

NO. 40082-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

DEONTE JAMAR THOMPSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 08-1-03373-4

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

BY _____
DEPUTY
STATE OF WASHINGTON
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FILED
COURT OF APPEALS
DIVISION II

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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

1. Whether the State adduced sufficient evidence to support the jury's verdict finding defendant possessed a firearm while possessing a controlled substance?
2. Whether the State's remarks during closing and rebuttal arguments were proper in light of the facts in defendant's case, defendant's theory of the case, and defense counsel's remarks during her closing argument?

B. STATEMENT OF THE CASE.

1. Procedure

On July 21, 2008, the State charged Deonte Jamar Thompson, hereinafter "defendant," with three counts of assault in the first degree with firearm enhancements, one count of unlawful possession of a firearm, one count of drive-by shooting, and one count of unlawful possession of a controlled substance with a firearm enhancement. CP 1-4. The case came before the Honorable John A. McCarthy for trial on September 24, 2009. RP 3. After the State rested its case in chief, the trial court granted defendant's motion to dismiss the drive-by shooting charge. RP 772.

On October 13, 2009, after hearing the evidence and deliberating on it, the jury found defendant guilty of the remaining charges. CP 185-196. By special verdict, the jury found defendant was armed with a

firearm while committing the three assaults and while possessing a controlled substance. *Id.*

The court sentenced defendant on December 4, 2009. RP 1031-1032. The court imposed a low-end sentence on each charge, totaling 297 months in prison. CP 208-223. The court imposed an additional 198 months for the firearm enhancements, to run consecutively with the low-end sentence, resulting in 495 months total confinement. *Id.*, RP 1020-1021. From entry of this judgment and sentence defendant filed this timely notice of appeal. CP 15-21.

2. Facts

On July 19, 2008, several friends and family members of Marquita Jackson¹ gathered at her home at 2507 Martin Luther King Junior Way in Tacoma, Washington to celebrate Marquita's birthday. RP 268, 419, 464, 596, 637. Shortly before 1:30 a.m., Marquita and several other witnesses saw a silver SUV drive by Marquita's house several times. RP 276, 379, 429, 469, 600, 639, 729. The car drove by a third time and soon after disappearing around the corner onto S. 25th St., Marquita, Christina Williamson, Michael Jackson, Danielle Green, and Courtney Moore saw a man walk around a street corner onto Martin Luther King Junior Way holding a gun in his hand. RP 384, 431, 470, 603, 643. Marquita,

¹ Due to the number of witnesses with shared last names and initials, the State will refer to each witness by his or her first name. The State intends no disrespect to any witness.

Christina, Michael, Danielle, and Courtney all recognized the man with the gun as defendant. RP 395, 433, 471, 608, 645.

After seeing defendant walk toward the house with the gun, Michael told Marquita, Christina, Danielle, and Courtney to go inside. RP 471. Before the group could enter Marquita's house, defendant pointed the gun at the crowd and opened fire. RP 384, 433, 472. One bullet grazed Marquita's leg. RP 386. A second bullet struck Michael in the arm. RP 387, 433, 474. Immediately after defendant fired the final shot, Marquita called 911 from inside her house describing defendant and the silver SUV to the 911 operator. RP 390, 276, 301.

At 1:28 a.m. Tacoma Police Officers Kevin Bartenetti and David May were dispatched to the shooting location. RP 276, 301. The officers arrived and spotted the silver SUV within one minute of being dispatched to the scene. RP 276, 390. At this time, the SUV was parked on the shoulder of Martin Luther King Junior Way and S. 25th St., just around the corner from Marquita's house. RP 279. Officer May pulled the patrol car behind the suspect vehicle and noticed a man standing outside the SUV's front passenger door. RP 278-279. He activated the patrol vehicle's emergency lights upon which the man got into the SUV. RP 278-279. Officer Bartenetti shined the patrol car's spot light on the SUV, but the vehicle pulled away and headed eastbound on S. 25th St. RP 279-280. The officer pursued the suspect vehicle eastbound on S. 25th St and then southbound on J St. RP 280-281. The suspect vehicle came to a stop on J

St. RP 281. The officers conducted a high risk felony stop and eventually arrested defendant from the front passenger seat of the SUV. RP 307. Officers also arrested the vehicle's driver and a passenger from the back seat. RP 284, 307.

