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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the State presented sufficient evidence to support the conviction of all three defendants for conspiracy to commit first degree robbery and/or first degree burglary.

2. Whether the order of joinder entered on January 17, 2008, violated Cooper's due process rights and resulted in a violation of her right to a speedy trial.

3. Whether the court properly excluded Nathan Hoffman's testimony because it was not relevant.

4. Whether the court violated the appearance of fairness doctrine.

5. Whether the prosecutor committed misconduct, and if he did, whether it requires reversal of Cooper's conviction.

B. STATEMENT OF THE CASE.

1. The State accepts the statement of substantive and procedural facts as set forth by Waller and Reading. Those set forth in Cooper's brief contain some inaccuracies, in addition to a fair amount of argument, but the State will address those in the argument portion of this reply brief.

C. ARGUMENT.

1. The State produced sufficient evidence that, along with the reasonable inferences flowing from it, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt that all three defendants were guilty of conspiracy to commit first degree robbery and/or first degree burglary.

All three appellants challenge the sufficiency of the evidence to support their respective convictions. Waller and Reading were found to have conspired to commit both burglary and robbery, while Cooper was found to have conspired only to commit robbery. [RP 841-43]<sup>1</sup> All three argue that there was insufficient evidence of an agreement to commit either crime.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

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<sup>1</sup> Unless otherwise noted, all references to the report of proceedings are to the trial record of June 18, 2008 through June 26, 2008.

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

RCW 9A.28.040(1) defines conspiracy:

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any

one of them takes a substantial step in pursuance of such agreement.

Burglary in the first degree is found in RCW 9A.52.020(1):

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

Finally, robbery in the first degree is set forth in RCW 9A.56.200(1):

A person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or

(ii) Displays what appears to be a firearm or other deadly weapon; or

(iii) Inflicts bodily injury; or

(b) He or she commits robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

The appellants are correct that there was no direct testimony that the four people involved, Waller, Reading, Cooper, and Afo, articulated to each other, or to any other witnesses, that they had made a plan to rob or burglarize the victim, Hoffman. However, the State is entitled to the reasonable inferences from the evidence presented, and the bulk of the evidence makes no sense unless the

four defendants had an understanding, *i.e.*, an agreement, that when Hoffman was located they would obtain the money they claim he owed by force. While there was conflicting testimony in some cases, the jury was presented with the following evidence.

Janus Afo, who pleaded guilty to residential burglary and had received a plea bargain in exchange for his testimony against his co-defendants, [RP 346-47], testified that Cooper came to him on November 27, 2007, for help in locating "Nate." (David Nathan Hoffman, RP 259) He went to Kristinna Whitt. [RP 313] Tara Miller, who was with the group that night, said she met Waller, Reading, and Cooper about midnight in Shelton. The group drove to Olympia for something to eat, arriving between 1:00 and 2:00 a.m. About 2:30 they returned to Shelton to pick up Afo, then once again drove back to Olympia around 3:00 to 4:00 a.m. [RP 459-60] They went to Whitt's mother's house on Steamboat Island. [RP465] Whitt estimated they arrived at about 6:00 a.m. Driving her own car, Whitt met the group at the Steamboat Island store because "I didn't want anything happening at my parents' house." [RP 257] Afo got into her car, and the group, in the two vehicles, went to the driving range just down the road. [RP 259] Cooper apologized to Whitt but said Whitt was their only link to finding Nate. [RP 260] Cooper got

into Whitt's car along with her and Afo, and the two cars went to West Olympia, to the trailer home of a person named Kathy. [RP 261] Everybody went inside, and using Kathy's phone and Cooper's cell phone, Whitt made a series of calls, eventually getting directions to where Nate might be. [RP 264] She testified that she didn't have a choice whether to help the group find Nate. RP 258] She also testified that although she did not see a weapon, Afo implied that he had a gun. [RP 299-300] Whitt gave the directions to Afo. Waller, Reading, and Afo left in the Ford Explorer that the group had been driving all night. [RP265-66] Cooper and Whitt remained at Kathy's trailer. Afo testified that he "probably would have beat somebody up," and he "wasn't expecting a tea party." [RP 364] When Detective Kolb interviewed Cooper on November 30, 2007, Cooper told her that because she had introduced Nate to Reading (and possibly Waller), she felt obligated to help Reading get his money back. She told Kolb that the men were going to "beat [Nate] up," and "They were going to beat him pretty bad." [RP 390-91]

Afo, Waller, and Reading ended up in the 6500 block of Dennis Place. Narissa Kelley, who lived in that block, saw the Explorer driving around the neighborhood, passing her house about

five times between 8:40 or 8:45 a.m. and the time it stopped around 9:30 at the residence across the street from her home. Three men got out. [RP 72-74] The man she identified in court as Waller went to the front door of the residence, opened the screen door, and appeared to be attempting to open the door by pushing on it with his shoulder. [RP 75, 79] One of the other men appeared to be trying to open a bay window on the front of the residence. All three men were wearing garments with hoods, and all of them had the hoods on their heads. [RP 76] She saw them all get back into the Explorer and leave. [RP 77] Kelley called 911. [RP 78]

