

FILED
COURT OF APPEALS
DIVISION II

NO. 37380-7

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

HOWARD O. CARR, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 05-1-03018-8

BRIEF OF RESPONDENT

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Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u>	1
	1. Whether Judge Steiner's findings on the validity of the intercept order are verities on appeal?.....	1
	2. Whether the facts in the application for the intercept were minimally adequate for the court to authorize the interception of the conversation?	1
	3. Whether the prosecuting attorney properly elected and the court properly instructed the jury regarding the specific criminal act that was the basis for Count V?.....	1
	4. Whether there was sufficient evidence to satisfy the factual prong of <i>Workman</i> for the court to give an instruction on a lesser included offense in Count V?.....	1
	5. Whether the spousal privilege applied in a case where the defendant was a guardian of a child and charged with a crime of abusing that child?	1
	6. Whether Detective Shaviri testified regarding or commented upon the defendant's post-arrest silence?.....	1
	7. Where there is no instructional error, is the defendant entitled to a new trial?	1
	8. Whether the defendant has demonstrated cumulative error?	1
B.	<u>STATEMENT OF THE CASE</u>	2
	1. Procedure.....	2
	2. Facts	3
C.	<u>ARGUMENT</u>	6
	1. THE INTERCEPT ORDER WAS LAWFUL AND SUPPORTED BY SUFFICIENT FACTS.	6

2.	THE TRIAL COURT’S FINDINGS REGARDING THE CrR 3.5 HEARING ARE SUPPORTED BY EVIDENCE.....	10
3.	THE JURY WAS CORRECTLY INSTRUCTED THAT ONLY ONE INCIDENT WAS THE BASIS FOR THE CHARGE IN COUNT V.....	11
4.	THERE WAS SUFFICIENT EVIDENCE TO SATISFY THE FACTUAL PRONG UNDER <i>WORKMAN</i> TO PERMIT THE COURT TO GIVE AN INSTRUCTION ON THE LESSER INCLUDED CHARGE.....	12
5.	THE PROSECUTOR’S QUESTION OF THE DEFENDANT’S WIFE DID NOT VIOLATE SPOUSAL PRIVILEGE.	14
6.	DET. SHAVIRI DID NOT COMMENT ON THE DEFENDANT’S RIGHT TO REMAIN SILENT.	15
7.	THE TRIAL COURT DID NOT COMMIT CUMULATIVE ERROR.	17
D.	<u>CONCLUSION</u>	18

Table of Authorities

State Cases

<i>In re Lord</i> , 123 Wn.2d 296, 868 P.2d 835 (1994)	17
<i>State v. Badda</i> , 63 Wn.2d 176, 385 P.2d 859 (1963).....	17
<i>State v. Broadaway</i> , 133 Wn.2d 118, 131, 942 P.2d 363 (1997).....	9
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	17
<i>State v. Easter</i> , 130 Wn.2d 228 922 P.2d 1285 (1996).....	15
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	13
<i>State v. Fricks</i> , 91 Wn.2d 391, 588 P.2d 1328 (1979).....	15
<i>State v. Gallegos</i> , 73 Wn. App. 644, 652, 871 P.2d 621 (1994)	14
<i>State v. Kichinko</i> , 26 Wash.App. 304, 311-12, 613 P.2d 792 (1980).....	7, 8
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	12
<i>State v. Lewis</i> , 59 Wn. App. 834, 801 P.2d 289 (1990)	9-10
<i>State v. Manning</i> , 81 Wn. App. 714, 718, 915 P.2d 1162 (1996)	6
<i>State v. Petrich</i> , 101 Wn.2d 566, 572, 683 P.2d 173, (1984).....	11, 12
<i>State v. Platz</i> , 33 Wn. App. 345, 349-50, 655 P.2d 710 (1982)	7
<i>State v. Porter</i> , 98 Wn. App. 631, 634, 990 P.2d 460 (1999)	6, 7
<i>State v. Stevens</i> , 58 Wn. App. 478, 795 P.2d 38 (1990)	17
<i>State v. Waleczek</i> , 90 Wn.2d 746, 585 P.2d 797 (1978).....	14
<i>State v. Wood</i> , 52 Wn. App. 159, 758 P.2d 530 (1988)	14
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382(1978).....	1, 12