Tacoma Police Officer Keith O'Rourke took defendant into custody and read him his *Miranda*² rights. RP 408-409. Pursuant to defendant's arrest, Officer O'Rourke performed a pat down search of defendant's person and found 3.1 grams of cocaine in defendant's front shirt pocket. RP 411, 564, 761. Before forensic investigators arrived at the scene, Officer May noticed a handgun resting on the floorboard behind the vehicle's driver seat in plain view. RP 309. Later tests on the handgun matched the gun to bullet casings found at the shooting site. RP 542.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE DEFENDANT WAS ARMED WITH A FIREARM WHILE UNLAWFULLY POSSESSING A CONTROLLED SUBSTANCE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51

Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict. As such, these

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said, “[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.”

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

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

On appeal, defendant argues the State failed to adduce sufficient evidence to prove defendant was armed with a firearm while possessing a controlled substance pursuant to the firearm enhancement. Brief of Appellant at 18. The trial court in defendant’s case instructed the jury that:

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use.

CP 145-184, Jury Instruction No. 37. Generally, for purposes of firearm sentencing enhancements the State must prove a nexus exists between the defendant, the weapon, and the crime. *State v. Schelin*, 147 Wn.2d 562, 575-576, 55 P.3d 632 (2002). However, “the State need not prove a nexus between the defendant, the weapon, and the crime when the defendant *actually* possesses the firearm” as the nexus protections become redundant

in actual possession case. *State v. Rooth*, 129 Wn. App. 761, 773, 121 P.3d 755 (2005) (emphasis added); *State v. Easterlin*, 126 Wn. App. 170, 174, 107 P.3d 773 (2005). In the present case, defendant unlawfully possessed the cocaine while actually possessing the firearm.

Five eyewitnesses identified defendant as the man who fired several shots at Marquita's house on July 18, 2008. RP 384, 432, 470, 603, 643. Marquita testified she called 911 after the shots were fired and police arrived at the scene almost immediately thereafter. RP 390. Officers spotted the SUV as soon as they arrived at the shooting scene and activated their emergency lights. RP 278-279. After activating the emergency lights, a man got into the front passenger seat of the SUV, the vehicle drove away from the scene, and a chase ensued. RP 279-281, 302. When the vehicle finally stopped, officers ordered the three men inside the SUV, including defendant, out of the vehicle and placed them under arrest. RP 283-284, 307, 408. The officer who arrested defendant found the cocaine in defendant's front shirt pocket. RP 411.

Viewing these facts in the light most favorable to the State, and drawing all reasonable inferences in the light most favorable to the State, the jury could reasonably infer defendant possessed the cocaine while he shot at Marquita's house with the firearm. A very short amount of time passed between defendant's shots and defendant's first contact with law

enforcement officers. In fact, when officers first spotted the SUV, defendant had yet to reenter the vehicle. RP 279, 302. Given this short timeframe, the jury could reasonably infer defendant had no time after firing the shots to locate the cocaine from inside the SUV and place it in his shirt pocket. Furthermore, it is unreasonable to infer defendant put the cocaine in his shirt pocket after the officers began pursuing the vehicle. No reasonable person would place illegal drugs in their pocket after seeing and attempting to elude law enforcement officers. Rather, the reasonable inference from this evidence is defendant actually possessed the cocaine while actually possessing the firearm. Therefore, as defendant actually possessed the firearm in a manner readily available for offensive or defensive use while actually possessing the cocaine, the State adduced sufficient evidence to support the firearm enhancement verdict on the unlawful possession of a controlled substance charge.

