

NO. 39486-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

STEVEN HARVEY,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-00112-0

BRIEF OF RESPONDENT

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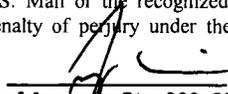
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DATED September 7, 2010, Port Orchard, WA 
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the arresting officer had probable cause to arrest Harvey even absent reference to his medical information?
2. Whether the trial court properly found that the state had established a prima facie case of compliance with WAC 448-14-020?
3. Whether the trial court properly excluded Harvey's self-serving hearsay statements that deputy Corn was a liar and a dirty cop?
4. Whether Harvey fails to overcome the presumption that his counsel's failure to object to a brief reference to the victim's children was a tactical decision?
5. Whether the trial court acted within its discretion in admitting an in-life photo of the victim?
6. Whether the prosecutor properly commented on the evidence and lack thereof in closing argument?
7. Whether Harvey fails to show (in a claim raised for the first time on appeal) that the trial court violated the appearance of fairness doctrine by making one sua sponte evidentiary ruling?
8. Whether Harvey fails to show that cumulative error deprived him of a fair trial?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Steven Harvey was charged by information filed in Kitsap County Superior Court with vehicular homicide. CP 1. Before trial, the trial court denied Harvey's motion to suppress his blood draw on the grounds that the deputy lacked probable cause to arrest him. CP 497. A jury found him guilty as charged. CP 493.

B. FACTS

On January 21, 2008, around 5:30 in the evening, Jessica Torres was on her way home from work on Clear Creek Road near Poulsbo. 2RP 148, 410. Harvey, who had been drinking and playing poker most of the afternoon, was coming the other way at an extreme rate of speed and crossed the center line, colliding with Torres's car. The impact pushed her car back 30 or more feet. Torres was pronounced dead at the scene. 4RP 499. The autopsy showed that she died as a result of the injuries she sustained in the accident. 4RP 610. She was negative for alcohol or drugs. 4RP 611.

Harvey's car was ripped into pieces. His hood was on an embankment, and his engine landed in a ditch. 2RP 150, 192. The main part of the car came to rest some 100 feet from the point of impact on the opposite side of the road. 2RP 151.

Witnesses compared the sound of the crash to an explosion. 2RP 148.

One witness, who had worked with explosives in the Navy said it was louder than any explosion he had ever heard in the military. 2RP 159.

Harvey's engine was in the ditch. 2RP. His hood and radiator were at the top of the embankment. 2RP 192. Although the temperature was about 32 degrees, 2RP 210, the roadway was bare and dry. 2RP 219, 282. The weather was clear and cold. 2RP 282.

There was a half-full 1.75-liter bottle of Jim Beam in the back seat of Harvey's car. 2RP 246, 293.

Based on the tire marks, before the collision, Harvey's car began to rotate counterclockwise. 2RP 288. Ultimately it slid the last 80 feet before collision almost broadside. 2RP 288. Harvey's car continued to rotate after impact, striking the victim's car a second time. 2RP 289. Harvey's car came to rest another 70 feet north from the point of impact, on the southbound shoulder. 2RP 290. The damage to the victim's car ran from the front corner to the windshield pillar on the driver's side. 2RP 290. The secondary impact was between the left rear door and the gas flap. 2RP 291. There were no tire marks indicating evasive action before the point of impact. 2RP 188, 292.

The accident reconstructionist concluded that Harvey's car was doing between 80 and 87 miles per hour at the time his vehicle began sliding. 3RP 451. At the point of impact he was doing 67 to 75 miles per hour. 3RP 463.

The Mazda was doing between 10 and 20 miles per hour at the time of impact. 3RP 464. The speed limit was 50. 3RP 475.

A vacationing Indiana police officer came upon scene shortly after the collision. 5RP 710. Harvey was sitting in the driver's seat of his car and appeared to be unconscious. 5RP 712. About three or four minutes later, he suddenly came to and started to climb out of the car. 5RP 713. He climbed out the passenger side, where the door was missing. 5RP 713.

The car was at the bottom of a steep embankment. 5RP 714. Harvey crawled up the embankment. 5RP 714. When he got to the top, he stood up. 5RP 715. His balance appeared unstable. 5RP 716. He was swaying from side to side. 5RP 716. The officer approached him and told him he had been in an accident and that he should sit down. 5RP 716. When Harvey spoke, his speech was slurred and his eyes were watery and bloodshot. 5RP 716. He also had the odor of alcohol about him. 5RP 717.

When the paramedic spoke to Harvey at the scene, he seemed confused and asked several times what had happened. 4RP 499. The paramedic told Harvey that there had been a bad accident and that he should come to the medical unit to be checked out. 4RP 499. Harvey was not cooperative. 4RP 500. He had to coax him several times to get him to the unit for evaluation. 4RP 500. The EMT wanted to put him on an IV and

oxygen but Harvey refused, so he was only able to put Harvey on a back board and put a cervical collar on him as a precaution. 4RP 500.

He could smell alcohol on Harvey. 4RP 501. It was strong enough that he could smell it outdoors standing several feet from him. 4RP 501.

Deputy Corn was dispatched to Harrison Hospital. 3RP 358. When he arrived the staff pointed out Harvey's room, but said that Harvey was down having a CAT scan. 3RP 359. After the scan, Harvey was transported on a gurney back to his room. 3RP 362. Harvey was unconscious or nonresponsive. 3RP 361. Corn could smell the odor of intoxicants on Harvey's breath. 3RP 362.

Corn advised Harvey he was under arrest for vehicular homicide. 3RP 362. Corn read him his *Miranda* rights from the DUI packet. 3RP 362. About half way through, the phlebotomist began to prepare his arm for the blood draw. 3RP 362. Harvey became alert, sat up on the gurney and became argumentative. 3RP 362. Harvey eventually agreed to cooperate with the blood draw. 3RP 377.

Harvey displayed signs of alcohol impairment. 3RP 378. There was an odor of alcohol. 3RP 378. His speech was slurred and his eyes were glassy and watery. His face was flushed. 3RP 378.

