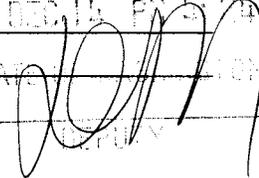


NO. 37259-2

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COUNT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY: 

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

STATE OF WASHINGTON, RESPONDENT

v.

ABEL EDUARDO CONTRERAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant

No. 06-1-05904-4

BRIEF OF RESPONDENT

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

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7. Is defendant entitled to relief under the cumulative error doctrine where he is unable to show prejudicial error?

B. STATEMENT OF THE CASE.

1. Procedure

On December 15, 2006, the State charged defendant Abel Contreras with one count of murder in the first degree, one count of murder in the second degree, three counts of unlawful possession of a firearm in the second degree, and one count of attempting to elude a police vehicle. CP 1-4. The murder charges also had firearm enhancements. CP 1-4.

The case was assigned to the Honorable Judge Beverly Grant. RP 3.¹ Pre-trial motions were started on November 9, 2007. RP 3. The court accepted the stipulation that defendant made a knowing and voluntary waiver in regards to his CrR 3.5 statements. CP 11-13, RP 111. The court denied the defense motion to sever one of the possession of a firearm counts as well as the attempting to elude charge. RP 278-290. The court

¹ The State will refer to the verbatim report of proceedings as follows:

Volumes 1-17, including 13A, 13B, 14AM session and 14PM session are sequential in pagination and will be referred to as RP. The three volumes of voir dire, 12/5/07, 12/6/07 and 12/10/07 start over at page 1 but are sequentially paginated to each other and will be referred to as Voir Dire RP. The remaining non-sequentially paginated proceedings will be referred to as: 11/27/07 RP, 12/11/07 RP, 12/12/07 RP (this is the duplicate volume 11), 12/17/07 RP, 12/20/07 RP, and 1/11/08 RP.

did grant the motion to sever defendant's trial from the trial of his co-defendant Anthony Sakellis. RP 296.

The court ruled on many pre-trial motions including the defense motion to exclude mention of defendant's gang association. RP 345. The State stipulated that the mention of gang association would be excluded. RP 361. Voir Dire commenced on December 5, 2007. Voir Dire 3.

Defendant stipulated that he was prohibited from possessing a firearm. RP 1003-4, CP 63-64.

Defense counsel moved for a mistrial toward the end of the trial based on a statement made by one of the State's witnesses. 12/20/07 RP 55, 63. The trial court delayed ruling on the motion for a mistrial but did inform the jury that the question and answer at issue were to be stricken. 12/20/07 RP 60. The court later denied the defendant's motion for mistrial. RP 1566-68.

The jury found defendant guilty of murder in the first degree, murder in the second degree, three counts of unlawful possession of a firearm in the second degree and attempting to elude. CP 160-166, RP 1714-1715. The jury also found that defendant was armed with a firearm for the purposes of both murder counts. RP 1714.

The court held sentencing on January 11, 2008. 1/11/08 RP 4. The conviction for murder in the second degree was vacated and dismissed. 1/11/08 RP 6. Defendant was determined to have an offender score of six. 1/11/08 RP 5. The court sentenced defendant to 416 months, the high end

of his sentencing range, with 60 months for the firearm enhancements. CP 178-190, 1/11/08 RP 30. The court sentenced defendant to 28 months apiece on the three firearm charges and 14 months on the attempted elude with the time to run concurrent. CP 178-190, 1/11/08 RP 31. Defendant filed this timely appeal. CP 169, 1/11/08 RP 33.

2. Facts

Libby Wagner went to her son's apartment on December 11, 2006. RP 666, 668. Her son, the victim, Luis Bernal was sleeping. RP 666. Kelly Kowalski, Roman Atofau and defendant, Abel Contreras, were in the apartment as well. RP 676-7, 683.

Kelly Kowalski was a good friend of the victim, or Taco as he was called. RP 728. She also knew Tony Sakellis or ScarFace and the defendant or Lalo. RP 730, 731. When defendant arrived at the victim's that day, he had a gun with him. RP 736. Defendant showed the gun to people at the apartment. RP 737. Defendant didn't threaten anyone initially and eventually put the gun away. RP 738. Jonathan Mayhall or Lanky also showed up at the apartment. RP 740. Mayhall showed up with Sakellis. RP 743. Ms. Kowalski testified that she did methamphetamine with the victim and Mayhall that day. RP 746. She also purchased alcohol. RP 748.

Sakellis was the first to pull out a gun. RP 754. Sakellis pointed the gun at the victim's head. RP 754. Sakellis was holding the gun that

defendant had walked in with. RP 756. Sakellis told the victim that he owed him money. RP 756. Defendant also had a gun. RP 757.

The victim said he was bleeding. RP 759. Ms. Kowalski saw the victim put his hand to his head and his hand came away bloody. RP 759.

Ms. Kowalski testified that she heard a shot, the victim fell to the ground and that there was a hole in the ceiling. RP 760-61. Ms. Kowalski was scared so she ran out of the apartment. RP 761. Atofau was in front of her and Sakellis was next to her. RP 761. Ms. Kowalski heard more gunshots behind her. RP 762. Because she was on a lot of drugs and scared, Ms. Kowalski did not go to the police. RP 764.

Jonathan Mayhall knew the victim and was at his apartment on the date of the incident. RP 1175-6. He arrived with Sakellis who he described as his drug dealer. RP 1176-7. Mayhall witnessed defendant put a gun, a chrome revolver, on the bottom shelf of the coffee table. RP 1204. Atofau had an H&K 9mm black gun. RP 1208. Sakellis had the revolver and defendant had Atofau's gun. RP 1214-5. Sakellis pointed the gun at the victim and then backhanded him with it. RP 1213, 1216. Defendant then hit the victim in the back of the head with the butt of the gun. RP 1217. The victim screamed in pain, there was blood and a shot went off. RP 1218. Atofau fled. RP 1221. Mayhall and Sakellis got to the door at the same time. RP 1224. He heard two or three more gunshots. RP 1226. Mayhall saw defendant step back and draw up his

hand that was holding the gun. RP 1248. The gun was pointed in a downward motion toward the victim. RP 1249.