Defendant relies on the nexus analysis discussed in *State v. Gurske*, 155 Wn.2d 134, 118 P.3d 333 (2005), *State v. Schelin*, 147 Wn.2d 562, 55 P.3d 632 (2002), and *State v. Valdobinos*, 122 Wn.2d 270, 858 P.2d 199 (1993) to support his arguments on this issue. Brief of Appellant at 19. These cases each focused on whether the State adduced sufficient evidence to prove the defendants *constructively* possessed a firearm while committing another crime. *Gurske*, 155 Wn.2d at 138-139;

See *Easterlin*, 126 Wn. App. at 173 (*Schelin* and *Valdobinos*, involve constructive possession and therefore fundamentally differ from actual possession cases). Defendant's analysis ignores the significant time period when defendant actually possessed both the firearm and the cocaine and therefore the case law cited in his brief is not applicable to the facts of defendant's case.

Viewing the evidence in the light most favorable to the State, the State adduced sufficient evidence to prove the firearm enhancement to defendant's unlawful possession of a controlled substance conviction.

2. THE STATE'S ARGUMENTS DURING CLOSING AND REBUTTAL WERE NOT MISCONDUCT AND WERE BASED ON THE FACTS AND ISSUES IN THE CASE.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct were improper and that it prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin* at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and

resulting prejudice that could not have been neutralized by an admonition to the jury.” *Id.*

To prove a prosecutor’s actions constitute misconduct, the defendant must show the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985)(citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). The court will disturb the trial court’s exercise of discretion only when no reasonable judge would reach the same conclusion. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

On appeal, defendant argues the prosecutor committed misconduct during closing argument where she allegedly 1) expressed a personal belief on defendant’s guilt; 2) improperly vouched for a witness; 3) misstated the law; and 4) accused defendant of attempted murder. Brief of Appellant 10 – 16. Defendant did not object below to the first or second allegedly improper comments.

- a. The prosecutor did not express a personal opinion about defendant's guilt or the witnesses' credibility.

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. *State v. Dhaliwal*, 150 Wn.2d 559, 557, 79 P.3d 432 (2003). To determine whether the prosecutor is expressing a personal opinion, independent of the evidence, this court views the challenged comments in context with the entire argument and the fact in the case. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009); *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). It is common for statements to be made during closing argument that standing alone sound like an expression of personal opinion but when judged in light of the total argument are arguments about the ultimate facts and conclusions to be drawn from the evidence. *McKenzie*, 157 Wn.2d at 53-54. Prejudicial error does not occur until it is clear and unmistakable counsel is not arguing an inference from the evidence, but is expressing a personal opinion. *Id.* The State's challenged arguments were not statements of personal opinion.

During closing argument, in response to defendant's testimony that he was not the shooter, the prosecutor stated:

Could Marquita be mistaken? Was she wrong when she made that 911 call? Well, she said he was in a silver, like a Jeep or like a Saturn. It's a gray Saturn. This is her call to

911. She was right about that gray Saturn. She was right when she said he is a light-skinned black guy because defendant is a light-skinned black guy, and she was right when she told the 911 operator that he was wearing a gray hooded sweatshirt because, in fact, when the car was stopped within moments, he was wearing the light gray hooded sweatshirt. She was right about all of that.

The shooter wore the gray sweatshirt with a hood. He called wanting to fight with the cousins. He told police that he didn't know anything about the shooting. The shooter ran from the scene wearing a light-colored shirt. The shooter fought with Brittany. The shooter is found sitting in the front passenger seat, and the shooter is a light-skinned black male, and that shooter is no one other than [defendant].

Therefore, he is undeniably accountable for what he did. He is definitely responsible. He is responsible for possession of cocaine. He is guilty of being a Felon in Possession of a Firearm.

RP 949-950 (Italicized portion challenged in Appellant's brief at 12). The prosecutor later argued:

Did [the gun shots] scare them? You bet it did. You bet it did. And you know what? You heard the scare in Marquita's voice, and you heard what it was like in that house immediately after the shooting. You bet it scared them.