The blood samples were analyzed at the state toxicology lab. 4RP

528. Two gas chromatographs each yielded a result of .104 BAC. 4RP 566.

III. ARGUMENT

A. THE ARRESTING OFFICER HAD PROBABLE CAUSE TO ARREST HARVEY EVEN ABSENT REFERENCE TO HIS MEDICAL INFORMATION.

Harvey argues that the trial court should have suppressed his blood draw because there was no lawful probable cause to arrest him. This claim is without merit because the trial court properly found that the arresting officer had probable cause even without the medical information, because suppression is not a remedy under the statute, and because the officer fell within the exception to the statute.

This Court reviews a trial court's findings of fact upon a CrR 3.6 hearing for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Unchallenged findings are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). The Court reviews de novo a trial court's legal conclusion of whether the evidence meets the probable cause standard. *In re Petersen*, 145 Wn.2d 789, 799, 42 P.3d 952 (2002).¹

1. *Deputy Corn had probable cause to arrest Harvey without*

¹ Harvey faults the State for not calling the paramedic or Corn's sergeant to testify. Brief of Appellant at 20. However, hearsay is admissible at a suppression hearing. *See State v. Jones*, 112 Wash.2d 488, 493, 772 P.2d 496 (1989) (a trial court is not bound by the Rules of Evidence when it determines questions concerning the admissibility of evidence, citing ER 104(a), ER 1101(c)(1), (c)(3)).

reference to his medical information.

Under the Fourth Amendment to the United States Constitution, a warrantless arrest must be supported by probable cause. *State v. Bonds*, 98 Wn.2d 1, 8-9, 653 P.2d 1024 (1982); *see also* RCW 10.31.100 (“A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant.”). Probable cause to arrest exists “when facts and circumstances within the arresting officer’s knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed.” *State v. Huff*, 64 Wn. App. 641, 646-47, 826 P.2d 698 (1992). This determination is made in a “practical, nontechnical manner.” *State v. Gillenwater*, 96 Wn. App. 667, 671, 980 P.2d 318 (1999). “A tolerance for factual inaccuracy is inherent to the concept of probable cause.... Probable cause requires more than suspicion or conjecture, but it does not require certainty.” *State v. Chenoweth*, 160 Wn.2d 454, 475-76, 158 P.3d 595 (2007). The arresting officer need not, at the time of arrest, have evidence to prove each element of the crime beyond a reasonable doubt. *State v. Knighten*, 109 Wn.2d 896, 903, 748 P.2d 1118 (1988). Further, “the arresting officer’s special expertise in identifying criminal behavior must be given consideration.” *State v. Scott*, 93 Wn.2d 7, 11, 604 P.2d 943 (1980). Finally, “[u]nder the fellow officer rule, probable cause may be determined based on the information possessed

by the police as a whole when they are acting in concert.” *Clement v. Dep’t of Licensing*, 109 Wn. App. 371, 375-76, 35 P.3d 1171 (2001), *review denied*, 146 Wn.2d 1017 (2002).

In *State v. Steinbrunn*, 54 Wn. App. 506, 511, 774 P.2d 55, *review denied*, 113 Wn.2d 1015 (1989), the court concluded that the officer had probable cause to arrest the defendant where the defendant had been in a head-on fatality collision and had the odor of intoxicants about him.

Here, Corn had been informed by his sergeant, who was at the scene, that there was evidence at the scene of recklessness and excessive speed, as well as alcohol observations. 1RP 16. The sergeant told Corn that Harvey had crossed over the center line and struck the other vehicle head-on. 1RP 20. The other driver was pronounced dead at the scene. 1RP 20. Corn also observed that there was an odor of alcohol. 3RP 378. Harvey’s speech was slurred and his eyes were glassy and watery. His face was flushed. 3RP 378. He therefore believed that there was probable cause for vehicular homicide under various prongs of the law. 1RP 20.

The foregoing evidence was more than sufficient for Corn to have probable cause to arrest Harvey for vehicular homicide. The trial court thus specifically and properly found that there was probable cause to arrest Harvey independent of any evidence contained in his medical records. 1RP 55.

2. *Suppression is not a remedy for violation of the statutory rights established in RCW ch. 70.02.*

Harvey also fails to show that suppression is the proper remedy for alleged violations of RCW ch. 70.02. The legislature specifically laid out remedies for violation of the act. *See* RCW 70.02.170. These remedies are solely civil in nature, and make no mention of any application in criminal proceedings. Harvey urges this Court to extend the Act's application to the criminal context, and to suppress information allegedly obtained in violation of the act.

When a violation of law is statutory but not constitutional, the Court's initial task is the same as it always is when determining the meaning and effect of a statute: To carry out the Legislature's intent, if that intent can be discerned. , 138 Wn.2d 466, 477-78, 980 P.2d 1223 (1999); *State v. Riles*, 135 Wn.2d 326, 340, 957 P.2d 655 (1998); *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997); *American Legion Post 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991); *State v. Simms*, 95 Wn. App. 910, 915, 977 P.2d 647 (1999).

If the Legislature manifested an intent that the violation be remedied by excluding evidence, that intent controls. For example, under the Privacy Act, the Legislature specifically provided for civil and criminal remedies of violations of the act. The Legislature further provided that interceptions of

communication in violation of the act would be inadmissible in court. RCW 9.73.050. Likewise, in RCW 46.61.470(1), the Legislature stated that evidence from a “speed trap” shall not be “admitted ... in any court at a subsequent trial.”

If the legislature manifested an intent that the violation not be remedied by excluding evidence, that intent likewise controls. An example is RCW 9.73.090, in which the legislature stated that police, fire, emergency medical, emergency communication center, and poison center personnel may “[record] incoming telephone calls” and that law enforcement officers may “intercept, record, or disclose an oral communication or conversation.” The legislature went on to state that “[c]ommunications or conversations authorized to be intercepted, recorded, or disclosed by this section shall not be inadmissible under [the exclusionary provision of Washington’s privacy act] RCW 9.73.050.” RCW 9.73.090(3).