Roman Atofau was also at the victim's apartment. RP 1311. At some point during the day, he and defendant went for a ride. RP 1313. Defendant was driving a white Caprice. RP 1317. Defendant had a .36 silver revolver with him on the date of the incident. RP 1401-2. Defendant told him that the victim was falling back on business. RP 1408. The victim was in debt to defendant by \$3,000 or \$6,000. RP 1409. Defendant said he was going to talk through money issues when they got back to the victim's. RP 1412. Defendant handed the gun to Sakellis and Sakellis pointed the gun at the victim. RP 1420. Sakellis said he wanted his shit and then pistol whipped the victim. RP 1420. Defendant had a black semi-automatic gun and hit the victim in the head with it. RP 1424. The victim fell off the computer chair. RP 1425. Atofau pushed Ms. Kowalski out of the way and didn't see anyone else as he was fleeing. RP 1426-7. He did see defendant go toward the victim with the gun. 12/20/07 RP 29.

Tehra Luhtala testified that she picked up Atofau on the date of the incident and he was completely distraught. RP 1383-4. He told her that the victim was dead and that someone had killed him. RP 1386.

Terry Pfeiffer was stopped at the stoplight at 40th and McKinley when he heard what sounded like two pops. 12/12/07 RP 9-10. He saw two males exit the building. 12/12/07 RP 10, 14.

Jamie Velasquez lived next door to the victim. 12/12/07 RP 22-3, 25. He heard three gunshots with the first and second shots being close together and then a third shot. 12/12/07 RP 30. Velasquez went next door to the victim's and saw the victim lying on his side bleeding from the head. 12/12/07 RP 62.

Police officers arrived on the scene. The victim's body was lying on the floor. 12/12/07 RP 78, 95, 130, RP 876, 1279. There was drug paraphernalia on the table. 12/12/07 RP 79. Officer Antush noticed gunshots wounds to the victim and blood around the victim's head. 12/12/07 RP 79. Two entrance wounds made by bullets were visible in defendant's shirt. 12/12/07 RP 99-100. Spent shell casings were observed at the scene. 12/12/07 RP 137.

The holes in the victim's shirt were consistent with bullet wounds. RP 815. The victim had three bullet holes in his back and injury to his head. RP 816. A bullet hole was also found in the ceiling. RP 887. Four shell casings were collected from the scene. RP 833-36. All four bullets were fired from the same gun. RP 1158. An H&K weapon could have fired the bullets. RP 1159.

The victim had visible fracturing of the skull. RP 1335. The injury was serious but not fatal on its own. RP 1335. The laceration and the fracture of the skull were consistent with someone being struck with the butt of a gun. RP 1339. The victim also had three entrance type bullet wounds and one exit type. RP 1342. One wound was in the upper back,

one in the mid-back and one in the lower back. RP 1345, 1348, 1349.

Death was caused by multiple gunshot wounds. RP 1360.

Police eventually tried to apprehend defendant and Sakellis for the murder of the victim. RP 909-10. On December 13, 2006, officers tried to stop defendant's white Chevy Caprice. RP 910, 12/20/07 RP 48. .

Officers tried to stop defendant in his vehicle but defendant fled from officers as soon as they turned on their lights. RP 910, 12/20/07 RP 48-49.

Defendant fled at a high rate of speed, at least 60 mph, through a residential neighborhood where the speed limit was 25 mph. RP 915.

Defendant failed to stop at a stop sign and drove up onto the sidewalk in an effort to get away from the pursuing police vehicles. RP 916-7,

12/20/07 RP 49. At one point, officers had to drive into oncoming traffic to keep up with defendant who was traveling at around 80 mph. RP 918-

19. The pursuit of defendant ended in a crash. RP 920. Defendant then fled from the vehicle and ran up a hillside. RP 921. A K-9 officer was

called in to track defendant. RP 922-23. Defendant was captured by the K-9 officer about 10-15 minutes after the containment officers arrived. RP 924-25.

Officer Fredericks and his K-9 partner Clao, arrived to track defendant. RP 974, 983. Defendant had climbed over a fence and that was the starting point for Clao. RP 985. Clao immediately picked up the scent and located defendant in a juniper bush. RP 986-88.

Defendant initially said he was the passenger in the car and that the driver didn't stop because there was an SKS rifle in the car. RP 926, 1020, 12/20/07 RP 53. Defendant then said he was going 150 mph and was just trying to get to the convenience store when they tried to stop him. RP 927, 12/20/07 RP 53. Defendant stated, "You're not going to believe this, but I have a conscious. If I hit and killed somebody, I would have stopped." 12/20/07 RP 54. A rifle was found in the backset of the vehicle. RP 1113.

Defendant told his girlfriend, Jennifer Klepach, that the victim was dead. RP 1476. He told her that the victim and Sakellis got in fight and that Sakellis hit the victim in the back of the head and the gun went off by accident. RP 1478. Defendant told her the victim made gargling sounds. RP 1478. Defendant also told her he got his left arm lifted up and shot three times. RP 1581. Defendant admitted to her that he killed the victim but he was laughing while he said it. RP 1486. Defendant then said Sakellis did it. RP 1486. Defendant told her there were two 9mm guns at the victim's house that day. RP 1479. Defendant said that he and Sakellis had thrown the guns away on the Hilltop. RP 1479.

Defendant changed his story several times. RP 1028-29. Defendant originally said he had driven by the victim's house and thought it was being raided because of the illegal activity that took place there. RP 1021. Defendant said there were stolen goods, drugs and pretty girls at the victim's apartment. RP 1021-22.

