

NO. 41103-2-II

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

STATE OF WASHINGTON, Respondent

v.

JOSE MIGUEL GASTEAZORO-PANIAGUA, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-00004-6

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A.	RESPONSE TO ASSIGNMENTS OF ERROR.....	1
I.	Response to Assignment of Error A: the trial court did not violate the defendant’s right to be present because the defendant waived his right to be present, the court’s discussions involved purely ministerial or legal issues, and the defendant has failed to demonstrate prejudice.....	1
II.	Response to Assignment of Error B: the trial court did not abuse its discretion when it admitted the defendant’s custodial statements because the defendant did not make an unequivocal request for counsel.	1
III.	Response to Assignment of Error C: the trial court did not abuse its discretion when it denied the defendant’s request for an “informant” instruction because the State’s case was not solely reliant on the uncorroborated testimony of the informant.	1
IV.	Response to Assignment of Error D: the trial court did not abuse its discretion when it admitted evidence of Jose Muro’s prior inconsistent statements because Muro’s statements were admissible under ER 613.	1
V.	Response to Assignment of Error E: the trial court did not abuse its discretion when it denied the defendant’s motion for a mistrial because Deputy O’Dell did not provide improper opinion testimony; in the alternative, any error was not serious and it was invited.	1
VI.	Response to Assignment of Error F: the trial court did not abuse its discretion when it allowed Detective Buckner to testify about the course of his investigation because the officer’s investigation was relevant in this case.....	1
VII.	Response to Assignment of Error G: the prosecutor did not commit misconduct during closing argument and the defendant has not demonstrated defense counsel was ineffective.....	1
VIII.	Response to Assignment of Error H: the defendant failed to preserve any alleged error in the special verdict instruction; in the alternative, any error was harmless.....	1

B.	STATEMENT OF THE CASE	2
I.	Procedural history	2
II.	Summary of Substantive Facts.....	3
C.	ARGUMENT.....	13
I.	Response to Assignment of Error A: the trial court did not violate the defendant’s right to be present because the defendant waived his right to be present, the court’s discussions involved purely ministerial or legal issues, and the defendant has failed to demonstrate prejudice.....	13
II.	Response to Assignment of Error B: the trial court did not abuse its discretion when it admitted the defendant’s custodial statements because the defendant did not make an unequivocal request for counsel.	22
III.	Response to Assignment of Error C: the trial court did not abuse its discretion when it denied the defendant’s request for an “informant” instruction because the State’s case was not solely reliant on the uncorroborated testimony of the informant.	29
IV.	Response to Assignment of Error D: the trial court did not abuse its discretion when it admitted evidence of Jose Muro’s prior inconsistent statements because Muro’s statements were admissible under ER 613.	33
V.	Response to Assignment of Error E: the trial court did not abuse its discretion when it denied the defendant’s motion for a mistrial because Deputy O’Dell did not provide improper opinion testimony; in the alternative, any error was not serious and it was invited.	43
VI.	Response to Assignment of Error F: the trial court did not abuse its discretion when it allowed Detective Buckner to testify about the course of his investigation because the officer’s investigation was relevant in this case.....	49
VII.	Response to Assignment of Error G: the prosecutor did not commit misconduct during closing argument and the defendant has failed to demonstrate defense counsel was ineffective.....	54

VIII. Response to Assignment of Error II: the defendant failed to preserve any alleged error in the special verdict instruction: in the alternative, any error was harmless.....	68
D. CONCLUSION	73

TABLE OF AUTHORITIES

Cases

<i>Alvarez v. Gomez</i> , 185 F.3d 995, 998 (9th Cir. 1999).....	24
<i>Brown v. United States</i> , 356 U.S. 148, 154, 78 S. Ct. 622 (1958).....	62
<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 579, 854 P.2d 658 (1993)....	48
<i>City of Seattle v. Patu</i> , 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002).....	45
<i>Davis v. United States</i> , 512 U.S. 452, 459, 114 S. Ct. 2350 (1994)....	23, 24, 27, 28
<i>Edwards v. Arizona</i> , 451 U.S. 477, 483, 68 L. Ed. 2d 378, (1981).....	23
<i>In re Det. of Lord</i> , 123 Wn.2d 296, 306, 868 P.2d 835 (1994) ...	14, 15, 17, 21
<i>In re Det. of Post</i> , 170 Wn.2d 302, 309, 241 P.3d 1234 (2010).....	33, 50
<i>Johnson v. Howard</i> , 45 Wn.2d 433, 436, 275 P.2d 736 (1954)	29
<i>Kentucky v. Stincer</i> , 482 U.S. 730, 745-46, 107 S. Ct. 2658 (1987) ..	13, 14, 17
<i>McNeil v. Wisconsin</i> , 501 U.S. 171, 178, 115 L. Ed. 2d 158, 111 S. Ct. 2204 (1991).....	23
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	22, 23, 25
<i>Portuondo v. Agard</i> , 529 U.S. 61, 69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000).....	62, 63
<i>Sessoms v. Rummels</i> , 650 F.3d 1276, at 5, 2011 U.S. App. LEXIS 11175 (2011).....	24, 28
<i>Smith v. Endell</i> , 860 F.2d 1528, 1529 (9th Cir. 1988).....	24
<i>Snyder v. Massachusetts</i> , 291 U.S. 97, 105-06, 54 S. Ct. 330 (1934).....	14
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971)....	29
<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010)	68, 69, 70, 71, 72
<i>State v. Bennett</i> , 161 Wn.2d 303, 307, 165 P.3d 315 (2009).....	68
<i>State v. Brightman</i> , 155 Wn.2d 506, 514, 122 P.3d 150 (2005).....	15
<i>State v. Brown</i> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997).....	56, 60
<i>State v. Carothers</i> , 84 Wn.2d 256, 269, 525 P.2d 731 (1974).....	30, 31, 32
<i>State v. Cross</i> , 156 Wn.2d 580, 619, 132 P.3d 80, <i>cert. denied</i> , 549 U.S. 1022 (2006).....	22
<i>State v. Demery</i> , 144 Wn.2d 753, 760, 30 P.3d 1278 (2001).....	48
<i>State v. Edwards</i> , 131 Wn. App. 611, 614, 128 P.3d 631 (2006)	51
<i>State v. Escalona</i> , 49 Wn. App. 251, 254, 742 P.2d 190 (1987).....	44
<i>State v. Fleming</i> , 83 Wn. App. 209, 921, P.2d 1076 (1996), <i>review denied</i> , 131 Wn.2d 1018, 936 P.2d 417 (1997).....	57, 58, 59
<i>State v. Gentry</i> , 125 Wn.2d 570, 641, 888 P.2d 1105 (1995).....	56, 60
<i>State v. Gregory</i> , 158 Wn.2d 759, 858, 147 P.3d 1201 (2006).....	55

<i>State v. Grishby</i> , 97 Wn.2d 493, 499, 647 P.2d 6 (1982).....	62
<i>State v. Grover</i> , 55 Wn. App. 923, 930, 780 P.2d 901 (1989).....	42
<i>State v. Hockaday</i> , 144 Wn. App. 918, 924, 184 P.3d 1273 (2008).....	45
<i>State v. Huelett</i> , 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).....	22
<i>State v. Irby</i> , 170 Wn.2d 874, 880, 246 P.3d 796 (2011).....	13, 14, 15, 17, 20
<i>State v. Jessup</i> , 31 Wn. App. 304, 314-15, 641 P.2d 1185 (1982).....	50
<i>State v. Johnson</i> , 80 Wn. App. 337, 341, 908 P.2d 900 (1996).....	63
<i>State v. Koss</i> , 158 Wn. App. 8, 16-17, P.3d 415 (2010).....	16, 21
<i>State v. Lucky</i> , 128 Wn.2d 727, 731, 912 P.2d 483 (1996).....	29
<i>State v. Lyskoski</i> , 47 Wn.2d 102, 108, 287 P.2d 114 (1955).....	68
<i>State v. Martin</i> , 171 Wn.2d 521, 532, 252 P.3d 872 (2011).....	63, 65, 66
<i>State v. McKim</i> , 98 Wn.2d 111, 653 P.2d 1040 (1982).....	30
<i>State v. Miller</i> , 110 Wn. App. 283, 285, 40 P.3d 692 (2002).....	63
<i>State v. Monday</i> , No. 82739-2 (June 9, 2011).....	56
<i>State v. Montgomery</i> , 163 Wn.2d 577, 591, 183 P.3d 267 (2008).....	44, 45
<i>State v. Neal</i> , 144 Wn.2d 600, 607, 30 P.3d 1255 (2001).....	50
<i>State v. Newbern</i> , 95 Wn. App. 277, 293, 975 P.2d 1041 (1999).....	34, 40
<i>State v. Nunez</i> , 160 Wn. App. 150, 248 P.3d 103 (2011), <i>review granted</i> 2011 Wash. LEXIS 616 (Wash., Aug. 9, 2011).....	70, 71, 72
<i>State v. O'Hara</i> , 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009).....	68, 69
<i>State v. Pirtle</i> , 136 Wn.2d 467, 483, 965 P.2d 593 (1998).....	14
<i>State v. Post</i> , 59 Wn. App. 389, 395, 797 P.2d 1160 (1990), <i>aff'd</i> , 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992).....	43, 44
<i>State v. Powell</i> , 126 Wn.2d 244, 258, 893 P.2d 615 (1995).....	22, 33, 50
<i>State v. Radcliffe</i> , 164 Wn.2d 900, 905-06, 194 P.3d 250 (2008).....	23, 24, 28
<i>State v. Reed</i> , 102 Wn.2d 140, 145, 684 P.2d 699 (1984).....	56
<i>State v. Rice</i> , 110 Wn.2d 577, 611, 757 P.2d 889 (1988).....	14
<i>State v. Robbins</i> , 25 Wn.2d 110, 169 P.2d 246 (1946).....	33
<i>State v. Roberts</i> , 80 Wn. App. 342, 352-53, 908 P.2d 892 (1996).....	50
<i>State v. Rogers</i> , 70 Wn. App. 626, 631, 855 P.2d 294 (1993), <i>review</i> <i>denied</i> , 123 Wn.2d 1004 (1994).....	56, 61
<i>State v. Russell</i> , 125 Wn.2d 24, 77, 882 P.2d 747 (1994).....	55, 57, 59
<i>State v. Ryan</i> , 160 Wn. App. 944, 252 P.3d 895 (2011), <i>review granted</i> 2011 Wash. LEXIS 619 (Wash., Aug. 9, 2011).....	69, 70, 71, 72
<i>State v. Sadler</i> , 147 Wn. App. 97, 114, 118, 193 P.3d 1108 (2008).....	15, 21
<i>State v. Scott</i> , 110 Wn.2d 682, 685, 757 P.2d 492 (1988).....	68, 69
<i>State v. Shutzler</i> , 82 Wash. 365, 367, 144 P. 284 (1914).....	15
<i>State v. Simmons</i> , 63 Wn.2d 17, 19-21, 385 P.2d 389 (1963).....	42
<i>State v. Smith</i> , 34 Wn. App. 405, 408-09, 661 P.2d 1001 (1983).....	24
<i>State v. Smith</i> , 82 Wn. App. 327, 334-35, 917 P.2d 1108 (1996).....	63