Statutes

RCW 5.60.060(1)15
RCW 9.73.1306
RCW 9.73.1320(3)(f)6

Rules and Regulations

CrR 3.5.....3, 9, 10

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

1. Whether Judge Steiner's findings on the validity of the intercept order are verities on appeal?
2. Whether the facts in the application for the intercept were minimally adequate for the court to authorize the interception of the conversation?
3. Whether the prosecuting attorney properly elected and the court properly instructed the jury regarding the specific criminal act that was the basis for Count V?
4. Whether there was sufficient evidence to satisfy the factual prong of *Workman* for the court to give an instruction on a lesser included offense in Count V?
5. Whether the spousal privilege applied in a case where the defendant was a guardian of a child and charged with a crime of abusing that child?
6. Whether Detective Shaviri testified regarding or commented upon the defendant's post-arrest silence?
7. Where there is no instructional error, is the defendant entitled to a new trial?
8. Whether the defendant has demonstrated cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

On June 17, 2005, the Pierce County Prosecuting Attorney's Office charged Howard Carr (hereinafter referred to as the defendant) with two counts of child molestation in the first degree and three counts of child rape in the first degree. CP 1-5. The charges were based upon an investigation by the Pierce County Sheriff's Department as part of the investigation, PCSD Detective Ray Shaviri applied for an order to intercept a phone call between the complaining witness, M.R., (the complaining witness will be referred to by her initials, because she is a minor) and the defendant.

On June 15, 2005, Judge Lisa Worswick approved and ordered the intercept. CP 25-29. The defendant filed a motion to suppress the intercepted conversation. CP 15-29. On August 31, 2005, the suppression hearing was held before Judge D. Gary Steiner. CP 42. Judge Steiner denied the motion. CP 42. September 12, 2005, the defendant filed a motion for reconsideration. CP 43-56. Judge Steiner issued a written order denying the motion to suppress after considering the new case cited by the defendant. CP 353-354.

On October, 23, 2006 the defendant pleaded guilty to an amended information charging him with three counts of child molestation in the first degree. CP 89-90, 92-109. In December, 2006, the defendant hired a

new attorney. CP 110-111. On December 11, 2006, the defendant moved to withdraw his guilty plea. CP 113-134. His motion was granted. CP 135. A new trial date was set.

October 22, 2007, the case was assigned to Judge John Hickman for trial. RP I ff. The court conducted a hearing pursuant to CrR 3.5 regarding the defendant's statements. RP I, V. Judge Hickman found the statements admissible. CP 288-306.

The trial proceeded on a second amended Information charging the defendant with two counts of child molestation in the first degree and three counts of child rape in the first degree. CP181-183. At the end of the trial, the jury found the defendant not guilty of Counts I-IV. CP 244-247. In Count V, the jury found the defendant not guilty of the charge of child rape in the first degree, but guilty of the lesser-included crime of attempted child Rape in the first degree. CP 248, 249.

On February 22, 2008, the court sentenced the defendant for attempted child rape in the first degree. CP 307-318. After Judgment and Sentence were entered, the defendant filed his timely appeal. CP 324.

2. Facts

The defendant and his wife, Wanda, met the Reilly family when the Carr's moved into an apartment complex in Federal Way, Washington. The two families became friendly. RP VII 389, 391. Gerri Reilly worked afternoons and evenings in a restaurant. Her husband, Phillip Reilly

worked at... Because of their hours, the defendant often babysat M.R. and her brother, R.R. RP VII 388. M.R. was six years old at the time. R.R. was four years old.

The defendant molested M.R. several times while babysitting her at the Federal Way apartment. RP VII 394.

In January 1997, the Reilly's moved to a new home in Graham, in Pierce County, Washington. RP VII 401. Mr. and Mrs. Reilly continued to have the defendant periodically baby sit their children. RP VII 411.