If the legislature failed to address the question of remedy, or failed to manifest an intent that can be discerned, it left a void in the law that a court must cope with by analyzing and applying common law. *Roberts v. Dudley*, 92 Wn. App. 652, 655, 966 P.2d 377 (1999), *aff’d*, 140 Wn.2d 58, 993 P.2d 901 (2000).

The Washington cases comport with this framework. Some are not on

point because the violation was both constitutional and statutory. *E.g.*, *Tacoma v. Houston*, 27 Wn.2d 215, 221, 177 P.2d 886 (1947) (excluding evidence obtained in violation of the Washington search warrant statute on grounds of both “constitutional and statutory proscriptions”) Some of the remainder have remedied statutory violations by excluding evidence. *E.g.*, *State v. Copeland*, 130 Wn.2d 244, 282, 922 P.2d 1304 (1996) (holding that “[w]here there is a violation of the court rule right to counsel, the remedy is suppression of evidence tainted by the violation”); *Spokane v. Kruger*, 116 Wn.2d 135, 145, 803 P.2d 305 (1991) (excluding breathalyzer results where the police failed to inform the minor defendant of his right to counsel under JCrR 2.11, in part because “suppression of any evidence acquired after a violation will serve as an effective deterrent to police misconduct”); *State v. Schulze*, 116 Wn.2d 154, 162, 804 P.2d 566 (1991) (clarifying *Kruger* by holding that exclusion of evidence obtained in violation of a defendant’s right to counsel “is only warranted where ... the evidence to be suppressed has been tainted by the violation”); *State v. Turpin*, 94 Wn.2d 820, 826, 620 P.2d 990 (1980) (excluding evidence where police failed to inform the defendant of her statutory right to independent blood testing, because “[e]vidence obtained unlawfully is excluded”); *State v. Anderson*, 80 Wn. App. 384, 388, 909 P.2d 945 (1996) (excluding evidence where police failed to inform the defendant of his statutory right to independent blood testing, because “Supreme Court

precedent requires that a person who submits to a blood test at the direction of the State be informed of his/her statutory right to an additional test by a qualified person of his or her own choosing”); *State v. Krieg*, 7 Wn. App. 20, 26, 497 P.2d 621 (1972) (excluding evidence that violated Washington’s pre-1975 statute granting implied consent to breathalyzer tests because “no remedy is presently available for enforcement of the statutory requirements, except to exclude the evidence unlawfully obtained”). However, none has stated that a statutory violation always (or never) begets exclusion.

Cases from other jurisdictions take a variety of approaches. Some are not on point because the violation was both constitutional and statutory. *E.g.*, *State v. Cohen*, 191 Ariz. 471, 957 P.2d 1014, 1016 (App. 1998) (execution of search warrant without knocking violated statute and bore on “reasonableness inquiry under the Fourth Amendment”) (citation omitted); *State v. Rauch*, 99 Idaho 586, 586 P.2d 671, 677-79 (1978) (“basic right to be secure in a person’s home, guaranteed by the fourth amendment, has resulted in statutes like” Idaho’s “knock and announce” statutes; evidence violating statute suppressed); *State v. Sakellson*, 379 N.W.2d 779, 784 (N.D.1985) (compliance with knock and announce statute was “a constitutional imperative implicit in the fourth amendment prohibition against unreasonable searches and seizures;” evidence violating statute suppressed); *State v. Ribe*, 876 P.2d 403, 413 (Utah App.1994) (“[B]ecause the violation of the Utah

[knock and announce] statute produced an unreasonable search, we hold that the unlawful execution of the warrant in this case implicated a fundamental, constitutional concern and suppression is therefore appropriate.”); *State v. Laflin*, 160 Vt. 198, 627 A.2d 344, 346 (1993) (“We hold that V.R.Cr.P. 3 was designed to both codify and enhance protections conferred by the Fourth Amendment, and that therefore the evidence seized should be suppressed under the exclusionary rule doctrine.”)

Some, probably a majority, hold that if a statutory violation is not also a constitutional violation, and the statute is silent concerning remedy, evidence shall not be suppressed. *E.g.*, *Burrece v. State*, 976 P.2d 241, 244 (Alaska App. 1999) (“[E]xclusionary rule embodied in Alaska Rule of Evidence 412 has not been applied when the statute that has been violated is wholly unrelated to a defendant’s constitutional rights.”); *People v. Fournier*, 793 P.2d 1176, 1179 (Colo. 1990) (“Where ... officer obtains evidence in violation of a statute or regulation, the exclusionary rule is not triggered unless the unauthorized conduct also amounts to a constitutional violation.”); *State v. Gibson*, 106 Idaho 54, 675 P.2d 33, 37-38 (1983) (“[S]ince we deal here with the asserted violation of a state statute rather than a violation of a constitutional right, we refuse to invoke the exclusionary sanction.”), *cert. denied*, 468 U.S. 1220 (1984); *State v. Johnson*, 318 N.W.2d 417, 437 (Iowa) (“[W]e refuse to exclude relevant evidence by applying the exclusionary

concept to conduct which is not of constitutional magnitude.”), *cert. denied*, 459 U.S. 848 (1982); *Beach v. Com.*, 927 S.W.2d 826, 828 (Ky. 1996) (“Evidence should not be excluded for violation of the statute’s provisions where no constitutional right is involved.”); *State v. Matthieu*, 506 So.2d 1209, 1212 (La. 1987) (Louisiana law “stresses the importance of constitutional violations in cases involving the exclusionary rule”); *Allen v. State*, 85 Md. App. 657, 584 A.2d 1279, 1286 (“Absent legislative authority for exclusion of evidence, the Constitution alone serves as the basis for suppression of evidence.”), *cert. denied*, 590 A.2d 158 (1991); *State v. Lunsford*, 507 N.W.2d 239, 243 (Minn. App. 1993) (“The exclusionary rule does not apply to technical violations of the statutes governing search warrants, where no constitutional violation is involved.”); *State v. Gadsden*, 303 N.J. Super. 491, 697 A.2d 187, 193 (“New Jersey courts have held that the exclusionary rule is to be applied only in cases in which evidence has been seized in violation of a suspect’s constitutional rights.”), *cert. denied*, 704 A.2d 17 (1997); *People v. Dyla*, 142 A.D.2d 423, 536 N.Y.S.2d 799, 806 (1988) (“The exclusion from evidence of a voluntary confession is warranted pursuant to New York statutory and constitutional law only when it is shown that the confession has been obtained in violation of a constitutionally-protected right of the accused.”), *appeal denied*, 545 N.E.2d 880 (1989); *State v. Droste*, 83 Ohio St.3d 36, 697 N.E.2d 620, 623 (1998) (“We have

