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I. PROCEDURAL HISTORY

The appellant was charged by information with assault in the first degree with a deadly weapon enhancement. The appellant proceeded to jury trial on January 19, 2010 before the Honorable Judge James Stonier. On January 21, 2010, the jury found the appellant guilty as charged, also finding that he was armed with a deadly weapon during the commission of the offense. The appellant was subsequently sentenced to 147 months in prison. The instant appeal timely followed.

II. STATEMENT OF THE CASE

On October 11, 2009, Amet Ascencio-Marquez went to a friend's home in Portland, Oregon to socialize. Mr. Ascencio-Marquez is Cuban, but has lived in the Portland area for around eight years. That day, he went to his friend Alberto's house, where he also met up with two other gentlemen, Alane and the defendant. Mr. Ascencio-Marquez was the only person with a car, and he agreed to drive the group up to Longview as the defendant and Alane wanted to visit some girls there. Along the way, the group stopped and purchased a bottle of liquor to drink. 5RP 60-64.

The group then arrived at an apartment in Longview, Washington. At the residence, Mr. Ascencio-Marquez and the three other Cuban males met three females and another male. The women were Lakeesha Brooks,

Rosabella Harms, and Sharlene Daniels. Ms. Daniels was also known by the nickname “Diabla” and was dating the defendant. 5RP 65-66.

While at the residence, Mr. Ascencio-Marquez got along well with everyone present except Ms. Daniels, whom he argued with. 5RP 66-67. After a few hours, Mr. Ascencio-Marquez needed to go home. He informed the defendant of this, but the defendant wanted to spend the night in Longview. 5RP 68-69. Mr. Ascencio-Marquez was unwilling to stay, and began to leave the apartment with Alberto and the group’s car. As Mr. Ascencio-Marquez approached the door, he saw the defendant come at him and stab him with a metal object. 5RP 69-71. He was certain that the defendant was the person that stabbed him. 5RP 77. After being stabbed, Mr. Ascencio-Marquez staggered to his vehicle, in an attempt to leave but ultimately collapsed in the parking lot. 5RP 72.

Cowlitz County Sheriff’s deputies arrived on the scene soon after the stabbing, and found Mr. Ascencio-Marquez lying on the ground in the parking lot of the apartment complex. 6RP 47-58. Mr. Ascencio-Marquez was rushed to St. John’s Hospital in Longview, where he was found to have a stab wound to his heart. Dr. Mario Forte, the treating physician, would later testify that the wound would have been fatal without medical treatment. 6RP 33-37.

Lakeesha Brooks testified that she rented the apartment that Mr. Ascencio-Marquez and the defendant had been at that evening. Ms. Brooks was dating Alane. 5RP 87-88. At the apartment, she noticed that Mr. Ascencio-Marquez was getting along well with everyone except the defendant's fiancée Ms. Daniels or Diabla. 5RP 93-95. When Mr. Ascencio-Marquez tried to leave, an argument erupted. She saw the defendant charge at Mr. Ascencio-Marquez and hit him, causing him to fall to the ground. 5RP 98-100. She did not see anyone else hit Mr. Ascencio-Marquez. However, she did see the defendant had a knife in his right hand after hitting Mr. Ascencio-Marquez. 5RP 101, 6RP 22.

When the police arrived, Ms. Brooks did not tell them the truth about what happened. Instead, she went along, out of fear, with a false story concocted by Ms. Daniels, the defendant's fiancée, that a Mexican "cholo" had stabbed the victim. 6RP 13-14. Later, after the police had left, she heard the defendant saying Mr. Ascencio-Marquez had been "talky, talky" while the defendant a stabbing motion with his right hand. 6RP 12-13, 22. Ms. Brooks also testified to hearing Ms. Daniels say she had wiped the defendant's fingerprints off the knife and thrown it on the balcony of an upstairs apartment. 6RP 131-132.