Another woman who lived at 6510 A Dennis Place, also saw the three men walking toward 6510 B Dennis Place, the other half of the duplex in which she lived. [RP 42-43] A man she also identified in court as Waller was one of them. [RP 49] She was concerned about them and felt they were threatening, so she tapped on her window to get their attention and let them know that someone was at home. [RP 46] They went out of sight toward the other side of the duplex. Approximately five minutes later Waller knocked on her door. She spoke to him through the window; he asked if Nate was home. She replied she did not know who Nate was, and they left in the Explorer. [RP 47-48] According to Afo, the

three men knocked on the screen door of unit B, which was locked, and after Waller spoke to the neighbor, they left. [RP 323-24]

Officer Christopher Tressler of the Tumwater Police Department heard the dispatch that a suspicious green Ford Explorer had been reported in the area of Dennis Place and 65<sup>th</sup>. [RP 89-90] He headed toward that area in his patrol car and in the 6400 block of Capital Boulevard spotted the vehicle traveling in the opposite direction. [RP 91] He passed it, observed that there were three occupants, and turned to get behind the Explorer, which was stopped at a red light. [RP 91-92] When the light turned green, he activated the overhead lights on his car in order to stop the Ford. [RP 95] Instead of stopping, the Ford moved onto I-5 for a short distance, then exited at Exit 104. [RP 96] While on the freeway, the Ford traveled at approximately 85 miles per hour and made numerous lane changes to pass other vehicles. At Exit 104, it braked hard and made a sharp right hand turn, which put it driving the wrong way onto the on-ramp to Highway 101. [RP 97] It traveled down Deschutes Way, and still traveling about 80 miles per hour in a 35 zone, passed another vehicle by going into the on-coming lane. [RP 98-99] It then turned left onto Lakeridge Drive by driving between the curb and a truck headed in the opposite

direction. It continued up the hill at a high rate of speed, [RP 99] turned up a private driveway and stopped. Afo testified that during the chase, Reading retrieved a gun from under his seat, handed to Waller, who passed it back to Afo, and Afo left it in the car. [RP 329-31 All three occupants jumped out of the Ford and fled on foot [RP 100] in different directions. [RP 105] The backseat passenger, later identified as Afo, [RP 109, 126] was closest to the officer, so he gave chase and captured Afo at the entrance to the courthouse. [RP 107-08] Reading was identified as the driver and Waller as the front passenger. [RP 139]

Another officer with a tracking dog later captured Waller hiding in some brush. He was wearing a camouflage jacket, black hat and had a mask over part of his face. [RP 153-54] Two sets of black gloves were in a pocket of the jacket. [RP 132] The sheriff, who happened to be in the area at the time, spotted Reading climb over a fence and run into an area behind a convenience store on Evergreen Park Drive. Lt. Elwin apprehended him. [RP 166]

The Ford Explorer was searched. Among the items found in it were a loaded 45-caliber handgun, [RP 129-30] a hatchet, a club, ski masks, a police scanner, zip ties, camouflage face paint, a sleeping bag, [RP 134] and a cell phone. [RP 173] The gun, when

fired, operated normally. [RP 142-43] The scanner, when turned on, was set to the frequency used by the Tumwater, Lacey, and Olympia police departments. [RP 210] Also located in the vehicle were duct tape, binoculars, a walkie talkie, a small tool set, some gloves, and a wallet containing a Washington State Liquor Control Board card with Dawn Cooper's name on it, as well as a photograph of Cooper. [RP226-28]

Because the cell phone rang incessantly while the Ford was being searched at the scene, Detective Charles Liska answered it. The caller was a panicky-sounding female who repeatedly asked Liska who he was. [RP 173-74] He replied that he was Janus, which she clearly did not believe. [RP 174] She wanted to know where he was and where he could be picked up. He told her to come to the Dairy Queen in Tumwater. [RP 175] Even though the officer ended the call, the phone continued to ring, displaying "Don C" on the caller identification. The officer answered it again, and the called sounded like the same woman. [RP 176] He asked, "Dawn, where are you at?", and again sounding panicky, and with considerable profanity, she continued to ask where he was. The call was ended, and the phone immediately rang again. [RP 177]

This time the officer handed the phone to a female detective, Jennifer Kolb, who spoke with the woman for only a few seconds before handing the phone back to Liska; the caller repeatedly asked where he was, but when he replied he was at the Dairy Queen, she replied that he was not. He told her to meet him at the Chevron station, which is where she said she was. [RP 178-79] Liska called for other officers to go to Dairy Queen to look for suspicious females, and then the phone rang again. The same female asked the same questions over and over. She was increasingly panicky. [RP 179-80] The police did not locate anyone at the Chevron station. [RP 180]