<i>State v. Stenson</i> , 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008 (1998)	55, 56
<i>State v. Strode</i> , 167 Wn.2d 222, 225, 217 P.3d 310	13
<i>State v. Sublett</i> , 156 Wn. App. 160, 181, 231 P.3d 231 (2010).....	14, 16, 21
<i>State v. Thomson</i> , 123 Wn.2d 877, 880, 872 P.2d 1097 (1994).....	16, 20
<i>State v. Vaughn</i> , 101 Wn.2d 604, 610, 682 P.2d 878 (1984)	42
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	55, 61
<i>State v. Weber</i> , 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983).....	44
<i>State v. Wicker</i> , 66 Wn. App. 409, 412, 832 P.2d 127 (1992).....	50, 51
<i>State v. Williams</i> , 79 Wn. App. 21, 26, 902 P.2d 1258 (1995).....	33
<i>State v. Willoughby</i> , 29 Wn. App. 828, 831, 630 P.2d 1387 (1981)	30
<i>State v. Wilson</i> , 141 Wn. App. 597, 604, 171 P.3d 501 (2007).....	13
<i>State v. Yates</i> , 161 Wn.2d 714, 774, 168 P.3d 359 (2007), <i>cert. denied</i> , 128 S. Ct. 2964 (2008).....	55
<i>Sterling v. Radford</i> , 126 Wash. 372, 218 P. 205 (1923).....	34
<i>United States v. Fouche</i> , 776 F.2d 1398, 1405 (9th Cir. 1985).....	24, 28
<i>United States v. Gagnon</i> , 470 U.S. 522, 527, 105 S. Ct. 1482 (1985)14, 16, 20	
<i>United States v. Gravelly</i> , 840 F.2d 1156, 1163 (4th Cir.1988).....	34

Other Authorities

WPIC 6.05	29, 30, 32
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Rules

CrR 3.4(b).....	16, 17
CrR 3.5.....	22, 25, 27
ER 609	15
ER 613	19, 33, 34, 43
ER 801(c).....	50
ER 801(d)(1)(iii).....	42, 43
Federal Rule 43.....	16

Constitutional Provisions

<i>Fourteenth Amendment</i>	13, 17
U.S. Const. Amend. 14.....	13
Wash. Const. Art. I, §. 22	13, 15, 17

A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. Response to Assignment of Error A: the trial court did not violate the defendant's right to be present because the defendant waived his right to be present, the court's discussions involved purely ministerial or legal issues, and the defendant has failed to demonstrate prejudice.
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- VIII. Response to Assignment of Error H: the defendant failed to preserve any alleged error in the special verdict instruction; in the alternative, any error was harmless.

II. Summary of Substantive Facts

On December 30, 2009, Jose Muro was working in the back room of the Bi-Lo market on Highway 99 in Clark County, Washington. (RP 731). Jose's job was to stock inventory in the back of the store. (RP 734). At approximately 10:00 p.m., a man walked into the store, headed directly to the back, and started shooting at Muro. (RP 735). The first shot hit Muro in the shoulder. The second shot hit Muro in the stomach. The third shot hit Muro in the shoulder again and sent him falling to the ground. When Muro was on the floor, he was shot in the head. The final shot went through Muro's hand. (RP 735-36).

Muro was rushed to the hospital, where he was in surgery until the following night. (RP 1531). The shot to Muro's head went through his skull and out the back of his head. (RP 838). Muro spent the next eight days in the hospital. (RP 790). Muro's head was stapled shut. (RP 837-38). He sustained a broken shoulder, a broken arm, and a broken finger. One of his knuckles was completely shot-off. (RP 741).

Clark County Sheriff's Office ("CCSO") Detectives Rick Buckner and Detective Lindsey Schultz talked to Muro the night after the shooting, immediately after he came out of surgery. (RP 1531) Muro was hooked up to a series of tubes and, according to Detective Buckner, was in "pretty bad shape." (RP 1531). Muro told Detective Buckner and Detective

Schultz that his best friend, "Neeka," was the person who shot him last night at Bi-Lo. (RP 1537-38). Jose Gastiazoro-Paniagua, the defendant, was known to all of his friends and family as "Neeka." (RP 704-05). Detective Buckner asked Muro if he was sure Neeka shot him. Muro said he was sure. (RP 1537-38).

Trial commenced on June 14, 2010. (RP 71). For the next two weeks, the State presented more than twenty witnesses who testified to the defendant's motive, means, and opportunity to shoot Jose Muro, with the intent to kill him.

The State called a number Muro's friends and family members, who also knew the defendant. Each witness testified that, approximately one week before the shooting, Muro and the defendant had a falling-out in their close friendship (RP 702, 758-60, 781, 783). Muro had a brother named "Johnny." Johnny's girlfriend was named Nichole. Johnny and Nichole recently had a baby together. (RP 758). The defendant was also close friends with Johnny. (RP 756). Just before Christmas of 2009, Muro learned the defendant was having an affair with Nichole. (RP 702, 783, 781, 758-60). Muro viewed this affair as a betrayal against him and his family. (RP 760). Muro and the defendant had heated exchanges over the phone during the following week. (RP 786). Muro and the defendant also testified to this set of facts. (RP 722-725, 1840-41).

Jose Muro testified he and his brother had been good friends with the defendant for nearly ten years. (RP 720, 726). Muro testified he found out about the defendant's affair with Nichole just before Christmas of 2009. (RP 725). Muro was angry about the affair. He felt the defendant "did [his] brother wrong." (RP 722). He exchanged words with the defendant. (RP 725).

Muro testified, on the night of December 30, 2009, he received a phone message from the defendant and called him back. (RP 730). (The defendant's cell phone records confirmed he made this call to Muro. (RP 1685, 1687)). The defendant wanted to get a drink with Muro. Muro told him he couldn't get a drink because he was working. (RP 731-32). Muro testified the defendant knew where he worked (at Bi-Lo) and he would have known where he worked within the store (in the back). (RP 732).

The jury viewed surveillance video from Bi-Lo from the night of the shooting. (RP 558; State's Exhibit No. 22). Although the video was "grainy," it clearly depicted a man walk into the store immediately before the time of the shooting, walk-out, and then walk in again and head directly to the back of the store. The man had the general physique of the defendant and he was wearing a dark hooded sweatshirt with the hood up (RP 558, 594, 601).

Kenda Keesee was talking to a friend outside the Bi-Lo market on the night of the shooting. (RP 491-92). Keesee testified that she saw a man approaching who appeared to be in a hurry to get in the store. (RP 496). When he saw Keesee and her friend, he pushed through them, passed the door to the store, stopped, and then leaned against the wall. (RP 496, 506). Keesee resumed her conversation until moments later, when she saw people running from the store. (RP 502). The following night, Keesee was asked to review a photo lay-down, which included the defendant as "number 5" in the laydown. (RP 507, 592; Exhibit No. 25). Keesee identified "number 5" as the person who pushed past her and her friend. (RP 511, 592). Keesee said this person was wearing dark clothing with the hood up. (RP 594).

Laura Owings was friends with the defendant and Muro. (RP 702, 710). Owings testified that the defendant called her approximately one hour after the shooting. (RP 715). The defendant said to her "I heard [Muro] got shot. Is he alive or dead?" (RP 715).

CCSO obtained the defendant's cell phone records pursuant to a search warrant. (RP 829, 1685; Exhibit No. 249-256). The jury saw evidence and heard testimony that defendant's phone records showed he called Laura Owings at 10:56 p.m. (1687). The defendant's phone records also showed there were no incoming calls to his phone, and there were no

outgoing calls from his phone, between the time of the shooting and the time he called Laura. (RP 1687-88).

Curtiss Smith, the defendant's step-father, testified that the defendant lived with him, off and on, in Vancouver, Washington. (RP 798-99). Smith said he came home on the night of January 3, 2010, to find a note on his kitchen counter top. (RP 804). The note said "9th and Burnside." (RP 904). The keys to the defendant's 2003 Dodge Stratus were lying on top of the note. (RP 799, 804).

CCSO officers testified they discovered the defendant's vehicle parked in a lot at 9th and Burnside in Portland, Oregon. (RP 861-62; Exhibit No. 153-156). Upon executing a search warrant of the vehicle, officers discovered receipts for a motel in Woodburn, Oregon from December 30th, 2009 and a receipt for a motel in Wilsonville, Oregon, from January 1st, 2009. The guest who registered at the Woodburn motel was listed as "Jose Roman," from Nevada. The guest who registered at the Wilsonville motel was listed as "Jose R. Lopez," from Nevada. (RP 861-62; Exhibit No. 23-24).

CCSO Detective Scott Smith testified records from cell phone towers located in Washington and Oregon showed the defendant was making calls in Vancouver, Washington, on December 30, 2009. (RP 1594, 1603-07, 1617). These records also showed, between December 31,

2009 and January 2, 2010, the defendant made calls from Wilsonville, Oregon, then from Woodburn Oregon, and lastly from Portland, Oregon. (RP 1615-17; Exhibit No. 221-235, 250-251).

CCSO Deputy Muller testified that the defendant's cell phone records led them to locate him in Yakima, Washington on January 7, 2010. (RP 830; Exhibit No. 216). The defendant's phone records showed he made repeated calls to Yakima from the time of the shooting through January 2, 2010. (RP 830, 1689). With the assistance of the Yakima police department, the defendant was arrested on January 7, 2010.

Officers located a wallet and a cell phone on the defendant's person at the time of his arrest. The wallet contained an identification card for "Jose Roman Lopez," from Nevada. (RP 1679-80; Exhibit No. 17). The cell phone contained a photograph of the defendant holding a handgun. (RP 1176-77, 1198; Exhibit No. 173). CCSO conducted a forensic examination of the cell phone (pursuant to a search warrant) and discovered the photo was taken two weeks before Muro was shot. (RP 1165, 1176, 1189).