Rosabella Harms testified that she was at the apartment the night the stabbing occurred. 6RP 133-134. She also noticed that Mr. Ascencio-

Marquez got along well with everyone except Ms. Daniels, with whom he argued frequently. 6RP 136. Right before Mr. Ascencio-Marquez attempted to leave, Ms. Harms heard Ms. Daniels say “Get him, baby” to the defendant. 6RP 139. As Mr. Ascencio-Marquez was leaving, she saw the defendant strike him in his chest. Mr. Ascencio-Marquez fell to the ground, and she saw blood on his chest. She also saw the defendant with a knife soon after the incident. 6RP 141-142. Ms. Harms also stated she heard the defendant’s fiancée, Ms. Daniels, describe wiping the defendant’s fingerprints off the knife and putting it on a balcony. 6RP 144.

Detective Kelly Lincoln from the Sheriff’s Office recovered a folding knife from the balcony of an apartment above Ms. Brooks. 6RP 162-164. Detective Pat Schallert testified that she interviewed the defendant, who denied stabbing Mr. Ascencio-Marquez. Instead, the defendant claimed he had been sick in bed. 6RP 187-188.

The only witness called by the defense was the defendant. He stated he went to the apartment with Mr. Ascencio-Marquez and the others, had two to three drinks and became violently ill. He then went and stayed in the bedroom. 7RP 200-203. He denied having a knife or stabbing anyone. 7RP 203. Notably, on cross-examination the defendant denied that Ms. Daniels was his girlfriend or fiancée. Instead, he claimed that she and the other two women were prostitutes. 7RP 206-210.

III. ISSUES PRESENTED

1. Did the trial court err by admitting into evidence statements under ER 804(b)(3)?
2. Did the trial court err by admitting non-hearsay statements into evidence?
3. Did the prosecutor commit misconduct during closing argument?
4. Did cumulative error deny the appellant a fair trial?

IV. SHORT ANSWER

1. No.
2. No.
3. No.
4. No.

V. ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion by Admitting Statements Made by Sharlene Daniels Under ER 804(b)(3).

The appellant argues that the trial court erred by admitting statements made by Sharlene Daniels under ER 804(b)(3), claiming that the trial court failed to find she was unavailable as a witness. However, at trial, appellant's counsel did not dispute Ms. Daniels' unavailability, and in fact agreed that she was unavailable to testify. Also, at trial, the appellant did not object on this basis, but instead raised a different

objection to the statements. As this claim was not presented to the trial court, the appellant is barred from making this argument on appeal.

On appeal, this Court reviews the admission of evidence under an abuse of discretion standard. State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

a. At Trial, the Appellant Agreed that Ms. Daniels was Unavailable.

At trial, the appellant's counsel noted at the outset that one of the evidentiary issues in the case was the admission of statements by Ms. Daniels. Trial counsel stated that:

[T]he one concern I have is the issue of statements that I think the prosecutor intends to elicit *from a witness who's not available*, and I think they would typically be hearsay, and I believe they are aiming at the co-conspirator/exception to the hearsay, and I have some concerns that that would not be appropriate, but I guess we'll have to deal with that when we get to that point.

5RP at 4-5 (emphasis added). It is clear from this statement that appellant's trial counsel agreed that Ms. Daniels was unavailable to testify.

Later in the trial, the trial court considered the admissibility of statements made by Ms. Daniels under both the co-conspirator and statements against interest exceptions to the hearsay rule. The State

informed the court that “we do not expect to hear from Ms. Daniels in this trial, as she cannot be located.” 6RP 108. Unsurprisingly, given trial counsel’s earlier statements, the defense did not dispute Ms. Daniels’ unavailability.