Later in 1997 the defendant was babysitting the Reilly children. Because of Mr. and Mrs. Reilly's work hours and the distance to his Federal Way home, the defendant would stay the night at the Reilly's home. RP XIV 1386. The defendant slept on a day bed that was in a small room off the main downstairs room. RP XIV 1387. The defendant always slept nude. RP XIV 1401.

One morning, M.R. and R.R. went in to wake the defendant. They pulled the blankets off the defendant. He turned and sat on the edge of the bed. RP VII 426, 522. When R.R. left the room, the defendant grabbed M.R. The defendant put her on his lap with her back to him. RP VII 424, 426, 519,565. M.R. was wearing a nightgown and underwear. The defendant pulled the underwear aside. RP VII 425.

M.R. could feel the defendant trying to penetrate her, but she was too small. RP VII 424, 527. Because the defendant held her hips with his hands, M.R. believed the defendant was trying to penetrate her with his

penis. RP VII 424, 522. M.R. felt pain on her vagina, RP VII 426, but outside of it. RP XII 1111. The contact was barely inside the outer folds of skin of her genitals. RP XII 1113.

She yelled for him to stop. RP VII 425. The defendant stopped when R.R. returned to the room. RP VII 424.

M.R. did not believe that the defendant had penetrated her. RP VII 524. During a medical examination later, after disclosure, M.R. told the nurse that the defendant had not put anything inside her. She told the nurse that she was still a virgin. RP VII 432, IX 728.

M.R. did not disclose the molestations until she was 14 years old. RP VII 429. She told her mother, who reported it. Police then began an investigation. RP VII 430.

Pierce County Sheriff's Detective Ray Shaviri was assigned to investigate the case. RP I 57. As part of the investigation, Det. Shaviri applied for and was granted an order to intercept and record a telephone conversation between M.R. and the defendant. RP I 57-58. M.R. assisted the detective by participating in the phone call intercept. RP VII 433. She telephoned the defendant and spoke to the defendant. Det. Shaviri stood by M.R. and listened to the conversation through electronic equipment. RP VII 434. Detective Tait Purviance ran the electronic equipment and recorded the conversation. RP I 58.

On June 17, 2005, Det. Shaviri, accompanied by Det. Lund drove to Ocean Shores where they arrested the defendant. RP I 67. Det. Shaviri

advised the defendant of his constitutional rights. RP I 69. While the detectives drove the defendant from Ocean Shores to Tacoma, the defendant made several unsolicited statements to them. RP I 71, 83-87.

C. ARGUMENT.

1. THE INTERCEPT ORDER WAS LAWFUL AND SUPPORTED BY SUFFICIENT FACTS.

RCW 9.73.130 governs the intercepting and recording of private conversations. A party seeking to intercept and record a conversation must apply to a judge for an order permitting it. The appellate or reviewing court does not review the sufficiency of the application de novo, but to decide if the facts in the application were minimally adequate to support the determination. *State v. Manning*, 81 Wn. App. 714, 718, 915 P.2d 1162 (1996).

In addressing the validity of such orders, Washington courts have held that “a judge issuing an intercept order has considerable discretion to determine whether the statutory safeguards have been satisfied.” *State v. Porter*, 98 Wn. App. 631, 634, 990 P.2d 460 (1999). Washington courts “do not review the sufficiency of the application de novo ... and will affirm if the facts set forth in the application are minimally adequate to support the determination.” *Id.* In interpreting the need for an intercept as required by RCW 9.73.1320(3)(f), courts have held that “police need not

make a showing of absolute necessity; the need requirement is interpreted in a ‘common sense fashion’”. *Porter*, 98 Wn. App. at 635, citing *State v. Platz*, 33 Wn. App. 345, 349-50, 655 P.2d 710 (1982).

In *Porter*, the police obtained an order allowing them to intercept a private conversation as part of an ongoing narcotics investigation involving a criminal defense attorney. In holding that the “need” cited in the application and order were insufficient, the court noted that

a successful conviction for possession generally requires that the State produce the actual drugs found in the suspects actual or constructive possession. The affidavit here does not suggest what taped conversations would add to a successful prosecution if drugs were found in Mr. Porter’s possession, or what deficiencies in the proof such conversations would remedy if no drugs were found. An intercept may have been appropriate if proof of knowledge of the illegal nature of the possessed property were an element of the offense. *State v. Kichinko*, 26 Wash.App. 304, 311-12, 613 P.2d 792 (1980).