Frank Bulgar testified as a ballistics expert for the State. (RP 1195). Bulgar testified the gun that the defendant was holding in the cell phone photograph was a Springfield Armory X-D bi-tone model handgun. (RP 1198). Bulgar testified these hand guns utilize .40 caliber and .45

caliber bullets. (RP 1201). Bulgar said he had no doubt that the gun the defendant was holding in the photograph was real. (RP 1200).

CCSO Detective Kevin Schmidt testified he recovered eight .45 caliber bullet casings from around and under the cooler at Bi-L-o, where Muro was shot. (RP 474-75, 451; Exhibit No. 48-55, 150-152). CCSO deputies took custody of the bullet fragments that were removed from Muro's body during surgery, which were consistent with the recovered bullet casings. (RP 296, 347; Exhibit 46-48).

Dionisio Ibanez is the father of the defendant's girlfriend (Melissa Ibanez). (RP 1058). Dionisio testified, just before New Year's of 2009, he saw the defendant loading a gun at his daughter's apartment in Vancouver, Washington. (RP 1058, 1060, 1068). Dionisio recognized the gun as being a .45 caliber gun. (RP 1069). The defendant told Dionisio he recently bought the gun. (RP 1070).

Detective Buckner and Detective Schultz interviewed the defendant at the Yakima sheriff's office on January 7, 2010. (RP 866). The defendant waived *Miranda* and agreed to talk to the officers. The defendant's demeanor was "arrogant" and "cocky" throughout the twenty-five minute interview. (RP 866-67). The defendant said he knew his good friend Jose Muro had been shot; however, he did not call Muro or check-in on him because he had people keeping tabs for him. (RP 871). The

defendant told the officers he got drunk and decided to go to Yakima for a vacation. (RP 872-73). He said he was "kicking back." (RP 872). The defendant said he hitch-hiked to Yakima and brought only the clothes on his back. (RP 872-73, 918). Officers discovered multiple duffle bags of clothing belonging to the defendant at the residence where he had been staying in Yakima. (RP 918).

The defendant testified that the night of the shooting (December 30, 2009), he was having dinner at a Chinese restaurant in Portland, Oregon. (RP 1850). He could not recall the name of the restaurant or the time he was eating. (RP 1850-51). He said he was planning to go to Reno, Nevada that night, but changed his mind and went to Wilsonville, Oregon instead. (RP 1850-53). The defendant said, five days later, he took his friend, "Smokey's" car to Yakima. (RP 1861). He did not think Smokey would want his car back. (RP 1862-63).

The defendant's good friend, Garold Jacobson, also testified at trial. (RP 1410). Jacobson had known the defendant for more than twelve years. (RP 1410-11). Jacobson and the defendant were housed in the same cell block at the Clark County Jail while the defendant was pending trial. (RP 1412). Jacobson said the defendant confided in him about the shooting at Bi-Lo and the events that led up to it. (RP X).

Jacobson was pending trial on a separate case for acting as an accomplice to murder in the first degree and three counts robbery in the first degree. (RP 1446). Jacobson entered into a cooperation agreement with the State to provide truthful testimony against the six co-defendants in his pending case. (RP 1446-47). As part of the cooperation agreement, Jacobson also agreed to provide truthful testimony against the defendant in this case. (RP 1446-47). In exchange, the State would agree to recommend a plea to three counts of robbery in the first degree, with a deadly weapon enhancement, on Jacobson's pending case and a 120 month sentence. (RP 1448, 1475; Exhibit 257 – Cooperation Agreement).

Jacobson testified the defendant told him he had an affair with Nichole Sanchez and Jose Muro learned about it around Christmas of 2009. (RP 1424). Jacobson testified the defendant said Muro called him when he returned from California with Nichole. (RP 1425). Muro told the defendant "there's gonna be blood," to which the defendant responded, "be careful, because it might not be mine." (RP 1425). Jacobson testified the defendant said, two days later, Muro showed up at his girlfriend's apartment, with a shotgun (RP 1428). Jacobson testified the defendant told him, after that incident, he decided it was time to "go handle" the situation with Muro. (RP 1431-32).

Jacobson testified the defendant told him he went to Bi-Lo on the night of December 30, 2009. (1434). The defendant told him he walked into the market, walked out, and then walked in again when he saw Muro emerge from the back of the store. (RP 1434). The defendant told Jacobson he rushed to the back of the store and started shooting Muro. (RP 1435-36). The defendant told Jacobson he shot at Muro seven or eight times, but only hit him five or six times. (RP 1436). The defendant told Jacobson he used a .45 caliber handgun with hollow-points, "a Springfield X-D .45." (RP 1439). The defendant told Jacobson he had a picture of himself on his cell phone with his gun. (RP 1440). Jacobson testified the defendant told him he dumped the gun in a slough in Oregon. (RP 1441). The defendant told Jacobson he was wearing a dark "hoodie" and a stocking cap that night. (RP 1441). The defendant told Jacobson that Muro had his hands up, in a defensive manner when he was shooting him. (RP 1443). The defendant told Jacobson he thought Muro was dead. (RP 1443).

The State will provide facts pertaining to the defendant's assignments of error in the argument section of the Response Brief.

C. ARGUMENT.

- I. Response to Assignment of Error A: the trial court did not violate the defendant's right to be present because the defendant waived his right to be present, the court's discussions involved purely ministerial or legal issues, and the defendant has failed to demonstrate prejudice.

The defendant claims the trial court violated his constitutional right to be present when it discussed scheduling matters in his absence, even though he waived his right to be present for these discussions. *Br. of Appellant*, p. 15, citing U.S. CONST. AMEND. 14; WASH. CONST. ART. I, §. 22. The defendant's claim is without merit.

Whether a defendant's constitutional right to be present has been violated is a question of law that is reviewed de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citing *State v. Strobe*, 167 Wn.2d 222, 225, 217 P.3d 310). Under the *Fourteenth Amendment*, the defendant has a due process right to be present at trial.¹ *U.S. CONST. AMEND. 14*. The right to be present is not absolute. Rather, the courts have found the defendant has a right to be present for all "critical stages" of trial. *Kentucky v. Stincer*, 482 U.S. 730, 745-46, 107 S. Ct. 2658 (1987); *Irby*, 170 Wn.2d at 882-83; *State v. Wilson*, 141 Wn. App. 597, 604, 171 P.3d 501 (2007). A critical stage occurs when the defendant's presence "has a

¹ *Irby*, 170 Wn.2d at 880 (stating Washington applies federal due process jurisprudence, under the Fourteenth Amendment, when reviewing the right to be present at trial).

reasonably substantial relation to the fullness of his opportunity to defend against the charge...” *State v. Pirtle*, 136 Wn.2d 467, 483, 965 P.2d 593 (1998) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330 (1934)). A defendant’s presence has a reasonably substantial relation to the fullness of his right to defend when evidence is being presented, when the defendant has an opportunity to provide aid or suggestions to his counsel, and when a fair hearing would be thwarted by the defendant’s absence. *Kentucky v. Stincer*, 482 U.S. at 745-46; *Irby*, 170 Wn.2d at 882-83; *State v. Rice*, 110 Wn.2d 577, 611, 757 P.2d 889 (1988). For example, in *Irby*, the Court found jury selection was a critical stage of trial because the defendant could assist his attorney in determining which jurors were qualified to fairly and impartially try his case. *Irby*, at 882-83.

In contrast, a critical stage of trial does not occur, for which the defendant has a right to be present, when the court hears legal or ministerial matters that do not require resolution of disputed facts. *United States v. Gagnon*, 470 U.S. 522, 527, 105 S. Ct. 1482 (1985); *Irby*, at 881; *In re Det. of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). Such proceedings are not critical stages of trial because the defendant cannot interject or provide advice to his counsel and there is no evidence presented that may impact the defendant’s ability to defend his case. *Gagnon*, 470 U.S. at 527; *Lord*, 123 Wn.2d at 306. For example, in *Lord*,

the Court found none of the following court proceedings were critical stages of trial: deferred ruling on an ER 609 motion, ruling on defense's motion for funds, settlement on wording of jury questionnaires and pretrial instructions, setting time limit on testing certain evidence, announcement of rulings on previously-heard evidentiary matters, ruling whether jurors could take notes, and directing State to provide defense with summaries of witness testimony. *Lord*, 123 Wn.2d at 306.

Under *article 1, section 22* of the Washington Constitution, a defendant has a right to "appear and defend in person or by counsel." *WASH. CONST. ART I, § 22*. Whether the defendant's right to appear and defend has been violated is also a question of law that is reviewed de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The courts have found the defendant's right to appear and defend is limited to when the defendant's "substantial rights may be affected." *Irby*, at 885 (citing *State v. Shutzler*, 82 Wash. 365, 367, 144 P. 284 (1914)). A defendant's substantial rights may be affected during adversary proceedings, including the presentation of evidence, suppression hearings, and jury selection. *State v. Sadler*, 147 Wn. App. 97, 114, 118, 193 P.3d 1108 (2008).

In contrast, a defendant's substantial rights are not affected (and the defendant does not have a right to appear and defend) when the court

resolves “purely ministerial or legal issues that do not require the resolution of disputed facts.” *State v. Koss*, 158 Wn. App. 8, 16-17, P.3d 415 (2010); *State v. Sublett*, 156 Wn. App. 160, 181-82, 231 P.3d 231 (2010). For example, in *Sublett*, the Court found the defendant’s substantial rights were not affected when the court responded to a jury question regarding an instruction, because the question involved a purely legal issue that arose during deliberations and did not require the resolution of disputed facts. *Sublett*, 156 Wn. App. at 181-82.

A defendant may waive his right to be present and his right to appear and defend, provided the waiver is voluntary and knowing. *State v. Thomson*, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994); *Gagnon*, 470 U.S. at 527. For example, in *Gagnon*, the Court found the defendants waived their presence under for an in chambers conference between the court, counsel, and a juror when:

[the defendants] neither then nor later in the course of the trial asserted any Rule 43 rights² they may have had to attend this conference. [The defendants] did not request to attend the conference at any time. No objections of any sort were lodged, either before or after the conference. [Defendants] did not even make any post-trial motions, although post-trial hearings may often resolve this sort of claim.

- *Gagnon*, at 527.

² Federal Rule 43 corresponds with Washington CrR 3.4(b), *infra*.

