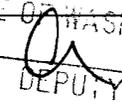


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DIVISION II

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

STATE OF WASHINGTON, RESPONDENT

v.

ALEJANDRO CASTRO GARCIA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 09-1-02494-6

BRIEF OF RESPONDENT

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

1. Should this court consider defendant's challenge to jury instruction number 18 when the challenge is not constitutional in nature and is raised for the first time on appeal?
2. Did the State commit prosecutorial misconduct where defendant cannot show prejudice or that the statements were flagrant and ill-intentioned?
3. Has defendant failed to meet his burden of showing deficient performance and resulting prejudice necessary to succeed on his claim of ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Alejandro Castro Garcia, on May 18, 2009 with two counts of unlawful sale of a controlled substance. CP 1-3. Count I was for an incident on April 15, 2009 and count II was for an incident on May 15, 2009. CP 1-3.

The case was called for trial on December 14, 2009 in front of the Honorable Bryan Chushcoff. 12/14/09RP 3¹. An amended information was filed on the day of trial. 12/14/09RP 3. The amended information added one count of unlawful possession of a controlled substance with intent to deliver: heroin. CP 84-87. School bus route enhancements were also added to all three counts. CP 84-87.

At the end of the trial, the defense moved for a motion for mistrial based on a slide in the State's PowerPoint presentation during closing argument. RP 12/21/09RP 96. The court denied the motion. 12/21/09RP 98.

During deliberations, the jury asked three questions, although all were of the same nature. 12/23/09RP 3, CP 51-54. The trial court addressed the questions with the parties. 12/23/09RP 3-13.

On December 23, 2009, the jury found defendant not guilty of count I which related to the April 15th incident. 12/23/09RP 16. The jury found the defendant guilty of counts II and III which dealt with the May 15th incident. 12/23/09RP 16-17. The jury also answered yes on the special verdicts that both counts happened within a school bus zone and

¹ The State will refer to the Verbatim Report of Proceedings as follows: the five sequentially paginated volumes will be referred to as RP. The remaining volumes will be referred with the date of the hearing preceding RP.

both were major violations of the uniform controlled substance act.

12/23/09RP 17-18, CP 89-90, 92-93.

Sentencing was held on January 8, 2010. RP 387, CP 96-109. The court sentenced defendant to the high end of the standard range on both counts to run concurrent for a total of 68 months. RP 392, CP 96-109.

The court also sentenced defendant to 24 months the sentencing enhancement to run consecutive to each other and the base sentence for a grand total of 116 months. RP 392, CP 96-109.

Defendant filed this timely appeal. RP 393, CP 110.

2. Facts

Stephen Santella worked as a confidential informant for the City of Olympia and specifically, the Thurston County Narcotics Task Force (TNT). RP 7, 25. Santella began working with the TNT on a contract. RP 25, 297-8. Santella agreed to help TNT with at least four investigations and in exchange, Santella would receive a sentencing benefit. RP 26. Santella successfully completed his contact in January 2009 and then continued to work for TNT as an informant in exchange for money. RP 27, 300.

Santella told Detective Matt Renschler that he could buy large quantities of heroin from a Hispanic male in the Tacoma area. RP 31. Initially the operation seemed too risky and Detective Renschler told

Santella no. RP 32. However, he reconsidered and the first controlled buy happened on April 8, 2009. RP 33. Santella contacted Jared Neff and his girlfriend, Rebecca Rycraft, in Lacey and the three drove to Tacoma. RP 33, 38-9. The point of this buy was to build trust between Neff and Santella so that TNT could deal directly with the unidentified Hispanic source. RP 37, 69. Once in Tacoma, Neff, Rycraft and Santella contacted two Hispanic males and purchased heroin. RP 33, 38, 41, 70. The two Hispanic males drove a green Toyota Camry. RP 40. Defendant was not involved in the April 8th buy. RP 70, 353.

Santella was provided \$150 to pay Neff to get the connection to the source of the drugs so that TNT could deal with the source directly and not have to go through Neff. RP 46. This was accomplished successfully on April 14, 2009. RP 46.