Porter, 98 Wn. App. at 636.

In *Porter*, the intercept order failed because the case would instead hinge on whether drugs were recovered in the possession of defendant.

The *Kichinko* case, cited above, is also helpful. There, the police were investigating the defendant for fencing stolen property. An order authorizing the interception and recording of private conversations was obtained. In rejecting defendant’s challenge to the sufficiency of the “need” articulated in the application, the court noted:

The application explains that successful prosecution of the crime of attempted possession of stolen property requires proof of knowledge that the property to be received has been stolen, as reflected by the defendant's statements. ... The application further points out that unless it can be shown exactly what was said, the evidence that could otherwise be garnered would be inexact, conflicting and confusing. Though we might paint a more detailed and eloquent picture of the necessity of a recording for a successful investigation, the statements set forth adequately comply with the requirements of the statute. We hold the application sufficient and the order authorizing the recording and videotaping of the conversation between the detectives and the defendant valid.

Kichinko, 26 Wn. App. at 311-12.

In the present case, the intercept order was issued by Superior Court Judge Lisa Worswick. The defendant, through his first attorney, challenged the adequacy of the application and moved to suppress the statement. As Judge Steiner observed in his ruling, these crimes were committed 10 years before, the defendant and the victim were the only two persons who witnessed all of these crimes, at the time of the crimes, the victim was too young to know the actions were wrong, and there was no forensic or physical corroborating evidence, such as DNA. The application also reflects that the acts were secretive. The defendant concealed the acts and had told the victim not to tell anyone about them. The defendant feared for his life if the acts were reported.

At trial, the defendant, through new counsel, again challenged the adequacy of the facts in the application. This time the challenge came in the context of a CrR 3.5 hearing.

The appellate court independently reviews the record. Unchallenged findings are verities on appeal. Challenged findings are verities if supported by substantial evidence in the record. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). The defendant did not challenge Judge Steiner's findings below and does not assign error to them in his appeal. Therefore, Judge Steiner's conclusion that the "normal investigative techniques would be unsuccessful" requirement was complied with has been established.

The findings of the court order are supported in the application. The issuing judge and the reviewing judges could certainly conclude from the application that normal investigative techniques, such as directly interviewing the defendant, would likely be unsuccessful. The suppression motion was heard by Judge Steiner. He reviewed the application and found that the facts in it were minimally adequate to support Judge Worswick's initial determination. Judge Hickman had the same application before him. He likewise found the application adequate. Their rulings should be affirmed in the appellate court.

The defendant's argument that the intercepted conversation should be suppressed because the officers failed to record all of it is without applicable authority. *State v. Lewis*, 59 Wn. App. 834, 801 P.2d 289

(1990) is inapposite. The evidence in *Lewis* was suppressed because evidence was found based on an illegal arrest, not an illegal search warrant. *Id.* at 836-837.

In the present case, the language in the Order authorizes the applicants to intercept and record the conversation. The Order limits the period of time during which the intercept is valid. The Order does not require the applicants to do anything.

2. THE TRIAL COURT'S FINDINGS REGARDING THE CrR 3.5 HEARING ARE SUPPORTED BY EVIDENCE.

Judge Hickman's finding II is supported by the evidence. Det. Shaviri testified that the phone conversation only lasted 2-3 seconds after the tape ran out. RP I 62. Det. Purviance's report stated the same. RP I 65, 79. The defendant testified that the conversation went on for 20-30 seconds. RP V 228. The court may certainly find that two to three seconds, or even 30 seconds is "of short duration" in the context of a one-hour recording.

Det. Shaviri and Det. Purviance listened to the entire conversation. RP I 78-80. Det. Purviance's report stated that M.R. had said good-bye and the conversation ended. RP I 80. From this, the court could find that the only conversation that was not recorded was M.R. and the defendant saying good-bye.