Defendant admitted he was at the apartment but originally said he left after the victim's mom left. RP 1022. He said he left in the victim's car with Atofau. RP 1023. He said his girlfriend then picked him up but he couldn't remember her last name or where she lived. RP 1024. Defendant did say that he and Sakellis were good friends. RP 1026.

Defendant eventually admitted to being in the apartment in the afternoon. RP 1029. At first, he said he was in the bathroom, heard gunshots and came running. RP 1036. He said he heard four shots. RP 1037. Defendant then said that he and Atofau were mad at the victim. RP 1037. He said the victim had stolen money from Ms. Kowalski's purse and that the victim owed him money. RP 1036.

Defendant then told the police that he hadn't been in the bathroom but had actually been in the living room. RP 1040. Sakellis said, "let's get down to business." RP 1040. An argument ensued. RP 1040-1, 12/17/07 RP 5. Defendant said he ran and that Ms. Kowalski was right in front of him. 12/17/07 RP 6. The gun that he had come in with, a .38 colt revolver, had ended up with Sakellis. 12/17/07 RP 7. Defendant had made it clear to Sakellis when he walked in that the gun was there for him if he needed it. 12/17/07 RP 7.

Sakellis hit the victim and the victim was bleeding from the head. 12/17/07 RP 11-12. He wanted him to feel the steal. 12/17/07 RP 16. It was all about money. 12/17/07 RP 16.

Defendant said the money the victim owed him didn't matter but then said he was angry. 12/17/07 RP 11. Defendant also told the police that you are doing someone a favor when you kill them. 12/17/07 RP 17. Defendant stated, "I had a lot of involvement in there, but I can assure you when we all ran out, he was still alive." "I didn't put no bullets in him." 12/17/07 RP 17.

Defendant then admitted that he had hit the victim alongside the head with Atofau's H&K gun. 12/17/07 RP 20. Defendant said he hit the victim on the head and the gun went off and fired into the ceiling. 12/17/07 RP 20. Ms. Kowalski ran out and so did Mayhall and everyone else followed. 12/17/07 RP 20. The victim was trying to get up. 12/17/07 RP 21. Defendant left the gun in the living room and claimed he left the victim alive. 12/17/07 RP 21-2.

Defendant said he was going to spend the rest of his life in prison. 12/17/07 RP 9.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING STATEMENTS MADE BY DEFENDANT AS SUBSTANTIVE EVIDENCE WHEN THEY WERE ADMISSIONS BY PARTY OPPONENT.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, *review*

denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

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

ER 801(d)(2) provides:

Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party,

or (v) a statement by a co-conspirator of a party during the course and furtherance of the conspiracy.

The court acknowledged that the statements made by Ms. Klepach to the police were admissions by defendant. RP 1510. Defendant had talked to Ms. Klepach the night of the murder and had told her what had happened. RP 1477-81. She relayed those statements to the police. RP 1481-1483. Ms. Klepach never denied making those statements, she just indicated that since making the statements to the police she had talked to defendant many, many times and might have misunderstood him. RP 1489. However, she continued to maintain that what she had said that night were her statements and was what she had actually believed defendant had told her. RP 1485-1491.

Defendant tries to analyze these statements as prior inconsistent statements both at the trial level and on appeal. Defendant cites *State v. Sau*, 115 Wn. App. 29, 60 P.3d 1234 (2003) for the proposition that defendant's statements to Ms. Klepach's can only be used for impeachment purposes and not as substantive evidence. However, *Sau* is distinguishable since the witnesses in that case denied that the statements given previously were true and the statements were admitted only for impeachment purposes. *Id.* at 33-35. Had the witnesses in that case not made inconsistent statements in court, the out of court statements would not have been admitted.

In the instant case, the statements were not sought as impeachment, but were sought from the beginning to be introduced as substantive evidence of defendant's involvement in the crime. RP 1484. Ms. Klepach was not put on the stand to be impeached; she was put on the stand to tell the jury about defendant's confession as defendant had confessed to her. RP 1505.

Further, the statements in the instant case were not inconsistent. The witness admitted that she made the statements and that even as she sat in court, she believed that when she had made those statements, the statements were true. RP 1491. As the State argued below, the issue here was not prior inconsistent statements. RP 1507-13. The issue here was what defendant confessed to Ms. Klepach the night of the murder. RP 1507-13. These are statements by party opponent and were properly admissible as such. The court did not abuse its discretion in denying the defense request for a limiting instruction.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO DISMISS WHERE THE SINGLE, ISOLATED STATEMENT WAS NOT SO PREJUDICIAL AS TO DENY DEFENDANT A FAIR TRIAL.

CrR 8.3(b) allows a judge to dismiss charges against a defendant only where arbitrary actions or governmental misconduct has prejudiced the rights of the defendant.

Before a court may dismiss a charge under CrR 8.3(b), two factors must be met. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). First, a defendant must show that the prosecutor acted arbitrarily or committed misconduct. *Id.* Prosecutorial mismanagement qualifies as governmental misconduct. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993).

Second, the defendant must prove that this action prejudiced his or her right to a fair trial. *Michielli*, 132 Wn.2d at 240. Prosecutorial misconduct or mismanagement does not warrant dismissal under this rule if it does not prejudice the defendant. *State v. Teems*, 89 Wn. App. 385, 388, 948 P.2d 1336 (1997). The defendant has a right to a fair trial, but that “right does not include a right to an error free trial.” *State v. Ciskie*, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988). The trial court’s power to deny a motion to dismiss is discretionary and is only reviewable for a manifest abuse of discretion. *Blackwell*, 120 Wn.2d at 830. The trial court’s decision should be reversed only if it was manifestly unreasonable, or based on untenable grounds, or made for untenable reasons. *Id.* A new trial is necessitated only when the defendant “has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.” *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997) (citing *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); see also *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968) (“Something more than a possibility of prejudice must be shown to warrant a new

trial.”)). Dismissal is an extraordinary remedy and its appropriateness is fact specific, to be determined on a case by case basis. *See State v. Ramos*, 83 Wn. App. 622, 637, 922 P.2d 193 (1996), *State v. Coleman*, 54 Wn. App. 742, 749, 775 P.2d 986 (1989).

