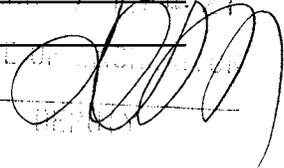


NO. 38539-2

COURT OF APPEALS  
STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNY TWITTY, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable James Orland, Judge

No. 07-1-05164-5

---

**BRIEF OF RESPONDENT**

---

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

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2. Has defendant failed to present a meritorious issue regarding the court's purported exclusion of evidence when: 1) the court's ruling on the motion in limine was narrower in scope than defendant's claim; 2) there was no offer of proof clearly setting forth the nature of the evidence that defendant wanted to adduce; 3) the ruling in limine was tentative and defendant did not seek a final ruling, and 4) the jury heard evidence of the nature which defendant asserts was improperly excluded?

3. Has defendant failed to show any abuse of discretion in the court's evidentiary rulings when the court excluded clearly irrelevant evidence of a gun that had no connection to the charged crimes?

B. STATEMENT OF THE CASE.

1. Procedure

On October 4, 2007, the Pierce County Prosecutor's Office charged appellant, JOHNNY CASSANOVA TWITTY (defendant), with assault in the first degree and unlawful possession of a firearm in the first degree in Pierce County Cause No. 07-1-05164-5. CP 1-2, 3. Prior to trial, the State amended the information to add an additional count of attempted murder in the first degree. CP 122-123; RP 1, 27-29. Firearm enhancements were alleged on the counts alleging assault and attempted murder. CP 122-123.

The case was assigned to the Honorable James R. Orlando for trial. RP 1. After holding a hearing pursuant to CrR 3.5, the court found that defendant's custodial statements would be admissible in the State's case in chief. CP 34-42. This ruling is not challenged on appeal. The court also ruled on several motions in limine. CP 43-45; RP 165-186. Some of these rulings are challenged on appeal.

After the jury had been sworn and impaneled, the parties appeared in court on a Monday morning, prepared to begin with opening statements, only to discover that the defendant had undergone a surgical procedure the previous Friday and been brought to court in a wheelchair, jail issued

pants, and on medication. RP 197-198. With the knowledge of both counsel, the court sought information from the jail physician as to defendant's condition to proceed with trial. RP 201-205. After a recess in which the court spoke briefly with the physician, the court informed the parties of what he had learned and indicated that he was sending the defendant back to the jail to be evaluated by the doctor, and then the doctor would be in court at 1:30 that afternoon for questioning. RP 206-207. After hearing testimony from the jail physician, trial proceeded. RP 208-215.

At the close of evidence, the court instructed the jury on assault in the first and second degree, attempted murder in the first and second degree, unlawful possession of a firearm in the first degree and the defense of self defense-applicable to the assault and attempted murder charges – and necessity with regards to the firearm possession charge. CP 58-104. The jury found defendant guilty of assault in the first degree with a firearm enhancement, attempted murder in the first degree with a firearm enhancement, and unlawful possession of a firearm in the first degree. CP 115, 117, 118, 120, 121.

On November 7, 2008, the court imposed sentence on the attempted murder and unlawful possession of a firearm convictions. CP 148-160. The court imposed standard range sentences of 316 months on the attempted murder, plus a 60 month firearm enhancement, and 75 months on the firearm conviction, for a total period of confinement of 376

months, a term of 24-48 months of community custody, and gave credit for 401 days served. *Id.*

Defendant filed a timely notice of appeal from entry of this judgment. CP 161.

## 2. Facts

Larry Mahone testified that on October 2, 2007, sometime around 6:00 pm, he went to Oh! Gallagher's (OG's) bar in Lakewood, an establishment he frequented regularly. RP 426-427. He played video games for a while, then he got a call from a friend, Adrian Serrano, asking Mahone to come pick him up from work. RP 427-428. Mahone left his drink with the bartender, then went to pick up Serrano. RP 428-429. After stopping by Serrano's house briefly, both men returned to OG's bar. RP 429.

A short time after arriving back at the bar, Mahone and Serrano went outside to smoke a cigarette. RP 430. A man Mahone knew of only as "Cass" was also smoking a cigarette outside. RP 430. Mahone identified Cass as being the defendant. RP 430. Mahone had seen defendant at the bar prior to leaving to pick up Serrano, and spoken to him briefly. RP 431, 443-444. Mahone had noticed some people come into the bar, look around and leave; this didn't look right to Mahone. RP 444. Mahone testified that when defendant came to the bar, he told him "Be careful –something's going on- looks like UFOs been coming in and out." RP 445. Mahone testified that a UFO is an unidentified person. RP 445.