Judge Hickman's finding as to the disputed fact was also supported by evidence. The evidence shows that the amount of conversation not recorded was 2-3 seconds. Very little could be said in that time, other than good-bye. The court could conclude that that is all that was said. The court also heard the rest of the tape, where the defendant did make some exculpatory statements. The court essentially found that the defendant was not prejudiced by the detectives' failure to record the last 2-3 seconds of the conversation. The court was free to conclude that there was insufficient credible evidence to find that the defendant made a materially different statement before the tape ran out.

3. THE JURY WAS CORRECTLY INSTRUCTED
THAT ONLY ONE INCIDENT WAS THE BASIS
FOR THE CHARGE IN COUNT V.

When evidence indicates that multiple acts are the basis for one charge or more, the State must either elect the act upon which it will rely for conviction, or the jury may be instructed on unanimity as to which act has been proven beyond a reasonable doubt, *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173, (1984). In *Petrich*, the defendant had been charged with one count of indecent liberties and one count of statutory rape. At trial, the victim testified to numerous incidents of sexual intercourse and molestation, any of which could be the basis of the charged crimes.

In *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988), there were two victims. One count was charged per victim. The victims testified of several events, any of which could have been the basis of the molest or rape charges.

In the present case, the deputy prosecutor specifically elected one act as the basis of the charge in Count V. The deputy prosecuting attorney referred to Count V specifically as the incident in the guest bedroom in Graham. This was to differentiate it from the other incidents charged. RP XVII 1860-1862. Instruction 12A specifically identified one incident for the basis of the crime charged in Count V. Further, in closing argument, the deputy prosecuting attorney specifically identified the Graham spare room/lap incident as the basis for Count V. RP XVIII 1932. In closing, he twice referred to Count V as “the lap incident.” RP XVIII 1933. The Court and the prosecutor did everything necessary to comply with *Petrich*. There was no error.

4. THERE WAS SUFFICIENT EVIDENCE TO SATISFY THE FACTUAL PRONG UNDER *WORKMAN* TO PERMIT THE COURT TO GIVE AN INSTRUCTION ON THE LESSER INCLUDED CHARGE.

Under *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382(1978), a jury may be instructed on a lesser-included offense if the elements of the lesser are necessarily elements of the greater, and if the evidence supports

an inference that the lesser crime was committed. *Id.*, at 447-448. These are often referred to as the legal prong and the factual prong of *Workman*.

In *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000), the Supreme Court followed *Workman*. The Court closely examined the factual prong analysis. The Court observed that it had held in the past that the evidence must raise the inference that only the lesser included crime was committed. *Id.*, at 455. When determining if the evidence at trial was sufficient to support giving an instruction on a lesser included, the appellate court views the supporting evidence in the light most favorable to the party requesting the instruction. *Id.*, at 455-456.

In the present case, the defendant concedes that the legal prong is satisfied. App. Brief at 46. The evidence supports instructing the jury on the lesser included offense. M.R. testified that the defendant put her on his lap and tried to penetrate her vagina from behind. RP VII 424. She later told the examining nurse that the defendant had not put anything inside her. RP VII 432. Cross-examination also covered that the defendant was unsuccessful at penetrating M.R. RP VIII 522, 524. The State later recalled M.R. and asked more specific questions about whether the defendant had touched her inside the outer skin of her genitals. RP XII 1113. Again, cross-examination pointed out that there was no penetration.

From this evidence the jury could conclude that only the lesser offense was proved. Or, to put it another way; the evidence supported the

inference that the defendant was guilty of the lesser instead of the greater.

State v. Gallegos, 73 Wn. App. 644, 652, 871 P.2d 621 (1994).

5. THE PROSECUTOR'S QUESTION OF THE
DEFENDANT'S WIFE DID NOT VIOLATE
SPOUSAL PRIVILEGE.

RCW 5.60.060(1) protects a spouse from being examined regarding communications, without the consent of the other spouse. This is generally referred to as the marital or spousal privilege. Under the statute, the privilege does not apply in circumstances where the spouse is charged with a crime against a child of whom the spouse is a parent or guardian.