In the instant case, the State stipulated that they would not mention defendant’s gang association. Officer Shafner was called toward the end of the State’s case. At one point, Officer Shafner was asked what other statements defendant had made to him. 12/20/07 RP 54. After the officer relates a direct quote from defendant, he than says, without being asked, “And we talked to him generally about his gang affiliations.” 12/20/07 RP 54. Defense counsel immediately objected and the jury was excused. 12/20/07 RP 54. When the jury returned, the court told the jury that the question and answer were to be stricken and that the jury was not to consider them. 12/20/07 RP 60.

The trial court did not abuse its discretion in denying defendant’s motion. The State admitted that is had not informed the officer of the court’s order, but also indicated that it clearly had not meant to elicit such testimony. 12/20/07 RP 56, CP Supp. 198-228. Nevertheless, the State took responsibility for the statement coming in.

However, contrary to defendant’s assertions, this statement was not so overly prejudicial as to warrant a mistrial and dismissal. Defendant relies on *State v. Morsette*, 7 Wn. App. 783, 502 P.2d 1234 (1972) in arguing that the isolated statement above was the type of information that

was so prejudicial in nature that a curative instruction could not have erased it from the minds of the jury. *Morsette* is distinguishable. In *Morsette*, a pair of pants that was associated with the crime was testified to in length by the State's expert. *Morsette*, 7 Wn. App. at 787-8. In addition, witnesses said the pants were worn by the defendant. *Id.* at 787. However, it was discovered the pants belonged to another man and the State moved to withdraw the exhibit. *Id.* at 788. The court instructed the jury to disregard the exhibit and to erase it from their minds. *Id.* at 788-9. The court found this extensive testimony was too prejudicial to be cured by an instruction. *Id.* at 789.

Defendant also relies on *State v. Miles*, 73 Wn.2d 67, 436 P.2d 198 (1968). In *Miles*, the police officer read into the record a telegraph that indicated that defendant was headed to Spokane to duplicate a robbery committed in Grandview. *Id.* at 69. This introduced evidence of an unrelated crime. *Id.* It put into the minds of the jury that defendant had committed other robberies. *Id.* at 70. The court found that this kind of evidence was too prejudicial to be cured by a jury instruction.

The instant case is distinguishable from *Morsette* and *Miles*. Unlike in *Morsette*, there was not extensive testimony about defendant's gang affiliations. In fact, the statement made by Officer Shafner, does not reference defendant's membership in any gang. In addition, unlike in *Miles*, there is no indication that defendant is in a gang or that he had committed any prior bad acts. The single, isolated statement indicates that

the officers talked to defendant in general about his gang affiliation but does not say he had any gang affiliations. The statement is general enough and brief enough that a curative instruction such as the one given was the appropriate remedy in this case.

The instant case is more similar to *State v. Slone*, 133 Wn. App. 120, 134 P.3d 1217 (2006). In that case, there was a pre-trial ruling excluding evidence of defendant's refusal to take field sobriety tests. *Id.* at 123. At trial, the officer testified that he asked defendant if he would perform field sobriety tests. *Id.* The officer did not mention whether or not the defendant had performed the tests. *Id.* at 129. The court found no abuse of discretion in the trial court ruling that the testimony was a non-prejudicial harmless error. *Id.* at 129-30. As in *Slone*, the statement made by the officer was not specific in terms of defendant's gang affiliation. It was a non-prejudicial, harmless error. The trial court did not abuse its discretion in denying the motion for mistrial.

Defendant goes on to argue that gang evidence was adduced at other times in the trial. However, the fact that Detective Krause testified that he specializes in gang crimes and homicides does not add to defendant's argument. RP 1278. Detective Krause was not asked anything about gangs or his experience with them, he was only asked about the homicide that he was investigating. RP 1278. Defendant did not object to this statement nor was this statement ever brought up as an issue at the trial court level. *See* CP 79-89. The existence of this statement does

not undercut the analysis above of the brief statement made by Officer Shafner.

Further, the voir dire by the State had nothing to do with gang evidence. Juror 9, on her own, and not in response to any question indicated that the east side of Tacoma was “gang related.” Voir Dire RP 269. The State did not acknowledge the statement and moved on with questioning. Voir Dire RP 269. Juror 60 then asked the State if she was referring to gang related activities. Voir Dire RP 270. The State made it clear that she was not referring to gang activities at all. Voir Dire RP 270. The court held a sidebar and defense counsel indicated that the State was “trying very much to keep it away from the notion of east side gang activity.” Voir Dire RP 274. No other mention of gang activity was brought up. Again, this instance was not objected to and indeed defense counsel felt that the State was trying very hard to keep to the pre-trial ruling. These were spontaneous responses from two prospective jurors. These responses do not indicate any pattern by the State to violate the previous stipulation. The statement made by Officer Shafner was isolated.

The court’s ruling on the defense motion was that the jurors had heard from 20+ witnesses and that there had been testimony about a lifestyle very different than theirs. RP 1565. While the court incorrectly thought that two pictures of witness Roman Atofau with guns had been admitted, that was not the sole or primary basis for her denying the motion to dismiss. RP 1565-66. The primary reason was that there had been

testimony about the guns and drugs and crime related lifestyle of the people involved with the case. RP 1565-66. The single, isolated statement, while a violation of the court's ruling, did not prejudice defendant to the extent that a mistrial was warranted. Based on the facts of the instant case, the trial court denied the motion for a mistrial and motion for dismissal. There was no abuse of discretion.

3. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT GUILTY OF FIRST DEGREE MURDER AS THERE WAS EVIDENCE OF PREMEDITATION.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case

of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff*, 25 Wn. App. at 593. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

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

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

In this case, defendant challenges the sufficiency of the evidence regarding his conviction for murder in the first degree. Br. of Appellant at p. 38-53. He contends that there is insufficient evidence that he acted with premeditated intent to kill the victim. Br. of Appellant at p. 38.

A defendant is guilty of murder in the first degree when, with a premeditated intent to cause the death of another person, the defendant causes the death of that person. RCW 9A.32.030(10)(a).

In order to find defendant guilty of murder in the first degree the jury had to find that: 1) on or about the 11th day of December, 2006, the defendant shot Luis Bernal; 2) that the defendant acted with intent to cause the death of Luis Bernal; 3) that the intent to cause the death was premeditated; 4) that Luis Bernal dies as a result of defendant's acts; and, 5) the acts occurred in Washington. CP 112-148 (Instruction 10); *see also* RCW 9A.32.030(1)(a).

The jury was also instructed as to the meaning of premeditated:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take a 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.

CP 112-148 (Instruction 8). Defendant now claims that there was insufficient evidence to support a determination that he was acting with a premeditated intent to kill.

There was sufficient evidence for the jury to find defendant guilty of murder in the first degree, specifically in regards to premeditation.² There was testimony that the victim owed defendant money and defendant was angry. RP 756, 759, 1408, 1409, 12/17/07 RP 10-11. Defendant himself admitted to being angry at the victim. RP 1037. Defendant said he was going to talk to the victim about money issues when they got to his house. RP 1412. Defendant also brought a gun with him to the victim's house. RP 736, 1204. Defendant aimed a gun at the victim. RP 757, 785. Defendant used the gun in his hand to hit the victim in the head with such force that his skull fractured and the gun in his hand went off accidentally. 12/17/07 RP 20, RP 1216-17, 1218, 1225, 1334-5, 1424. The shot hit the ceiling. RP 761. After defendant hit the victim, the victim fell to the ground. RP 760, 1425. While all of the other people in the apartment fled after the first gunshot, defendant stayed in the apartment. 12/17/07 RP 20, RP 761, 1221, 1224, 1226. Defendant was observed moving toward the victim with the gun. 12/20/07 RP 29. Defendant was also observed with his gun pointed in a downward motion toward the victim. RP 1249. Three more shots rang out. RP 762, 1226, 1430, 12/17/07 RP 20. There was a pause between at least two of the shots. 12/12/07 RP 30. The victim was shot three times in the back. RP 816, 1342. The victim was most likely

² This is the only element of first degree murder that defendant challenges. Br. of Appellant at p. 38.

lying down when he was shot. RP 1363. The only person left in the apartment was defendant. 12/12/07 RP 20. All four shots were fired from the same gun. RP 1158.

Defendant told the police that he does not get nervous and he does not lose control. RP 1030, 1035. Defendant said he is never off point. 12/17/07 RP 16. Defendant told the police that you are doing someone a favor when you kill them. 12/17/07 RP 17.

Defendant told Jennifer Klepach that he lifted up his arm and shot three times. RP 1481. He also said he killed the victim but he was laughing while he said it. RP 1486. Defendant said the victim was gurgling like he was gargling gravy. RP 1490.

Defendant had time to form the intent to take Luis Bernal's life. While everyone else around him fled when the gun he was holding went off accidentally, defendant did not flee. The gun accidentally went off when defendant struck the victim with such force that his skull fractured and he fell to the floor. Defendant then was observed approaching the victim with his gun toward him. Defendant has to aim the gun at the victim since when it went off accidentally it was pointed toward the ceiling. Witness then heard three shots with a reported pause between at least two of them. Defendant aimed to kill. He no longer was shooting into the ceiling, he shot into the victim's back with the intent to kill. While defendant presents many examples of premeditation in his brief, there is no set time or pattern to equal premeditation. A prolonged

struggle, stealthy behavior, a drawn out plan or horrific facts are not required for the jury to find premeditation. The jury instruction included above accurately states the law on premeditation. Defendant formulated the thought and intent to kill Luis Bernal and then acted upon that thought. There was sufficient evidence of premeditation.

4. THE STATE DID NOT COMMIT ERROR OR VOUCH FOR WITNESSES' CREDIBILITY AS THE STATE DID NOT EXPRESS A PERSONAL OPINION AND DID NOT INVADE THE PROVINCE OF THE JURY.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), overruled on other grounds by *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, citing *Gentry*, 125 Wn.2d at 593-594.

A prosecutor’s allegedly improper questioning is reviewed in “the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) cert. denied, ___ U.S. ___, 129 S. Ct. 2007, 173 L.

Ed. 2d 1102 (2009). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

Defendant cites several instances where he believes the prosecution was vouching for witnesses. In most of these situations, defense counsel did not object to these questions, so the error is waived unless the questions are flagrant and ill-intentioned. During Ms. Kowalski's testimony, she was asked if she told the officer's the truth and if she was truthful in her testimony in court. RP 766-8. Defense counsel did not object. Defense counsel then asked her on cross-examination if she was truthful. RP 776-7. During Mr. Mayhall's testimony he indicated he told the police the truth in response to a question from the State. RP 1194. Defense counsel did not object. Defense counsel then asked him on cross-examination if he had changed his story and he said he had not because that would be a lie. RP 1252. Mr. Atofau was asked if he was truthful with the detective. RP 1319-20. Defense counsel did not object. Ms. Luhtala was asked if she told the truth to the police. RP 1388. Defense counsel did not object.