Mahone testified that he would see the defendant at the bar about once a week. RP 445. Mahone would also see defendant at an apartment house as each had a friend that lived in the building. RP 448. Mahone testified that he had had no arguments or confrontations with the defendant that night, or previous to that night. RP 430- 431, 446. Mahone testified that before his cigarette was finished, defendant pulled out a gun and shot him, unprovoked. RP 431, 448-450. There was no argument, threats, or confrontation between them prior to defendant pulling his gun. RP 440, 453. On cross examination, Mahone testified that he might have asked defendant whether he had a gun on him that night because of the UFOs he had seen at the bar. RP 446-447.

Mahone testified that he believes the first shot hit him in the stomach, and that he tried to move or run away, to avoid being shot any more. RP 432, 450-453. He ran one direction toward his car, fell, then got up and ran back inside the bar when he saw the door open. RP 432-434. Police arrived and Mahone was taken to the hospital. RP 434, 437.

Shannon Moss was bartending at OG's the night of the shooting. RP 592-593. She had not had any problems with the victim that night or on previous nights. RP 593-594. Ms Moss had not had any prior problem with the defendant, whom she calls Cass, either, and never noticed any problems between the defendant and the victim. RP 595-596. Ms. Moss confirmed that the victim was there that night and that he left at one point, asking her to watch his drink. RP 593-594. She testified that the next time

she saw the victim after that, he was bleeding. RP 594. She called 911. RP 595. She did not see the shooting, but only heard it. RP 594.

On October 3, 2007, Terrance Kuhn was working as the night manager of H and L Produce, which shares a parking lot with Oh! Gallagher's (OG's) bar. RP 288-292. The H and L market is open twenty four hours and the "building" is open on three sides. RP 289-290. Mr Kuhn was working in the early morning hours when he heard a couple of gun shots coming from the direction of OG's. RP 292-293. He went outside and saw a man, about 150 feet away, shooting at another man, whom he recognized as "Larry," a patron of both OG's and H and L Produce. RP 294-298. The shooter was standing with his arm outstretched; he fired three shots as Larry ran away from him. RP 294-296. Larry then turned and ran back toward the direction of OG's front door; the shooter fired a couple more shots at Larry as he ran back toward the door. RP 296. As the shots were being fired, Mr. Kuhn saw Larry stumble; from the way Larry ran after that, Mr. Kuhn concluded that he had been hit by the shots. RP 298. Mr. Kuhn testified that about five other people were outside of OG's when the shots were being fired, and that these people all ran for safety. RP 295. Mr Kuhn testified that from the shape of the gun he could tell that it was a semi-automatic, and that it was dark in color. RP 301. After the shooting was over, the shooter went to the passenger side of a car, opened the door, closed it, then went around to the driver's side, got in, and drove away. RP 301-302. He testified that

the driver left quickly, and that he could hear the car accelerate and the tires screech as it entered the roadway. RP 302. Mr. Kuhn did not recognize the shooter, but described him as a black male, six feet and slender wearing darker clothes with a striped shirt. RP 299-300.

Once he felt it was safe, he went over to OG's to see if anyone else had been hurt; there was no one else in the area. RP 303. He tried to go into OG's but the door was locked. RP 303. As he walked back toward H and L he could hear sirens approaching. RP 303. He gave the responding officers a description of the shooter, as well as the car he had left in. RP 304, 335-336. Later that night, police asked him to go to the Lakewood precinct to view two people to see if he could identify either of them. RP 304-305, 615. He was shown two males: one he had not seen before - the other was the shooter. RP 305-306. The two men he was shown were defendant and Lonzell Graham. RP 615. That night, Mr. Kuhn identified the defendant as being the shooter. RP 616- 618. At trial, Mr. Kuhn identified the defendant as being the shooter. RP 300-301.

Lakewood police were dispatched to OG's at 7304 Lakewood Drive at 12:50 am on October 3, 2007, in regards to a shooting. RP 225, 334, 497-499. Officers noted the seriousness of the victim's wounds and indicated that medical aid should make it a priority call; the victim was in considerable pain. RP 336-337, 341, 499. Once the building was secured and its occupants removed, the entire scene was cordoned off with crime

scene tape. RP 227-236, 501-503. Detective Johnson, who is also the forensic services manager for the Lakewood Police department, arrived at the scene to supervise the processing of the crime scene. RP 240-243. Several casings and a spent bullet and several bullet fragments were collected at the scene. RP 261-280, 355-363. Detective Parr reviewed all of the reports of the witness interviews done by various officers that night at OG's; only the victim, Adrian Serrano, and Mr. Kuhn indicated that they had witnessed the shooting. Mr. Serrano died from homicidal violence approximately two weeks after the shooting. RP 613.