stated on many occasions that absent a violation of a constitutional right, the violation of a statute does not invoke the exclusionary rule.”), *cert. denied*, 526 U.S. 1145 (1999); ORS § 136.432(1) (“A court may not exclude relevant and otherwise admissible evidence in a criminal action on the grounds that it was obtained in violation of any statutory provision unless exclusion of the evidence is required by: (1) The United States Constitution or the Oregon Constitution[.]”); *Troncoso v. Com.*, 12 Va. App. 942, 407 S.E.2d 349, 350 (1991) (“[The Virginia] Supreme Court has steadfastly refused to extend [the exclusionary] rule to encompass evidence seized pursuant to statutory violations, absent an express statutory provision for suppression.”); *State v. Verkuylen*, 120 Wis. 2d 59, 352 N.W.2d 668, 669 (App. 1984) (“Suppression is therefore required only upon a showing that evidence was obtained in violation of a constitutional right, or when a statute specifically requires suppression of illegally obtained evidence.”).

Here, the Legislature did provide a remedy. The overwhelming weight of authority suggests that in this circumstance suppression should not be engrafted upon the remedy already specified by the Legislature.

Harvey maintains that this argument misapprehends his contention: that he is claiming that he is entitled to suppression not for violation of his statutory rights, but of his constitutional right to privacy. He fails however, cite any authority that holds that violation of this statute is also a violation of

his constitutional rights. As such he fails to meet his burden of showing that the trial court erred.

3. *Deputy Corn did not invade Harvey's bodily privacy.*

Harvey also maintains that Corn invaded Harvey's bodily privacy by personally inspecting Harvey's pupils. This contention is factually unsupported. Corn testified, without contradiction, that he merely asked the nurse if she had checked Harvey's eyes. She then proceeded to check them, and Corn observed her doing so. There is no evidence that she checked them for his benefit, or that she did not check them as part of her medical duties. 1RP 15-16.

4. *The authorities caused Harvey to be brought to the hospital.*

Finally, even were suppression a remedy under RCW ch. 70.02, and even were there no probable cause without the medical information, the evidence would still have been sufficient for the trial court to conclude that Harvey's information was properly disclosed under the statute.

RCW 70.02.050 provides:

(1) A health care provider or health care facility may disclose health care information about a patient without the patient's authorization to the extent a recipient needs to know the information, if the disclosure is:

* * *

(k) To fire, police, sheriff, or another public authority, that brought, or caused to be brought, the patient to the health care facility or health care provider if the disclosure is limited to

the patient's name, residence, sex, age, occupation, condition, diagnosis, estimated or actual discharge date, or extent and location of injuries as determined by a physician, and whether the patient was conscious when admitted;

Harvey testified at the hearing that he was combative with the aid personnel because he did not want to go to the hospital. 1RP 31. The paramedic likewise told Corn that Harvey was unconscious much of the time. The trial court had sufficient evidence that the authorities "caused" Harvey to be brought to the hospital.² The trial court did not err, and this claim should be rejected.

B. THE TRIAL COURT PROPERLY FOUND THAT THE STATE HAD ESTABLISHED A PRIMA FACIE CASE OF COMPLIANCE WITH WAC 448-14-020.

Harvey next claims that the trial court abused its discretion in finding that the results of his blood test were admissible. This claim is without merit because to be admissible, the sample must be preserved in accordance with the relevant WAC provisions. In determining whether the WAC has been complied with all inferences are drawn in the light most favorable to the State. Here, applying the proper standard of review, no abuse of discretion occurred.

² RCW 18.73.270, although enacted subsequent to the accident in this case, provides that "a ... paramedic ... who renders treatment to a patient for ... injuries sustained in an automobile collision, shall disclose without the patient's authorization, upon a request from a federal, state, or local law enforcement authority" the type of information Corn learned from the

A trial court's ruling on the admission of a blood alcohol test result is reviewed for abuse of discretion. *State v. Brown*, 145 Wn. App. 62, ¶ 8, 184 P.3d 1284 (2008), *review denied*, 165 Wn.2d 1014 (2009). Harvey bears the burden of showing abuse of discretion. *Id.* The trial court abuses its discretion when it admits evidence of a blood test result in the face of insufficient prima facie evidence. *Id.*

“Prima facie evidence” is defined under the statute as “evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved.” RCW 46.61.506(4)(b). To determine the sufficiency of the evidence of foundational facts, the court must assume the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. *State v. Brown*, 145 Wn. App. at ¶ 9 (*citing Id.*).

In order to admit blood alcohol test results, “the State must present prima facie proof that the test chemicals and the blood sample are free from any adulteration which could conceivably introduce error to the test results.” *State v. Brown*, 145 Wn. App. at ¶ 10. “[A] blood sample analysis is admissible to show intoxication under RCW 46.61.502 only when it is performed according to WAC requirements.” *Id.*

paramedic in this case.

As Harvey notes, WAC 448-14-020(3)(b) provides:

Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.

The purpose of requiring the use of anticoagulants and enzyme poison in the blood sample is to prevent clotting and or loss of alcohol concentration in the sample. *State v. Brown*, 145 Wn. App. at ¶ 12. Fulfillment of the requirements of WAC 448-14-020(3)(b) is mandatory. *Id.* Once a prima facie showing is made, it is for the jury to determine the weight to be attached to the evidence. *Id.*; RCW 46.61.506(4)(c).