The second controlled buy occurred on April 15, 2009. RP 47. Santella placed a call to the source. RP 50, 192. The source was a male with a thick Hispanic accent. RP 50. A meet location was set up. RP 50, 192. The same green Toyota Camry showed up. RP 51-2, 69-70, 336. Two Hispanic males were in the car. RP 194, 218, 336. Santella got out of the vehicle and walked over to the Camry. RP 197. The passenger of the Camry got out and walked toward Santella. RP 197. Santella handed him the money and passenger handed Santella the heroin. RP 197, 222. The heroin purchased was just over 50 grams. RP 56, 59. The amount of heroin, actually weighed at 51.4 grams, is larger than an amount for

personal use. RP 157-8, 212. The driver remained in the vehicle and did not say anything. RP 198, 337. The driver of the vehicle was defendant. RP 199, 218-9, 227, 353. The location of the buy was within 236 yards of an elementary school bus stop. RP 234-5.

The third controlled buy occurred on May 15, 2009. RP 82. The plan was different in this buy in that officers were planning on arresting the suspects after the deal. RP 82. Santella made a phone call to the Hispanic source. RP 86, 241-2. A meet was arranged. RP 90, 241. The car that showed up this time was a silver Saturn. RP 91, 243, 343. There were two Hispanic males in the vehicle. RP 243. These were the same two males as the previous buy on April 15th. RP 343. Santella approached the passenger side of the Saturn. RP 246. The driver turned toward Santella and looked like he was talking to him. RP 247. Santella made hand movements towards the driver and gave the money to the driver. RP 248, 268. The passenger told Santella to give the money to the driver. RP 346. The driver counted the money and then said something to the passenger in Spanish. RP 346. The passenger gave Santella the heroin. RP 347. The driver was defendant. RP 353. The amount of heroin obtained was 107.8 grams. RP 157, 261. This amount is larger than an amount for personal use. RP 157-8, 261. The buy was within 1000 feet of a bus stop for an elementary school. RP 274, 276.

After the buy, two Hispanic males were arrested. RP 93. Defendant was one of the two people arrested. RP 93. The second person arrested was Garcia Delores. RP 95.

Defendant's identification was in the name of Juan Hernandez Peralta. RP 97. This was determined to be a false name. RP 97. Defendant's true name was determined to be Alejandro Castro Garcia. RP 97.

A search warrant was obtained for the vehicle and a hidden compartment was discovered in the center console area. RP 109. Large amounts of US currency and heroin were found in the compartment. RP 109. The heroin weighed just under 35 grams. RP 112, 158. This amount of heroin was determined to be substantially larger than an amount for personal use. RP 158. \$3,854.00 was found in the vehicle. RP 113. In addition, another \$1,400.00 of pre-recorded buy money was also found in the vehicle. RP 115. The vehicle was owned by Delores. RP 116. However, documents were found in the car that contained defendant's name. RP 121-124. No drug paraphernalia was found in the vehicle. RP 149.

Defendant claimed that he was not in Washington on April 15, 2009. RP 10, 14. Defendant has been arrested for driving under the influence of intoxicants in September 2008 and fled to California. RP 10-11. He said he did not come back until May 2009. RP 12. On May 15, 2009, he was with Delores and they were supposed to go play basketball.

RP 18. Instead, they went to pick up money that someone owed Delores.
RP 18. When the police turned on their lights, Delores stuck the money in the middle of the vehicle and told defendant to tell the police the stuff in the car belonged to him. RP 20. Defendant claimed he did not know what was in the car and did not know about the heroin. RP 20, 50-1. Defendant also claimed he did not know he was helping deliver heroin but he did admit that Santella handed him the money and that he counted it. RP 21.

C. ARGUMENT.

1. DEFENDANT DID NOT PRESERVE A CHALLENGE TO JURY INSTRUCTION NUMBER 18 AND AS IT IS NOT AN ISSUE OF A CONSTITUTIONAL NATURE, IT SHOULD NOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

A trial court's jury instructions are reviewed under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law. *State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the

evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963). The Court of Appeals will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); See *State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009).