The defendant was driving his girlfriend's car, a Mercury Sable station wagon, that night. RP 344-345. She testified that he left from her residence in Kent, Washington, late in the evening of October 2, 2007, in her car. RP 346-347. Defendant returned early in the morning of October 3, but left again in her car. RP 347-348.

Trooper Ryan Durbin of the Washington State Patrol was on duty the early morning hours of October 3, 2007; he had heard dispatches regarding the shooting in Lakewood. RP 479- 481. At approximately 2:50 am, the trooper saw a vehicle matching the description of the suspect vehicle in the shooting incident. RP 482. The car was disabled with its hazard lights on partially blocking the roadway at the Sprague exit of westbound Highway 16. RP 482. The trooper radioed for some back up

assistance indicating that he had a vehicle that matched the description of the suspect vehicle in the Lakewood incident. RP 484. As he pulled in behind the vehicle he noticed two men walking away from the vehicle. RP 482-483. The trooper identified one of these males as being the defendant. RP 483. He asked the men what was wrong with the vehicle and whether he could be of assistance. RP 483. The men indicated that they were on their way home, coming from Seattle and had run out of gas. RP 484. The trooper asked them to return to the vehicle so he could push it out of the lane of traffic. RP 485. The trooper pushed the car 30 to 40 feet to get it out of the roadway. RP 487. The trooper had asked both men for identification; he got identification with the name Lonzell Graham from the defendant's companion, but the defendant indicated that he did not have any identification. RP 486. At this point, back up assistance arrived – Lakewood police officers. The defendant told one of these responding officers that his name was Troy Hardin, and a birth date of February 7, 1971. RP 492-494. The trooper was asked to transport the defendant to the Lakewood Police Department; he did so transferring custody of the defendant to Detective Parr. RP 488. The car defendant had been driving was impounded and towed to the Lakewood Station and placed in a secure location. RP 495 -496. In a subsequent search of this

vehicle, police located a Hi-Point Luger pistol in the rear cargo area. RP 365-374, 621.

Detectives Bunton and Parr of the Lakewood Police Department interviewed the defendant at the station after advising him of his constitutional rights. RP 599, 623-625. The detective testified that defendant told them his name was Troy Hardin. RP 603. When asked about his activities that night, defendant told the detectives that he had been to a club in Seattle that night with his friend, Lonzell, and Lonzell's girlfriend. RP 602, 627. Both detectives testified that defendant had told them that he had come straight from Seattle before breaking down on Highway 16. RP 602, 628. Defendant initially denied being at OG's that night, but when told that they knew he had been there, defendant changed his answer and stated that he had gone there to see his cousin, Patrick Dixon. RP 602- 604, 628-629. When the defendant was shown a picture of the victim, Larry Mahone, the defendant stated that he had never seen him before. RP 600, 630-631. When defendant was arrested, officers found that he had Washington State ID card in his pants pocket identifying him as Johnny Cassanova Twitty, with a DOB of 7/26/74. RP 623. While defendant and Mr. Graham were in holding cells, Detective Parr overheard defendant yelling at Graham to "Sit back and be quiet." RP 633.

John Schoeman, a forensic specialist in firearms and ballistics with the Washington State patrol, testified that he was asked to examine a 9-millimeter Luger C9 Hi-Point firearm, which had been found in defendant's car, seven fired cartridge casings and one fired bullet, recovered from the crime scene. RP 373-374, 506-530. He found the firearm to be fully operational, with a five and a half pound trigger pull. RP 529-532. Based upon his testing and examination of the seven fired cartridges against test fired cartridges, Mr. Schoeman testified with reasonable scientific certainty that all seven cartridges had been fired from the 9mm Luger. RP 532-538. Mr. Schoeman could not testify with reasonable scientific certainty that the fired bullet had been fired from the gun he examined because the fired bullet did not have sufficient reproducible marks to make a definitive match. RP 538-539. He could state that the bullet had been fired by a Hi-Point 9mm pistol, as that was the only gun that had the same rifling characteristics as seen on the fired bullet. RP 541.

With regard to the victim's injuries, the victim testified that he was shot in his left hip, left leg, right back thigh, stomach, back, and both hands. RP 431-432, 435-436. He was in the hospital for almost two weeks and had more than one operation, including one where a portion of his intestines were removed. RP 437, 553-572. A bullet remains in his

lower back. RP 552. A plastic surgeon attempted to repair the damage to his hands. RP 406-419. The gunshot injuries to his hands resulted in permanent damage and loss of function. RP 438-440, 418-419.

Defendant stipulated that he had a prior felony conviction for a serious offense that precluded him from owning or possessing a firearm. RP 657.