Having agreed at trial that Ms. Daniels was unavailable, the appellant may not argue otherwise on appeal. Under RAP 2.5(a), an appellate court “may refuse to review any claim of error which was not raised in the trial court.” This rule enshrines the longstanding principle that “an issue, theory, or argument not presented at trial will not be considered on appeal.” State v. Jamison, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979), quoting Herberg v. Swartz, 89 Wn.2d 916, 578 P.2d 17 (1978). The purpose of this rule is to require defendants to bring purported errors to the trial court’s attention, thus allowing the trial court to correct them, rather than staying silent in an attempt to “bank” the issue for appeal.¹ See State v. Fagalde, 85 Wn.2d 730, 731, 539 P.2d 86 (1975). The application of this rule is required here, as the appellant is asserting a factual position on appeal that is contrary to the representations made to the trial court. This Court should reject this claim, as the trial court can

¹ Requiring defendants to raise their objections in the trial court also allows for the development of a complete record regarding the alleged error. To allow defendants to bring forth new claims on appeal denies the State the ability to make a full record, especially in this case where the appellant did not dispute and in fact agreed with the State’s representation that the witness was unavailable.

hardly be said to have been “manifestly unreasonable” when it relied on the statements of trial counsel.

b. As the Appellant Did Not Argue the State Failed to Show that Ms. Daniels Was Unavailable, This Claim is Not Preserved for Appeal.

Furthermore, at trial, the appellant did not object to the admission of Ms. Daniels’ statements on the basis that the State had not proved she was unavailable. Instead, trial counsel objected on the basis that the co-conspirator exception did not apply as there was no showing the appellant was involved in a conspiracy with Ms. Daniels. 6RP 110-111. Regarding admission under ER 804(b)(3), statements against interest, trial counsel argued that, though the statements may have been against Ms. Daniel’s penal interest, those statements did not have anything to do with the appellant. 6RP 112.

The trial court then heard testimony regarding the statements attributed to Ms. Daniels, outside the presence of the jury. 6RP 117-125. Trial counsel continued to argue that the statements were not admissible as the appellant did not join in them, the statements were not against his penal interest, and he was being denied the right to confrontation. 6RP 127. Trial counsel summarized his argument as “So, I still object, and my objection is based upon trying to tie the defendant into – I don’t know how to articulate it any better than that, Your Honor.” 6RP 128. At no point did

trial counsel argue to the court that there was no showing that Ms. Daniels was unavailable.² The trial court then ruled that, though it was not convinced the statements were made in furtherance of a conspiracy, the statements were admissible under ER 804(b)(3) as being against the interest of Sharlene Daniels, the declarant. 6RP 128-130.

The appellant argues now that the trial court erred when it admitted this evidence, because it did not consider whether there was sufficient proof that Ms. Daniels was unavailable. However, under RAP 2.5(a), this argument has been waived by the appellant's failure to present it to the trial court. See also Jamison, 25 Wn.App. at 75 (an issue, theory, or argument not presented at trial will not be considered on appeal). Additionally, ER 103(a)(1) requires the objecting party to state the specific grounds of his objection. A party may only assign error on appeal to the specific grounds asserted at trial. Grounds not asserted at trial are waived on appeal. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2 1182 (1985).

In State v. Pappas, 195 Wn. 197, 200, 80 P.2d 770 (1938), the Supreme Court held that:

If an objection naming a specific, but untenable, ground be overruled, it cannot upon appeal be made to rest upon another

² This would have been a curious argument indeed, given trial counsel's statement to the court at the beginning of the trial that she was unavailable.

ground which, although tenable, was not called to the attention of the court during the trial.

This rule has continued undisturbed into the present day, as held in State v. Price, 126 Wn.App. 617, 109 P.3d 27 (2005). There, the court held

A party who objects to the admission of evidence on one ground at trial may not on appeal assert a different ground for excluding that evidence. And a theory not presented to the trial court may not be considered on appeal. Thus, Price's claim of error is not properly before this court.

Price, 126 Wn.App at 637. Applying this rule, appellate courts have regularly refused to consider new arguments not made at the trial level.

In State v. Sims, 77 Wn.App 236, 890 P.2d 521 (1995), the appellant argued that hearsay statements were improperly admitted as excited utterances because the declarant had made inconsistent statements that indicated fabrication. However, this argument had not been presented to the trial court, was not preserved for appeal, and would not be considered by the appellate court. Sims, 77 Wn.App. at 238.