The State agrees that the decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010) is the controlling law on the challenged special verdict instruction, number 18, in this case. However, the rule adopted in *Bashaw* is not constitutional. *Bashaw*, 169 Wn.2d at 146 n. 7. Rather, it is a common law rule. *Bashaw*, 169 Wn.2d at 146 n. 7. As such, this challenge cannot be raised for the first time on appeal. In order to challenge this instruction, it must have been objected to below. In the instant case, no objection to this jury instruction was raised. There is no

ruling from the trial court to be considered on appeal. As such, this court should decline to address defendant's challenge to the special verdict instruction as it is not of a constitutional nature and is raised for the first time on appeal.

2. THE STATE'S COMMENTS IN CLOSING ARGUMENT, ALTHOUGH ARGUABLY INARTFUL AT TIMES, WERE NOT PREJUDICIAL OR ILL-INTENTIONED, FLAGRANT AND DID NOT RISE TO THE LEVEL OF PROSECUTORIAL MISCONDUCT.

The United States Constitution guarantees defendants a fair, but not necessarily error free, trial. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). To demonstrate prosecutorial misconduct, a defendant must show that comments made by the prosecutor were both prejudicial and improper. *See Fisher*, 165 Wn.2d at 747, 202 P.3d 937. "Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). A defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper to prove prosecutorial misconduct. *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). The burden rests on the defendant in showing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718.

The court defines prejudice as “a substantial likelihood [that] the misconduct affected the jury’s verdict.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). “Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Russell*, 125 Wn.2d at 86, citing *State v. Dennison*, 72 Wn. 2d 842, 849, 435 P.2d 526 (1967). The prosecutor may respond to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

The court has repeatedly held that when a defendant fails to object to improper argument during closing, he waives appeal on the issue. *State v. Anderson*, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009); *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). “Unless a defendant objected to the improper comments at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice.” *State v.*

Barrow, 60 Wn. App. 869, 876, 809 P.2d 209 (1991), *citing State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). Thus, defendant must show that the prosecutor's behavior could not have been cured by a jury instruction in order to demonstrate flagrant and ill-intentioned behavior.

- a. Despite remarks in initial closing, the State correctly stated the burden of proof in rebuttal and the jury is presumed to follow the court's instructions.

A prosecutor who personally vouches for the credibility of witnesses commits misconduct. *State v. Swan*, 114 Wn.2d 613, 653, 790 P.2d 610 (1990). "However, prejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion." *Id.* at 664. Regarding witness credibility, the court held that "[c]ounsel is given reasonable latitude to draw and express inferences and deductions from the evidence, including inferences as to the credibility of witnesses." *State v. Adams*, 76 Wn.2d 650, 458 P.2d 558 (1969). A prosecutor may argue, based on the evidence presented in trial, that the jury should consider certain testimony over others. *Id.* In *State v. Copeland*, the court held that prosecutor's statements during closing argument that defendant was a liar "were related to the evidence and drew inferences that [the defendant] lied because his testimony conflicted with that of other witnesses." 130 Wn.2d 244, 922 P.2d 1304 (1996).

A jury is presumed to follow the court's instructions regarding the proper burden of proof. *State v. Gregory*, 158 Wn.2d 759, 861-62, 147 P.3d 1201 (2006).

In that instant case, the court instructed the jury on the law including the reasonable doubt standard and the presumption of innocence.

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

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

CP 55-83, Instruction 2, *see also* Washington Pattern Jury Instructions Criminal, WPIC 4.01. Further, the court instructed the jury:

The lawyer's 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 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 55-83, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02.

Defendant assigns errors to the State's remarks about telling the jury that it was their job to determine if defendant was telling the truth. RP 66, 70. Defendant also takes issue with the State telling the jury that if they determined defendant was lying then he was guilty across the board. RP 68, CP 113-118, slide 4. All of these statements and the PowerPoint slide were objected to in the trial court.