Harvey argued below that the WAC was not satisfied because the amount of enzyme poison in the vials was insufficient to prevent clotting and stabilize the alcohol concentration. A similar contention was raised in *Brown*. There, nobody with firsthand knowledge testified as to what was contained in the vials used for Brown's blood sample prior to the blood draw. This Court declined to find that the foundation was not met, however:

The regulation requires only that the blood samples "be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration." WAC 448-14-020(3)(b). Further, there is a relaxed standard for foundational facts under the blood alcohol statute in that the court assumes the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. RCW 46.61.506(4)(b).

The toxicologist testified that vials used for the

collection of samples for a blood alcohol test are provided by the manufacturer with powdery chemicals, which he identified as potassium oxalate and sodium fluoride. He also stated that he read the labels on the vials that contained Mr. Brown's blood, which indicated that the vials contained sodium fluoride and potassium oxalate. The toxicologist also testified if those chemicals were not present, the blood would be clotted and no alcohol would be detected in the samples. The toxicologist observed in this case that the blood in the samples was not clotted and alcohol was detected in the samples.

The State therefore provided sufficient evidence, under RCW 46.61.506(4)(b), that the vials contained the WAC-approved substances in sufficient amounts to stabilize and preserve the blood samples.

State v. Brown, 145 Wn. App. at ¶ 14-17.

Here, the phlebotomist and the arresting officer testified that the vials were issued by the toxicology lab, that they were not expired, that they were undamaged, that they contained the anti-coagulant and the preservative powder, that they were sealed and that the vacuum was intact. 3RP 366-69, 373, 375, 405, 422-24. The officer ensured that the powder was mixed with the blood. 3RP 369, 374, 405. Johnston, the scientist who performed the testing, confirmed that the vials were provided to law enforcement by the toxicology lab. 4RP 535. The vials are vacuum sealed before being sent to law enforcement. 4RP 544. In each vial is an enzyme preservative and an anticoagulant. 4RP 544. Johnston testified that the vials did not appear damaged; they were intact and the blood was in usable condition. 4RP 557. The white powder in the empty vials contains an enzyme poison which keeps

alcohol or any other chemicals from being produced. 4RP 558. It also contained an anticoagulant to keep the blood in a liquid state. 4RP 558. If it had not worked there would have been a clot in the tube and the sample would have been almost untestable. 4RP 558. Likewise, he was certain that the enzyme poison was present because it was placed in the tubes before they were sealed and sent out to law enforcement. 4RP 568. If the seal were broken, the tube would not have drawn blood. 4RP 568. He explained that the enzyme poison was sodium fluoride, 25 mg. 4RP 574. He further noted that the Winek study had found that that with a properly drawn blood sample from a living subject, *no* preservative is actually required to prevent microbe contamination. 4RP 575. Johnston had a bachelor's degree in biochemistry. 4RP 564. . His position was based on the industry standard for forensic toxicology, as opposed to clinical laboratory testing. 4RP 501. He believed that the lab used appropriate amounts, based on his personal experience. 4RP 643, 5RP 826. He also noted that they checked for contamination by making sure the vial caps were still sealed. 5RP 751. Additionally if there was fermentation, the chromatograms would show fermentation byproducts, such as methanol, ethanol, acetone, acetaldehyde, etc. 5RP 751. No such substances appeared in the results. 5RP 763. He believed that his testing was in conformity with toxicology lab policies, and was in conformity with the WAC. 5RP 850.

Harvey's argument ignores the standard of review. Taking the foregoing evidence in the light most favorable to the State, as is required, the trial court did not abuse its discretion in concluding that the state had made a prima facie showing that Harvey's blood was preserved in conformity with the WAC standard. Although Harvey spent multiple days cross-examining Johnston with various treatises and papers, that cross-examination went to the weight of the evidence, and was for the jury to consider. It does not vitiate the evidence cited above. This claim should be rejected.

C. THE TRIAL COURT PROPERLY EXCLUDED HARVEY'S SELF-SERVING HEARSAY STATEMENTS THAT DEPUTY CORN WAS A LIAR AND A DIRTY COP.

Harvey next claims that the trial court erred in excluding evidence that he had called the arresting officer a liar and a dirty cop. This claim is without merit because the statements were self-serving hearsay, and even if not, any minimal non-hearsay probative value would have outweighed the prejudicial effect.

Harvey asserts that exclusion of this evidence violated his right to confront the witnesses against him. The constitutional right to compulsory process is synonymous with a defendant's right to present a defense. U.S. Const. amend VI; Wash. Const. art. I, § 22; *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). But the right to present testimony of witnesses is

not absolute, and a defendant has no right to offer testimony inadmissible under applicable evidence rules. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); *State v. Aguirre*, 168 Wn.2d 350, ¶ 21, 229 P.3d 669 (2010). The trial court's decision to exclude evidence is reviewed for an abuse of discretion. *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). An aggrieved party must clearly establish manifestly unreasonable or untenable grounds for the trial court's decision before the appellate court will find an abuse of discretion. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

Hearsay, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," is not admissible unless an exception applies. ER 801(c). Out-of-court admissions by a party, although hearsay, may be admissible against the party if they are relevant. *State v. Finch*, 137 Wn.2d 792, 824, 975 P.2d 967 (1999). However, if an out-of-court admission by a party is self-serving, and in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible under the admission exception to the hearsay rule. *Id.*

Here, Harvey's statements that Corn was a liar and a dirty cop would have served only to vilify Corn in the eyes of the jury. The statements were thus self-serving hearsay and were properly excluded as such.

Even if the statements had some minimal relevance to explain Harvey's belligerence, the trial court properly excluded them as more prejudicial than probative. The threshold to admit relevant evidence is very low; even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Relevant evidence may be excluded, however, if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

Corn testified on cross-examination that Harvey did not "care for him." 3RP 392. He elaborated that "Harvey had a specific problem with him. *Id.* The prior incident involving Harvey was gone into by the defense in great detail. 3RP 392-94. As such, any further probative value of eliciting Harvey's actual words was minimal at best. Under the circumstances, the trial court did not err in excluding the highly inflammatory statements that the officer was a liar and a dirty cop.