Whitt testified that after the men left Kathy's trailer, they called Cooper to advise they had found the place and were going in. [RP 284] Thirty to forty-five minutes later, Cooper placed a call to the men; she was concerned because she had not heard from them. While Whitt described her as calm, Cooper placed "a few" calls, and from Cooper's side of the conversation, Whitt understood that the men were at Dairy Queen and needed a ride. [RP 285-86] At one time Cooper spoke to a female, became angry, and told her to give the phone to one of the men. Cooper was concerned that they were in trouble, but also unsure if they were playing a joke on

her. [RP 287] She was afraid that they had been arrested and she was being set up by the police. [RP 289] At Cooper's instigation, Whitt, Cooper, and Miller drove in Whitt's car to the Dairy Queen, but there was a vehicle there that Cooper believed was an undercover police car, and she thought she was being set up. [RP 289-91] Cooper placed more telephone calls, and then the three women went to the neighborhood that the men had been directed to; they walked around, locating the house where Nate was supposed to be. There was a green SUV in the driveway and a man standing at the window. They left. [RP 291-93] They returned to Dairy Queen, where Whitt left her car and Cooper's father gave them a ride back to Kathy's. Whitt got a ride back to her car at the Dairy Queen, where Cooper also arrived and retrieved her belongings from Whitt's car. [RP 293-94]

At trial, Reading testified that approximately two months earlier, he had let Nate test drive a Pontiac worth \$1500, but Nate had never returned the car. [RP 531-32] Reading said he simply wanted to locate Nate to find out why he had not paid for the car. [RP 535] Waller and Cooper were long-time friends, but he had met Afo only that day; Afo said he could find Nate. [RP535-36] Waller was only along because they were friends. [RP 535].

Again, there was conflicting testimony about some things, but these facts were before the jury. It alone was the sole judge of credibility and the trier of fact. A rational and reasonable jury could have found it unlikely that Reading would spend half the night, enlisting people he didn't even know to locate Nate just to make a friendly inquiry about Nate's failure to return or pay for a car he had taken for a test drive two months earlier. The jury could reasonably have disregarded the denials that there was an agreement to find Nate and rob him or break into his house, since the neighbor testified that the men appeared to be trying to get into the house that they mistakenly thought was Nate's. Cooper, Waller, Reading, and Afo all acted in concert, and both Cooper and Afo acknowledged that beating Nate was likely. This does not sound like a casual, friendly debt.

The jury could also have considered that obtaining the unwilling help of Whitt at daybreak in order to locate Nate was more consistent with a plot to rob Nate than to have a casual discussion. All three of the men went to find Nate, wearing clothing that could be used to conceal their faces. The Ford contained equipment that would be useful in a burglary or robbery. Waller was identified as the person testing the front door with his shoulder, and speaking to

the next door neighbor. That is inconsistent with Reading's testimony that Waller was simply along because they were friends. A jury could reasonably conclude that because they were such good friends, Waller was along to help Reading beat the money out of Nate. When signaled by the police to pull over, Reading led the officer on a movie-style chase in an effort to escape, which a jury might consider an unlikely thing to do just because the men had warrants. The jury could reasonably have concluded that they were aware that the neighbor, having seen them and being clearly suspicious of them, may have called the police and they didn't want to have to explain why they were trying to open the door and window of a house where no one was home, especially with the clothing and equipment they had with them.

A reasonable jury could also have discounted the defendants' denials of a conspiracy when it heard that Cooper was concerned that the men had not returned, and was afraid they had run into trouble with the police. Had they simply been going to find Nate and discuss a "borrowed" car, she would have had no reason to be alarmed when they failed to return or worry about the police intercepting them. Her frantic efforts to locate them and her fear of being set up by the police are consistent with a plan to do harm to

Nate, but inconsistent with the explanation offered by the defense. The jury could infer that the plan was either to rob Nate, because there was talk of beating, and/or burglarize his home, because the men made attempts to enter the residence where they thought Nate lived.

In short, all of the conduct exhibited by the defendants, as well as the items they were wearing and carrying in the Ford, were consistent with an agreement reached among Waller, Reading, Cooper, and Afo to obtain money by force from Nate. The jury determines which witnesses to believe and how much weight to give the evidence, and while it had conflicting evidence to choose from, it could reasonably have believed there was a conspiracy. Under the standard articulated above, there was sufficient evidence to support the convictions that resulted.

2. The order joining the defendants for trial did not violate Cooper's due process rights nor cause a violation of her right to a speedy trial.

a. Joinder by court rule.

CrR 4.3(b) addresses the joinder of defendants for trial. It reads:

Joinder of Defendants. Two or more defendants may be joined in the same charging document:

(1) when each of the defendants is charged with accountability for each offense included;

(2) when each of the defendants is charged with conspiracy and one or more of the defendants is also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

(3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:

(i) were part of a common scheme or plan; or

(ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

General Rule (GR) 3 provides:

For criminal cases involving more than one defendant in a single charging document, a duplicate original of the charging document will be filed for each defendant. Each defendant will receive a unique cause number. . . . .

The assignment of a separate cause number to each defendant of those names on a single charging document is not considered a severance. Should a defendant desire that the case be severed, the defendant must move for severance.

Cooper argues extensively that the charging documents in this case did not join the defendants. She may be reading more into the rules than is there. By its terms, CrR 4.3 only addresses the situation where two or more defendants are joined in the same charging document, and GR 3 merely specifies that if that happens, duplicate originals with separate cause numbers are to be filed. The rules do not prohibit joinder by listing co-defendants on the

separate charging documents. In this case, neither rule applies, because the defendants, while charged with a common conspiracy, had different additional charges. They could not have been charged in the same document. If they were properly joined by listing co-defendants in the charging documents, failing to list the co-defendants in amended informations would not have severed the defendants; extrapolating from the above rules, some affirmative action is required to sever joined defendants, and omitting names from amended informations would be insufficient to do that.

b. Order of joinder.