Defendant called Patrick Dixon to testify. RP 662. Mr. Dixon testified that he had worked at OG's earlier in the day on October 2, but left before his cousin, the defendant, got there. RP 663 -671. The victim was there at the time he left. RP 671. He came back to the bar after getting a call from defendant. RP 673. Dixon testified that Mahone was still there; he described him as ranting and raving about outsiders coming to our bar. RP 674- 678. Mr. Dixon testified that he was ready to leave and looking for his cousin when he noticed that defendant was scuffling with Mahone over a gun Mahone was holding. RP 679. They fell to the ground, the gun went off, and everybody ran. RP 679. He ran too; he heard six shots as he ran, but can't tell what happened because he was running. RP 680- 683. Ten days after this shooting, Patrick Dixon shot Larry Mahone's brother, Tyrone, in the head, killing him. RP 687-688. Dixon had lived in the same apartment complex as Larry and Tyrone Mahone with incident. RP 689.

Defendant testified on his own behalf. The defendant testified that the victim, whom he had seen but never spoken to before, approached him and asked about whether he had a gun. RP 739. Defendant testified that he felt that the victim, Mahone, and his friends were trying to intimidate him. RP 739-740. Defendant testified that inside the bar, Mahone made several comments to him about “outsiders” and “watching your back.” RP 741-744. Defendant testified that later he went outside to smoke a cigarette, where he saw Mahone, who had left the bar, returning; after getting out of his car, Mahone approached the defendant and said “let me get a cigarette, Cuz.” RP 748. The defendant testified that he gave Mahone a cigarette, who then got a gun from his friend and turned back toward defendant. RP 748-750. At that point defendant grabbed the gun and they began wrestling over the gun. RP 750.

Defendant testified that as they were wrestling, the gun was going off multiple times, then both of them fell, as did the gun. RP 750-752. Defendant thought Mahone was trying to get to the gun, so he got there first and grabbed the gun. RP 750-752. Defendant testified that Mahone jumped up and started running at him so he fired the gun in Mahone’s direction, aiming at the pavement, trying to scare him. RP 753. Defendant stated he told him to stay away or something to that effect. RP 754. Defendant testified that he then jumped in his car and left the scene. RP 754. Defendant testified that he had never had any previous problems

with Larry Mahone. RP 782. On cross examination, defendant was confronted with inconsistent statements between in his testimony, and his testimony at an earlier hearing on topics, such as: 1) whether Patrick Dixon was working at OG's that night, whether defendant left OG's for a period of time over the course of the evening; 3) where Lonzell Graham and Patrick Dixon were at the time of the shooting, and 4) whether defendant's hand was ever on the trigger of the gun. RP 760- 763, 786-793, 815-836, 841-848, 857-862, 865-872.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT THE COURT MADE AN IMPROPER EX PARTE COMMUNICATION, THAT HE WAS PREJUDICED BY ANY ALLEGED IMPROPER COMMUNICATION, OR THAT THE COURT VIOLATED THE APPEARANCE OF FAIRNESS.

The Code of Judicial Conduct states that judges should “neither initiate nor consider ex parte ... communications” in a pending proceeding. CJC Canon 3(A)(4). Ex parte communication is any contact between the court and counsel, or a neutral third party, when opposing counsel is not present and is “[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested.” *State v. Watson*, 155 Wn.2d 574, 579, 122 P.3d 903 (2005) (quoting Black's Law Dictionary 296 (8th ed.2004)); *Sherman v. State*, 128 Wn.2d 164, 181, 205, 905 P.2d 355 (1995).

Washington courts generally apply the term “ex parte communication” to communications made by or to a judge, during a proceeding, regarding that proceeding, without notice to a party. *See, e.g., State v. Bourgeois*, 133 Wn.2d 389, 407-08, 945 P.2d 1120 (1997) (finding an improper ex parte communication between the court’s staff (bailiff) and the jury where a juror told the bailiff of juror intimidation which the bailiff relayed to the judge, but which the judge did not pass on to counsel); *Sherman v. State*, 128 Wn.2d 164, 181, 205, 905 P.2d 355 (1995) (finding an ex parte communication between a judicial extern and a treatment program to find out about the monitoring of physicians in the program, specifically the plaintiff in a case before the judge involving an employment dispute over the plaintiff’s drug use); *Buckley v. Snapper Power Equip. Co.*, 61 Wn. App. 932, 937-38, 813 P.2d 125 (1991) (holding that a direct communication between a trial judge and a guardian ad litem regarding settlement, which was passed on to defense counsel without the knowledge or participation of the plaintiff’s counsel, was an improper ex parte communication); *State v. Romano*, 34 Wn. App. 567, 568-69, 662 P.2d 406 (1983) (concluding there was an ex parte communication where a judge, during a current proceeding, contacted third parties to verify the defendant’s income without the defendant’s knowledge).