Similarly, in State v. Saunders, 132 Wn.App. 592, 132 P.3d 743 (2006), trial counsel had objected at trial to admission of the victim's statements as hearsay, but on appeal argued that the statements included an identification of the perpetrator and thus fell outside the medical diagnosis exception. As this was a new argument against the statements, the court refused to consider it. Saunders, 132 Wn.App. at 607.

Again, in State v. Mathes, 47 Wn.App. 863, 737 P.2d 700 (1987), the appellate court refused to consider an argument not presented at trial. In Mathes, trial counsel had objected to the admission of a document as a recorded recollection, arguing the document was not authenticated because the witness had no independent recollection of the events. On appeal, the argument shifted to a claim the document was not authenticated as the witness had not signed it. Though the objection remained the same, authentication, the appellate court steadfastly refused to consider the new claim. Mathes, 47 Wn.App. at 868.

Here, the appellant argues to this court there was no showing Ms. Daniels was unavailable. However, at trial the appellant argued that Ms. Daniels' statements were inadmissible because they were not tied to him, and that he had the right to confront Ms. Daniels regarding the statements. The appellant never argued the State had failed to prove Ms. Daniels was unavailable, and did not dispute the State's assertions that she could not be found. Based upon the preceding authority, the State asks this Court to refuse to consider a new argument not made to the trial court. As in Price, Sims, Saunders, and Mathes, the appellant is introducing new issues on appeal that should not be reached by this Court.

c. Even if the Trial Court Erred by Admitting Ms. Daniels' Statements, Any Error was Harmless.

Finally, even if this Court should find the trial court erred by admitting the statements, such error was harmless in light of the other evidence against the appellant. When the trial court commits an evidentiary error, such an error only justifies reversal if it results in prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is without prejudice, or harmless, where the evidence is of minor significance compared with the overwhelming evidence as a whole. State v. Yates, 161 Wn.2d 714, 766, 168 P.3d 359 (2007).

Even without the statements by Ms Daniels, the case against the appellant was overwhelming. Three witnesses testified that he had struck the victim. Mr. Ascencio-Marquez described the stabbing in great detail, and was certain the appellant did it. Ms. Harms and Ms. Brooks both saw the appellant strike the victim, and that he was armed with a knife immediately afterwards. Ms. Brooks stated that the appellant made a stabbing motion while saying the victim had talked too much. Also, the only person with a motive to harm the victim was the appellant, as the victim was about to leave, stranding the appellant in Longview, and the victim and the appellant's fiancée had been arguing throughout the night.

The appellant's denial was less than credible, as he claimed that the female witnesses were prostitutes, a wild accusation without any support from other witnesses. Given the overwhelming evidence arrayed against the appellant, any error cannot be said to have prejudiced him significantly.

II. The Trial Court Did Not Err by Admitting Non-Hearsay Statements into Evidence.

The appellant argues the trial court erred by admitting the fact that Ms. Daniels was heard to say "get him, baby" shortly before the defendant stabbed Mr. Ascencio-Marquez. The appellant contends this statement was impermissible hearsay. However, the statement was not hearsay, as it was admitted to simply show that Ms. Daniels made the statement and to show the effect on the listener, the appellant.

As noted previously, the admission of evidence is reviewed under an abuse of discretion standard. Baldwin, 109 Wn.App. 516. An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." Neal, 144 Wn.2d at 609.

A statement is not hearsay if it is not offered for the truth of the matter asserted. ER 801(c). Considering this rule, a statement is not hearsay if it is offered simply to show that the statement in question was

made. See Karl B. Tegland, Washington Practice: Courtroom Handbook on Evidence, Chapter 5 at 391 (2009-2010). A statement is also not hearsay if it is offered to show the effect on the listener. See State v. Roberts, 80 Wn. App. 342, 352-353, 908 P.2d 892 (1996).