In any event, even though the trial court, as well as defense counsel for Waller and Reading, apparently believed the charging documents joined the defendants, it is quite possible that they did not. The prosecutor was unwilling to rely on this method, and he filed a motion to join on January 7, 2008. [CP 18]<sup>2</sup> This was done in response to Cooper's motion to continue because she was having difficulty obtaining an investigator; the State wanted to be sure that the defendants were kept together for trial. It was noted for hearing on January 17, 2008. Cooper asked for a week to

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<sup>2</sup> Unless otherwise noted, all references to the Clerk's Papers are those designated by Cooper.

review the motion to join. [01/17/08 RP 7-8] The matter was continued for one week, which was January 24, but the status hearing was still set for January 30 and the trial for the week of February 4. [01/17/08 RP 9]

On January 24, there was an inquiry into the status of Waller's counsel, but nothing else happened. The record does not reflect that Cooper or her attorney were even present. [01/24/08 RP 3-4] On January 30, the day of the status hearing, Cooper's attorney, as well as counsel for Afo and Reading, was not present at the time the hearing was set. [01/30/08 RP 3-6] They all eventually showed up and the hearing began. [01/30/08 RP 6] Counsel for Waller had recently been appointed because his first attorney discovered he had a conflict, and the new attorney needed time to prepare. [01/30/08 RP 7, 14] The court found that the cases should be kept together in the interest of justice and judicial efficiency. [01/30/08 RP 14] It noted that the motion to join had been signed on January 17, [01/30/08 RP 12] and that the defendants were all facing the same underlying allegations and charged as co-defendants. [01/30/08 RP 17] Cooper was advised that she could bring a motion to sever and that while she had asked for a continuance she was also on notice. Her attorney said he

would bring a motion to vacate the order of joinder [01/30/08 RP 17] and to sever. The court further found good cause to continue the trial date. [01/30/08 RP 21-22]

This case was a logistical nightmare; the prosecutor remarked that it was like herding cats. [03/13/08 RP 6] Cooper set her motion to vacate the order of joinder for March 13, 2008. [CP 46] The court expressed frustration that there had been status hearings scheduled for the previous day, but the parties were not present at the same time to address scheduling. [03/13/08 RP 4] Cooper's counsel was not present at the March 13 hearing, [03/13/08 RP 10] although the clerk's minute for that day indicates that at some point her attorney and the prosecutor set the matter for March 17. [CP 47]

On March 17, the court indicated that the order to join had been signed inadvertently and prematurely, but that it did not mean that joinder was inappropriate. Cooper's counsel argued at length against joinder, primarily because joinder took the case beyond the 60-day speedy trial time for Cooper. Cooper did not, however, bring any motions to dismiss for violation of speedy trial, and made no effort to have the motion to vacate the joinder order heard before her 60-day trial time had expired. Her counsel believed it

was up to the court or the prosecutor to note his motion for argument. [03/17/08 RP 16-19] Following counsel's lengthy argument, the court, treating the motion as one to sever, ruled that Cooper had had notice that she was joined with three co-defendants and that she had not carried her burden of establishing grounds to sever. The motion was denied. [03/17/08 RP 31] Trial was set for the week of May 19. [03/17/08 RP 33, CP 49] On May 6, the State filed a motion to continue the trial until the week of May 27 because a State witness was unavailable. [CP 173]

On May 29, 2008, Cooper's attorney argued a motion, filed on May 12, to dismiss based on improper joinder and violation of her speedy trial rights. Counsel made the same arguments he raised in the March 17<sup>th</sup> hearing. [05/29/08 RP 7-14] The judge, a different one than heard the earlier motion, ruled that Cooper had not established a basis to dismiss and that the earlier rulings would stand. [05/29/08 RP 17]

While Cooper brought motions to vacate the joinder order, those can be treated as a motion to sever; the arguments and result would be the same. "A trial court's denial of a motion for severance is reviewed for abuse of discretion." State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982)

Cooper maintains that the order of joinder was improperly entered because she had no notice or opportunity to be heard, and she is prejudiced because the joined cases were continued beyond the 60-day speedy trial time set forth in CrR 3.3(b)(1). Setting aside the notice provided by the charging documents, Cooper certainly knew on January 17 that the State had filed a motion for joinder. It is unclear from the record why the January 24<sup>th</sup> hearing did not take place. On January 30, however, it was clear that Cooper objected to joinder and her counsel was instructed to file a motion to sever. [01/30/08 RP 18, 22] He did so, [CP 24] but did not set it for hearing for some time, expecting, as noted above, that somebody else would do that for him.