In determining whether an ex parte judicial communication violates the appearance of fairness, the reviewing court objectively

considers how the court proceedings would appear to a reasonably prudent and disinterested person and “assume that a ‘reasonable person knows and understands all the relevant facts.’” *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995) (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988)). The prohibition in the CJC recognizes that where a trial judge's decisions are tainted by a suspicion of partiality, the effect on the public's confidence in the judicial system can be great. *Sherman*, 128 Wn.2d at 205. When an ex parte communication takes place, the trial judge “generally should disclose the communication to counsel for all parties.” *Rushen v. Spain*, 464 U.S. 114, 119, 104 S. Ct. 453, 78 L.Ed.2d 267 (1983). An ex parte communication does not constitute grounds for reversal absent a showing of prejudice to the outcome of the trial. *Rice v. Janovich*, 109 Wn.2d 48, 63, 742 P.2d 1230 (1987). In *Rice*, a question arose regarding a stipulation made by several of the defendants in an earlier trial involving a different plaintiff. The next day, the trial judge announced that he had called the attorney representing the prior plaintiff for information to resolve the issue, and informed the parties of what he had learned. This action was challenged as improper ex parte communication. On review, the Supreme Court strongly disapproved of the action, but found that the appellants had not asserted or shown any prejudice resulting from this action; as such it did not provide a basis for reversal.

In the case before the court, defendant asserts that the trial judge's telephone conversation with a physician in the jail regarding the defendant's physical fitness to be in trial constituted an improper ex parte communication that warrants the grant of a new trial. The record reveals the following occurred.

On the morning of Monday, September 22, 2008, the parties were expecting to proceed with opening statements before a jury that had been empanelled and sworn the prior week, when both counsel learned that the defendant, who was in custody, had undergone a surgical procedure the previous Friday. RP 197, 203. The defendant had been brought to court in a wheelchair and jail issued pants. *Id.* The prosecutor indicated that more information about defendant's condition was needed before the trial could proceed. RP 197. Defense counsel indicated that he was unaware of the surgery until that morning, and that his client had been given Vicodin for the pain; he was uncertain about his client's mental state while on this prescription, and did not want to proceed with the trial until he could find out more information about his client's status. RP 197-198. Defense counsel suggested a recess until 1:30 pm so he could find out more information. RP 198-199. The court agreed that more information was needed, and indicated that he wanted someone from the jail to come to the court with defendant's file to provide additional information. RP 203-205. The court indicated to both parties that he would send an email

to the jail to “see which medical staff is over there and available to come over, address these issues.” RP 205. The court instructed his judicial assistant to let the jury go until 1:30 and took a short recess. RP 205.

After a brief recess, the court informed the parties that he had spoken to someone who would contact the jail medical director, Dr Balderrama, who would review the defendant’s chart and call the court within an hour. RP 205. The court indicated that he posed a number of questions to be relayed, such as whether there was another medication that could be given to the defendant instead of the Vicodin. RP 205. The court asked counsel to remain for a short time to see if any information would be forthcoming. RP 205-206. Again after another recess, the judge took the bench and indicated:

COURT: I had a conversation with Doctor Balderrama, who has indicated that the procedure that Mr. Twitty had was a minor procedure to drain some fluid, that he’s on a low dosage of Vicodin, this shouldn’t affect his ability to participate in the trial at all.

But I have asked that Mr. Twitty be returned to the jail now. Doctor Balderrama will meet with him and make sure he’s not suffering any effects from the drug or other conditions that would prevent him from participating in trial. And Doctor Balderrama indicated that he would be available at 1:30 to address those concerns, make a record of it. So he’s there ready to see Mr. Twitty at this time.

Okay?

RP 206-07. Neither party expressed any concern or objection to what the

court had done. RP 207. The court recessed until the afternoon, at which time Dr. Balderrama was present in court. RP 207-208. The court put the doctor under oath, then had the doctor verify the substance of the information that had been imparted to the court during their earlier conversation. RP 208-209. After that, the court allowed each attorney to ask any questions he wished of the doctor. RP 210-215. Again, neither counsel raised any concern or objection to what the court had done in the trial court. RP 215-216.

Initially, it is debatable whether the trial court engaged in an improper *ex parte* contact as defined by Washington law. The situation involved one where the court and counsel were in agreement that additional information was needed so that an informed decision could be made as to whether the trial could proceed. Both counsel knew that the court was going to be contacting the jail to try to locate the person who possessed the needed information *prior* to the court taking such action; neither counsel objected. This distinguishes the current case from the cases cited above, where at least one counsel was not aware that the court was going to engage in a communication with a third person. Moreover, when the court obtained information about the defendant's health status, it immediately disclosed that information to both counsel.