The questions by the State were not flagrant or ill-intentioned. The questions were in line with the testimony in this case. The prosecutor was not vouching for any of the witnesses. The questions related to if the

witnesses had testified truthfully or had been truthful with the police. The State's witnesses had admitted being drug dealers, using drugs on the day in question and having criminal histories. Kelly Kowalski admitted to doing methamphetamine on the date of the murder. RP 746. Jonathan Mayhall talked about his drug use and admitted to gathering his drug paraphernalia before he fled. RP 1219. He also said he was on probation. RP 1178. Roman Atofau told the jury he was already in the system. RP 1320-1321. Tehra Luhtala said she was under the influence of drugs at the time. RP 1387. Jennifer Klepach said she had been out at a bar all night long so her memory was better in court than when she talked to police. RP 1482. The State's questions did not vouch for them or imply that the State had any outside information as to whether they were testifying truthfully or not.³ The jury had plenty of evidence before it of the witnesses' lifestyle and wrongdoings. It was still up to the jury to judge the credibility of admitted drug users, drug dealers and convicted felons. The jury is the sole judge of credibility and the questions by the prosecutor did not invade that role.

³ The instant case is distinguishable from *U.S. v. Roberts*, 618 F.2d 530, (9th. Cir. 1980), *cert. denied*, 452 U.S. 942, 101 S. Ct. 3088, 69 L. Ed. 2d 957 (1981). In that case, the prosecutor told the jury that a detective was in the courtroom to make sure the witness did not lie and if the witness did lie, the plea agreement would have been called off. *Id.* at 533. The court found it to be improper when the state referred to evidence outside the record to imply that the witness was testifying truthfully. *Id.* at 533-4. That is not the case here. There is no evidence of prosecutorial misconduct or that defendant was prejudiced by these questions.

Defense counsel did object to two instances. She objected when Ms. Kowalski was asked, after cross-examination, if she had testified truthfully. RP 793. Defense counsel has examined her on her truthfulness during cross-examination and whether or not she had changed her statement. RP 780-782. This question still did not vouch for the witness but it also was in response to questioning by defense counsel.

Defense counsel also objected when Ms. Klepach was asked if she had been truthful when she met with detectives. RP 1483. Ms. Klepach had just indicated that her memory was better in court that day because she had been drinking on the night before she talked to detectives. RP 1482. The State's question did not vouch for Ms. Klepach, it merely was a clarification. The State did not improperly vouch for its witnesses.

Defendant also claims that the court erred in allowing testimony that witnesses were fearful of testifying. Br. of Appellant at p. 54. Evidence that a defendant threatened a witness is admissible to imply guilt. *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997), citing *State v. Kosanke*, 23 Wn.2d 211, 215, 160 P.2d 541 (1945). However, if no connection is made between the fear and the defendant, then the evidence should be considered only to evaluate the witness's credibility. *Id.*

Defendant alleges several instances where testimony of fear was admitted. Defense counsel did not object to the testimony presented by Ms. Kowalski that she was fearful of defendant and defense counsel even

brought her back just to discuss that subject. 12/20/07 RP 42. Ms. Klepach testified that she was fearful and that she didn't want to be in court. RP 1491-92. She also testified that defendant had sent her autopsy photos and that they scared her. RP 1492-95. Defense counsel did not object. The testimony of both of these women, especially Ms. Klepach could be tied back to defendant and thus was proper testimony.

Mr. Mayhall was asked if he was in compliance with probation, and he testified that he was in fear of his safety and even his life to testify in this trial. RP 1178. Defense counsel objected. RP 1178. The State, however, did not elicit this testimony and indicated that it didn't know where the witness was going. RP 1179. The witness's response was non-responsive. The State did not elicit this testimony and there is no evidence of misconduct.

Defense counsel did object to Ms. Luhtala being asked if she was afraid to testify during re-direct. RP 1398. Ms. Luhtala indicated that she was scared for her son and scared about retaliation. RP 1398-99. Defense counsel had just asked about why she went to the police and had elicited that the police were looking for her. RP 1397-98. This question was in response to defense counsel's questioning and again can be seen as a clarifying question. There is no evidence of misconduct.

Defense counsel also did not object to the State's closing argument. RP 1655. The State's argument was a proper argument based on the evidence admitted. There is no error.

The credibility of Mayhall, Kowalski, Atofau, Luhtala, and Klepach was at issue. There had been plenty of discussion as to the lifestyle that these witnesses had engaged in. The jury heard testimony about drugs, guns and criminal history. The State could reasonably anticipate that the defense could attack the credibility of the witnesses. As such, the State was permitted to ask questions about the witnesses' reluctance to testify. See *Bourgeois*, 133 Wn.2d at 402.

Finally, defendant argues that the State should not have put Ms. Klepach and Mr. Atofau on the stand if they weren't going to testify. Case law does not support this. Both the federal and state constitutions protect a criminal defendant's right to confront the witnesses against him. U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend.10); *State v. Russell*, 125 Wn.2d 24, 73, 882 P.2d 747 (1994). "The essential purpose of confrontation is cross-examination." *Pettit v. Rhay*, 62 Wn.2d 515, 521, 383 P.2d 889 (1963) (quoting *Brown v. United States*, 234 F.2d 140, 141 (6th Cir.1956)).

Notwithstanding the defendant's Sixth Amendment right to confrontation, a witness's valid assertion of the Fifth Amendment justifies the witness's refusal to testify. *State v. Levy*, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006). The Fifth Amendment's privilege against self-incrimination protects the rights of witnesses to refuse to give incriminatory answers in any official proceeding. U.S. Const. amend. V; *State v. Lougin*, 50 Wn. App. 376, 380, 749 P.2d 173 (1988). When there

is arguably a conflict between a witness's Fifth Amendment privilege and a defendant's Sixth Amendment right to compulsory process, such conflict is resolved in favor of the witness's right to silence. *United States v. Cuthel*, 903 F.2d 1381, 1384 (11th Cir.1990) (citing *Alford v. United States*, 282 U.S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 2d 624 (1931)).

