed that the jury was unimpressed by it. This testimony was calculated to and undoubtedly did implant in the minds of the jury the idea that the defendants had committed other robberies of this type and were therefore most likely to have committed the one charged. It is true that there was no reference to past

acts; but the inference is strong that the Yakima County sheriff had sufficient knowledge of the defendants' activities to form a judgment about their future plans. We do not think the prejudicial effect of this testimony could be removed by an instruction.

*Miles*, 73 Wn.2d at 70, 436 P.2d 198.

As in the *Miles* case, the prejudicial effect of the State elicited testimony could not be removed by an instruction. Similarly, in *State v. Suleski*, 67 Wn.2d 45, 48-49, 406 P.2d 613 (1965), the reviewing court determined that “adroitly drawn picture of the defendant’s criminal proclivities, sketched upon the backdrop of the medical witness’s fear of violence and suspicion of drug addiction, literally dissolved any legalistic curtain based upon the theory that the court’s instructions could remove all undue impressions from the jurors’ minds. The defendant was irretrievably prejudiced” and hence the bells could not be unringed by a curative instruction. *Suleski*, 67 Wn. at 51, 406 P.2d 613. Here, the “bells” of Mr. Contreras’ gang association especially in light of the repeated testimony regarding witness fears of harm or retaliation and his alleged drug dealing activities were “so conclusively rung as to effectively preclude ‘their unringing.’” — even though irrelevant to the charges before them — is simply too inflammatory to credibly presume that the jury could disregard the testimony, even when instructed to do so. Here,

as in *Suleski*, the State has created an “adroitly drawn picture of the defendant’s criminal proclivities.”

“The question in all cases, is not whether the court, if trying the case, would disregard the obnoxious evidence but whether the court is assured that the jury has done so.” *Suleski*, 67 Wn. at 51, quoting *State v. Meader*, 54 Vt. 126, 132 (1881). Because the type of information given by Officer Shafner is “inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors” (*Miles*, 73 Wn.2d at 71) it cannot be assumed that the jury could disregard his testimony. The trial court abused its discretion in finding that the defendant was not prejudiced, the court’s abuse of discretion is readily apparent when her ruling was based on her erroneous and confused belief that she had let in evidence of other witnesses looking like gang members, referring to Roman Atafoa, when in fact she had excluded the defense proffered evidence. RP 12/20/06 p. 5, CP 194-96 (Ex 186, 187 & 188.)

Because the trial abused its discretion in failing to dismiss the criminal charges in the furtherance of justice under CrR 8.3(b) when the defendant amply demonstrated (1) government misconduct or arbitrary action that (2) prejudiced the defendant’s right to a fair trial the trial court abused its discretion. Here, the court’s reasoning that defendant was not prejudiced is manifestly unreasonable or based on untenable grounds – it

was based on her faulty recollection of her rulings – she mistakenly thought evidence defense had sought to have admitted was admitted when in fact the court excluded it. RP 641 (excluded reference to apartment being strewn with stolen goods and criminal ebay enterprise) RP 1565 – defendant not prejudiced because pictures of Atofau show this is part of their lifestyle when in fact court excluded the photos because the state argued they were “too prejudicial” RP 12/20/07 p. 10.) *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

Both of these prongs were met and the trial court abused its discretion in failing to grant the defense motion and neglected to file an order stating its reasons supporting its decision.

**Issue No:3 Contreras’ Conviction For Premeditated First Degree Murder Is Not Supported By Substantial Evidence.**

Contreras next argues that the State presented insufficient evidence that he premeditated the killing because (1) he made no statements before the incident showing that he intended to kill Bernal or anyone else, (2) he had no motive to kill Bernal who still owed him money, and (3) he did not have a plan to procure a weapon or (4) act in stealth, but rather the events described by the State’s witnesses suggest everyone panicked when the handgun grabbed from either Roman Atofau or from the coffee table accidentally discharged.

To prevail on a challenge to the sufficiency of the evidence, Contreras must show that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Allen*, 159 Wn.2d 1, 7, 147 P.3d 581 (2006); *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct 2781 (1979). All reasonable inferences from the evidence are drawn in favor of the State. *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995); *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). *State v. Gregory*, 158 Wash.2d 759, 817, 147 P.3d 1201 (2006); *State v. Clark*, 143 Wash.2d 731, 769, 24 P.3d 1006 (2001)). Here, the State charged Contreras with premeditated first degree murder, so it had to prove beyond a reasonable doubt that Contreras acted with premeditated intent to cause Bernal's death. RCW 9A.32.030(1)(a).

Premeditation is the deliberate formation of and reflection on the intent to take a human life and involves the mental process of thinking beforehand, deliberating on, or weighing the contemplated act for a period of time, however short. *Allen*, 159 Wash.2d at 7-8, 147 P.3d 581. Premeditation must involve more than a moment in time. RCW 9A.32.020(1); *Allen*, 159 Wn.2d at 8, 147 P.3d 581. The State can prove premeditation by circumstantial evidence where the inferences argued are reasonable and the evidence supporting the jury's finding is substantial. *Clark*, 143 Wn.2d at 769; *Gentry*, 125 Wn.2d at 597. Although

determinations of the credibility of witnesses are for the trier of fact and will not be reviewed on appeal, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), this court can review whether the jury, after hearing all of the facts, could have rationally found guilt beyond a reasonable doubt. *See State v. Hundley*, 126 Wn.2d 418, 421-422, 403 P.2d 403 (1995).