Secondly, the information sought by the court was of benefit to both parties as well as the court. Both counsel needed to know if the defendant's physical health was sufficient to proceed with the trial, and

whether his medication raised any issue as to his cognitive function. A judge would be negligent in his duties in allowing a criminal trial to proceed with a defendant who is physically unfit to withstand the rigors of trial, or mentally handicapped by prescription painkillers from fully understanding the proceedings, particularly when a recess of a short duration might alleviate any problem. The fact that the court and both counsel wanted additional information also distinguishes this case from those cited above.

The information sought by the court involved the defendant's health status, and not the merits of the case being tried, or any issues that the jury would decide. The information was necessary to determine whether the court could proceed ahead with the impaneled jury or whether a mistrial would have to be declared in the court. The jury never heard from Dr. Balderrama or information regarding defendant's surgery. Thus, any information learned by the court was independent of the issues raised in defendant's case. Unlike the *Sherman* and *Romano* cases, the trial court below was not doing improper investigation into the merits of defendant's case.

Finally, the court brought the source of his information to the courtroom and placed him under oath, giving each side the opportunity to question him on these matters, outside the presence of the jury. The court gave each side the opportunity to adduce any information that might be relevant to the question about whether to proceed with the trial that day.

Neither side adduced any information which would indicate that defendant was unfit to proceed with trial. Neither side asked the court to recess the trial for any further length of time. Thus, there is no indication that any prejudice flowed from the court's earlier communication with Dr. Balderrama. Even assuming that it was error for the court to speak with Dr. Balderrama off the record, any error was clearly harmless as to the outcome of the trial. Under *Rice*, there is no reason to reverse when the error is harmless.

Lastly, the State would submit that the actions of the trial court do not violate the appearance of fairness. When this court objectively considers how the court proceedings would appear to a reasonably prudent and disinterested person who knows and understands all the relevant facts, it should find that such a person would conclude that the trial court was acting to protect the defendant from being tried while his mind was clouded by pain or narcotic drugs and without jeopardizing his health. That same person would also find that the court was also trying to ensure that jurors and witnesses were not kept waiting unnecessarily, and that proceeding with the trial that day would not be a basis for later reversal. Thus, the actions of the court was protecting everyone's interests rather than favoring a particular party. Nothing in the record would lead such a person to conclude that the court was being unfair to either side. This claim is without merit.

2. DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING ITS EVIDENTIARY RULINGS OR THAT HE POSSESSED ANY RELEVANT, ADMISSIBLE EVIDENCE THAT WAS EXCLUDED FROM HIS TRIAL.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

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

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. *State v. Rehak*, 67 Wn. App. at 162; *In re Twining*, 77 Wn. App. 882, 893, 894 P.2d 1331, *review denied*, 127 Wn.2d 1018 (1995). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Baird*, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997).

Limitations on the right to introduce evidence are not unconstitutional unless they affect fundamental principles of justice. *Montana v. Engelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L.Ed.2d 361 (1996) (stating that the "accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence" (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L.Ed.2d 798 (1988))). Similarly, the Supreme Court has stated that the defendant's right to present relevant

evidence may be limited by compelling government purposes. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983) (discussing Washington's rape shield law).

Under ER 103(a)(2), error may not be asserted based upon a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by offer or was apparent from the context of the record. "An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). The party offering the evidence has the duty to make clear to the trial court: 1) what it is that he offers in proof; and, 2) the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. *Ray*, 116 Wn.2d at 539, citing *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978). Finally, if the ruling was a tentative ruling on a motion in limine, a defendant who does not seek a final ruling waives any objection to the exclusion of the evidence. *State v. Riker*, 123 Wn.2d 351, 369, 869 P.2d 43 (1994), citing *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991).

The essence of defendant's claim is that he was wrongly precluded from adducing certain evidence in front of the jury. Defendant asserts that he should have been allowed to adduce evidence that:

(1) [the victim] approached [the defendant] with information regarding a gang dispute; (2) that [the victim] wanted to know if [defendant] had a gun because [the victim] anticipated a gun battle with the Crips; (3) that [the victim] was a Lakewood Hustler gang member; and (4) that the victim's associate the night of the shooting had a gun.

Appellant's Brief at p. 18. Defendant did not affirmatively move to admit any of the listed evidence. The State brought motions in limine to exclude certain evidence, such as any reference to a gun found inside Adrian Serrano's backpack that was in the victim's truck, and any reference that the victim was a gang member. RP 165-166, 168-170. Any exclusion of evidence came as a result of the court granting the State's motions in limine. Defendant made no offers of proof as to evidence he wanted admitted. As will be discussed in more detail below, the record in this case does not support defendant's assertion as to what evidence was excluded by the court's ruling, or that the evidence he claims was excluded, actually was.