A “guardian” under the statute can be any adult who stands in the place of the parent. In *State v. Waleczek*, 90 Wn.2d 746, 585 P.2d 797 (1978), the defendant and his wife were friends of the 7 year-old victim's family. The victim spent the night at the defendant's home, when the molestation occurred. The defendant's wife was questioned about the incident and the defendant's statements. The Court held that the defendant was a “guardian” of the child and therefore, there was no privilege.

In *State v. Wood*, 52 Wn. App. 159, 758 P.2d 530 (1988), the defendant and his wife were next-door neighbors of the 6 year-old victim. The child would go next door to play with the defendant, who molested her. The defendant's wife was called to testify against him. The Court held that she was compelled to do so, under the “guardian” exception.

In the present case, the defendant was a frequent childcare provider for the M.R. and her brother. The charged crimes occurred while he was acting as M.R.'s guardian. It was lawful for the deputy prosecuting attorney to ask the defendant's wife if she and the defendant had discussed the case.

Aside from the legality of the prosecutor's question, there was no harm or prejudice to the defendant. Before the defendant's wife answered, the defense counsel objected to the question. RP XVI 1697. The court immediately sustained the objection. The defendant's wife did not answer the question. The prosecutor did not pursue or argue the topic.

6. DET. SHAVIRI DID NOT COMMENT ON THE
DEFENDANT'S RIGHT TO REMAIN SILENT.

It is improper for a prosecutor to purposely elicit testimony regarding or comment upon a defendant's invocation of his right to remain silent. *See, e.g., State v. Easter*, 130 Wn.2d 228 922 P.2d 1285 (1996). *Easter* was a DUI case. Before being arrested, the defendant declined to speak to the police. The prosecutor later commented to the jury that the defendant was a "smart drunk" for refusing to speak to police.

In *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979), the prosecutor elicited testimony from the arresting officer that the defendant made no statement after being advised of his rights. In closing argument, the prosecutor then commented about the defendant's post-arrest silence.

The present case is very different. The prosecuting attorney took steps to make sure that Det. Shaviri did not comment on the defendant's right to remain silent. Out of the presence of the jury, with Shaviri present, the prosecuting attorney explained what he was going to ask Det. Shaviri about the advisement of rights. The prosecutor was not going to ask any questions regarding the defendant invoking his rights. RP XI 987. Further, the prosecutor essentially told Shaviri not to bring it up. RP XI 987.

When testimony resumed before the jury, Det. Shaviri read the Miranda rights as he had read them to the defendant. RP XI 989. The prosecutor then specifically asked: "After that, did you drive him to Tacoma?" RP XI 991. Det. Shaviri responded: "Yes." RP XI 991.

The prosecutor asked the limited question with the specific purpose of preventing any comment or implied comment on the defendant's right to remain silent. Neither the prosecutor nor the witness asked or commented on the defendant's right or whether the defendant exercised the right. The testimony that followed was regarding unsolicited statements the defendant made to the detectives during the drive to Tacoma. RP XI 998 ff. The prosecutor committed no misconduct. The court committed no error.

7. THE TRIAL COURT DID NOT COMMIT CUMULATIVE ERROR.

The doctrine of cumulative error recognizes that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant a fair trial. *See In re Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). Reversals for cumulative error are reserved for truly egregious circumstances where a defendant is truly denied a fair trial. This could be because of the enormity of the errors *see e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963), or because the errors centered around a key issue. *See e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984). Cumulative errors must also be prejudicial. *State v. Stevens*, 58 Wn. App. 478, 795 P.2d 38 (1990).

In the present case, the defendant identifies no great weight or pattern of small or particular errors committed, nor how they prejudiced him. The trial court did not commit cumulative error.

09 FEB -2 PM 3: 28

D. CONCLUSION.

The evidence in this case was gathered lawfully. The defendant received a full and fair trial. For the reasons argued above, the State respectfully requests that the defendant's conviction be affirmed.

STATE OF WASHINGTON
BY Thomas C. Roberts
DEPUTY

DATED: FEBRUARY 2, 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 c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/2/09
Date Signature