Due process requires the State to prove beyond a reasonable doubt every element of the crime charged. *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984); *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S. Ct. 1068 (1970); *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). The State bears the burden of proving the defendant premeditated the offense beyond a reasonable doubt. *State v. Lane*, 112 Wn.2d 464, 472, 771 P.2d 1150 (1980).

The legislature has declared that the premeditation necessary to support conviction for murder in the first degree must “involve more than a moment in point of time.” RCW 9A.32.020(1). This court has defined premeditation as deliberate formation of and reflection upon the intent to take a human life [that] involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. *State v. Hoffman*, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991). Premeditation may be proved by circumstantial evidence where inferences supporting premeditation are reasonable and the

evidence is substantial. *Clark*, 143 Wn.2d at 769, 24 P.3d 1006; *State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982); *State v. Robtoy*, 98 Wn.2d 30, 43, 653 P.2d 284 (1982)(defined premeditation as the deliberate formation of and reflection upon the intent to take a human life). Mere opportunity to deliberate is not sufficient to support a finding of premeditation. *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986); *State v. Pirtle*, 127 Wn.2d 628, 644, 902 P.2d 245 (1995).

Premeditation is the essential element that distinguishes first-degree from second-degree murder. RCW 9A.32.030(1)(a).<sup>5</sup>; Specific intent to kill and premeditation are not synonymous, but separate and distinct elements of the crime of first-degree murder. *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984, 986(1987); *United States v. Quintero*, 21 F.3d 885, 890 n. 3 (9th Cir.1994).

Both courts and commentators have noted the lack of clarity in the precise legal definition of premeditation. See *United States v. Shaw*, 701 F.2d 367, 393 (5th Cir.1983); 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.7(a) at 477 (2d. ed. 2003) (“It is not easy to give a meaningful definition of the word[ ] ‘premeditate’ ... as ... used in connection with first degree murder.”); Benjamin N. Cardozo, *What Medicine Can Do For*

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<sup>5</sup>RCW 9A.32.030(1) A person is guilty of murder in the first degree when (a) With premeditated intent to cause the death of another person, he or she causes the death of such person or a third person.

*Law, in Law and Literature* 97-100 (1931) (“[The phrase] deliberate and premeditated .... is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it,” and “is much too vague to be continued in our law.”). Federal courts, however, have “look[ed] to the common law to find the definition” of the statutory terms contained in the federal murder statute, *United States v. Pearson*, 203 F.3d 1243, 1271 (10th Cir.2000), and in so doing have concluded, consistent with many state courts, that the element of premeditation essentially requires a showing that the defendant acted with “a ‘cool mind’ that is capable of reflection, and ... did, in fact, reflect, at least for a short period of time before his act of killing.” *Shaw*, 701 F.2d at 393; see LAFAVE § 14.7(a) at 477-78; see also *Austin v. United States*, 382 F.2d 129, 137 (D.C.Cir.1967) (premeditation requires that “there was a further thought, and a turning over in the mind-and not a mere persistence of the initial impulse”), *overruled on other grounds by United States v. Foster*, 783 F.2d 1082, 1085 (D.C.Cir.1986). In short, premeditation, at minimum, requires that at some point *after* the defendant forms the intent to kill the victim, he has the time to reflect on the decision to commit murder, that he in fact does reflect on that decision, and that he commits the murder with a “cool-mind” after having engaged in such reflection.<sup>FN4</sup> Cf. 9th Cir. Model

Crim. Jury Instr. 8.89 (2003); WPIC 26.01.01<sup>6</sup>; *State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982); *State v. Robtoy*, 98 Wn.2d 30, 43, 653 P.2d 284 (1982); *U.S. v. Begay*, 567 F.3d 540, 545 -547 (9<sup>th</sup> Cir. 2009).

Because premeditation necessarily describes a subjective state of mind about which the defendant rarely provides any direct testimony or evidence, it is almost always an element that must be proved by reference to “the defendant’s conduct ... in the light of the surrounding circumstances.” LaFave § 14.7(a) at 480; *see also U.S. v. Free*, 841 F.2d at 325 (9<sup>th</sup> Cir. 1988) (“Premeditation may ... be established circumstantially.”). In general, the element is typically established through proof that falls into at least one of “[t]hree categories of evidence”:(1) facts about how and what the defendant did prior to the actual killing which show he was engaged in ... *planning activity*; (2) facts about the defendant’s prior relationship and conduct with the victim from which *motive* may be inferred; and (3) facts about the *nature of the killing* from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed [the victim] according to a preconceived design. LaFave § 14.7(a) at 480; *see also*

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<sup>6</sup> WPIC 26.01.01 - Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

*Free*, 841 F.2d at 325 (“Relevant circumstantial evidence includes, *inter alia*, the defendant's prior relationship to the victim, the defendant's carrying of the murder weapon to the scene, and the manner of the killing.”). As stated in *U.S. v. Begay*, 567 F.3d 540, 545 -547 (9th Cir. 2009), the courts “do not suggest that these three methods of proving premeditation constitute a rigid or exclusive list. Rather, we simply observe that evidence of planning activity, motive, or the cool or methodical nature of the killing is evidence that will tend to support a finding of premeditation, although motive standing alone is the least probative of the three.” *U.S. v. Begay*, 567 F.3d 540, 545 -547.