- a. The court excluded evidence that the victim was a gang member during the State's case in chief but did not preclude defendant from testifying regarding what the victim said to him about a potential gang dispute; the jury heard evidence of the potential gang dispute and that defendant thought the victim was a gang member.

The State asked for the following evidence to be excluded:

“evidence that [the victim] is known or reputed to be a Lakewood Hustler, evidence of his nickname is Little Lakewood [sic]; evidence of his nickname is C-Money[sic], ... and evidence of the search warrant the shows up[sic] this gang photo.” RP 170. At the point, the State brought this motion in limine, the court had heard defendant's testimony at the CrR 3.5 setting forth his version of the shooting incident; defendant testified that the victim had pulled a gun on him, which he grabbed to protect himself and while they were struggling, the gun went off several times, but that his finger was never on the trigger. RP 121-123.

Defendant had also testified that prior to pulling the gun, the victim had approached him, asked him if he had his gun, and indicated that some guys, Crips, were trying to kill him and there might be a shoot out and asked for help protecting himself. RP 117-118. Defendant testified that he had interpreted this as an intimidation tactic – as the victim and his friends were trying to scare him away. RP 118-119.

In response to the State's motion in limine, defense counsel argued that as his theory was that the victim was at the bar, OG's, armed and ready for a fight with Hilltop Crips, and that he should be able to adduce information about the victim's gang affiliation. RP 171. Defense counsel did not articulate what evidence of the victim's gang affiliation he was prepared to adduce at trial. Defense counsel agreed that the photo was not admissible if it did not picture the victim throwing gang signs. RP 172. The State countered that in its view, this incident was not a gang incident, but if the defendant wanted to paint the victim as a gang member, then evidence of the defendant's gang affiliation<sup>1</sup> might also be relevant. RP 172-173. The court indicated that it could see possible relevance of the conversation that went between the defendant and the victim. RP 175. Ultimately, the court ruled that any evidence of the victim's alleged gang membership would be excluded in the State's case in chief, but that the information would become relevant "if the defendant takes the stand and testifies in a manner consistent with what he testified to in the 3.5 hearing and then we can deal with that in rebuttal with [the victim], if necessary." RP 177. The written order on the motions in limine did not preclude the defendant from testifying as to any statements the victim purportedly said

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<sup>1</sup> The record indicates that both the victim and the defendant would deny being gang members at the time of the incident, although defendant acknowledged that he had been a black gangster disciple in his youth. RP 119-120.

to him about an impending gang dispute or gun battle with the Crips, but only from identifying the victim as a gang member. CP 43-45.

At trial, the defendant did testify, but when he described what the victim had stated to him, he did not phrase it in the same manner as his testimony at the CrR 3.5 hearing. The defendant testified that the victim, whom he had seen but never spoken to before, approached him and asked about whether he had a gun. RP 739. Defendant again testified that he felt that the victim, Mahone, and his friends were trying to intimidate him. RP 739-740. Defendant testified that inside the bar, Mahone made several comments to him about “outsiders” and “watching your back.” RP 741-744. Defendant testified that later he went outside to smoke a cigarette, where he saw Mahone, who had left the bar, returning; after getting out of his car, Mahone approached the defendant and said “let me get a cigarette, Cuz.” RP 748. The defendant testified that he gave Mahone a cigarette, who then got a gun from his friend and turned back toward defendant. RP 748-750. At that point defendant grabbed the gun and they began wrestling over the gun. RP 750.

On cross-examination, defendant indicated that he thought the “situation was gang related,” in part because “Cuz” is a gang-related word. RP 797. The defendant also made the following statements during cross examination:

Defendant: I’m looking—I am looking ahead at Mahone. Like I said, I am looking at his vehicle, I am wondering what’s going on, who’s getting out of the car, what. That’s

what I am looking at. You can't just try to cross me up with the little things when there's bigger things that's happening here. *You know what type of person Mahone is. The police that testified here has had problems with Mahone before. They know what type of person Mahone is.*

Prosecutor: Did you hear that testimony in this trial Mr. Twitty? Yes or no, sir?

Defendant: *Because there's a lot of things that's not—that have not been allowed in this trial for this jury to even hear. That's what.*

RP 794 (emphasis added).