The statement at issue, “get him, baby”, was offered only to show that Ms. Daniels made it, and that it had an effect on the appellant. As such, the statement was not hearsay and its admission was not error. The appellant has failed to show the trial court’s decision was so “manifestly unreasonable” as to be an abuse of discretion. This Court should uphold the admission of this statement.

III. The State Did Not Engage in Prosecutorial Misconduct During Closing Argument.

The appellant claims the State engaged in prosecutorial misconduct by allegedly expressing a personal opinion that the appellant had committed the crime and was not credible. However, to prevail on a claim of prosecutorial the appellant must show both improper conduct and prejudice. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000); State v. Russell, 125 Wn.2d 24, 85 882 P.2d 747 (1994). This high burden is required as a prosecutor is afforded wide latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94, 804 P.2d 577 (1991). Furthermore, allegedly

improper arguments by the prosecutor must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. Russell, 125 Wn.2d at 85-86.

Even if a comment is improper, prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. Roberts, 142 Wn.2d at 533. The failure to object to an improper remark constitutes a waiver of error, and will not result in reversal unless the remark is so flagrant and ill-intentioned that it resulted in prejudice that could not have been neutralized by a curative instruction. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The Supreme Court held in State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) that:

[I]n order for an appellate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.

The court in Swan further held that “[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” Id.; citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

Here, the appellant did not object to the purported misconduct at trial, thus he must meet the higher standard set forth in Swan. The first

statement that the appellant alleges to be misconduct is “The crime that he committed.” This statement was made after the prosecutor had detailed the specific facts and evidence that showed the appellant had in fact committed the crime. 8RP 21-25. The Supreme Court has noted that there is a critical distinction between the individual opinion of the prosecutor, as an independent fact, and an opinion based upon or deduced from the evidence in the case. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). Given this, prejudicial error does not occur until it is “clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.” McKenzie, 157 Wn.2d at 54.

Here, the context of the remark clearly shows that it was an argument based upon the facts at trial, not the prosecutor’s personal opinion. This conclusion becomes inescapable when it is remembered that trial counsel did not object. Indeed, an objection would have been fruitless and would only serve to annoy the trial judge and jury.

The appellant next claims that the prosecutor expressed an opinion on the appellant’s credibility by saying “He’s lying.” 8RP 48. However, the context of this remark again reflects that this was not the prosecutor’s opinion but instead a permissible inference to be drawn from the evidence. See State v. Jackson, 150 Wn.App. 877, 209 P.3d 553 (2009). As such, the remark was certainly not “flagrantly ill-intentioned” or in fact at all

improper. This Court should find there was no prosecutorial misconduct whatsoever in the State's closing argument.

IV. Cumulative Error Did Not Deny the Appellant a Fair Trial.

The appellant argues that under the cumulative error doctrine he is entitled to a new trial. This doctrine may only be applied where there were several trial errors, none of which is itself sufficient to warrant reversal, but which when combined denied the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). However, this doctrine only applies where the appellant can show multiple errors at trial. Without such a multiplicity of error the doctrine has no application. State v. Hartzell, 156 Wn.App. 918, 237 P.3d 928 (2010).

As argued previously, the trial court did not err in this matter, nor was the appellant denied a fair trial. The cumulative error doctrine does not apply, as the appellant has not shown any significant error effecting the trial. The Court should reject the appellant's claim.

VI. CONCLUSION

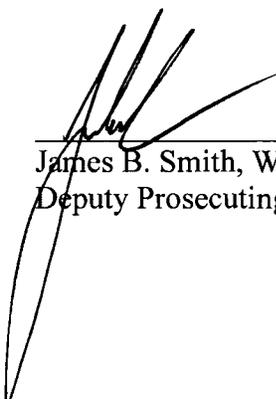
Based on the preceding argument, the State respectfully requests the Court to affirm the appellant's conviction. The trial court did not abuse

its discretion, and the prosecution did not engage in misconduct. The judgment of the trial court should be affirmed.

Respectfully submitted this 16th day of November, 2010.

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