On March 17 and again on May 29, Cooper was afforded the opportunity to argue at length regarding the joinder issue. Although both dates were well beyond February 11, when she maintains her speedy trial time ended, she still had both notice and at least two opportunities to be heard. Had the court ruled in her favor, her case would have been dismissed. She cannot demonstrate any prejudice, because the court did not grant her motions, and there is nothing in the record to lead to the conclusion that the court would have ruled differently before February 11. She is in exactly the

same position she would have been in had her objection to the joinder motion been heard on January 24, as originally scheduled. She has not alleged that she was actually prejudiced in her ability to present her defense because of the continuances. No evidence disappeared or witnesses became unavailable. The trial record shows that the defendants were properly joined, since they were all charged with the conspiracy and some of them with acts committed in furtherance of the conspiracy. CrR 4.3(3). Cooper has failed to show that joinder was improper. If joinder is proper, then severance is within the discretion of the trial court. State v. Hentz, 32 Wn. App. 186, 189, 647 P.2d 39 (1982) (*reversed on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983)) Because joinder in this case was proper, Cooper's motions to vacate the order or to dismiss were correctly denied.

c. Speedy trial.

Because the defendants were properly joined, the court was within its discretion to continue the joint trial beyond Cooper's 60-day trial period.

CrR 3.3(f)(2) provides:

On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice

and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance.

Here Cooper had apparently filed at least one motion to continue. [01/17/08 RP 7] On January 30, the court found good cause to continue for an extended time because Waller's attorney had been forced to withdraw at a late date and new counsel required time to prepare. The court specifically found the interests of justice and judicial economy warranted both joinder and the continuance. [01/30/08 RP 14] Subsequent continuances are less well-documented, but Cooper has not claimed that they were unjustified except as to her speedy trial right.

State v. McKinzy, 72 Wn. App. 85, 863 P.2d 594 (1993), involved a similar factual situation where two defendants were joined for trial. On the last day of speedy trial, one of them asked for a 30-day continuance because he had obtained a new lawyer. The other wanted to go to trial immediately and moved to sever. The court denied the motion to sever and granted a continuance. The defendants were convicted and the convictions were affirmed.

The court of appeals noted that CrR 4.4(c)(i),<sup>3</sup> which has been argued by Cooper as a basis for severance, is not a mandatory directive, and “the preference for severance may be tempered by considerations of judicial economy and potential prejudice to others.” *Id.*, *supra*, at 89. See also State v. Wood, 94 Wn. App. 636, 643, 972 P.2d 552 (1999).

Separate trials are not favored in this state. Grisby, *supra*, at 506. “Severance is not mandatory even where a defendant’s speedy trial rights are at issue.” State v. Dent, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). The delay in Dent (which involved only two co-defendants) was slightly more than two months, and was caused by the withdrawal of defense counsel due to a conflict of interest and the appointment of new counsel. The defendant sought severance because a continuance would take the trial beyond his speedy trial period. *Id.* The Supreme Court noted that there was no claim of any prejudice in presenting his defense, just as Cooper has made none. The interests of judicial efficiency include the burden on the court, jurors, and witnesses when separate trials are held,

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<sup>3</sup> CrR 4.4(c)(i) reads:

The court, on application of the prosecuting attorney, or on application of the defendant . . . should grant a severance of the defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant’s rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of the defendant.

and the court may properly weigh those interests in denying severance. Id., at 485-86.

“[T]he defendant bears the heavy burden of demonstrating that the trial court’s denial of severance was an abuse of discretion.” State v. Robinson, 38 Wn. App. 871, 881, 691 P.2d 213 (1984) (citing to State v. Hentz, *supra*). The defendant must point to specific prejudice from a joint trial. State v. Alsup, 75 Wn. App. 128, 131, 876 P.2d 935 (1994). Cooper has failed to do so.

CrR 3.3, the time for trial rule, includes this provision:

(d)(3) Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

At the hearing on January 30, 2008, Cooper’s counsel noted they were ten days away from the last-set trial date, [01/30/08 RP 21] and a new date was set beyond February 11, [01/30/08 RP 15, 22] but he never specifically moved to have Cooper’s trial set before February 11. Rather, he filed a motion to vacate the order of joinder and noted it for hearing first on March 6 and then March 13,

2008. [CP 37, 46] At the hearing on March 17, the court specifically noted that Cooper's counsel had not filed any motions relating to speedy trial issues [03/17/08 RP 15] and that he had set the hearing on his motion to vacate the order of joinder on March 6, well after the date he alleges speedy trial expired. [03/17/08 RP 16-17] In other words, rather than moving the court to set the trial no later than February 11, he moved to vacate the order of joinder on the grounds that Cooper had not had an opportunity to be heard. [CP 24-25] He argued in his brief in support of his motion that Cooper's right to a speedy trial was violated, but also argued a number of other grounds for severance. [CP 29-35] The State maintains that Cooper did not properly preserve the speedy trial issue for appeal, but even if she did, the court was within its discretion to continue her case along with the others with which it was joined.

3. The court properly excluded the testimony of Nathan Hoffman because it was not relevant.

Cooper complains that the court improperly refused to allow her to call Nathan Hoffman as a witness, making an offer of proof that he would testify that, several months before, Cooper had introduced him to Reading, who loaned him money to bail a friend

out of jail, and that he considered the debt to be a friendly one. There was no reason for any of the defendants to be upset with him. [RP 441-42] The court found that this testimony would be irrelevant and excluded Hoffman as a witness. [RP 449] The trial court was correct.

Cooper is correct that a defendant has the right to present a defense. However, as with all other evidence, defense evidence must be "relevant and material to the defense." State v. Bell, 60 Wn. App. 561, 565, 805 P.2d 815 (1991) (citing to State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986)).