Also, waiver of presence is expressly permitted under Washington Criminal Court Rule 3.4(b). Washington CrR 3.4(b) provides:

...[t]he defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict...

- Wash. CrR 3.4(b).

Presuming the defendant does not waive his presence, the court reviews a violation of the right to be present, under the *Fourteenth Amendment*, and the right to appear and defend, under *art. I, sec. 22*, by conducting a harmless error analysis. *Irby*, at 885. However, in order for the court to engage in a harmless error analysis, the defendant must first demonstrate that he has been prejudiced. *Lord*, at 306-07 (finding “prejudice to the defendant will not simply be presumed”). It is the defendant’s burden to show that his absence from a courtroom proceeding adversely affected the outcome of his case. *Kentucky*, 482 U.S. at 747; *Lord*, at 306-07 (holding defendant failed to demonstrate “how his absence affected the outcome of any of the challenged proceedings”).

In this case, trial lasted two weeks. On three separate occasions, the court discussed ministerial matters with trial counsel at the end of the day and then followed-up with trial counsel, on any remaining ministerial matters, the next morning. On each occasion, the court asked the

defendant whether he wanted to remain present for the discussions. (RP 889; 1205; 1485). On each occasion, the defendant said, "no," he did not want to remain present. (RP 889; 1205; 1485). For example, on June 17, 2010, after witness testimony had concluded for the day, the trial court advised the defendant "we're just talking about planning...if you want to stick around you're welcome to...it's your choice." (RP 889). The defendant declined the court's offer to remain in court. (RP 889). This colloquy occurred again at the end of the day on June 21, 2010 and June 22, 2010. (RP 1205; 1485).

In the defendant's absence, the court discussed the scheduling of witnesses for the following day of trial. (RP 889; 1205; 1485). In addition, the following discussions took place. On June 17, 2010, the parties also discussed how the State could facilitate the transfer of materials related to a DNA analysis to the defense. (RP 899). There was no DNA evidence in this case. (RP 891). The following morning, defense counsel asserted there "may" be an issue with privilege regarding the defendant's girlfriend, Melissa Ibanez. (RP 909). The issue was not discussed any further. When the defendant arrived, Ibanez provided an offer of proof and ultimately refused to testify at the trial. (RP 981).

At the end of the day on June 21, 2010, the court said it wanted briefing from the parties on issues pertaining to ER 613. (RP 1205). The

court opined, “if” it decided to admit prior inconsistent statements, then it “would” grant a limiting instruction. (RP 1205). The court did not make any decisions regarding the admission of prior inconsistent statements at this time.

At the end of the day on June 22, 2010, the court stated “I don’t want to discuss any substantively, but I - - any motions to dismiss would *probably* not be real fruitful at the end of the State’s case based on sufficiency of the evidence.” (RP 1489) (emphasis added). The defense did not argue a motion to dismiss at this time and the court did not make a ruling on a motion to dismiss. The following morning, the court read two proposed stipulations to the parties, both of which were previously requested by the defendant (one stipulation regarded the defendant’s predicate criminal offense for the purpose of Count Two: Unlawful Possession of a Firearm in the First Degree, the second stipulation limited the evidence the jury could review from the search that was conducted at the defendant’s residence. (RP 1503-04) (CP 26, 27-28).

The defendant clearly waived his right to be present for any of these discussions. The trial court advised the defendant of each proceeding beforehand. The court invited the defendant to stay and the defendant declined the court’s invitation. Defense counsel repeatedly advised the court that he was keeping his client informed as to the content

of the proceedings. (RP 912: 1521). Neither the defendant nor defense counsel ever asked the court to repeat the substance of what it had covered in the defendant's absence. The proceedings were held on the record. The defendant never objected to the proceedings either before or after they were held. The defendant never made any post-trial motions regarding the proceedings. The record clearly demonstrates the defendant's waiver of his right to be present was knowing, intelligent, and voluntary. Consequently, this Court should find the defendant effectively waived his right to be present and he may not now complain about his waiver on appeal. *Gagnon*, at 527; *Thomson*, 123 Wn.2d at 880.

In the alternative, this Court should find neither the defendant's constitutional right to be present nor his constitutional right to appear and defend was violated when the court held these discussions in the defendant's absence. Unlike in *Irby*, where the court selected jury members in the defendant's absence, in this case, there were no decisions made in the defendant's absence that had a "reasonably substantial relation" to the defendant's ability to defend against his charges. *Contrast Irby*, at 882. In fact, there were no discussions held where the defendant could have provided aid or suggestions to his counsel at all. *Irby*, at 882-83. Consequently, no critical stages of trial were conducted in the defendant's absence. *Id.* Also, the court did not take testimony, resolve

disputed facts, or conduct adversary hearings in the defendant's absence. Consequently, the defendant's substantial rights were not affected in his absence. *Staller*, 147 Wn. App. at 114, 118.

The discussions that were held in the defendant's absence were limited to purely legal and ministerial matters. The defendant had no constitutional right to be present for these proceedings. *Lord*, at 306; *Sublett*, at 181-82.

In addition, even if this Court found the defendant's constitutional rights were violated, it should not grant relief because the defendant has made no showing that he was prejudiced. The defendant has not stated what, if any, decisions were made in his absence and he does not argue how the court's decisions adversely affected the outcome of his trial. It is the defendant's burden to demonstrate prejudice and he has made no effort to do so. Consequently, there is no need for this Court to engage in a harmless error analysis. However, the record shows, if *any* error occurred, it was certainly harmless. The defendant's convictions should be affirmed.

II. Response to Assignment of Error B: the trial court did not abuse its discretion when it admitted the defendant's custodial statements because the defendant did not make an unequivocal request for counsel.

The defendant claims the trial court erred when it admitted his custodial statements, pursuant to a CrR 3.5 hearing, because he made an unequivocal request for counsel. *Br. of Appellant*, p. 19. The defendant is referring to the following statement, which he made after he waived his rights under *Miranda*: "I mean, I guess I'll just have to talk to a lawyer about it and, you know, I'll mention that you guys were down here with a story and..." *Br. of Appellant*, p. 19; (RP 105-06).

A trial court's decision to admit statements made during a custodial interrogation is an evidentiary decision that is reviewed for an abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 619, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006). The trial court abuses its discretion when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979) (finding "[a]n abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court").

An officer is free to conduct a custodial interrogation of a suspect once the suspect has been advised of his or her *Miranda* rights and has

knowingly and voluntarily waived these rights. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Edwards v. Arizona*, 451 U.S. 477, 483, 68 L. Ed. 2d 378, (1981); *State v. Radcliffe*, 164 Wn.2d 900, 905-06, 194 P.3d 250 (2008). A suspect who has waived his rights under *Miranda* may request counsel at any time during the interrogation. *Edwards*, 451 U.S. at 484-85. Once a request for counsel is made, the officer must cease asking questions and he may not recommence questioning until counsel is present or the suspect reinitiates the conversation. *Id.*

However, a request for counsel must be unequivocal and unambiguous. *Radcliffe*, 164 Wn.2d at 907. If a suspect's request for counsel is equivocal or ambiguous, an officer may proceed with questioning. *Id.* The court applies an objective test in order to determine whether a suspect's request for counsel is unequivocal and unambiguous. *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350 (1994); *see also Radcliffe*, at 907 (finding Washington applies the standards set forth under *Davis*). Under this objective test, the court considers what a "reasonable officer in light of the circumstances would have understood," as opposed to "[t]he *likelihood* that a suspect would wish counsel to be present." *Davis*, 512 U.S. at 459 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178, 115 L. Ed. 2d 158, 111 S. Ct. 2204 (1991)). This objective test is designed to provide a "bright line" that can be applied by officers "in

the real world of investigation without unduly hampering the gathering of information.” *Davis*, at 461 (finding “if [the courts] were to require questioning to cease if a suspect ma[de] a statement that *might* be a request for an attorney, this clarity and ease of application would be lost”). If an officer must ask further questions in order to determine whether the suspect has made a request for counsel, then the suspect’s request is not unequivocal. *State v. Smith*, 34 Wn. App. 405, 408-09, 661 P.2d 1001 (1983).

The courts have found a suspect’s request for counsel is unequivocal when the suspect *actually* asks for an attorney to be present during the interrogation. *Smith v. Endell*, 860 F.2d 1528, 1529 (9th Cir. 1988) (“[c]an I talk to a lawyer?”); *Alvarez v. Gomez*, 185 F.3d 995, 998 (9th Cir. 1999) (“[c]an I get an attorney right now, man?”).

In contrast, the courts have found a suspect’s request for counsel is not unequivocal when the suspect simply makes an assertion that he *may* want to talk to an attorney. *Davis*, at 455 (“maybe I should talk to a lawyer”); *United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985) (“[I] might want to talk to a lawyer”); *Sessoms v. Runnels*, 650 F.3d 1276, at 5, 2011 U.S. App. 11-115 (2011) (“[my] father asked me to inquire about an attorney”); *Rudcliffe*, at 904, 907 (“maybe [I] should

contact an attorney”). In these cases, the officer is free to proceed with questioning.

In the present case, the trial court conducted a CrR 3.5 hearing on June 14, 2010, the first morning of trial. (RP 71). Detective Buckner and Detective Schultz testified at the hearing. (RP 74). Both officers interviewed the defendant on January 8, 2010, shortly after midnight, at the Yakima Police Department. (RP 74, 80). The interview lasted approximately twenty-five minutes. (RP 80).

Detective Schultz was the primary officer in the case. (RP 80). Schultz advised the defendant of his *Miranda* rights while Detective Buckner sat in the interview room with her. (RP 80). After Schultz advised the defendant of each *Miranda* right, she asked the defendant if he understood that right. (RP 96). Each time, the defendant responded that he understood that particular right. (RP 96). Both Buckner and Schultz testified that the defendant never asked for clarification of his rights, he never expressed any confusion, and he was very fluent in English. (RP 82-83, 98). The defendant did not appear to be tired. (RP 90). The officers never made any threats or promises to the defendant. (RP 83). The defendant agreed to talk to the officers. (RP 83, 98). Both officers testified that the defendant never invoked his right to remain silent, he never stopped answering questions, and he never asked the detectives to

stop asking him questions. (RP 83, 91, 98). Both officers testified that the defendant never asked to have an attorney present. (RP 83, 98).