However, while the above statements are problematic, that does not make them reversible misconduct. Defendant not only has to show that the remarks are improper but also that they are prejudicial. *State v. Warren*, 15 Wn.2d 17, 26, 195 P.3d 940 (2008). This Court is required to view these comments in the context of the entire closing argument, the issues presented in the case, the evidence presented and the court's instructions to the jury. *Id.* at 28. This Court cannot view these statements in isolation. *Id.* Any prejudice from the State's comments was minimized. Defense counsel objected immediately and the trial court sustained the objections. RP 66, 68, 70. Further, defendant did not request any further curative instructions. The jury was properly instructed on the law including the burden of proof and the presumption of innocence and they are presumed to have followed those instructions. The fact that the jury acquitted defendant of count I is good evidence that they did follow the court's instructions and that the State's arguments did not

prejudice defendant. While the State's comments in initial closing were problematic, they were not prejudicial.

Further, since this Court must look at the entire case, it is important to note that the State later reminded the jury in rebuttal what burden the State is held to.

Ladies and gentlemen, I hope you didn't take what I said, during my initial closing, as any attempt to suggest that I was shifting the burden of proof.

Let me be absolutely clear. It is the State's burden to prove these charges against the defendant beyond a reasonable doubt. It is the State's burden and State's burden alone, but when this defendant chooses to walk over here and get on the stand and testify under oath and then tell you that everything he says is the truth, you don't and aren't bound to accept what he says as gospel. You don't have to say to yourself, boy it's the State's burden of proof.

RP 92. The State's reminded the jury that the State's burden is to prove the case beyond a reasonable doubt. The State also put into context the arguments it had been making and that while defendant did testify, that did not mean the jury had to blindly accept defendant's story. Because the jury was instructed properly, because they demonstrated that by acquitting defendant of count I, and because a review of the entire case and all closing arguments indicates that the jury was made aware of the proper burden of proof, the comments made by the State in initial closing are not reversible error.

- b. The State did not commit misconduct in stating that accepting defendant's explanation would require the jury to believe the State's witnesses were lying or mistaken.

It is sometimes improper for a prosecutor to tell the jury that their verdict rests on whether they believe one witness or another. *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) (“[I]t is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying.”); *State v. Barrow*, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991) (concluding that it was misconduct for prosecutor to argue that “in order for you to find the defendant not guilty . . . you have to believe his testimony and completely disbelieve the officers’ testimony”). “It is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken.” *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Statements that guilt or innocence depend on a determination that a witness is lying are inappropriate when it is possible that the testimony of the witness could be “unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved.” *Casteneda-Perez*, 61 Wn. App. at 363; accord *Barrow*, 60 Wn. App. at 871, 875-76 (misconduct for prosecutor to say that the defendant was calling the State’s witnesses liars when the defendant presented a mistaken identity theory). However, where “the parties present the jury with conflicting versions of the facts

and the credibility of the witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.” *State v. Wright*, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995). When defendant presents an alibi in testimony, “the prosecutor is entitled to attack the adequacy of the proof, pointing out the weaknesses and inconsistencies[.]” *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

When a prosecutor states in closing argument that the defendant is calling the State’s witnesses liars, the court has held such behavior as misconduct but not serious enough to be flagrant and ill-intentioned. *Barrow*, 60 Wn. App. at 876. “[D]efense counsel did not object, request that the arguments be stricken, or ask for a curative instruction. Counsel clearly could have minimized the impact of this argument if he had taken any of these steps.” *Id.* Specifically, the court stated that “[a] curative instruction particularly could have obviated any prejudice engendered by these remarks.” *Id.* These kinds of arguments, although improper, are not flagrant and ill-intentioned such to warrant reversal. *See State v. Wright*, 76 Wn. App. 811, 823, 888 P.2d 1214 (1995) (holding that closing argument which states that the jury, to believe defendant, must believe that State’s witnesses are mistaken is not prosecutorial misconduct).