Finally, any error would be harmless. Harvey argues that the constitutional harmless error standard applies. However, where the exclusion of evidence does not prevent the defendant from arguing his theory of the case, the trial court's evidentiary ruling does not the defendant's right to present a defense, and does not amount to constitutional error. *State v. Anderson*, 112 Wn. App. 828, 837, 51 P.3d 179 (2002). In such circumstances, this Court applies the non-constitutional harmless error

standard. *Id.* Under this standard, an error in the admission of evidence is “not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

As noted, above, Harvey was permitted to delve extensively into the prior contact between him and Corn. Moreover, there was also evidence presented that Harvey was confrontational and intoxicated before he ever saw Corn at the hospital. The paramedic testified that Harvey smelled strongly of alcohol and was uncooperative. 4RP 499-501. An Indiana police officer who came upon the scene also testified that Harvey appeared intoxicated. 5RP 715-17. There was also an open bottle of whiskey in the back of Harvey’s car. 2RP 246. As such there is no reasonable possibility that the outcome of the case would have been different had these two brief statements been admitted.³

D. HARVEY FAILS TO OVERCOME THE PRESUMPTION THAT HIS COUNSEL’S FAILURE TO OBJECT TO A BRIEF REFERENCE TO THE VICTIM’S CHILDREN WAS A TACTICAL DECISION.

Harvey next claims that counsel was ineffective for not objecting to brief testimony regarding the existence of the victim’s children. This claim is

³ The State would submit that any error would be harmless even under the more stringent

without merit because Harvey fails to show that counsel's lack of objection was not tactical or that the failure to object changed the outcome of the trial.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a

constitutional standard for harmless error.

reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Counsel's decision not to object to victim impact testimony can be characterized as legitimate trial strategy or tactics. *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). The testimony about the victim impact statement was brief and counsel may not have wanted to risk emphasizing the testimony with an objection.

Harvey has not rebutted the presumption that a tactical reason existed for defense counsel not to object. *See Davis*, 152 Wn.2d at 714. He asserts that counsel could not have had a tactical reason for not objecting to the mention of Torres's children because he objected to the introduction of her photograph. This argument fails to prove its point. Had counsel objected, he would have highlighted the testimony regarding the children. On the other hand, he could reasonable have concluded that if the photo were admitted it would be published to the jury, as indeed it was. 6RP 916. There was thus no similar downside to objecting to the photo.

Furthermore, Harvey fails to demonstrate prejudice. The testimony was extremely brief, and was not emphasized.⁴ It was one response in a trial that lasted seven days. There was lengthy testimony regarding the nature, severity and cause of the accident, of Harvey's speed and intoxication. In light of all the evidence adduced at trial, to conclude that the jury abandoned its sworn duty and found Harvey guilty because they learned the victim had children would be fanciful at best. This claim should be rejected.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING AN IN-LIFE PHOTO OF THE VICTIM.

Harvey next claims that the trial court abused its discretion in admitting an in-life photo of the victim. This claim is without merit because such photos are relevant and admissible. Moreover, any error would be harmless.

The admission of in-life photographs lies within the discretion of the trial court. Such photographs have been held relevant to establish the identity of the victim. *State v. Finch*, 137 Wn.2d 792, 811, 975 P.2d 967 (1999). The State need not accept a stipulation as to identity and may insist on proving the issue in the manner it wishes. *Id.*. Once the court has

⁴ Indeed, there was no argument presented about the victim having a family. The only argument of that nature came from Harvey's counsel who argued in closing that Harvey worked at the Puget Sound Naval Station and had a wife and child. 8RP 1294. §

determined that such evidence is relevant, then the court must determine whether its probative value is substantially outweighed by unfair prejudice to the defendant. *Id.*

In this case, the photos were admitted as part of the identification of the victim by her husband. The first photo (Exhibit 74) was admitted without objection. 1RP 98. The second (Exhibit 73) drew the sole objection “Objection under 403,” which was overruled. 6RP 916.⁵

In *Finch*, the defendant argued that the presence of the victim’s dogs in an in-life photo did not serve the purpose of identifying the victim and unnecessarily increased the potential to inflame the jury because they suggested the dogs had lost their owners and were victims too. The Supreme Court rejected this contention. Here, likewise, the mere fact that the victim had family would not be particularly remarkable.

Moreover any error would be harmless. As previously discussed, an erroneous evidentiary ruling is not grounds for reversal unless, within reasonable probabilities, it materially affected the trial’s outcome. Thus, improper admission of evidence is not prejudicial and constitutes harmless error if the evidence is of minor significance in reference to the overall,

⁵ Although Harvey is technically correct that he did indicate before trial that he would be objecting to the exhibit, he did not offer any grounds for objection at that time. 1RP 98.

overwhelming evidence as a whole. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, the photograph was one of nearly 100 exhibits admitted in the course of this 7-day trial. The testimony surrounding it was extremely brief. It was not mentioned again during the trial. Moreover, extensive evidence regarding the severity of the impact, Harvey's intoxication, and criminally negligent driving was introduced. This evidence likely had far more impact on the jury than the unremarkable fact that the victim left behind family members.

Thus the "photograph was of 'minor significance' in reference to the 'overall, overwhelming evidence' submitted to the jury," and Harvey fails to show that the "photo materially affected the jury's verdict." *State v. David*, 134 Wn. App. 470, 483, 141 P.3d 646 (2006) (*quoting Bourgeois*, 133 Wn.2d at 403).

F. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

Harvey next claims that the trial prosecutor committed a number of instances of misconduct. None of the cited comments was objected to below. As such, Harvey must show not only that the comments were improper, but that they were so flagrant and ill-intentioned that they could not have been

cure by a timely objection and instruction. Harvey fails to meet this burden.

In order to establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In reviewing a prosecutorial misconduct claim, this Court generally affords the State great latitude in making arguments to the jury. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). Prejudice is established only if there is a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). In the absence of a proper objection interposed at trial, this Court reviews allegations of prosecutorial misconduct only where the challenged arguments were so flagrant and ill-intentioned that a proper curative instruction could not have ameliorated any resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Harvey did not object to the prosecutor's comments at trial. He fails to show either impropriety or that they require reversal on appeal.