The officers described the defendant's demeanor as "arrogant" throughout the interview. (RP 90, 99). Detective Buckner also described the defendant as "cocky." (RP 90). When asked whether the defendant knew why the officers were talking to him, Detective Schultz responded: "[a]bsolutely, yes." (RP 98). However, Schultz also described the defendant as "disinterested somewhat of our conversation." (RP 101). She said the defendant provided "very quick" and "short" answers throughout the interview. (RP 102).

At some point in the interview, Detective Buckner interjected with the following comment to the defendant:

Buckner: [b]ut you've been through the system to know that you know we don't end up down here with you in custody unless we've got probable cause.

(RP 105). The defendant responded with the following comment:

Defendant: *I mean, I guess I'll just have to talk to a lawyer about it and, you know, I'll mention that you guys were down here with a story and - -*⁵

(RP 101). The comment in italics is the comment that the defendant claims was an unequivocal request for counsel. *Br. of Appellant*, p. 19.

⁵ The defendant's comment is referenced three times in the transcript. (RP 89, 100, 107). It appears exactly the same each time it is referenced. In each instance, the defendant trails off with "...you guys were down here with a story and - -" (RP 89, 100, 107).

After the defendant made this comment, the following colloquy took place:

Buckner: Well, we have our version.

Defendant: Right. I don't know what you guys are talking about.

Buckner: Okay, you don't want to talk about your version, your set of circumstances?

(RP 103). The interview continued in this fashion and the officers decided to terminate it soon thereafter. (RP 102).

At the CrR 3.5 hearing, Detective Buckner testified that he did not interpret the defendant's comment as an invocation of his right to counsel. (RP 89). Detective Schultz also testified that she did not believe the defendant's comment was a request for counsel. (RP 101). When defense counsel asked Detective Schultz "how she came to this realization," she responded: "[b]ecause he - - because he wasn't a specific request." (RP 101). Schultz said the defendant's comment was very "nonchalant," in the context in which it was made. (RP 101). Detective Schultz said, if there was any meaning to be given to the defendant's comment, she interpreted it as a statement that the defendant intended to talk to a lawyer at "sometime in the future." (RP 106).

Under the objective test that was set forth by the Court in *Davis*, the defendant's comment was not an invocation of his right to counsel.

The defendant never actually asked for an attorney. The defendant never asked if it was possible to “get” an attorney. The defendant never asked for *his* attorney to be called. The defendant never said he wanted to stop the interview and the defendant continued talking to the officers after he made this comment. In addition, when the defendant continued talking to the officers, after he made this comment, he immediately moved on to another topic. A reasonable officer in light of the circumstances would not interpret the defendant’s comment as an unequivocal request for counsel. *Davis*, at 459.

Also, there is nothing from the defendant’s comment to suggest that he was seeking an attorney to be present at the time of the interview. Rather, the defendant’s comment indicated he intended to consult an attorney in the future. The defendant’s comment is similar to the comments made by the defendant’s in *Davis*, *Fouche*, *Runnels*, and *Radcliffe*. In each of these cases, the defendant was not “requesting” anything; rather, he was simply making a comment that he *may* consult an attorney in the future. In each of these cases, the courts found the defendant’s expression of future intent was not an unequivocal request for counsel. *Davis*, at 455; *Fouche*, 776 F.2d at 1495; *Runnels*, 650 F.2d at 5; *Radcliffe*, at 904, 907.

This Court should find the trial court did not abuse its discretion when it admitted the defendant's custodial statements because it was reasonable for the trial court to find, in light of the circumstances, that the defendant's comment was not an unequivocal request for counsel. The defendant's convictions should be affirmed.

III. Response to Assignment of Error C: the trial court did not abuse its discretion when it denied the defendant's request for an "informant" instruction because the State's case was not solely reliant on the uncorroborated testimony of the informant.

The defendant claims the trial court erred when it refused to provide to the jury with his proposed cautionary instruction regarding the credibility of an informant's testimony. *Br. of Appellant*, p. 23. The defendant's proposed instruction was modeled after Washington Pattern Jury Instruction ("WPIC") 6.05 - Testimony of Accomplice.

When a trial court's decision to reject a proposed instruction is "predicated upon rulings as to the law," the court's decision is reviewed de novo. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996) (quoting *Johnson v Howard*, 45 Wn.2d 433, 436, 275 P.2d 736 (1954)). When a trial court's decision to reject a proposed instruction is based on the facts of the case, the court's decision is reviewed for an abuse of discretion. *Lucky*, 128 Wn.2d at 731 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Under the Washington Pattern Jury Instructions, there is no standard cautionary instruction that the court must provide when an “informant” testifies at trial. In contrast, there is a standard pattern jury instruction that *may* be provided when an “accomplice” testifies at trial.

WPIC 6.05. WPIC 6.05 provides:

[t]estimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

(WPIC 6.05). Using its discretion, the trial court *may* provide WPIC 6.05 to the jury when an accomplice testifies at trial. However, the trial court is *required* to provide this instruction only if the State’s case is “solely” reliant upon “the uncorroborated testimony of [the] accomplice.” *State v. Carothers*, 84 Wn.2d 256, 269, 525 P.2d 731 (1974); *State v. Willoughby*, 29 Wn. App. 828, 831, 630 P.2d 1387 (1981), *overruled on other grounds in State v. McKim*, 98 Wn.2d 111, 653 P.2d 1040 (1982).

In the present case, the trial court rejected the defendant’s proposed instruction because it found neither the Washington Supreme Court nor the Washington Court of Appeals had approved a cautionary instruction regarding an informant’s testimony. (RP 1904). However, the

court also rejected the defendant's proposed instruction because it found the instruction was inapplicable, given the facts of the case. (RP 1904). Further, the trial court found the defendant was able to argue his theory of the case without this instruction because the jury would still be instructed that they were the sole judges of credibility. (RP 1904; Instruction No. 1: CP 90).

Garold Jacobson's testimony was credible. Jacobson was a long-time friend of the defendant's. (RP 1411). It was logical that the defendant would confide in Jacobson when the two were housed in the same cell block at the Clark County Jail. (RP 1413). Jacobson said he reviewed very little outside information about the case. (RP 1421, 1444). Jacobson would only know the information to which he testified if the defendant told it to him.

Also, Jacobson's testimony was corroborated. Jacobson knew the defendant was wearing a black hoodie at the time of the shooting. (RP 1441). Jacobson knew Muro shot the defendant in the stomach and in the head. (RP 1436). Jacobson knew the defendant shot Muro five or six times, though he shot at him seven or eight times. (RP 1436). Jacobson knew the defendant shot Muro with a Springfield X-D .45." (RP 1439). The State's case did not "rely solely upon" Jacobson's "uncorroborated testimony" in order to support the defendant's convictions. *Carothers*, 84

Wn.2d at 269. For this reason, even if Jacobson was an “accomplice,” the trial court would not have been required to provide a cautionary “accomplice” instruction under WPIC 6.05. *Carothers*, at 269.

In addition, the defendant was able to call Jacobson’s credibility into question throughout trial. Defense counsel cross-examined Jacobson regarding his cooperation agreement (RP 1448); the jury received a copy of the cooperation agreement as an exhibit; and the jury was instructed that they were the sole judges of credibility (Instruction No. 1; CP 90).

Under a de novo standard of review, this Court should find an error of law did not occur when the trial court rejected the defendant’s proposed “informant” instruction. There is no requirement under the law that such an instruction be provided. Also, even under the analysis for WPIC 6.05 (the accomplice instruction), an “informant” instruction was not required here because the State’s case was not solely reliant upon Jacobson’s uncorroborated testimony. For the same reasons, this Court should find the trial court did not abuse its discretion when it rejected the defendant’s proposed “informant” instruction.

IV. Response to Assignment of Error D: the trial court did not abuse its discretion when it admitted evidence of Jose Muro's prior inconsistent statements because Muro's statements were admissible under ER 613.

The defendant claims the trial court erred in admitting Jose Muro's prior inconsistent statements through the testimony of Detective Rick Buckner and Yulia Venegas. *Br. of Appellant*, p. 28. The defendant's claim is without merit.

A trial court's decision to admit evidence is reviewed for abuse of discretion. *In re Det. of Post*, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010). The court's decision will be reversed only if the "exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Post*, 170 Wn.2d at 309 (quoting *Powell*, 126 Wn.2d at 258).

Under Washington Evidence Rule 613, a prior, unsworn, statement by a witness is admissible at trial, for the purpose of impeachment. ER 613. A prior statement by a witness is admissible for impeachment purposes so long as the witness testifies inconsistently to his or her prior statement at trial. *State v. Robbins*, 25 Wn.2d 110, 169 P.2d 246 (1946) (finding a witness may be impeached by a prior inconsistent statement either on direct or cross-examination). The prior out-of-court statement is not hearsay because it is not offered for the truth of the matter asserted. *State v. Williams*, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995). Rather, the

purpose of impeachment by prior inconsistent statement is to aid the jury in evaluating whether the witness's testimony is credible. *State v. Newbern*, 95 Wn. App. 277, 293, 975 P.2d 1041 (1999). "If the witness testifies at trial to an inconsistent story, the need for the jury to know that this witness may be unreliable [is] compelling." *Newbern*, 95 Wn. App. at 293.

Before a prior inconsistent statement may be admitted, the witness must be "afforded the opportunity to explain or deny the same and the opposite party [must be] afforded an opportunity to interrogate the witness thereon..." ER 613. However, the witness's statement at trial does not need to be directly contradictory to the witness's prior statement, in order for the prior statement to be admissible under this rule. *Sterling v. Radford*, 126 Wash. 372, 218 P. 205 (1923). Inconsistency is determined, "not by individual words or phrases alone, but the whole impression or effect of what has been said or done." *Radford*, 126 Wash. at 375. "It is enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the witness whom it sought to contradict." *Newbern*, 95 Wn. App. at 294 (quoting *United States v. Gravelly*, 840 F.2d 1156, 1163 (4th Cir.1988)).

In the present case, Detective Buckner spoke to the victim, Jose Muro, the night after the shooting. (RP 1531). Detective Schultz was also present for this conversation. (RP 1531). Buckner spoke to Muro while Muro was still in the hospital, immediately after he had come out of surgery. (RP 1531). Buckner said Muro was in “pretty bad shape” at the time; however, he also said Muro was able to communicate and he appeared to understand the officer’s questions. (RP 1532-33). Muro told Detective Buckner that the defendant, “Neeka,” was the person who shot him at the Bi-Lo market, on the night of December 30, 2009. (RP 1537-38). Buckner clarified with Muro whether he was sure it was the defendant who shot him. (RP 1537-38). Muro said he was sure it was the defendant. (RP 1537-38).