ER 401 defines relevant evidence:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 402 provides:

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

In this case, even had Hoffman testified as Cooper expected, the evidence would not have made the any of the facts the jury had to decide more or less probable. It was faced with

evidence about what the defendants said and did. Hoffman was never present at any time during these events, nor did he know about them until some time later, and his state of mind was totally irrelevant to the determination of the issues before the jury. A jury could reasonably conclude that even if Hoffman actually believed this was a “friendly debt” and nobody had reason to be upset with him, Reading, who had only just met Hoffman at the time he loaned the money, might take a less casual view of a debt that had gone ignored for several months.

The relevance of Hoffman’s proposed testimony becomes even more tenuous in light of Reading’s testimony, which was that Hoffman had taken Reading’s car, a Pontiac no less, for a test drive and never brought it back. [RP 531-32, 539] Hoffman’s views about a loan to bail out a friend would be completely irrelevant.

A trial court has broad discretion regarding the admission or exclusion of evidence. State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996). Its decision is reviewed for abuse of discretion. State v. Posey, 161 Wn.2d 638, 648, 167 P.3d 560 (2007). Here, it cannot be said that the court abused its discretion.

4. The court did not violate the appearance of fairness doctrine.

The appearance of fairness doctrine applies to judicial and quasi-judicial decision makers. It seeks to prevent the situation where a decision maker is biased or has a personal interest in the matter at hand. It requires not only that the judge be impartial, but that he or she appear to be impartial. State v. Finch, 137 Wn.2d 792, 808, 975 P.2d 967 (1999). "Evidence of a judge's actual or potential bias must be shown before an appearance of fairness claim will succeed." State v. Chamberlain, 161 Wn.2d 30, 37, 161 Wn.2d 30 (2007).

Cooper appears to believe the trial court was biased against her because it was occasionally impatient with her counsel. A review of the record shows that her attorney frequently tried the patience of both the trial judge and the judges who heard pretrial motions. A few examples follow.

At the hearing held on January 30, 2008, Mr. Finlay, Cooper's counsel, was not present at the time the hearing was set and appeared only at some later time after the court had taken a recess. [01/30/08 RP 3-6] On March 13, 2008, the date Mr. Finlay had set for argument on his motion to vacate the order of joinder,

[CP 46] he did not appear. [03/13/08 RP 6] At the hearing on March 17, the court became frustrated because Mr. Finlay not only took an excessive amount of time to make his argument and did not answer the question posed by the judge, [03/17/08 RP 15] but interrupted the court. [03/17/08 RP 18] At a hearing on May 29, 2008, Mr. Finlay again failed to reach his point after lengthy argument. The court suggested that time was running out: "We're running a little bit out of time, so go ahead. I don't want to cut you off, but on the other hand . . ." [05/29/08 RP 12] Several paragraphs later, the court said, "I thought we were going to sum up but we're continuing on, and . . ." [05/29/08 RP 13]

At trial, Mr. Finlay doggedly argued a number of things, but as an example, he maintained that the judge had made a ruling in limine during a chambers conference that there be no mention that Kristinna Whitt was kidnapped. When she testified that Afo made a remark about her being a hostage, Mr. Finlay maintained that it violated the ruling. The court did show some irritation because Mr. Finlay, who had been given an opportunity to make a record of the matter, had failed to put an order on the record. "So I'm encouraging you to move beyond the point of, well it was a previous court order. It was not a previous court order. It was

discussed, but when counsel was given an opportunity to put it on the record, it was not put on the record, so I'm giving you that opportunity now." [RP 272-73]

Again during the trial, Mr. Finlay wanted to add "a little more" to the record a matter that had been discussed several times. [RP 449] When Mr. Finlay refused to let go of an issue after the court had made its ruling, the court cut him off and asked for any other matters necessary to take up before the jury entered. Mr. Finlay took offense that the court was angry with him for "just trying to represent my client." [RP 452] The court responded, "Counsel, I'm not frustrated by your representation of your client. . . . What frustrates me is being late for appearances, not being adequately prepared, not having a witness list, and then bringing up issues at the 11<sup>th</sup> hour when it's a difficult time for the counsel and the Court to deal with them and I have a jury waiting." [RP 453]

There is nothing in the record to indicate that the judge was biased against Cooper, or that he appeared to be biased against her. The court was on occasion justifiably irritated with her counsel, who brought on himself the rebukes of the court. There is no basis for a reversal of her conviction because of a violation of the appearance of fairness doctrine.

As part of her argument that the trial court appeared biased against her, Cooper complains that the reasonable doubt jury instruction read to the jury before the evidentiary portion of the trial began has been disapproved by the Supreme Court. Shortly after the jury panel was sworn, the court read preliminary instructions; Cooper objects to this portion:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we can know with absolute certainty, and in criminal cases, the law not (sic) require proof that overcomes every possible doubt.

[RP 30-31]. It is true that this is a variation of the language that the Supreme court disapproved in State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007). In that case, the court instructed trial courts to use WPIC 4.01 when instructing the jury on the State's burden of proof. Id., at 318. The court did not, however, reverse Bennett's conviction, finding that the instruction met minimum due process requirements. Id. Division One of the Court of Appeals has reversed a conviction based upon a failure to use WPIC 4.01, although in that case the instruction that was used was far different from both WPIC 4.01 and the instruction used in Bennett. State v. Castillo, *slip op.* 61867-9-I (June 1, 2009).