But that's not the only thing it did. Because *someone got shot because he meant to kill someone, and that's why he had come down there. I can't explain to you why he would want to do such a thing. I don't have to. Why people do the things they do, I can't explain that. But he did. He did. That man who sat in that chair and testified in the manner that he did this morning, that's who did that.*

He is guilty. He is guilty of everything as charged, not

watered down, not he only wanted to scare. He is guilty. You know he is guilty. And I am asking you to return a verdict that represents exactly what he did that night and not a watered-down version of what he did that night. Thank you.

RP 952-953 (italicized portion challenged in Appellant's Brief at 13).

During rebuttal closing argument, in response to defendant's challenges to Marquita's credibility, the prosecutor stated:

Everything that [Marquita] said to that 911 operator within seconds, everything was true. And so how could she have been mistaken when everything she said was true. She was not inconsistent, has never been so. She was adamant about what she saw. You saw her demeanor in this courtroom. You saw how she reacted when she was asked to identify who the shooter was. She believes it because it's the truth.

....

Ladies and gentlemen, Marquita believes it because it's the truth. It's the truth because he did it, and we know he did it because he said he was there. And you are right, it does fit into a nice picture when you put all the pieces together because that's what it is.

We don't have a video of what happened, and you have to take bits and pieces together because the fact – the person who was getting in that car, who was in the process of getting in the front passenger seat, that's the guy who was – who just ran to the car. And the guy who was in that front passenger seat, that was [defendant]. That's the bit, the one piece in the puzzle that you have to connect with everything else.

RP 1000-1001 (italicized portion challenged in Appellant's Brief at 14).

Defendant did not object to any of the above statements that are claimed as error. As such, defendant must show that the arguments constitute misconduct and that the prosecutor's actions were "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). In the instant case, the court instructed the jury that:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 145 – 184, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02. The court also instructed the jury that it is "the sole judge of credibility of each witness." *Id.* A jury is presumed to follow the jury instructions and therefore is presumed to disregard any arguments not in line with the instructions provided by the court. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

When viewing the challenged arguments in context with the State's entire argument and the facts of the case, it is clear the State's goal was to convince the jury of certain ultimate facts and conclusions to be

drawn from the evidence, not express a personal opinion about defendant's guilt or any witnesses' credibility. Defendant testified at trial that on July 19, 2008, he was near the shooting site but did not have a gun and did not know who fired the shots, effectively contradicting Marquita's testimony. RP 847-849, 867. By testifying and denying involvement, defendant provided an alternate version of events which the State had to rebut.

Given defendant's testimony, the State spoke at length about Marquita's version of events, emphasizing its consistency with and corroboration by other evidence. RP 949-953, 1000-1001. The State suggested the jury consider a witness's memory, personal interests, and manner in which they testified when assessing defendant's and Marquita's testimony. *Id.* Thus when the State stated, "[defendant] is guilty of everything as charged, not watered down, not he only wanted to scare," and "you saw how [Marquita] reacted when she was asked to identify who the shooter was. She believes it because it's the truth," the State was encouraging the jury to infer credibility based on the manner and substance of defendant's and Marquita's testimonies. RP 953, 1000. The State never expressed a personal opinion that defendant was guilty or that a witness was credible. Especially when reviewed in light of the State's argument as a whole, the State's comments do not constitute improper

vouching with regards to Marquita's testimony, or improper opinion on defendant's guilt. See *State v. Jackson*, 150 Wn. App. 877, 884-885, 209 P.3d 553 (2009)(when viewed in context with the whole argument, prosecutor's statement that officer's testimony was "accurate and true," not improper opinion argument).

The prosecutor's arguments in the present case were reasonable inferences from the evidence and did not amount to clear and unmistakable expressions of personal opinion. *McKenzie*, 157 Wn.2d at 54. Even if this court were to find the State's arguments improper, defendant fails to show, and in fact never argues, the statements were flagrant or ill intentioned. Defendant fails to meet his burden as to this issue. The prosecutor did not commit misconduct with these arguments.

b. The prosecutor did not misstate the law during closing argument.