In the instant case, defendant challenges the State’s argument that, “in order to conclude that this defendant wasn’t involved in the April 15th buy, is determine that Steven Santella obviously is lying or grossly

mistaken because Steven Santella was there April 15th and Steven Santella saw the driver.” RP 75. Defendant also challenges the slide that includes that “Stephen Santella is lying or grossly mistaken” as one of the many things that the jury must accept in order to conclude that defendant was not involved on April 15th. CP 113-118. Defendant did not object to either the statement or the slide so the statements must be flagrant and ill-intentioned in order to be considered prosecutorial misconduct.

The State did not tell the jury that in order to acquit defendant that they had to disbelieve the State’s witnesses. The State’s argument was a survey of the inconsistencies between the stories and versions of events. Defendant, by providing testimony that directly contradicts testimony given by the State’s witnesses, gives the State an opportunity to compare the credibility of the accounts. Further, the State may respond to argument or comment presented at trial by defense counsel. *Russell*, 125 Wn.2d at 87.

The State did not insist that the jury must choose exclusively between believing the State’s witness or defendant’s witnesses; the State said that by accepting defendant’s explanation of events, one must assume that the State’s witnesses were lying or grossly mistaken. RP 75, RP 113-118. This argument was the logical conclusion from the evidence presented since the State and defendant presented two entirely different versions of events. When considering this case in light of the above case

law, the comments made by the State were not ill-intentioned and flagrant. The State did not commit prosecutorial misconduct.

c. The trial court did not error in denying the defense motion for mistrial.

The trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. *See State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A trial court's denial of a motion for mistrial will be overturned only when there is a "substantial likelihood" the error prompting the motion affected the jury's verdict. *Rodriguez*, 146 Wn.2d at 269-70. A trial court should deny a motion for a mistrial unless "the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *Id.* at 270 (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

The trial court is in the best position to determine the prejudice of the statement in context of the entire trial. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). If an objection was made, the appellate court will still give deference to the trial court's ruling when examining the conduct for prejudice because "the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a

defendant's right to a fair trial. *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

A reviewing court should examine the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow. See *State v. Crane*, 116 Wn.2d 315, 332-333, 804 P.2d 10 (1991) *superseded on other grounds by statute as stated in In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

Defendant claims the State committed prosecutorial misconduct by using a booking photo of defendant, which had not been admitted into evidence, as the last slide of his PowerPoint. While defendant does not assign error to the court's denial of the mistrial, the mistrial motion was based on this slide. RP 96. It is important to analyze the effect of any prejudice this slide might have caused by looking at the trial court's ruling and analyzing it under the above case law.

The slide that defendant claims is prosecutorial misconduct was not objected to in front of the jury at the time it was shown. Defense counsel waited to bring a motion for mistrial until after the jury had been excused after the State's rebuttal closing. RP 96. Defense counsel argued that the booking photo sent the message to the jury that defendant had

been in jail and that the jury should return him to jail. RP 97. The court denied the motion for a mistrial. RP 98. While the trial court recognized that the use of the photo was not proper, the court also analyzed it as to what prejudice it could have caused defendant. RP 97-8. The trial court reviewed the photo and found that while you could see some sort of gray outfit, there was not number on it and the outfit was otherwise unidentifiable. RP 97. The background of the photo was just gray. RP 97-8. The trial court determined that the photo itself did not prejudice defendant to the point where the court should declare a mistrial. RP 98. As the trial court is in the best position to analyze the prejudice in the context of the trial, this court should give the trial court's ruling deference. Defendant could not show prejudice then and cannot show it now on appeal since the jury acquitted defendant of one of the charges. While the photo should arguably not have been included in the PowerPoint, the inclusion of the photo does not prejudice defendant and does not meet the standard for reversible prosecutorial misconduct.

d. Defendant has failed to establish that there was an accumulation of prejudicial error.

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. *Id.* “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, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (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. *Id.* 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 sometimes 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 error 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 Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* 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.”).