1. The prosecutor did not attack defense counsel.

According to Harvey, "the prosecutor strayed from the evidence and accused the defense of trying to trick and confuse the jury." Brief of

Appellant at 44. That contention is tenable only if the statement to which he now objects is taken out of context. In context, it is clear the prosecutor was not straying from the evidence, but commenting upon it.

Before the comments Harvey cites, she directed the jury to the “to-convict” instruction, first emphasizing the State’s burden of proof:

These are the elements that the State has to prove beyond a reasonable doubt. And it is the State’s burden to prove that. It’s my burden to prove to you that each of these elements has been proved, and I embrace that burden. And I think that you’ll find -- after considering everything, you will find that the State has met its burden.

8RP 1288-89. She then discussed each of the elements, concluding that the only truly contested element was whether Harvey was under the influence of alcohol. 8RP 1289-90. Here she specifically discussed the issues Harvey had attempted to raise at trial:

So the issue is element Number 3. Was the Defendant driving a motor vehicle while under the influence of an intoxicating liquor? What do you have to help you with that? Well, you have the blood results of .10, two runs, both .104. You have the blood results of the .10. Let the Defense bring up what they might bring up. And I think, if you actually listen to what it is, it’s not relevant to this case.

They discussed with Mr. Johnston over the period of over a day things that might happen. There might be contamination. Sure. I think all of us thinking individuals would never say, There’s no possible way that there’s going to be contamination. But that’s why we take certain measures to make sure that there isn’t. That’s why we use a cleaner on the arm. That’s why we use a sterile needle. That’s why we use sterile vials. That’s why they have the anticoagulant and the enzyme poison. That’s why they do that. Listen to what

the Defense is saying and whether or not there is actually any evidence to support what they're suggesting, and I think you'll find that there's not. That's the BAC.

What other evidence do you have to determine whether or not the Defendant was driving under the influence or was impaired by intoxicating liquor? You have speeds of between 80 to 87 miles an hour. When someone is drunk, their judgment is impaired. They might not go the speed limit. They might think that they can go whatever speed limit they want. But that speed limit means nothing to a person potentially who's intoxicated.

What other evidence do you have? You have the fact that he smells of alcohol. When Mr. Nugent approached him, he could smell it on him. When the paramedic, the EMT, contacted him, he could smell it on his breath. When Deputy Corn responded to Harrison Hospital, he could smell it on him. Ladies and gentlemen -- and the other piece is you've got the half empty bottle of booze that his buddies say he was drinking out of that day.

Ladies and Gentlemen, the Defense attacks the blood alcohol content because that's what they can attack. They can't attack these photos. They can't say that the Defendant didn't do that. They can't attack the fact that Jessica Torres is dead.

And Ladies and Gentlemen, you also heard that there is a second vial of blood. There's a second vial of blood that the Defense could have had tested, if they so chose. You also heard that [the defense expert] Dr. Emery is not an expert in blood. They could have brought a toxicologist who is. They could have had a toxicologist test that second vial of blood, and they didn't. What is a reasonable inference from that?

Ladies and gentlemen, every Defendant has the right to a trial. They have the right to a trial by a jury of their peers. They have a right to require the State to prove each element beyond a reasonable doubt. Don't believe for an instant that all of this is because there are actually issues with the State's evidence. The Defense' [sic] strategy, in this case, has been one of confusion of the issues. Listen to what they're saying and analyze it for yourself.

If you assume that what they're saying is true, A) is it reasonable in the light of the other evidence? Is it applicable in this case? And does it make you seriously doubt whether or not the Defendant killed Jessica Torres, when he was driving drunk on January 21st? I would submit to you that it won't.

8RP 1290-92.

Likewise, in the State's final argument, she was again discussing the evidence when she made to comment to which Harvey now objects:

There are a couple of themes, if you listen to the Defense's case. And Counsel indicated that they weren't throwing everything at the wall to see what sticks. And I would suggest that, yes, in fact, they are. There are a number of issues that they raised that were irrelevant. And, in fact, one of them -- and I'll just give you a couple of examples -- one of them was this apparent rise in the road. I'm not sure I'm going to find it, at this point. The road rises and comes to a crest where the collision was.

And if you'll recall, in Mr. McFadden's closing, he indicates that that made it difficult for people to see and suggests that that may be a cause of this collision. But if you'll recall Mr. Cottingham's testimony, his own witness, Mr. Cottingham, agreed that that was not relevant in this case. When he was asked about the rise of the road, he agreed it's not relevant. And yet, they brought it up in their closing.

Regarding Mr. Cottingham, Ladies and Gentlemen, this is a case where the Defendant is charged with a death of another human being. And the Defense wants you to rely on an expert witness who wants to clarify on the stand whether at the time of the interview with the State he was under oath or not. They're asking you to believe that individual, as if him being under oath has anything to do with whether or not he's going to give important information.

Mr. Cottingham is an example contradicting everything that the Defense has suggested is important in scientific data. His report is a two-and-a-half-page letter that

he wrote on March 31, before he'd really had a chance to digest all of the information. That's a joke. He didn't update his report at all. He never provided additional analysis.

And, in fact, with all due respect to Dr. Emery, Dr. Emery didn't provide any analysis either. Both of them had data that they could look at in order to analyze this case, and they didn't. Why didn't they do it? Well, in Dr. Emery's case, part of that is he could have done the uncertainty measurements and didn't. But also, he's not a toxicologist. And if the Defense had wanted to present different results in this case, they could have called a toxicologist. And they didn't. And you can make your own reasonable inferences from that.

8RP 1342-44.

As the Supreme Court has explained, context is critical in reviewing a closing argument:

“It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.”