Similarly, the Washington Supreme Court has said, “Four characteristics of the crime are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing. *Pirtle*, 127 Wn.2d at 628, 644, 904 P.2d 245 (1995) citing, *Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). The second and third factors can be further combined as evidence of planning.

Facts supporting premeditation have included the following: In *Clark*, the seven-year-old victim was stabbed at least seven times in the neck, cuts on her hands suggested a struggle, and she was sexually assaulted. 143 Wn.2d 731, 739, 769-70, 24 P.3d 1006, cert. denied, 516 U.S. 843, 116 S.Ct.131, 133 L.Ed.2d 70 (1995). In *Gentry*, the defendant

picked up a large rock to use as a weapon, he struggled with the 12 year old victim over the course of 148 feet of a secluded wooded trail, blows were struck on both sides of the young girl's head, and sexual assault was apparently attempted. 125 Wn.2d at 600-01, 888 P.2d 1105. In *Ortiz*, the victim was found in her home, the knife was procured from a room other than where the murder took place, defensive wounds indicated a prolonged struggle through more than one room, multiple wounds were inflicted from more than one weapon - the victim was struck in the face with something other than the knife, and the victim had been raped. *Ortiz*, 119 Wn.2d at 297, 312-13. In *Ollens*, the victim taxi cab driver was stabbed several times with a knife that defendant brought with him, his throat was then slashed and the victim was struck from behind, and the evidence suggested that robbery was the motive. *Ollens*, 107 Wn.2d at 849.

In *State v. Gregory*, 158 Wn.2d 759, 816 – 818, 147 P.3d 1201 (2006), the court found that the facts similarly demonstrated premeditation. In *Gregory* There was no sign of forced entry into the female victim's home, she was stabbed in the throat in her kitchen and then dragged to her bedroom, her hands were tied behind her back, her clothes were cut off of her, and she was stabbed three times in the back, her throat was slit three separate times, and a vertebra in her neck was

fractured. Despite her severe injuries, the woman struggled. The female victim was raped both vaginally and anally before she died. Moreover, none of her tip money from that evening was found, and the diamond earrings that she always wore were never recovered. These facts are not similar to the facts in this case where there is no evidence of a prolonged struggle through several rooms of a home and no motive of sexual assault or robbery

The circumstances in *Gentry* are not similar either. In *State v. Gentry*, 125 Wn.2d 570, 598-601, 888 P.2d 1105 (1995) the court found sufficient evidence of premeditation where the facts established Gentry attacked a young 12 year old girl along a heavily wooded and secluded trail while she was picking flowers. The evidence indicated that the struggle between the young girl and her attacker began on the main trail through the wooded area, and ended at the bottom of a connecting foot path, 148 feet from the main trail. Her body was concealed behind a very large log. Her sweatshirt had been pulled up, partially over her head, and her T-shirt had been pulled up to the middle of the breast area. Her jeans and underpants had been pulled down around her thighs, suggesting she was the victim of an attempted sexual assault. The flowers the young girl apparently had picked and her glasses were found near the point where the attack began. At some point the Defendant armed himself with a large

rock. The rock was used to strike the child on her face and head between 8 and 15 times, possibly more. During the struggle, the victim's earring was torn from her ear. She apparently fought her attacker who inflicted approximately 10 "significant" injuries. Two of the head injuries were serious enough to cause death by themselves. One of these was struck after the victim's sweatshirt had been pulled up over her face.

The Gentry court concluded,

In sum, from the evidence presented a rational trier of fact could well conclude that the killer of this child had deliberately picked up a large rock to use against his victim; that he had the opportunity during continuous blows over 148 feet of trail to deliberately form and reflect upon the intent to take the life of the victim; that the victim struggled against her attacker; that blows were struck to both her face and the back of her head; that the final blow was inflicted upon her forehead while her head was covered with her shirt and that it was inflicted at the place where her body was found; and that she was the victim, as well, of an attempted sexual assault.

We hold that there was substantial evidence before the jury from which a rational trier of fact could determine beyond a reasonable doubt that the killing of the victim was premeditated.

*State v. Gentry*, 125 Wn.2d 570, 601.