It is improper for a prosecutor to misstate the law during closing argument. *State v. Davenport*, 100 Wn.2d 757, 765, 675 P.2d 1213 (1984). Statements by the State or defense counsel to the jury regarding the law must be confined to the law as set forth in the jury's instructions. *State v. Estill*, 80 Wn.2d 196, 200, 492 P.2d 1037 (1972). Misstatement of the law by the State during closing argument does not warrant reversal unless the improper statement results in prejudice to the accused. *Estill*,

80 Wn.2d at 201. On appeal, defendant argues the State improperly misstated the law during rebuttal closing argument. As a general rule, remarks by the State are not grounds for reversal where they are in reply to defense counsel's acts and statements. *State v. Davenport*, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). During rebuttal closing argument, the State argued:

The State: And counsel to argue that he acted recklessly rather than intentionally, well, I am not going to use the word "ridiculous" because apparently it's offensive. I will use the word "unreasonable." It is not reasonable. Because you know what? If he didn't do it, if he wasn't the shooter, he is guilty of nothing. You don't have it both ways. I wasn't the shooter, but if you believe I was, I didn't really intend to hurt anybody.

Defense Counsel: Your Honor, I'm going to object to that. Again, shifts the burden. It's a misstatement of the law.

The Court: Overruled.

The State: That's what defense would have you believe. If [defendant] was not the shooter, then fine, but he did not intend to hurt these people. He shot at these people. He walked over there and just started shooting at them. What do you think he was thinking of doing?

RP 993. This argument did not misstate the law. The State's arguments were in response to defense counsel's suggestion that when a person fires a gun into a crowd of people, that person does not necessarily intend to inflict great bodily harm. RP 980-981. Defense counsel also argued that discharging a firearm in a crowd of people could be a reckless act. RP

981. Defense counsel's arguments were intended to convince the jury that if it believed defendant shot at the victims, his actions were merely reckless.

Defendant confuses the State's factual argument with a legal argument. Contrary to defendant's claims, the State did not make a legal argument to the judge or the jury that defendant should not be permitted to argue for the lesser included offense of assault in the second degree. Rather, the State's arguments suggested to the jury that under the facts of this case, the evidence showed defendant was the shooter then his actions were not merely reckless so defendant was guilty of the greater offense and not the lesser offense defense counsel was advocating. The argument asked the jury to reach the conclusion that defendant acted with an intent to inflict great bodily harm. This was a reasonable argument to make given the facts in the case, defense counsel's statements during closing argument, and the instructions provided to the jury.

In defendant's case, the jury was instructed on assault in the first degree, and a lesser included of assault in the second degree. CP 145-184. To prove assault in the second degree, the State only had to show defendant recklessly inflicted substantial bodily harm. *Id.* The court instructed the jury that a defendant acts recklessly when he "knows of and disregards a substantial risk that a wrongful act may occur and this

disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.” CP 145-184, *see also* Washington Pattern Jury Instructions Criminal, WPIC 10.03. The court defined substantial bodily harm as a “bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the functioning of any bodily part or organ...” CP 145-184, *see also* Washington Pattern Jury Instructions Criminal, WPIC 2.03.01. Defendant argued that if the jury believed he fired the shots, his conduct only amounted to assault in the second degree.

However, to prove assault in the first degree, as charged, the State had to prove defendant intended to inflict great bodily harm. CP 145-184, *see also* Washington Pattern Jury Instructions Criminal, WPIC 35.07. A person acts intentionally when “acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 145-184, *see also* Washington Pattern Jury Instructions Criminal, WPIC 10.01. Great bodily harm is defined as an injury that creates a probability of death. CP 145-184, *see also* Washington Pattern Jury Instructions Criminal, WPIC 2.04. Therefore to prove assault in the first degree, the State had to prove defendant acted with an intent to injure his victims in a way that would create a probability of death. The prosecutor’s arguments used the evidence to show if defendant was the shooter, he had an intent to kill,

pursuant to assault in the first degree, not merely scare, pursuant to assault in the second degree, when he opened fire on the people sitting on Marquita's porch.