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, either because of the enormity of the errors, *see e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error

because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). 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 the instant 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 that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

There was evidence that the defendant was present at the scene of the May 15th buy. The confidential informant, Stephen Santella, testified that defendant was the driver of the vehicle on May 15th. RP 353. Santella testified that he handed the money for the drug deal to the defendant. RP 346. Defendant counted the money. RP 346. Detective Russell thought he saw Santella give the money to the driver. RP 268. Defendant himself testified that he went with Delores on May 15th to pick up money owed to Delores. 12/21/09RP 18. Defendant admitted that Santella handed him the money and that he might have counted it. 12/21/09RP 21. Defendant himself testified that he was at the scene, that

Santella gave him the money and he counted it. He admitted involvement. Combined with the testimony of the informant and the officers involved, the jury found him guilty of the two crimes that happened on May 15th. The fact that they acquitted defendant of the crime on April 15th shows that any errors were not so prejudicial as to deny defendant a fair trial. The jury clearly listened to and weighed the evidence and determined that State had met their burden as to two counts but not as to the third. Prejudicial error, let alone an accumulation of it, cannot be shown. Any error in this case was harmless. Defendant cannot prevail under the doctrine of cumulative error.

3. DEFENDANT RECEIVED
CONSTITUTIONALLY EFFECTIVE
ASSISTANCE OF COUNSEL AS DEFENDANT
CANNOT SHOW DEFICIENT PERFORMANCE
OR PREJUDICE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court

has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81

Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing Strickland, 466 U.S. at 689-90.

Under the prejudice aspect, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel’s performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d, at 335 (*citing State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S., at 690;

State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S., at 689.

Defendant asks this court to find that because defense counsel failed to propose WPIC 10.02, the definition of knowledge, he is ineffective and the conviction must be reversed. First, case law requires a review of the entire record and not just a review of this issue. A review of the entire record indicates that counsel was an advocate for his client. Defense counsel made motions in limine on behalf of his client, objected when needed, put on a defense case, and made a motion for mistrial. The record shows that defense counsel was an advocate for his client throughout the entire trial.

Second, there was a legitimate tactical reason for defense counsel not requesting WPIC 10.02 when it was determined that it had not been given to the jury. The jury asked several questions about prior knowledge with the word prior underlined. 12/23/09RP 3-4. The jury’s three questions were all about when knowledge occurred and not what knowledge meant. The court alerted the parties that the jurors had not been given the definition of knowledge. 12/23/09RP 4. Defense counsel

said that while he would not have objected to the instruction had it been offered, that giving such an instruction at that point would not be helpful to the jury. 12/23/09RP 4-5, 9. Defense counsel made a reasoned and tactical decision not to ask for the knowledge instruction to be given during deliberations based on his belief that it would confuse the jury further and based on the fact that instruction number 6 really held the answer to their question². 12/23/09RP 5-7, 10. Based on the nature of the juror's questions, there is nothing to suggest defense counsel was deficient for not offering this instruction. Defendant has not met his burden of showing that defense counsel's performance as deficient. His claim of ineffective assistance of counsel fails.

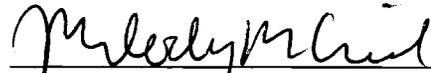
² “[A]dditional instructions on the law can be given during deliberation.” *State v. Becklin*, 163 Wn.2d 519, 529-30, 182 P.3d 944 (2008). Whether to give further instructions to the jury after deliberations have begun is within the discretion of the trial court. *State v. Ng*, 110 Wn.2d 32, 42-43, 750 P.2d 632 (1988); see CrR 6.15(f)(1). However, “such supplemental instructions should not go beyond matters that either had been, or could have been, argued to the jury.” *State v. Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990).

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction and sentence below.

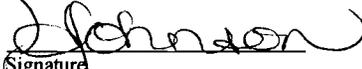
DATED: FEBRUARY 14, 2011

MARK LINDQUIST
Pierce County
Prosecuting Attorney


MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

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.

2/14/11 
Date Signature