This case is also unlike the case presented to the *Pirtle* court. In *Pirtle*, the Court found Pirtle had at least two motives to kill Dawnya: in revenge for her role in his firing from the Burger King for sexual harassment, and to prevent evidence of his new crimes from being

considered during his upcoming sentencing for felony assault in Montana. The second motive could have applied to the other victim, Tod as well. The Pirtle court also found there was evidence Pirtle planned to kill. Although there was a fairly large sum of money in his home, Pirtle decided to rob the one business establishment in the vicinity where he was well known and could be identified, and he did not bring a disguise. At trial, he testified he took a knife from his kitchen with him to the Burger King. He drove to a church approximately a half block from the Burger King, parked, and watched the Burger King. He waited several minutes until another employee, Wesley LeDoux, left the restaurant before obtaining entry by pretending to be Wesley. He thought Dawnya was alone. Once in the Burger King, Pirtle took out his knife, cut the telephone cord, and had Dawnya open the safe in the office and give him her keys to the cash registers. He saw that Dawnya and Tod were bound and then put them into the freezer before emptying the cash drawers and the safe. He testified he put away his own knife and picked up a bread knife from a counter, then removed Dawnya from the freezer before killing her.

The Court further found that the method of killing supported a finding of premeditation. Pirtle took Dawnya into the walk-in cooler where he struck her several times in the head with two paint cans, then, after she was already unconscious and lying on the floor, he cut her throat.

Both Pirtle's testimony and physical evidence show Dawnya resisted the attack. Pirtle then talked Tod into leaving the freezer and walking to the office, telling Tod he only wanted to knock him out. He convinced Tod to take off his glasses and lie face down on the floor, whereupon he hit Tod twice with a fire extinguisher, then retrieved a knife and cut Tod's throat after he was unconscious. There were nine wounds to the front of Tod's neck and eight to the back of his neck, which could have been caused either by the knife or by a hacksaw found on Tod's body. After killing Tod, Pirtle returned to the cooler and cut Dawnya's throat some more, as Pirtle testified, "because her body was makin' noises." He sawed at her throat with the knife at least sixteen times, nearly decapitating her. The examining physician speculated the hacksaw also may have been used on Dawnya's neck. Based on these facts, many of which were drawn from Pirtle's own testimony, the court found the evidence was sufficient to establish premeditation. This is unlike this case in which there is no evidence of stealth, laying in wait or a prolonged struggle. Nor is there evidence of motive of robbery.

The instant case is also unlike the situation in *State v. Allen, supra*, where the evidence suggested a struggle over an appreciable period of time utilizing a number of different means and weapons and involving multiple wounds. *State v. Allen*, 159 Wn.2d 1, 7, 147 P.3d 581 (2006)

Allen's altercation with his mother went from the kitchen to the bedroom and involved pushing and wrestling before escalating to strangulation with a phone cord and finally beating with a rifle that was not readily available. The *Allen* court found that these facts supported a finding of premeditation

At trial, Contreras argued there was insufficient evidence of premeditation to support the charge of first-degree premeditated murder. At no point did Contreras express a preconceived intention to shoot Luis Bernal. At the very most, the evidence elicited at trial established that Contreras may have suggested to Atofau that Bernal and he needed to have a talk about Bernal's failure to take care of his business obligations. RP 1412. There is no motive to kill Bernal because, if the State's witnesses are to be believed Bernal still owed him money and no evidence of robbery or another crime was presented. The evidence presented at trial was that Sakellis is the one who went to the Bernal apartment with Mayhall with the intent to have a physical altercation regarding Bernal's failure to pay Sakellis money Bernal owed him. RP 1250. Mayhall went to the Bernal apartment as back up in the event of a physical confrontation RP 1250. Sakellis took Contreras' gun and escalated an otherwise mundane afternoon of partying into a personal attack on Bernal and Roman. RP 754-55; 1209, 1213,1420. Much to the surprise of all the occupants in Bernal's apartment the readily available handgun, either provided to Mr. Contreras by Roman Atofau (RP 1214) or

suddenly appearing out of no where (RP 1421, 1437-38), accidentally discharged when Mr. Contreras hit Mr. Bernal on the head with the butt of the handgun. RP 1217. Everyone testified that they were surprised by this and panic ensued. RP 760 (Kowalski ran for the door); RP 1219 (Mayhall ran for the door); RP 1425 (Atofau took off running). Witnesses testifying for the State said they began fleeing from the apartment as soon as the gun accidentally discharged. RP 760, 1219, 1425. According to the State's witnesses, they hear additional shots as they run out of the apartment building. RP 762, 1226, 1430. The shots came in rapid succession. Mayhall describes them as fast as a person could pull a trigger. RP 1226. Kowalski said her memory was impaired by drugs and alcohol, but shots were quick. RP 777-78. The State argued in closing that multiple shots are tantamount to premeditation. RP 1636. According to the State's witnesses the individuals involved in this case routinely carried firearms. RP 1206; 1402. There was no testimony that having weapons available was a unique event suggesting some specific plan.

The State argued that premeditation was established when Contreras fired more than 1 shot at Bernal's body. RP 1636. However, there is nothing in Contreras' actions or statements to show that he at any time deliberately thought out and planned the death of Luis Bernal. In fact, according to the State's witnesses, they were all completely surprised by the shooting. The

mere presence of a gun was a common place thing for these individuals, so carrying a gun did not indicate that Contreras was planning to kill anyone. The whole incident is estimated to have taken seconds. RP 1226, 777-78. In any case, the mere passage of an appreciable amount of time is insufficient to prove premeditation; rather the evidence must be sufficient to support the inference that the defendant had time to deliberate and that he actually did deliberate. *Bingham*, 105 Wn.2d at 826. Even when intent to kill is established, premeditation cannot be inferred from the intent to kill. *Brooks*, 97 Wn.2d at 876.