The State's argument did not misstate the law. Defendant fails to show how the trial court abused its discretion in overruling defense counsel's objection to this argument.

c. The prosecutor did not appeal to the passions and prejudices of the jury.

A prosecutor may not deliberately appeal to the passions and prejudices of the jury during closing argument or encourage a verdict based on evidence not properly admitted. *State v. Belgarde*, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988). However, counsel must be accorded a reasonable latitude in argument to draw inferences and deductions from the evidence. *In re Detention of Law*, 146 Wn. App. 28, 52, 204 P.3d 230 (2008). Defendant argues the prosecutor improperly appealed to the passions and prejudice of the jury by accusing defendant of attempted murder. Brief of Appellant at 10. During closing argument, while arguing defendant had an intent to inflict great bodily harm the prosecutor argued:

But because the gun was defective – it could not keep the magazine in the firearm – he failed to kill any of them. He failed to accomplish his premeditated act. He ran from the house hoping to flee before the police arrived.

But ladies and gentlemen, he is not charged with attempted murder. He is not charged for the crime he actually committed.

....

He is not charged with the crime that he meditated and for the crime he is actually guilty of. He is charged only with Assault in the First Degree, three counts.

RP 938 (italicized portions challenged in Appellant's Brief at 11).

Defense counsel objected to these remarks. RP 938.

While the State's argument was poorly worded, it did not appeal to the passions and prejudices of the jury. At the core of the prosecutor's challenged statement is a recognition that in a case like defendant's, jurors may be wondering why the State did not charge defendant with a more serious crime. In these scenarios a prosecutor may want to clarify such an issue for the jury. However, the prosecutor in defendant's case erred in poorly phrasing her argument. This however does not warrant reversal.

To qualify as prosecutorial misconduct, a prosecutor must be acting in bad faith. *Manthie*, 39 Wn. App. at 820. A prosecutor's error in word choice or phrasing does not deserve the "misconduct" label.

"Prosecutorial misconduct is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009)(internal citations omitted).

"[M]isconduct...is more appropriately related to violations of the Rules of

Professional Conduct.” *Id.* Errors, like the one made in defendant’s case, should not provide the basis for reversal where the error does not violate a professional conduct rule. This challenged argument does not rise to reversible error and defendant fails to show the trial court abused its discretion in overruling his objection to the argument below.

Defendant’s second challenged argument on this issue occurred during the State’s rebuttal closing argument:

[Defense counsel] put in her drawing...bullets. And she put in paren[thesis] 2. Why did the defendant get charged with three counts if in fact – let’s assume, for the sake of argument – there has been a lot of testimony about how many shots are fired. Let’s say, for the sake of the argument, that only two shots were fired. Why is he charged with three counts? If the State doesn’t have to prove that anyone got injured, then why three counts? And why just Michael, Marquita and Christina?

Well, ladies and gentlemen, the truth of it is the defendant could have gotten charged for every single person who sat out there on that porch.

RP 997. Defense counsel objected to this argument. *Id.* This challenged argument was in direct response to defense counsel’s remarks during her closing argument that the State improperly charged three counts of assault despite only finding two spent bullet casings. RP 974. By calling into question why the State charged three counts of assault when only two bullet casings were found, defense counsel opened the door to the State’s response. The State’s response constituted a clarification of the law

allowing the jury to understand the origins of the three charges. The statements were not made to appeal to the passion and prejudice of the jury but were instead made to help the jury understand why defendant faced three assault charges instead of two. Defendant fails to show the State acted in bad faith when making these arguments and therefore fails to show the arguments were improper. The trial judge did not abuse its discretion in overruling defendant's objection to this argument.