Approximately one month later, Muro spoke to his girlfriend, Yulia Venegas, about the shooting at Bi-Lo, on December 30, 2009. Muro told Venegas that the defendant, “Neeka,” walked into the Bi-Lo market on December 30, 2009, headed directly towards him at the back of the store, pointed a gun at him, and shot him once in the stomach, twice on the left arm, and, once Muro was on the ground, on the head. (RP 792-93).⁴

Trial was held approximately six months after the shooting. When Muro testified at trial, he denied seeing the person who shot him and he

⁴ Venegas testified to this information in an offer of proof, outside the presence of the jury. (RP 791).

denied telling anyone that he saw the person who shot him. Muro testified to the following:

State: ...Did you get a chance to see who shot you?

Muro: No, I didn't.

State: You didn't see who - - who it was?...A male, female?

Muro: No, I didn't see nothin'. Like I said, everything happened so quick, I was trying -- I was trying to duck, pretty much closing my eyes when I -- when I was doing it.

- (RP 737)

Muro testified that he remembered talking to detectives immediately after he had surgery, while he was still at the hospital. (RP 743). However, he said he did not remember anything about his conversation with them. (RP 747). Next, Muro testified as follows:

State: You're saying that you did not see who shot you that evening; correct?

Muro: Yeah, that's correct.

State: Have you ever told anybody that you saw Neeka...shoot you?

Muro: No.

State: At any point?

Muro: No.

- (RP 747-48).

The trial court allowed the State to recall Detective Buckner and Yulia Venegas for the purpose of impeaching Muro with his prior inconsistent statements. (RP 1228-1230). However, the trial court found the State had not timely disclosed Venegas's impeachment evidence to the defense. Consequently, the court ruled, as a sanction, the State would not be permitted to ask Venegas the actual identity of the person Muro said shot him. (RP 1227-28). The trial court did not limit Detective Buckner's testimony because it found the State had timely disclosed Muro's prior statements to Buckner, to the defense. (RP 1231). Venegas testified to the following:

State: ...Did [the defendant] ever tell you who shot him?

Venegas: Yes.

State: Did he identify the person - -

Venegas: Yes, he did.

State: - - who shot him?

Venegas: Yes, he did.

State: And when did he make that - - that statement to you?

Venegas: At the end of February ...
...

State: Was that the only time [the defendant] identified who shot him?

Venegas: No, there was a second time.

...

Venegas: He told me after that when his brother Johnny was there, too.

- (RP 1290-91).

The defendant requested that a limiting instruction be read to the jury before Detective Buckner was recalled to testify. The trial court read the following instruction to the jury before Buckner testified:

I'm allowing the following evidence but you may consider it only for the purposes of impeachment of the victim. You must not consider the answers for any other purpose or for evidence of guilt of the crime charged.

(RP 1536-37). When the State recalled Detective Buckner, he testified to the following:

State: So what did you ask [Muro] at that point in regards to the shooter?

...

Buckner: My question was, "if we arrest Neeka- -" Neeka being the defendant, also know as Jose Gasteazoro. "If we arrest Neeka for this, would we be arresting the wrong person?"

...

State: What was his answer to you?

Buckner: "No."

State: Did you follow up that with further questions as to follow up?

Buckner: I asked the victim, Jose Muro. Do you understand the question?

State: What was his answer to you?

Buckner: He said, "Yes." I repeated the question again. "If we arrest Neeka for this, are we arresting the wrong person?"

...

State: His answer was?

Buckner: "No."

State: Did you ask a clarifying question subsequent to that?

Buckner: I did.

...

Buckner: "Did you see Neeka that night?"

State: His answer to you?

Buckner: "Yes."

State: Any further questions?

Buckner: I asked him, "Did Neeka shoot you?" His response... was, "Yes." or, "Yeah."

(RP 1535-36, 1537-38). At the conclusion of trial, the court provided the following written limiting instruction to the jury:

[c]ertain evidence has been admitted in this case for only a limited purpose. This evidence consists of alleged prior statements made by Jose Muro to Julie Venegas, Rick Buckner, and Lindsay Schultz. This evidence may be considered by you only for the purpose of assessing the credibility of Jose Muro. You may not consider it for evidence of guilt of the crime charged or any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

- (Instruction No. 7; CP 97).

⁵ The State did not recall Detective Schultz.

Under FR 613, the trial court properly allowed Detective Buckner and Yulia Venegas to testify to Muro's prior statements because Muro's prior statements were inconsistent from his statements at trial. Muro testified that he never told "anyone" he saw who shot him.⁶ Therefore, it was appropriate for the trial court to allow Detective Buckner and Venegas to testify that Muro told *them* he saw who shot him. Muro testified he wasn't able to see who shot him. Therefore, it was appropriate for the trial court to allow Buckner and Venegas to testify that Muro told them he was able to see who shot him. Muro testified he never told "anyone" that the defendant, "Neeka," shot him. Therefore, it was appropriate for the trial court to allow Detective Buckner to testify that Muro told him that the defendant, "Neeka," shot him. For this same reason, it would have been appropriate for the court to have allowed Venegas to testify that Muro also told her that the defendant, Neeka, shot him.⁷

The State was not required to confront Muro with the exact words he said to Buckner and Venegas. What is important is that the "whole impression and effect" of Muro's prior statements to Buckner and Venegas was inconsistent from his testimony at trial. *Newbern*, at 294

⁶ Merriam-Webster's Dictionary defines "anyone" as: "any person at all." *Merriam-Webster.com*, Merriam-Webster, 2011.

⁷ The trial court did not allow Venegas to testify to the identity of the shooter

(finding “[i]nconsistency is to be determined, not by individual words or phrases alone, but the *whole impression or effect* of what has been said or done..[d]o the two expressions appear to have been produced by inconsistent beliefs?”) To be sure, the “whole impression” of Muro’s prior statements was that he knew the defendant shot him. The “whole impression” of Muro’s trial testimony was that he did not know who shot him.

It was relevant for the jury to hear Muro’s prior inconsistent statements because this information would aid the jury in evaluating whether Muro’s testimony was credible. Also, there is little risk that the jury used this information for any purpose other than to evaluate the credibility of Muro’s testimony, because the trial court repeatedly instructed the jury that they could consider Muro’s prior statements *only* for this limited purpose. Also, there is no evidence from the record that the prosecutor argued during closing that the jury could consider Muro’s prior statements as substantive evidence. It was appropriate for the State to impeach Muro with his prior inconsistent statements and the trial court did not abuse its discretion when it allowed the State to do so.

In addition, even though the State did not argue Muro’s prior inconsistent statements were substantive evidence, Muro’s statements to

Detective Buckner would have been admissible under ER 801(d)(1)(iii) as prior statements of identification.

ER 801(d)(1)(iii) provides “[a] statement is not hearsay if... (1)... [t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (iii) one of identification of a person made after perceiving the person . . . ER 801(d)(1)(iii). Statements of prior identification are admissible at trial as substantive evidence when a witness, who was once able to identify a person, is no longer able to identify that person. *State v. Grover*, 55 Wn. App. 923, 930, 780 P.2d 901 (1989). “Uncertainty or inconsistency in identification testimony ‘goes only to its weight, not its admissibility.’” *Grover*, 55 Wn. App. at 930 (quoting *State v. Vaughn*, 101 Wn.2d 604, 610, 682 P.2d 878 (1984)). Statements of prior identification may be admitted through a witness other than the declarant. *Id.* at 932. Statements of prior identification are presumed to be reliable because they occur before the witness can be influenced to change his mind. *State v. Simmons*, 63 Wn.2d 17, 19-21, 385 P.2d 389 (1963).

Muro’s prior statement to Detective Buckner would have been admissible under this rule because Muro provided the identity of the shooter to Buckner when he spoke to Buckner at the hospital, the night after the shooting. However, at trial, Muro claimed he did not know the

identity of the person who shot him. Muro's statement of identification to Detective Buckner was reliable because the statement was made before Muro could be influenced to change his mind.

The trial court's decision to admit Muro's prior inconsistent statements was not manifestly unreasonable or based on untenable grounds because the statements were admissible under ER 613. In addition, Muro's prior statements of identification to Detective Buckner were admissible under ER 801(d)(1)(iii) as prior statements of identification. This Court should affirm the defendant's convictions.

V. Response to Assignment of Error E: the trial court did not abuse its discretion when it denied the defendant's motion for a mistrial because Deputy O'Dell did not provide improper opinion testimony; in the alternative, any error was not serious and it was invited.

The defendant claims Deputy O'Dell provided improper opinion testimony when he testified he could not identify the suspect in the surveillance video as the defendant but "that's what our investigation - - led to." *Br. of Appellant*, p. 30. The defendant claims the trial court erred when it denied his subsequent motion for a mistrial.

When a witness provides improper opinion testimony, the error is considered a trial irregularity. *See State v. Post*, 59 Wn. App. 389, 395, 797 P.2d 1160 (1990), *aff'd*, 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992). A trial irregularity constitutes reversible error only if it deprives

the defendant of a fair trial. *Post*, 59 Wn. App. 389. In determining whether a trial irregularity deprived the defendant of a fair trial, the court considers: (1) the seriousness of the irregularity; (2) whether the challenged evidence 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 a jury is presumed to follow. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987); *State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). The trial court is presumed to be in the best position to evaluate whether the irregularity resulted in prejudice. *Weber*, 99 Wn.2d at 165-66. Consequently, a trial court's decision to grant or deny a mistrial, based on a trial irregularity, is reviewed for abuse of discretion. *Id.*

A witness provides improper opinion testimony when he testifies to his opinion regarding the defendant's guilt. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (finding it is also improper for a witness to testify to his opinion regarding a witness's intent or veracity). A witness provides his opinion as to any of these issues when he tells the jury which result to reach. *See Montgomery*, 163 Wn.2d at 591. For example, in *Montgomery*, when the defendants were charged with possession with intent to manufacture methamphetamine, the court found the officer provided improper opinion testimony when he testified "I felt

very strongly that they were, in fact, buying ingredients to manufacture methamphetamine.” *Montgomery*, at 587-88.

Under the invited error doctrine, a defendant may not “set up an error at trial and then complain about it on appeal.” *State v. Hockaday*, 144 Wn. App. 918, 924, 184 P.3d 1273 (2008) (citing *City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002)). A defendant invites error when he “materially contribute[s] to the error challenged on appeal by engaging in some affirmative actions through which he knowingly and voluntarily sets up the error.” *Hockaday*, 144 Wn. App. 918 at 924.