The instant case lacks any of the features found in cases containing circumstances in which the court found evidence supporting a finding of premeditation including motive, prior threats, struggle over an appreciable period of time, assault with multiple means or a weapon not readily available, the planned presence of a weapon at the scene or driving the victim to an isolated location. See *State v. Allen*, 159 Wash.2d at 8, 147 P.3d 581; *Clark*, 143 Wash.2d at 769, 24 P.3d 1006; *State v. Pirtle*, 127 Wn.2d 628, 644-45, 904 P.2d 245 (1995); *State v. Hoffman*, 116 Wn.2d 51, 83, 804 P.2d 577 (1991); *State v. Giffing*, 45 Wn.App. 369, 374-375, 725 P.2d 445, 449 – 450 (1986); *State v. Lanning*, 5 Wn. App. 426, 437-439, 487 P. 2d 785 (1971), (driving the victim to a lonely spot and bringing a knife indicated premeditation); *State v. Luoma*, 88 Wn.2d 28, 33, 558

P.2d 756 (1977), cited with favor in *Bingham*, 105 Wn.2d at 824, 719 P.2d 109, (transporting the victim 5 miles supported a finding of premeditation). Here the mere opportunity to deliberate while pulling the trigger as fast as a person could fire the gun does not support a finding of premeditation. Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation. Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection. *Bingham*, 105 Wn.2d at 826, 719 P.2d 109. The rapidity of the event and the surprise and panic that followed the accidental discharge of the first shot belies a finding of premeditation.

Even construing the evidence cited in the facts above in the light most favorable to the State, there was insufficient evidence for a reasonable jury to find the State proved premeditation, requiring more than a moment in time, beyond a reasonable doubt. There is no evidence that at any time Contreras said anything that supports a finding that the murder of Luis Bernal was the result of going through the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time. *See Brooks* at 876. Because the State failed to establish beyond a reasonable doubt that Contreras premeditated the death of Luis Bernal, his conviction for one count of first-degree murder must be reversed.

#### **Issue No 4: The Court Improperly Allowed The State To Bolster Witness Testimony**

Mr. Contreras argues the State engaged in misconduct when it repeatedly elicited testimony from its lay witnesses Luhtala, Kowalski, and Mayhall, Atofao and Klepach on their fear or reluctance to testify and then argued in closing that Contreras was banking on witness reluctance, but that. RP 12/20/07 p. 42, RP 1397, 1399, 1178, 1655. The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a manifest abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 400-01, 945 P.2d 1120 (1997); *State v. Crenshaw*, 98 Wash.2d 789, 806, 659 P.2d 488 (1983). However, a prosecutor cannot bolster a witness' testimony by eliciting a statement from the witness to show the witness is fearful of testifying, without an attack on the witness' credibility. *State v. Bourgeois*, 133 Wn.2d 389, 400-01, 945 P.2d 1120 (1997). The evidence is impermissible on direct examination since it could lead the jury to view a witness' fear as substantive evidence of guilt (that the defendant has somehow threatened the witness.). *Id.* at 400. As stated by the Bourgeois court, "While we feel certain that the testimony of a witness regarding his or her fear or reluctance to testify might have a bearing on a juror's evaluation of that witness's credibility, such evidence might also have another effect. It

could lead the jurors to conclude that the witness is fearful of the defendant. In that sense, the testimony would have to be viewed as substantive evidence of the defendant's guilt because evidence that a defendant threatened a witness is normally admissible to imply guilt. *State v. Kosanke*, 23 Wash.2d 211, 215, 160 P.2d 541 (1945).” *Id.* at 400. “A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.” *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950).

Moreover, repeatedly asking witnesses if they were telling the truth is another form of improper vouching. *State v. Green*, 119 Wn. App. 15, 24, 79 P.3d 460 (2003) citing, *Jessup*, 31 Wn. App. at 316, 641 P.2d 1185; See also *Roberts*, 618 F.2d at 536 (“A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful.”) In *State v. Green*, *supra*, while the court agreed that an immunity agreement would have been admissible after the witness’s credibility was attacked, the court also agreed that the provisions that Cole “testify truthfully” should have been redacted because these provisions were prejudicial and improperly vouched for Cole's veracity.

Here the State asked Klepach if she was afraid of testifying. RP 1491-92. They also elicited from her that she was being truthful RP 1483. The State elicited from Mayhall he was in fear for life, but, even so he wants “the truth” known. RP 1178, 1194. The State elicited from Kowalski she was afraid of Contreras based on what she was told by others (RP 12/20/07 p. 42-43) and again asked her if she was being truthful. RP 766. The State also asked Atofau’s girlfriend if she was afraid of retaliation 1397, 1399, and as well whether was affecting her memory.