State v. McKenzie, 157 Wn.2d 44, 53-54, 134 P.3d 221 (2006), (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983)). Here, it is apparent that the prosecutor was arguing the evidence, or the lack thereof. She was not attacking defense counsel. The State is allowed to draw “an inference from the evidence as to why the jury

would want to believe one witness over another” during closing arguments. *State v. Skuza*, ___ Wn. App. ___, ¶ 57, 235 P.3d 842 (2010). As such the argument was proper. Moreover, even if she crossed the line, it cannot be said that her argument was so flagrant and ill-intentioned that it could not have been cured with a timely objection and request for a curative instruction.

5. *The prosecutor did not shift the burden of proof.*

Harvey also asserts that the prosecutor’s closing argument shifted the burden of proof. The prosecutor did not imply that Harvey had a duty to present evidence. To the contrary, as noted, she emphasized the State’s burden. What she did do was point out the shortcomings in the evidence that Harvey did present. This is proper.

The State is entitled to comment upon the quality and quantity of evidence the defense presents. *Gregory*, 158 Wn.2d at 860. Such argument does not necessarily suggest that the burden of proof rests with the defense. *Gregory*, 158 Wn.2d at 860. A prosecutor may encourage the jury to draw an unfavorable inference from a defendant’s failure to produce evidence that is properly part of the case and is within the control of the defendant in whose interest it would be to produce it, unless the prosecutor’s comments infringe on the defendant’s constitutional rights. *State v. Blair*, 117 Wn.2d 479, 485-91, 816 P.2d 718 (1991). As this Court recently observed:

Hartzell argues that the prosecutor's comments implied that he was obligated to present evidence and infringed upon his right to be presumed innocent. The arguments, however, were a pertinent reply to Hartzell's own comments and did not shift the burden to present evidence to Hartzell. On the contrary, the prosecutor specifically emphasized that Hartzell had no duty to present evidence.

State v. Hartzell, ___ Wn. App. ___, ¶ 48, 2010 WL 2803050 (July 19, 2010). Here, the prosecutor, as discussed above, was merely discussing the quality of the defense evidence. And in rebuttal she was responding to the defense implication that the State denied him the data needed to analyze the evidence. *See* 8RP 1331. Moreover, Harvey again fails to show that these unobjected-to comments were so flagrant and ill-intentioned that they could not have been cured if a timely objection had been raised.

6. *The prosecutor did not appeal to the jury's sympathy.*

In his final claim, Harvey recycles his ineffectiveness claim as one of prosecutorial misconduct. As discussed above, there was a single question and answer. The evidence, which was admitted without objection, was never mentioned again at trial. Harvey shows neither misconduct nor prejudice. This claim should be rejected.

G. HARVEY FAILS TO SHOW (IN A CLAIM RAISED FOR THE FIRST TIME ON APPEAL) THAT THE TRIAL COURT VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE BY MAKING ONE SUA SPONTE EVIDENTIARY RULING.

Harvey next claims that the trial court violated the appearance of fairness doctrine by sua sponte ruling (in a sidebar) that a defense question was improper. This contention is not preserved for review.

This Court will only consider claims raised for the first time on appeal, if they constitute a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). To satisfy this threshold requirement for review, the defendant must identify a constitutional error and show how this alleged error resulted in actual prejudice to his rights. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

“The appearance of fairness doctrine seeks to insure public confidence by preventing a biased or potentially interested judge from ruling on a case.” *In re Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009). But the Supreme Court has held that this doctrine does not implicate constitutional rights. *See State v. Tolia*s, 135 Wn.2d 133, 140, 954 P.2d 907 (1998): *see also Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978) (“Our appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally

based.”) Consequently, Harvey waived this claim by failing to raise it with the trial court. *State v. Morgensen*, 148 Wn. App. 81, 91, 197 P.3d 715 (2008) (applying the doctrine of waiver to defendant’s appearance of fairness claim).

Even if the issue were properly before the Court, however, it would be without merit. The entire exchange of which Harvey complains went as follows:

Q. You talked about outliers.

When you’ve analyzed labs’ data in the past, have you identified outliers in data?

MS. LEWIS: Objection, Your Honor. Relevance.

THE COURT: Objection is overruled.

THE WITNESS: Yes, I have.

BY MR. VOSK:

Q. And at that time, did the Lab have a policy on dealing with outliers?

A. Yes, they did. They still do.

THE COURT: I’m going to call for a sidebar, at this point.

(Sidebar)

THE COURT: Strangely enough, my objection is sustained.

BY MR. VOSK:

Q. Do you feel you had any trouble analyzing this data?

7RP 1112. During the next break the court set forth the basis for the sidebar:
for the record:

THE COURT: I called for the third sidebar being concerned that the analysis given by the witness concerning outliers had to do with regard to the breath testing and indicated that there be no further inquiry concerning that analysis.

Fair statement?

MR. VOSK: That is correct, Your Honor.

7RP 1116-17.

When applying the appearance of fairness doctrine, the test is objective. Evidence of actual or potential bias is a threshold requirement for an appearance of fairness claim before the court considers whether the trial court violated the appearance of fairness by deciding “whether a reasonably prudent and disinterested observer would conclude [the defendant] obtained a fair, impartial, and neutral trial.” *State v. Dominguez*, 81 Wn. App. 325, 330, 914 P.2d 141 (1996). Prejudice is not presumed, and the party claiming bias or prejudice must support the claim with evidence of the judge’s actual or potential bias. *Dominguez*, 81 Wn. App. at 328-29.

Here, there is no evidence whatsoever that the court harbored any actual or potential bias against Harvey. To the contrary, the record shows that the trial court granted many of Harvey’s motions and objections throughout the trial. Nothing in the cited passage would suggest to a neutral observer that the judge was in any way biased. This claim should be rejected.

**H. HARVEY FAILS TO SHOW THAT CUMULATIVE
ERROR DEPRIVED HIM OF A FAIR TRIAL.**

Harvey finally claims that he is entitled to a new trial under the doctrine of cumulative error. The cumulative error doctrine applies when several errors occurred at the trial court level, none alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). Here, as has been discussed, Harvey fails to even show multiple trial errors. This contention is without merit.

IV. CONCLUSION

For the foregoing reasons, Harvey's conviction and sentence should be affirmed.

DATED September 7, 2010.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R D Hauge', written over a horizontal line.

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