Here, Clark County Sheriff’s Office Deputy Eric O’Dell testified that he responded to the Bi-Lo market on the night of the shooting, at approximately 11:07 p.m. (RP 566). O’Dell testified that his primary role in the investigation was to work with the company that maintained Bi-Lo’s video surveillance system in order to retrieve a copy of the surveillance from that night. (RP 567). On direct examination, O’Dell testified that he reviewed the surveillance footage; however, did not offer an opinion regarding the identity of the person who could be seen on the surveillance video. (RP 568). On cross-examination, the following colloquy took place between defense counsel and Deputy O’Dell:

Defense: And there – in the video, there’s two other individuals that come into the store in that period of time.

O'Dell: Correct.

Defense: And one of them was wearing dark clothes and the other was wearing white clothes --

O'Dell: Correct.

Defense: -- with a baseball cap.

O'Dell: Correct.

Defense: And were you able to identify either of those individuals?

O'Dell: The -- the one subject in the light clothing, no; the one subject in the dark clothing was Mr. Paniagua.

Defense: Well, how do you know that?

...

Defense: Could you identify him from that video?

...

O'Dell: I didn't look at it close enough to do the identification.

Defense: So you're just believing that's him, that's not an identification, correct?

O'Dell: That's what our investigation --

Defense: No --

O'Dell: Led to.

Defense: -- I'm asking what you could see

O'Dell: Oh, I didn't -- that wasn't my responsibility, no, I didn't do that.

Defense: So the answer is no.

O'Dell: Correct.

- (RP 601-602).

The following day, defense counsel moved for a mistrial. (RP 768). Defense alleged Officer O'Dell offered improper opinion testimony when he testified "regarding identification of Mr. Paniagua" as being "the individual in the black hoody in the video." (RP 768). The trial court denied the defendant's motion for a mistrial. The court found, if the officer rendered an opinion at all, it was as to identification, not as to the defendant's guilt. (RP 773). Also, the court found the officer was simply answering the question that defense counsel had asked of him. (RP 773). Lastly, the court found defense counsel did a "masterful" job because he clarified with the officer that he did not positively identify the defendant from the surveillance footage. (RP 773). The court said it would give any curative instruction that the defense requested – now or at the end of trial. (RP 773).

The trial court's decision was correct. First, a trial irregularity never occurred in this case because Deputy O'Dell did not provide his opinion as to the defendant's guilt. Defense counsel asked Deputy O'Dell: "[c]ould you identify [the defendant] from that video?" Deputy O'Dell ultimately responded, "no - -." (RP 601). Washington has "expressly

declined to take an expansive view of the claims that testimony constitutes an opinion on guilt.” *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)). Consequently, it would not be reasonable to find Deputy O’Dell provided *his* opinion regarding the defendant’s guilt when he said “that’s what our investigation- - led to.”

In addition, if any irregularity occurred, it was not serious. Deputy O’Dell did not testify that, in his opinion, the defendant shot Jose Muro. Deputy O’Dell did not testify that, in his opinion, the defendant intended to shoot or kill Jose Muro. Deputy O’Dell did not testify that, in his opinion, the defendant was the person shown in the surveillance video. Deputy O’Dell never gave his opinion as to what result the jury should reach and he never gave “his office’s” opinion as to what result the jury should reach. As the trial court stated, if any error occurred here, defense counsel mitigated it when he clarified with Deputy O’Dell that *he* did not know who was shown in the surveillance video.

Also, any resulting prejudice from this trial irregularity could have been cured by an instruction to disregard O’Dell’s remark. Defense counsel did not request a limiting instruction after the court ruled on his motion for mistrial and offered to provide a limiting instruction. The

defendant has made no showing that the singular fleeting comment in this case was so prejudicial, it could not be cured by an appropriate instruction.

More importantly, any trial irregularity that occurred was invited by the defendant. During direct examination, Deputy O'Dell did not provide any opinions regarding his beliefs, or his office's beliefs, on the identity of the defendant in the surveillance video. If Deputy O'Dell provided *any* opinions regarding the guilt or identity of the defendant, it was only because defense counsel solicited these opinions during cross-examination. Because the defendant invited Deputy O'Dell's opinion during cross-examination, under the invited error doctrine, he cannot complain about O'Dell's answers on appeal.

This Court should find any trial irregularity that occurred was invited by the defendant. In alternative, this Court should find the trial court did not abuse its discretion when it denied the defendant's motion for a mistrial because any irregularity was not serious. The defendant's convictions should be affirmed.

VI. Response to Assignment of Error F: the trial court did not abuse its discretion when it allowed Detective Buckner to testify about the course of his investigation because the officer's investigation was relevant in this case.

The defendant claims the trial court erred because it allowed Detective Buckner to testify to testimonial hearsay when Buckner

discussed the course of his investigation. *Br. of appellant*, p. 30. The defendant's claim is without merit.

Whether a statement is hearsay is a question of law that is reviewed de novo. *State v. Neal*, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001). However, the trial court's decision to admit a statement is an evidentiary ruling that is reviewed for abuse of discretion. *In re Det. of Post*, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010) (quoting *Powell*, at 258 (evidentiary rulings are reviewed for abuse of discretion and reversed only if the "exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons")).

Under ER 801(c), hearsay is an out-of-court statement that is offered "to prove the truth of the matter asserted." A statement is not hearsay if it is used only to show the effect of the statement on the listener, as opposed to the truth of the statement. *State v. Roberts*, 80 Wn. App. 342, 352-53, 908 P.2d 892 (1996); *State v. Jessup*, 31 Wn. App. 304, 314-15, 641 P.2d 1185 (1982). Out-of-court statements may be admissible for the purpose of explaining the course of an officer's investigation because these statements are not offered to prove the truth of the matter asserted. See *State v. Wicker*, 66 Wn. App. 409, 412, 832 P.2d 127 (1992). However, in order to be admissible for the purpose of explaining the course of an officer's investigation, the out-of-court statements must also

be relevant to an issue in controversy. *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006); *Wicker*, 66 Wn. App. at 412 (finding, when “the police procedures were not challenged nor at issue in any way,” out of court statement regarding course of officer’s investigation was not relevant).

Clark County Sheriff’s Office Detective Rick Buckner was one of the lead investigators in the case. (RP 833). Detective Buckner pursued the defendant as a possible suspect after he spoke to numerous members of the victim, Jose Muro’s, family. (RP 839-40). At trial, the court permitted Detective Buckner to provide the following testimony regarding his investigation:

State: ...[a]t some point did you develop a potential suspect in this case?

Buckner: Yes, we did.

State: How did that occur?
...

Buckner: By talking to various family members at the hospital that evening, we were provided with the name of a possible suspect.

State: ...Were you given background information about either this person or any relationship with others?

Buckner: Yes, we were...
...

Buckner: We were told the defendant, Jose Muro, and [Muro's] brother...were best friends at one time. There had been a disagreement between them.

- (RP 838-40).

Here, Detective Buckner's testimony was not hearsay. These statements were not offered to prove the truth of the matter asserted; rather, they were offered to explain their effect on the listener. Specifically, these statements explained how and why Detective Buckner decided to pursue the defendant as a possible suspect in the case.

How and why Detective Buckner decided to pursue the defendant as a suspect was relevant in this case. During trial, defense counsel insinuated that the Clark County Sheriff's Office conducted a slipshod investigation and it had no real basis to pursue the defendant as a suspect. For example, during cross-examination defense counsel asked Buckner: "[w]ould it be an accurate statement to say that Mr. Gasteazoro became a person of interest in this investigation shortly after your first visit to the hospital?" (RP 936). Defense counsel then asked Buckner whether the officers searched the defendant's residence (pursuant to a search warrant) only because they had seen press release that indicated the defendant might be a suspect in the case. (RP 937). (Buckner refuted this allegation).

The defendant called the credibility of the officers' investigation into question. Consequently, it was relevant for the State to respond with evidence that demonstrated the officers conducted a careful and thoughtful investigation. The testimony from Detective Buckner demonstrated he did not blindly target the defendant as a suspect. Rather, Detective Buckner conducted multiple interviews with members of the victim's family. It was by virtue of these interviews that Buckner learned the defendant may be a person of interest.

If any error occurred with the admission of Detective Buckner's testimony, the error was harmless. Muro's family members testified at trial. They testified that the defendant and Muro used to be friends but recently had a falling-out. (RP 702; 755; 783). Even Muro and the defendant testified their long-time friendship ended abruptly in December of 2009. (RP 722; 1839). Consequently, Detective Buckner's testimony was cumulative and the defendant cannot show he was prejudiced by its admission.

In addition, Detective Buckner never testified to any out-of-court statements that were made by the defendant's girlfriend, Melissa Ibanez. *See Br. at Respondent*, p. 30. Detective Buckner testified to the following at trial:

State: Where did you go after talking with Melissa?

Defense: Objection...

State: ...Strike that.

State: What was the next step in your investigation?

Buckner: My investigation led us...to the Portland area.

(RP 860). Detective Buckner never testified to what, if anything, Melissa Ibanez told him.

Detective Buckner's testimony was not hearsay because it was offered to explain the course of his investigation. The trial court did not abuse its discretion when it admitted Buckner's testimony regarding the course of his investigation because the defendant called the credibility of the investigation into question. Further, if any hearsay was admitted, it was cumulative and did not prejudice the defendant.

VII. Response to Assignment of Error G: the prosecutor did not commit misconduct during closing argument and the defendant has failed to demonstrate defense counsel was ineffective.

The defendant claims the prosecutor committed reversible misconduct during closing argument when he said: "[t]here's been no alternative theory, no alternative suspect." *Br. of Appellant*, p. 34; (RP 1989). Here, the defendant claims the prosecutor improperly required the

defendant to produce evidence of another suspect. *Br. of Appellant*, p. 35. The defendant claims the prosecutor also committed reversible misconduct during closing argument when he said: “[the defendant] had the advantage of sitting through and listening to all the testimony.” *Br. of Appellant*, p. 34 (RP 1993). Here, the defendant claims the prosecutor improperly penalized the defendant’s decision to testify. *Br. of Appellant*, at p.36. Also, the defendant claims his trial counsel was ineffective because he failed to object to either of these comments; however, the defendant fails to provide any authority or analysis to support this argument.