Unlike *Bourgeois*, the bolstering evidence was not harmless because the State’s case was circumstantial and hinged on the jury’s determination of the credibility of the State’s eye witnesses, Kowalski, Mayhall and Atofau. So unlike the unlike situation in *Bourgeois* where the reviewing court found the three witnesses the State improperly bolstered were not central to the State’s case, the same cannot be said here. The State engaged in this improper bolstering of credibility because its eye witnesses had significant credibility issues at the time of their testimony –Kowalski was incarcerated at Purdy (RP 726); Mayhall was in violation of his probation and has numerous crimes of dishonesty (RP 1178) and Atofau was incarcerated and has crimes of dishonesty. RP

1309. Additionally, Luhtala admitted to heavy drug use during the pertinent time period. RP 1387, 1395.

Alternatively, such statements were not admissible as prior consistent statements offered to rebut an express or implied charge of recent fabrication. See ER 801(d)(1)(ii), which provides:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if-

(1) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, ...

A statement that merely corroborates a witness' earlier testimony is generally inadmissible as irrelevant under ER 401-03. *State v. Bargas* 52 Wn.App. 700, 702-703, 763 P.2d 470, 471 - 472 (1988); *State v. Harper*, 35 Wash.App. 855, 857, 670 P.2d 296 (1983), *review denied*, 100 Wash.2d 1035 (1984). However, the rule allows admission of a witness' out-of-court statements to rehabilitate testimony that has been impugned by a suggestion of recent fabrication. *State v. Stark*, 48 Wash.App. 245, 249, 738 P.2d 684, *review denied*, 109 Wash.2d 1003 (1987). Cross examination alone does not justify admission of prior consistent

statements; the questioning must raise an inference sufficient to allow counsel to argue the witness had a reason to fabricate her story later. *State v. Bargas*, 52 Wash.App. at 702-703; *State v. Dictado*, 102 Wash.2d 277, 290, 687 P.2d 172 (1984). The prior statement must have been made *before* a motive to falsify has arisen. *State v. Stubsjoen*, 48 Wn. App. 139, 146, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). Here, there was no evidence to suggest cross examination would elicit recent fabrication testimony and the State on direct brought out the stories told by its witness had not changed over time. But in this case no witness said they were changing their testimony because they were threatened or afraid of the defendant. RP 1399 (Luhtala- memory not affected by being afraid), RP 1231- Mayhall story to investigating officers and prosecutors consistent with what said on the stand; RP 766 – Kowalsi - testimony truthful to police and on stand. Here, the State argued that the witnesses testified consistent with their prior testimony. thus it was not admissible under this rule evidence either. RP 1655.

The State also had witnesses Atofau and Klepach invoke their decision not testify in front of the jury, even though they knew these witnesses did not want to testify. RP 1054, 1060, 1087, 1089; 1311, 1312, 1320. Also determinative to this issue is the general rule of law that holds the claiming of the privilege against self-incrimination under the fifth

amendment to the United States Constitution and article I, section 9 of the Washington Constitution is not evidence and a jury may not draw any inferences from it. *State v. Smith*, 74 Wn.2d 744, 757, 446 P.2d 571 (1968), vacated in part on other grounds, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), overruled on other grounds by *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975); see *United States v. Duran*, 884 F.Supp. 573, 574-75 (D.D.C.1995). Most cases in this area involve improper acts by prosecutors because invoking the privilege is not evidence, but the impact and prejudice was not lost on the court, nor presumably the jury. The court cited this as one of the reasons why she was not dismissing the charges after the State deliberately violated a court ruling excluding gang evidence, because the impact of the fear testimony, and the invocation of the right not to testify undercut a claim of prejudice.

**Issue No 5: Testimony That The Canine Tracking Dog Followed A Scent Produced By The Fear Of Apprehension And Thus Located Contreras Was An Impermissible Comment On Contreras' Guilt.**

No witness may testify as to an opinion on the guilt of the defendant, whether directly or inferentially. *State v. Farr-Lenzini*, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993); *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992).

Such an opinion violates a defendant's constitutional right to a trial by an impartial jury and his or her right to have the jury make an independent evaluation of the facts. *Farr-Lenzini*, at 460; *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985); *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Improper opinion testimony is problematic because of its ability to unduly influence the jury. 'Particularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the factfinder and thereby deny the defendant of a fair and impartial trial.' *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985).

The admission of such testimony is of constitutional magnitude because it invades the province of the jury, and therefore, it may be raised first time on appeal. *Jones*, 71 Wn. App. at 813; *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988); *State v. Saunders*, 120 Wn. App. 800, 811, 86 P.3d 1194 (2004) RAP 2.5.<sup>7</sup>

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<sup>7</sup> As recently noted in *State v. Ra*, 144 Wn. App. 688, 175 P.3d 609 (1008) "Generally, to preserve an issue for appeal, a party must object to inadmissible evidence when it is offered during trial even when the trial court has already excluded it through a pretrial order. *State v. Weber*, 159 Wash.2d 252, 272, 149 P.3d 646 (2006) (citing *State v. Sullivan*, 69 Wash.App. 167, 172, 847 P.2d 953 (1993)), *cert. denied*, --- U.S. ---, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007). This gives the trial court the opportunity to determine whether the evidence is covered by the pretrial motion and, if so, whether the court can cure any potential prejudice through an instruction. *See Weber*, 159 Wash.2d at 272, 149 P.3d 646. There is, however, an exception to the objection requirement where "an unusual circumstance exists 'that makes it impossible to avoid the prejudicial impact of evidence that had previously been ruled inadmissible.'" *Weber*, 159 Wash.2d at 272, 149 P.3d 646 (quoting *Sullivan*, 69 Wash.App. at 173, 847 P.2d 953).