The privilege against self-incrimination applies when the witness reasonably apprehends danger resulting from a direct answer. *Levy*, 156 Wn.2d at 731-32. But the witness may not make a blanket assertion of the privilege. *Levy*, 156 Wn.2d at 732; *Lougin*, 50 Wn. App. at 381. Rather, the witness may invoke the Fifth Amendment only in response to specific questions, unless the trial court can conclude, based on its knowledge of the case and the anticipated testimony, that the witness could legitimately refuse to answer all relevant questions. *State v. Delgado*, 105 Wn. App. 839, 845, 18 P.3d 1141 (2001); *Lougin*, 50 Wn. App. at 381.

The witness "must establish a factual predicate from which the court can, by use of 'reasonable judicial imagination' (aided by suggestions of counsel), conceive of a sound basis for the claim" of privilege. *State v. Hobble*, 126 Wn.2d 283, 290, 892 P.2d 85 (1995). The answer need only furnish a link in the chain of evidence needed to prosecute the witness for a crime. *Hobble*, 126 Wn.2d at 291. The danger of incrimination must be substantial and real, not merely speculative. *Hobble*, 126 Wn.2d at 291; *United States v. Apfelbaum*, 445 U.S. 115, 128, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980) (the danger of incrimination

confronted by defendant must be confronted by substantial and real, and not merely trifling or imaginary).

To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim “must be governed as much by {her} personal perception of the peculiarities of the case as by the facts actually in evidence.” *State v. Hobble*, 126 Wn.2d at 290 (quoting *Seventh Elect Church v. Rogers*, 34 Wn. App. 105, 114, 660 P.2d 280, review denied, 99 Wn.2d 1019 (1983)).

Determining the scope of the witness’s privilege is within the sound discretion of the trial court. *Lougin*, 50 Wn. App. at 382. A court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The State has two witnesses who were especially reluctant to testify. Jennifer Klepach indicated that she didn’t want to testify. RP 1054, 1087. However, Ms. Klepach was given an opportunity to speak with counsel and then put on the stand. RP 1088. Ms. Klepach did begin to answer questions but then when she was asked if she worked outside of the house, she refused to answer any more questions. RP 1089. Ms. Klepach never asserted that she was exercising her privilege under the Fifth Amendment, she just refused to answer questions. Ms. Klepach did

return to the stand later in the trial and did testify for the State. RP 1473-1537.

Roman Atofau indicated on the stand that he wanted to “take the fifth” but also indicated that he didn’t think answering the question posed to him would incriminate him. RP 1311-12. When he took the fifth a second time, the State again told him he wasn’t being asked anything incriminating, and he indicated he just didn’t want to do to testify. RP 1320-21.

Neither witness properly invoked a valid Fifth Amendment privilege. There was no error in putting them on the stand to answer questions when they have been subpoenaed to do so. The privilege has to be invoked on a question by question basis. In addition, both witnesses were afforded counsel to discuss their situation. The court did not error in allowing them to testify despite the fact that they were reluctant witnesses.

Defense counsel failed to object to many of the statements she now claims as error. The State’s questions and statements were proper in light of the testimony and not flagrant or ill-intentioned. There is no evidence of prosecutorial misconduct.

5. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PROPERLY ADMITTED EVIDENCE OF DEFENDANT'S FLIGHT INCLUDING TESTIMONY AS TO HOW THE K-9 OFFICER TRACKED DEFENDANT.

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

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

"Evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence." *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965).

"Flight is an instinctive or impulsive reaction to a consciousness of guilt or

is a deliberate attempt to avoid arrest and prosecution.” *Id.* The law does not define what circumstances constitute flight and as such, what may be shown as evidence of flight is broad. *State v. Jefferson*, 11 Wn. App. 566, 571, 524 P.2d 248 (1974).

In the instant case, defendant eluded police by fleeing in his vehicle. Officers tried to stop defendant in his vehicle but defendant fled from officers as soon as they turned on their lights. RP 910, 12/20/07 RP 48-49. Defendant was driving a white Chevy Caprice. 12/20/07 RP 48. Defendant fled at a high rate of speed, at least 60 mph, through a residential neighborhood where the speed limit was 25 mph. RP 915. Defendant failed to stop at a stop sign and drove up onto the sidewalk in an effort to get away from the pursuing police vehicles. RP 916-7, 12/20/07 RP 49. At one point, officers had to drive into oncoming traffic to keep up with defendant who was traveling at around 80 mph. RP 918-19. The pursuit of defendant ended in a crash. RP 920. Defendant then fled from the vehicle and ran up a hillside. RP 921. A K-9 officer was called in to track defendant. RP 922-23. Defendant was captured by the K-9 officer about 10-15 minutes after the containment officers arrived. RP 924-25.

Officer Fredericks and his K-9 partner Clao, arrived to track defendant. RP 974, 983. Officer Fredericks testified as to how a K-9 tracks and indicated that people produce a unique scent picture and that scent is enhanced when a person is under emotional distress. RP 980.

There is a difference when someone is under the fear of apprehension. RP 980. Defense counsel objected to this remark and the objection was overruled. RP 980, 994-1000. Defense counsel then declined to ask for a curative instruction. RP 1000.

Officer Fredericks was then asked to specifically discuss tracking defendant on December 13, 2006. RP 983. Defendant had climbed over a fence and that was the starting point for Clao. RP 985. Clao immediately picked up the scent and located defendant in a juniper bush. RP 986-88.

Defendant initially said he was the passenger in the car and that the driver didn't stop because there was an SKS rifle in the car. RP 926, 12/20/07 RP 53. Defendant then said he was going 150 mph and was just trying to get to the convenience store when they tried to stop him. RP 927, 12/20/07 RP 53. Defendant stated, "You're not going to believe this, but I have a conscious. If I hit and killed somebody, I would have stopped." 12/20/07 RP 54. Defendant admitted that he knew the K-9 and the other officers were there. RP 992.