In Cooper's case, while a portion of the disapproved instruction was read at the beginning of the trial, the court also informed the jury that it would be given the applicable law at the conclusion of the case.

Third, at the conclusion of all of the evidence, I will tell you what law applies to this case. The law that applies will be set out in written instructions which I will read out loud. You will have individual copies of the written instructions with you in the jury room during your deliberations.

[RP 34]

The instructions given to the jury at the end of the case, which became the law of the case, included Instruction No. 4, which is WPIC 4.01. The relevant portion of that instruction reads:

Reasonable doubt is one for way (sic) reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of (sic) evidence or lack of evidence. If from such consideration you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

[RP 681]

Therefore, the instruction which the jury was required to follow was the one approved in Bennett and which trial courts are required to use. The court did not commit error, and it is a far

stretch to find that this preliminary instruction violated the appearance of fairness doctrine.

5. The prosecutor did not commit misconduct; even if some of his remarks were improper, they were not so flagrant and ill-intentioned that a curative instruction would not have been sufficient.

Cooper identifies a long list of statements by the prosecutor which she labels as misconduct. The first include these remarks made during rebuttal: “I would not stand here and say believe everything Mr. Afo says.” [RP 797; and ““I don’t believe Afo. It doesn’t matter what I believe, . . . .” These remarks are taken out of context in the prosecutor’s rebuttal argument. In particular, the second comment continues: “. . . but I tell you what, I know one thing, your instructions don’t tell you that believing any witness is a black or white thing. It says you may give what weight and value to the testimony of any witness that you will, and I simply urge you when you consider the evidence of Mr. Afo that you consider that evidence both what he said and the inferences that can be drawn from that evidence in light of all if the evidence in the case.” [RP 798-99]

“Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence

addressed in the argument, and the instructions given.” State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990) A conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict. State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991); State v. Wood, 44 Wn. App. 139, 145, 721 P.2d 541 (1986).

A prosecutor must not express a personal belief as to the credibility of witnesses, but he or she is afforded wide latitude in closing argument to draw inferences from the evidence, including commenting on the credibility of witnesses and arguing inferences about credibility based on evidence in the record. A reviewing court will consider the context in which alleged improper statements are made. State v. Millante, 80 Wn. App. 237, 250-51, 908 P.2d 374 (1995)

Here, Cooper has taken two remarks out of context. Taken in its entirety, it is clear that the prosecutor was arguing from the evidence that Afo, although a State witness, had credibility problems. Cooper did not object to these remarks. A failure to object waives a challenge to that remark unless it is so flagrant and ill-intentioned, and the resulting prejudice so lasting that instructing the jury to disregard would be ineffective. State v. Bautista-Caldera,

56 Wn. App. 186, 193, 783 P.2d 116 (1989). The failure of defense counsel to object suggests that the argument did not seem “critically prejudicial” to the defendant in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). In the present case, it cannot be said that these remarks would so influence the jury that it would disregard both the instructions and its oath and convict without sufficient evidence.

Cooper also points to the prosecutor’s questions of Tara Miller, a defense witness, in which he asked her if she had certain criminal convictions. [RP 489] The prosecutor explained that he had misread Miller’s criminal history and asked the questions by mistake. [RP507-10] When the jury was next in the courtroom, the court gave a curative instruction:

In the cross-examination of Ms. Miller, the State asked some questions regarding her possible convictions of criminal offenses. You are not to draw any inference from the fact that the State asked those questions other than the one she admitted to, and there is no record that she ever was convicted of forgery or theft.

[RP 514] Jurors are presumed to follow instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). The prosecutor made a mistake, the court dealt with it in the appropriate manner, and Cooper has not shown that she was prejudiced by the error. To

prevail on a claim of prosecutorial conduct, she must show both improper conduct and prejudice resulting from it. State v. Henderson, 100 Wn. App. 794, 800, 998 P.2d 907 (2000). Even had the remarks been improper, the prejudicial effect is determined by examining them not in isolation but 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. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

Cooper complains about so many specific questions or remarks of the prosecutor that it is next to impossible to respond to them all. On pages 45 and 46 alone of her opening brief, she refers to 82 different portions of the transcript that contain alleged errors. The transcript of the trial is more than 850 pages, and to address each and every one of these statements would take more time than the State has available in which to file this brief, not to mention putting it over the page limit. The State will discuss a few instances of claimed misconduct, and rely on this court to consider the entire record in light of the principals of law argued herein.

Cooper complains that the prosecutor asked questions or made comments about matters that had been ruled inadmissible by the court in the orders in limine, for example, Reading's DOC

warrants. In that instance, the court ruled that the prosecutor's questions were within the scope of the order. [RP 555] As Cooper notes, sometimes the court sustained objections, such as to the prosecutor's question to Miller about whether the group had been doing drugs. [RP 477] The court sustained an objection to Whitt's testimony that Afo had made a remark about a hostage, even though it was uncertain whether it violated the rulings in limine, and gave the jury a curative instruction. [RP 277, 281-82] In each of these instances, the court dealt with the objections to questions or remarks in such a manner as to eliminate any prejudice.