Accordingly, assuming improper opinion testimony occurred, the first prong of the test has been satisfied. Within the meaning of RAP 2.5, ‘manifest’ means ‘unmistakable, evident or indisputable.’ *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Manifest errors are those that had ‘practical and identifiable consequences in the trial of the case.’ *Lynn*, 67 Wn. App. at 345. Here, assuming error exists, these errors are manifest.

An opinion as to the guilt of a defendant is particularly prejudicial and improper where it is expressed by a government official, such as a sheriff or police officer. *State v. Carlin*, 40 Wn. App. at 701, (a police officer’s testimony that a police dog tracked defendant by following a fresh “guilt” scent was reversible error); *State v. Haga*, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973) (an ambulance driver’s testimony that the defendant’s reaction to news of his wife’s death was unusually “calm and cool” impermissibly implied his opinion that the defendant was guilty.) As a police officer, Tim Fredericks, had a ‘special aura of reliability.’ *Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278.

Here, The State called Officer Fredericks to testify regarding his canine dog track of a scent that lead to Mr. Contreras, whom he described as the “suspect.”. RP 982, 986-89. Contreras objected to Police Officer Frederick’s testimony that his tracking dog is able to follow scents

generated by a suspect's enhanced scent in times of great emotional distress from fear of apprehension as an improper opinion of guilt. RP 980, 995. The court rejected defense counsel's offered curative instruction. RP 997. However, when the court requested defense counsel craft a different instruction, defense indicated the testimony was so prejudicial that the defendant was placed between a rock and a hard place such that by calling the jury's attention to the statement with a curative instruction could not alleviate the harm. RP 1000. Just as the opinion of tracking a guilt scent was reversible error in *State v. Carlin*, 40 Wn. App. at 701, Officer Frederick's testimony improperly invaded the province of the jury and the prejudicial impact of such testimony is 'unmistakable, evident or indisputable,' *Lynn*, 67 Wn. App. at 345, 835 P.2d 251, requiring Mr. Contreras' conviction be reversed and he be afforded a new trial.

**Issue No 6: The Trial Court Denied Contreras A Fair Trial When It Impermissibly Conveyed Its Opinion Regarding Witness Testimony, Evidence And The Defense Case.**

Article 4 § 16 of the Washington constitution prohibits the court from commenting on the evidence at trial:

Judges shall not charge juries with respect to matter of fact, nor comment thereon, but shall declare the law.

The purpose of Article 4 § 16 is to keep separate the respective functions of the judge and jury and “to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted.” *Heitfield v. Benevolent & Protective Order of Keglers*, 36 Wn. App. 685, 689, 200 P.2d 655 (1950). A judge makes an impermissible comment on the evidence when she inaccurately states the law applicable to an issue in the case. *State v. Thomas*, 166 Wn.2d 380, 391, 208 P.2d 1107 (2009), citing, *City of Seattle v. Smiley*, 41 Wn.App. 189, 192, 702 P.2d 1206 (1985).

Here, defense timely objected to the court’s statement regarding its evaluation of Ms. Klepach’s testimony (RP 1496) but even if it had not, because a comment on the evidence is constitutional error it may be raised for the first time on appeal. *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968); *State v. Hansen*, 46 Wn. App. 272, 300, 730 P.2d 706 (1986). Whether or not the statement was intended by the court as a comment is irrelevant. *Lampshire*, 74 Wn. 2d at 892.

A statement by the judge is a comment on the evidence “if it conveys or indicates to the jury a personal opinion or view of the trial judge regarding the credibility, weight, or sufficiency of some evidence introduced at trial.” *State v. Painter*, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980), *rev. denied*, 95 Wn.2d 1008 (1981). A comment is

constitutional error where it expresses “the court’s attitudes toward the merits of the case or the court’s evaluation relative to a disputed issue is inferable from the statement.” *State v. Hansen*, 46 Wn. App. at 300 (emphasis in original).

Comments by the court must be reviewed in the light of the facts and the circumstances of the case. *State v. Painter*, 27 Wn. App. at 715, *State v. Jacobsen*, 78 Wn.2d 491, 495, 447 P.2d 884 (1970).