Shortly after this exchange, the State asked for a hearing outside the presence of the jury- which was excused for the day -and the parties remained on the record. RP 798. The State argued that defendant's testimony had opened the door to evidence of the defendant's gang affiliation. RP 798-802. Defense counsel strenuously argued that any door opening had been caused by the State. Ultimately, the court found that defendant had not opened the door. RP 802. The court admonished the defendant not to refer to matters that had been excluded by either stipulation or other motions, and to confine his answers to information based upon his personal knowledge and recollection. RP 804-805. The court further granted the State's request for an instruction telling the jury to disregard the defendant's accusations that the Lakewood police had had problems with Mahone. RP 806. Defense counsel indicated that he thought some type of instruction was appropriate. RP 806-807. When the

trial resumed, the court instructed the jury to disregard the testimony. RP 815.

On further cross examination of the defendant, the prosecutor adduced that in his prior testimony, defendant had testified that Mahone had asked him if he had his gun because some Hilltop Crips were out to kill him [Mahone], and he wanted help defending himself. RP 838-839. Defendant indicated that he recalled the victim making the statement that there going to be a shootout with the Hilltop Crips, but not about him asking for help protecting himself. RP 839-840. Defendant again testified that he thought this was an “intimidation tactic for these gang members.” RP 840, 842. This testimony was not stricken. *Id.*

After the defendant completed his testimony, defense counsel rested without asking the court to revisit any of its earlier rulings on the motions in limine. RP 885-886. Again, no offer of proof was made as to the nature of any evidence that defendant thought should be admitted, but had been excluded by the court. The photograph discussed during the motions in limine was not admitted in the trial court, nor made part of the record on review. The record indicates that the parties did not know whether the victim was depicted in this photograph or not. RP 172, 174.

Defendant’s claims that the court excluded evidence that 1) the victim approached the defendant with information regarding a gang dispute, and 2) the victim wanted to know if defendant had a gun because the victim anticipated a gun battle with the Crips, is not supported by the

record. The court did not exclude this evidence and the jury heard it. CP 43-45; RP 838-840. Moreover, the jury also heard the defendant testify that he thought the victim was a gang member who was trying to intimidate him. RP 775-777, 840, 842.

What the record is devoid of is any offer of proof to show that defendant had any additional admissible evidence, other than his perception, that the victim was, in fact, a gang member. In order for the trial and appellate courts to properly assess this claim, it would need to know the substance of what defendant hoped to adduce. Defendant fails to identify where he preserved this claim in the trial court by making an offer of proof. Nor can defendant show that the court would have excluded such evidence had defendant re-raised the issue with the court after he testified at trial. The court had indicated that its ruling was subject to being revisited depending on the defendant's testimony. RP 177. Defendant did not properly preserve his objection to any exclusion of evidence by re-raising the issue when the court had given only a tentative ruling on a motion in limine. Moreover, it would appear that the jury did hear evidence of the nature that defendant claims he was entitled to adduce. Defendant has failed to demonstrate any error on the record that is before this court.

- b. The court did not abuse its discretion in excluding evidence of a gun that was wholly irrelevant to the issues in the case.

As mentioned earlier, the State brought a motion in limine to exclude any evidence that during a search of the victim's car, police found a gun inside a backpack belonging to one of the victim's friends, Adrian Serrano. RP 165-167. Over the defendant's objection, the court granted the motion to exclude the gun as being irrelevant. RP 167-168.

Defendant objected to the exclusion of the gun on the grounds that this gun "arguably could have belonged to the victim in this case" as it was in his car. RP 167. Defendant asserted that Mahone and Serrano were gang members who thought that something "gangster-related" was going to happen that night, and that's why they were armed. RP 167. The court indicated that as there was nothing to indicate that any second gun, much less the gun found in the car, was ever discussed, displayed or involved in the shooting incident, or any evidence that defendant was aware of the gun's existence, it could not find any relevance to the issues in the case. RP 167-168.

On appeal, defendant fails to explain how this evidence of this second gun was relevant to any issue before the jury, or how the exclusion of this evidence deprived him of his ability to present his defense; he just baldly asserts that it does. It was speculation as to whether the victim knew of the gun inside of his friend's backpack. Even if the victim's

knowledge of the gun was inferred, neither carrying a gun nor having a friend who carries a gun proves gang membership. Defendant was able to testify that Mahone pulled a gun on him and that his actions were done in self-defense without the evidence of the second gun being admitted. The exclusion of this evidence did not affect the presentation of his defense.

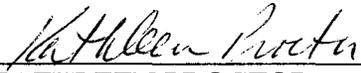
As defendant has failed to show any abuse of discretion in the court's evidentiary ruling, the trial court should be affirmed.

D. CONCLUSION.

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

DATED: August 7, 2009.

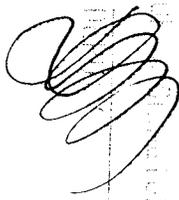
GERALD A. HORNE  
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Certificate of Service:

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

8.7.09   
Date Signature

BY   
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