Even if the challenged arguments are found to be improper, defendant cannot show any resulting prejudice. The jury was instructed:

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 145-184, Instruction No. 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02. The instructions contemplate that the jury is to carefully deliberate and that they are to reach a just a proper verdict unaffected by sympathy, prejudice or personal preference. A jury is presumed to follow the jury instructions and therefore is presumed to disregard any arguments not in line with the instructions provided by the court. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

Therefore, if the jury believed the State was making improper arguments, it is presumed to have ignored them.

Furthermore, given the overwhelming evidence of defendant's guilt in this case, defendant cannot show the error contributed to the verdict that was obtained. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Five eyewitnesses saw and identified defendant as the shooter. RP 284, 431, 470, 603, 643. Police officers apprehended defendant within minutes of him firing the first shot and found the gun in the SUV near defendant's seat. RP 276, 309, 390. The jury could reasonably infer, based on defendant's actions, he intended to inflict great bodily harm. Given the strength of this evidence, the jury's verdict was not affected by the State's references to defendant's intent to inflict injuries that had a probability of causing death. Any error assigned to this claim is harmless and defendant should not prevail on this issue.

- d. Defendant's issue raised in passing should not be considered on appeal.

An issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). On page 14 of Appellant's Brief, while arguing the State improperly expressed a personal opinion about a

witness's credibility, defendant cited to a statement where the State asked the jury to return a verdict of guilty reflecting "the truth of what [defendant] did that night." RP 1001. This statement did not refer to any witness or the credibility of any witness. Furthermore, defendant provides no law or argument specifically relating to this statement. Defendant therefore has failed to raise a valid claim upon which relief may be granted and this court should decline to consider any alleged error relating to this remark.

- e. Defendant fails to show any prejudicial error during the State's closing and rebuttal arguments, much less an accumulation of it.

Here, none of the errors alleged by the defendant have merit. Moreover, defendant can show no prejudice from the alleged errors, nor can he show that they would combine so that together they deprived the defendant of a fair trial.

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

577. “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999)(internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232 (1973)(internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Rose*, 478 U.S. at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)(“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998)

(“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93 94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine.

First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. *See Russell*, 125 Wn.2d at 94. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See Russell*, 125 Wn.2d at 94. Defendant does not argue the alleged errors in his trial are of constitutional magnitude.

Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See e.g., State v. Stevens*, 58 Wn. App. 478,

498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”)(emphasis added).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial. Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See *Stevens*, 58 Wn. App. at 498.

In defendant’s case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show any prejudicial errors, much less an accumulation of them. Furthermore, the State presented extensive clear and untainted evidence of defendant’s guilt. The State produced

multiple eye witnesses and victims who observed defendant firing at the people on Marquita's porch. The State also produced officers who arrested defendant within minutes of the shooting because he perfectly fit the description of the shooter. Finally, the State provided forensic evidence connecting the gun retrieved from the SUV to the bullet casings found at the shooting site. There was no dispute among the State's witnesses that defendant showed up at Marquita's house, defendant pulled out a gun, defendant shot at the people on Marquita's porch, defendant's shots struck Michael in the arm and grazed Marquita's leg, defendant fled the scene, and defendant possessed cocaine.

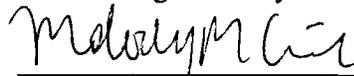
Additionally, nothing indicates the jury misunderstood its instructions or its duty to reach a fair and impartial decision. As discussed above, when viewing the alleged errors under the totality of the circumstances, the State made proper arguments that did not prejudice defendant's trial. Without prejudicial error, the cumulative error doctrine cannot apply.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court affirm the judgment and sentence below.

DATED: SEPTEMBER 27, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney

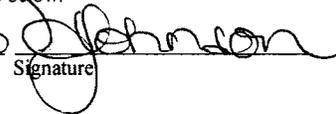


MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

Amanda Kunzi
Rule 9

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.

9/28/10 
Date Signature

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