Here the court commented on the credibility and the court’s assessment of the State’s most crucial witness, Ms. Klepach, on whether she voluntarily made statements to investigating police officers. RP 1496-1497. These statements included statements she attributed to Mr. Contreras. The editorial comment was made in the presence of the jury and conveyed the court’s opinion of the case and the defense. Here Ms. Klepach told the State in response to its question if she voluntarily turned over items from Contreras to the police, “as voluntary as you can, when if you don’t help them, you end up going to jail do you understand? I had to do it. I had to do it to not go to jail, when people are threatening taking you away from your kids and your life and your work ...” RP 1496. The State persisted, in again asking if she turned them over voluntarily. The defense objected. RP 1496. The court overruled the objection saying the question was not answered and directed her to answer the question –

telegraphing the court's opinion that her answer on the nature of what she perceived as the consequences of not cooperating with law enforcement was the "wrong" answer. After the court overruled defense objections, and told the witness what she thought of the answer, the State again asked the question, and the chastised witness gave the "right" answer.. RP 1496-97.

This comment was made to while Ms. Klepach was testifying on direct after she had been held in jail over the holidays on a material witness warrant. RP 1088-1090. The state's witness testified in response to repeated questioning on whether her taped statement made to police was voluntary that it was as voluntary as it could be considering the circumstances, including her belief they would arrest her. RP 1496. The court commented on this evidence and expressed her evaluation of the witness and the witness testimony.

Significantly, the court later declined to give a defense requested jury instruction on the limited use of inconsistent statements, permitting the State argue Ms. Klepach's inconsistent statements were substantive evidence. See Argument 1. The comment and rulings were overwhelmingly prejudicial. The trial court's comment, although perhaps unintentional, denied Contreras a fair trial and require reversal of his convictions.

**Issue No 7 - Cumulative error deprived Contreras of a fair trial.**

Even if none of the errors alleged by the defendant on appeal alone mandate reversal, where it appears reasonably probable that the cumulative effect of those errors materially affected the outcome of the trial, a reversal of the convictions is required. *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998), citing *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994); see also *State v. Coe*, 101 Wn.2d 772, 789, 694 P.2d 668 (1984); *State v. Oughton*, 26 Wn. App. 74, 85, 612 P.2d 812 (1980).

Contreras argues that cumulative error deprived his right to a fair trial. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004). Instead, the combined errors effectively denied the defendant a fair trial. *Hodges*, 118 Wn. App. at 673-74. 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 27 296, 332, 868 P.2d 835, 870 P.2d 964, cert. denied, 513 U.S. 849 (1994).

A cumulative error analysis depends on the nature of the error. Constitutional error requires reversal unless we are convinced beyond a

reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Welchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). Constitutional error is harmless when overwhelming evidence supports the conviction. *Welchel*, 115 Wn.2d at 728, 801 P.2d 948. Non-constitutional error requires reversal only if it is reasonably probable that the error materially affected the trial's outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Because this case involves both constitutional and non-constitutional errors, the reviewing court applies the more stringent constitutional error standard in evaluating the cumulative effect of any errors.

Although some of the evidentiary errors, standing alone, might not warrant reversal, their cumulative effect requires a new trial. The admission of evidence of gang affiliation, the innuendo of witnesses being afraid and invoking the Fifth Amendment privilege improperly allowed the jury to infer that he was a bad character and thus more likely to have murdered his friend Bernal. The admission of Klepach's out of court statements without the benefit of a limiting instruction supplied admissions and possibly a motive otherwise absent and increased the probability that the jury would infer guilt from the circumstantial evidence of guilt. Finally, the opinions on guilt expressed by an investigating officer invaded the fact finding role of the jury. In this case the untainted

evidence is so entangled with the State's use of improperly admitted evidence as to be inextricable.

The State relied so extensively on the improperly admitted evidence that this court is unable to determine whether the jury verdict would have been the same absent the errors. It is reasonably possible that the improperly admitted evidence took away reasonable doubts that the jury may have had about Contreras' guilt. Absent the erroneously admitted evidence, there was not overwhelming evidence of Contreras' guilt of premeditated first degree murder. Rather, the jury reasonably could have reached a different outcome in this largely circumstantial case. Thus, this court must reverse and remand for a new trial.

#### **D. CONCLUSION**

For the arguments put forth above, Contreras respectfully requests this court to reverse his convictions.

DATED this 13<sup>th</sup> of August, 2009.

Respectfully submitted,

By Mary Kay High  
MARY KAY HIGH  
WSBA No. 20123

CERTIFICATE OF SERVICE

Mary Kay High hereby certifies under penalty of perjury under the laws of the State of Washington that on the 13<sup>th</sup> day of August, 2009, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

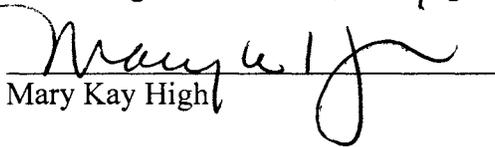
Mr. Abel Contreras  
DOC # 315819  
Clallam Bay Corrections center  
1830 Eagle crest Way  
Clallam Bay, WA 98326-9723

And, I hand delivered a true and correct copy of the Brief of Appellant and the report of Proceedings to which this certificate is attached, to

Ms. Kathleen Proctor  
Pierce County Dep. Pros. Atty.  
946 County-City Building  
Tacoma, WA 98402

And I delivered via email this brief to the Office of Public Defense.

Signed at Tacoma, Washington this 13<sup>th</sup> day of August 2009.

  
Mary Kay High