The evidence presented to the jury was consistent with evidence of flight. Defendant not only eluded police in his vehicle but then fled on foot once he crashed his vehicle. A K-9 officer was deployed to track down the defendant. The testimony that was objected to was foundational to the K-9 officer's training in tracking down suspects. It was not specific testimony about defendant and so in no way can be construed as a comment on this guilt. Further, evidence of flight is evidence of defendant

trying to avoid arrest or prosecution. See *Bruton*, 66 Wn.2d at 112. Fear of apprehension is why defendant was fleeing. Even if the testimony had been specific to defendant it would not have been error as it fits within the very definition of what flight evidence is. The court did not abuse its discretion in admitting the officer's testimony.

6. THE COURT'S ORAL RULING ON AN OBJECTION BY DEFENSE COUNSEL WAS NOT AN IMPERMISSIBLE COMMENT ON THE EVIDENCE.

Defendant alleges on appeal that the court commented on the evidence by a statement made during an evidentiary ruling. Because the remark was in response to an objection made, and because it did not give an opinion as to the weight or credibility of evidence, there was no error.

Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995), citing

State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), *review denied*, 88 Wn.2d 1004 (1977). “The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge’s opinion from influencing the jury.” *Id.*

A court’s statements giving reasons for its rulings, without indication that the court believes or disbelieves the testimony, do not constitute a comment on the evidence. *State v. Studebaker*, 67 Wn.2d 980, 983, 410 P.2d 913 (1966); *State v. Renfro*, 96 Wn.2d 902, 909-10, 639 P.2d 737, *cert. denied*, 459 U.S. 842, 103 S. Ct. 94, 74 L. Ed. 2d 86 (1982).

Here, the complained of statement was hardly a comment on the evidence. The ruling came during the testimony of witness Jennifer Klepach as she was asked whether she had voluntarily turned over some letters:

STATE: Did you voluntarily turn over Plaintiff’s Exhibit 168 and 169, these letters, to law enforcement?

WITNESS: Well, as voluntarily as you can, when if you don’t help them, you end up going to jail, do you understand? I mean 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. That’s why I am here right now because I don’t want to go to jail so that’s why I am here.

STATE: Jennifer, my question to you was did you voluntarily provide law enforcement with these two letters?

WITNESS: Yes.

DEFENSE COUNSEL: Objection, Asked and answered.

COURT: The question was asked but was not answered.

Overruled. Answer the question.

DEFENSE COUNSEL: Your Honor, I would object. I believe that was a comment on the evidence.

THE COURT: Go ahead.

STATE: Did you voluntarily hand these letters over?

WITNESS: Yes.

In making its ruling, the court was not commenting on the evidence or the case, but simply ruling on the asked and answered objection. If the question had been both asked and answered, the court would have sustained the objection. Further, the witness had actually completed answering the question prior to defense counsel's objection. Nothing in the remark commented on the judge's opinion as to the weight of evidence.

Even assuming any error, such error was harmless. Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial and the burden "rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment." *Lane*, at 838, quoting *State v. Stephens*, 7 Wn. App. 569, 573, 500 P.2d 1262

(1972), *aff'd in part, rev'd in part*, 83 Wn.2d 485, 519 P.2d 249 (1974).

Here, the jurors were cautioned in the written instructions to disregard entirely any apparent comment on the evidence, and that it was the judge's duty to rule on admissibility of evidence. CP 112-148 (Instruction 1).

They are presumed to have followed these instructions. *State v. Ingle*, 64 Wn.2d 491, 499, 392 P.2d 442 (1964).

Whether or not the witness voluntarily turned over the documents was not a central issue to the case. It was an issue that only dealt with this witness and how the items she had come to be in the possession of the police. Such a minor issue did not affect the outcome of the trial. The court's ruling on the objection was not a comment on the evidence. There is no error.

7. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE CUMULATIVE ERROR
DOCTRINE WHERE HE IS UNABLE TO SHOW
PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error,

regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type

of error will affect the court's weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. *Compare, State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*,

52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was

cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See *Stevens*, 58 Wn. App. at 498.

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

Defendant was at the scene of the crime, in fact he admitted being there. Defendant had an issue with the victim. The victim owed him money and he was mad at the victim. Defendant brought a gun to the victim's house and indicated that wanted to discuss money issues with the victim. Defendant got so mad at the victim that after his friend struck the victim across the forehead, defendant struck the victim in the head with the butt of a gun. Defendant struck defendant so hard that he fractured the victim's skull. The gun in defendant's hand went off and left a bullet hole in the ceiling. All of the witnesses in the apartment testified to a consistent story that defendant had the gun and that defendant did not flee with the rest of them.

While the victim was lying on the floor with a severe injury and the rest of the people in the apartment fled the scene, defendant was observed advancing toward the victim. He was observed with his arm down pointed

toward the victim, gun still in hand. Three more shots were heard. Those three shots were from the same gun that made a hole in the ceiling, the gun that was in defendant's possession. The three shots were to victim's back and victim was killed.

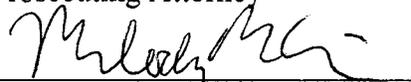
In addition, the court did not abuse its discretion when it admitted evidence of defendant's statements and flight evidence. The court also did not abuse its discretion in denying the defense motion for a mistrial where the single, isolated general statement did not necessitate a new trial. The prosecutor's questions and arguments were proper in response to the questions of defense counsel and in light of law and facts of the case. The court did not comment on the evidence when it permissibly responded to an objection by defense counsel. Further, had any of the statements been improper, the jury would be presumed to follow the court's instructions and apply the appropriate standards and law. Finally, there was sufficient evidence for the jury to find defendant guilty of murder in the first degree. Any error in this case was harmless. Defendant cannot prevail under the doctrine of cumulative error.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court affirm the convictions and sentence below.

DATED: December 14, 2009

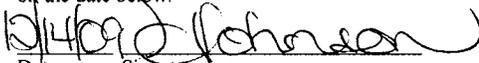
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Certificate of Service:

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

12/14/09 
Date Signature

BY  STATE OF WASHINGTON
CLERK OF SUPERIOR COURT
TACOMA, WASHINGTON