Cooper argues that it was impermissible opinion testimony for the detective to testify that during her interview with Cooper, she had confronted Cooper because she felt Cooper was not being honest about her account. Cooper acknowledges that in State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001), the Supreme Court held that a recorded statement in which the police officer accuses the defendant of lying during an interview is not inadmissible opinion testimony. She attempts to distinguish Demery, first using the argument that it was a plurality opinion, where four justices held it was not improper opinion testimony, one held that it was improper but was harmless error, and four held that it was reversible error.

That may be, but nevertheless five justices held that it was either proper testimony or can be harmless error. Her second grounds for distinguishing Demery is that in Demery the recorded statement itself was played to the jury, whereas in this case the detective testified that she made the statement to Cooper. There is, in fact, no difference between a jury hearing a recording of a police officer telling a defendant that the officer does not believe him and the officer telling the jury "I advised Ms. Cooper that I didn't feel she was being honest with me about the events that unfolded that day." [RP 388] While the detective was under oath at trial, she was not under oath at the time she made the statement she was recounting. "Because the officers' statements were not made under oath at trial, we conclude that they do not fall within the definition of opinion testimony for purposes of the evidentiary prohibition." Demery, *supra*, at 760. It was not improper for the Detective Kolb to testify to her statements to Cooper, and particularly since they occurred before Cooper made additional statements. The general impression given to the jury was that while Cooper may have been withholding information at first, she eventually came clean. [RP 389-91]

Cooper complains that Officer Tressler turned an exhibit which had not yet been introduced into evidence, a photograph of the Ford Explorer, to look at the exhibit number on the back, and in the process exposed the photo to the jury. The prosecutor apparently did the same thing to a different photograph, one of Janus Afo, while showing it to a witness. [RP 94, 109] There was no suggestion that it was done deliberately, and both were eventually admitted. Even if it was error for the jury to see them prematurely, they were admitted and thus there is no prejudice. Cooper points to numerous occasions when the prosecutor asked what she maintains were leading questions. When those were objected to, the court ruled accordingly. Cooper does not identify any prejudice to her.

Cooper argues that the prosecutor failed to follow ER 612 when he asked Whitt and Afo to review their statements to the police. [RP 288, 336] She does not identify the prejudice that follows from asking the witnesses to look at their prior statements even if they have not expressed a lack of memory. In Ms. Whitt's case, when the prosecutor responded that he wanted the world to know he was not leading the witness as he had been accused of doing, Cooper objected to that. A fairly casual reading of the

transcript shows that much of the prosecutor's behavior to which Cooper objects, such as this, was in response to the incessant nit-picking on the part of her counsel. Defense counsel was trying to do a thorough job and defend Cooper to the best of his ability, but he lacked the capacity to see the larger picture and identify the issues that really mattered. He precipitated much of the conduct which he now identifies as error. Cooper perceived many, many errors during the trial, including an occasion where her attorney believed that the prosecutor, a police officer, and some of the jurors were laughing at Waller's attorney. [RP 125] Nothing was too insignificant to be brought to the court's attention. One might say counsel was perhaps hypersensitive.

"It is well settled that a litigant is entitled to a fair trial but not a perfect one, for there are no perfect trials" In re Pers. Restraint of Elmore, 162 Wn.2d 236, 267, 172 P.3d 335 (2007) (citing to Brown v. United States, 411 U.S. 223, 231-32, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973)). The record, taken as a whole, shows that, notwithstanding the mountain of complaints, Cooper, and her co-defendants, received a fair trial. As argued above, this court will review the entire record. The State has responded to general categories of Cooper's complaints, but does not have the time or

space to respond to each individual statement that Cooper lists in her brief.

“The cumulative effect of repetitive error may be so flagrant that no instruction can erase the error.” Henderson, *supra*, at 804. The State maintains that cumulative error did not occur here, and that the vast majority of the matters Cooper claims as errors were not. It is worth noting that neither Waller nor Reading identified any errors in their briefs other than the claim of insufficient evidence. There was no cumulative error requiring reversal.

#### D. CONCLUSION.

Based on the foregoing argument and authorities, the State respectfully asks this court to affirm the convictions of all three appellants.

Respectfully submitted this 30<sup>th</sup> day of June, 2009.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

TO: PETER B. TILLER  
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PO BOX 58  
CENTRALIA, WA 98531

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STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY  
COURT OF APPEALS  
DIVISION II

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 1<sup>st</sup> day of July, 2009, at Olympia, Washington.

  
CHONG H. McAFEE

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I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

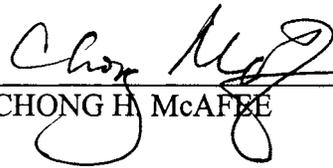
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

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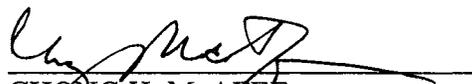
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TO: BRUCE J. FINLAY  
ATTORNEY AT LAW  
PO BOX 3  
SHELTON, WA 98584

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 1st day of July, 2009, at Olympia, Washington.

  
CHONG H. McAFEE