Prosecutorial misconduct is grounds for reversal only if “the prosecuting attorney’s conduct was both improper and prejudicial.”⁸ *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006). It is the defendant’s burden to make this showing. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Allegedly improper comments must be viewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument,

⁸ Washington does not apply a constitutional harmless error analysis when reviewing claims of prosecutorial misconduct. *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008) (citing see e.g. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 128 S. Ct. 2964 (2008), *State v. Rossier*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). “To prevail on a claim of prosecutorial misconduct, a defendant must show first that the prosecutor’s comments were improper and second that the comments were prejudicial.” *Warren*, 165 Wn.2d at 26, FN 3 (stating “[t]his has long been our approach to analyzing prosecutorial misconduct”). In *Warren*, the Court found, even when defendant alleged prosecutor’s comments undermined the presumption of innocence and shifted the State’s burden of proof, a constitutional harmless error analysis was not appropriate. *Id.*

and the instructions given to the jury.” *State v. Monday*, No. 82739-2 (June 9, 2011) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). A prosecutor enjoys wide latitude “in drawing and expressing reasonable inferences from the evidence.” *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995).

If the prosecutor’s statements were improper and defense counsel objected to them, the court considers whether there is a substantial likelihood that the statements affected the jury. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If defense does not object to the prosecutor’s statements, does not request a curative instruction, or does not move the court for a mistrial, then the issue is not preserved for future review. *Stenson*, 132 Wn.2d at 719 (finding the issue is “waived” when the defendant does not object to the prosecutor’s comment at the time of trial). An exception to this rule arises only if the prosecutor’s remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice” that could not have been neutralized by an instruction to the jury. *Id.* *see also Gentry*, 125 Wn.2d at 596. When defense counsel does not object to prosecutor’s statement at the time it is made, it “suggests [the statement] was of little moment in the trial.” *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294 (1993), *review denied*, 123 Wn.2d 1004 (1994).

- a. *The prosecutor did not commit misconduct when he said "there's been no alternative theory, no alternative suspect."*

A prosecutor commits misconduct during closing argument when he argues "the defendant has failed to produce another suspect," if the defendant attempted to introduce evidence of "another suspect" at trial but the trial court ruled such evidence was inadmissible. *State v. Russell*, 125 Wn.2d 24, 77, 882 P.2d 747 (1994); *See Br. of Appellant*, p. 35. Also, a prosecutor commits misconduct when he argues during closing argument when he argues the defendant is guilty because he has not produced evidence to refute his guilt and he would have done so, if such evidence existed. *State v. Fleming*, 83 Wn. App. 209, 921, P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997). For example, in *Fleming*, the prosecutor argued the following during closing argument:

[T]here is absolutely no evidence . . . that [D.S.] has fabricated any of this . . .

...

[I]t's true that the burden is on the State. But you . . . would expect and hope that if the defendants are suggesting there is a reasonable doubt, *they* would explain some fundamental evidence in this [matter]. And several things, they never explained."

Fleming, 83 Wn. App at 214-15 (emphasis added). The prosecutor then argued "the defendants ha[ve] not explained why the music in D.S.'s room got louder, how D.S. got scratched, and how D.S. saw Pam Spokus enter

the bedroom.” *Id.* The defendant’s did not testify at trial. *Id.* at 215.

Also, the prosecutor argued, in order for the jury to acquit the defendants, it had to find the State’s witnesses were either lying or mistaken. *Id.* at 213. The defendants did not testify at trial. *Id.* at 215.

On review, the Court in *Fleming* found the prosecutor’s comments were improper because they directly touched on the defendants’ constitutional right to remain silent. *Id.* Also, the prosecutor’s comments served to undermine the presumption of innocence and impermissibly shift the burden of proof because the prosecutor stated the defendants failed to meet *their* burden in proving their innocence. *Id.* The court found, “taken together and by cumulative effect,” the prosecutor’s comments warranted reversal. *Id.* at 216.

In the present case, the prosecutor said the following during closing argument (the italicized portion indicates the comment to which the defendant assigns error):

There’s no dispute that Jose Muro was shot here. There’s no dispute that whoever did it, who shot Jose Muro, was trying to kill him...

...

So the only issue is who did it. That’s what this case boils down to, who did it. You sat through two weeks of testimony. There’s been zero evidence of anybody else who had a motive or the opportunity or the means to commit this crime. *There’s been no alternative theory, no alternative suspect.* Jose Muro had no enemies, was not in

a dispute, argument or a fight with anybody other than the defendant.

...

It was not -- as you can see, it was not a robbery. Not a drug rip. Nothing to indicate why Jose Muro was shot other than by the defendant.

...

And all the facts in this case, I submit to you, if you look at the big picture, don't focus on the little narrow things, will point you to one conclusion. The only person who had motive, means, and ability to do it is the defendant sitting in front of you today.

- (RP 1988, L 21-23; 1989 L 3-11, 19-22; 1990, L 2-7).

The argument that was made here is sharply distinguishable from the arguments that were made in *Russell* and *Fleming*. In contrast to *Russell*, in this case, the defendant did not seek to introduce evidence of another suspect; the trial court did not exclude evidence of another suspect; and the prosecutor did not capitalize on this exclusion of evidence to make a false argument during closing. In contrast to *Fleming*, the prosecutor here did not argue "the defendant" had a burden to produce evidence of an alternative suspect and he did not argue "the defendant" had a burden to produce evidence of an alternative motive. Also, the prosecutor did not argue the jury must find the defendant guilty because "he" failed to produce evidence of either of these things.

When the prosecutor's argument is reviewed in the context in which it was made, it is clear the prosecutor was not arguing the defendant

failed to meet “his” burden to do *anything*. Rather, the prosecutor was arguing the evidence that had been presented at trial proved the State’s theory of the case: the defendant had a motive to shoot Jose Muro with the intent to kill him and the evidence proved the defendant, in fact, shot Muro with the intent to kill him. This was a correct statement of the case because the evidence did prove the defendant had a motive to kill Muro and it did prove the defendant was the person who, in fact, tried to kill Muro. Also, this argument was a correct statement of the law, because the jury was instructed “it is your duty to decide the facts in this case based upon the evidence presented to you during this trial.” (Instruction No. 1; RP 89).

A prosecutor’s comment should not be reviewed in a vacuum. *See Brown*, 132 Wn.2d at 561. Taken in context, it is clear the prosecutor’s comment was based on reasonable inferences from the evidence and it was a proper statement of the law. *Gentry*, 125 Wn.2d at 641. The prosecutor’s comment was not improper.

Assuming *arguendo*, this Court finds the prosecutor’s comment was improper, it should not find the prosecutor’s comment warrants reversal because it was neither flagrant nor ill-intentioned. The prosecutor made this comment one time in the course of closing argument. This comment was singular and isolated. It was not a recurrent theme

throughout closing, for which the prosecutor was repeatedly admonished by the court. *Comrast Warren*, 165 Wn.2d at 29 (finding prosecutor's conduct *could* be considered flagrant and ill-intentioned because the prosecutor was repeatedly reprimanded by the court when he argued, on three separate occasions during closing argument, that the defendant did not deserve the "benefit" of the reasonable doubt standard).

In this case, defense counsel never objected to the prosecutor's comment. Throughout trial, defense counsel showed no hesitation in objecting to the prosecutor's questions or comments. It is telling that defense counsel felt this comment was so inconsequential that it did not warrant reprimand by the court or a curative instruction to the jury. The fact that defense counsel did not object demonstrates, in the context of trial, the prosecutor's comment was of little import, it did not appear flagrant or ill-intentioned, and it did not appear to warrant a curative instruction. *Rogers*, 70 Wn. App. at 631.

In addition, the trial court properly instructed the jury regarding the reasonable doubt standard (Instruction No. 4, CP 94); regarding the presumption of innocence (Instruction No. 4, CP 94); and regarding the elements of the crimes, which must be proven by the State beyond a reasonable doubt (Instruction No. 11, CP 101; Instruction No. 17, CP 107). The jury is presumed to follow the court's instructions. *State v.*

Grishy, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). There is no reason to believe that, *if* this singular and isolated comment resulted in any prejudice, the prejudice could not have been neutralized by a proper curative instruction from the court.

b. The prosecutor did not commit misconduct when he said "he's got the advantage of sitting through and listening to all of the testimony."

A defendant puts his credibility at issue when he elects to testify at trial. *Portuondo v. Agard*, 529 U.S. 61, 69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000)). *In Portuondo*, the United States Supreme Court found the prosecutor did not improperly comment on the defendant's right to be present at trial when the prosecutor argued during closing: "[u]nlike all other witnesses...he get to sit here and listen to the testimony of all the other witnesses before he testifies. ... He used everything to his advantage." *Portuondo*, 529 U.S. at 64. The Court found this argument was not an improper comment on the defendant's constitutional rights; rather, it was an appropriate comment on the defendant's credibility. *Portuondo*, at 69 (quoting *Brown v. United States*, 356 U.S. 148, 154, 78 S. Ct. 622 (1958)) (finding, "when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness'").

The Court's decision in *Portuondo* abrogated any prior case law in Washington where the courts had found a defendant's constitutional right to attend trial, under the Sixth Amendment, might have been implicated when the prosecutor made a similar argument. *State v. Martin*, 171 Wn.2d 521, 532, 252 P.3d 872 (2011).⁹

In the present case, the defendant testified at trial. The defendant testified that he took his friend, "Smokey's" car to Yakima; however, on cross-examination, he agreed he told the investigating officers that he hitched a ride to Yakima. (RP 1861). The defendant testified he was having dinner at an unnamed Chinese restaurant in downtown Portland on the night of the shooting; however, his cell phone records indicated he was within one and one-half miles of the Bi-Lo market at the time Jose Muro was shot. (RP 1851). The defendant agreed he was not trying to cooperate with the police when he was interviewed by them. (RP 1863). Clearly, the defendant's credibility was at issue.

During the prosecutor's rebuttal closing argument, he made the following comments regarding the defendant's testimony (the italicized portion indicates the statement to which the defendant assigns error):

⁹ *Reading [?]*, e.g., *State v. Smith*, 82 Wn. App. 327, 334-35, 917 P.2d 1108 (1996), *rev'd*, 110 Wn. App. 283, 285, 40 P.3d 692 (2002); *State v. Johnson*, 80 Wn. App. 337, 341, 908 P.2d 900 (1996), *abrogated by Portuondo*, 529 U.S. 617, *as recognized in Miller*, 110 Wn. App. 283).

The defendant got on the stand this morning and testified to you about what happened, what he remembered, his involvement or lack thereof and so on and so forth.

Remember what he said. He said he admitted that he lied to the police initially when he was arrested in Yakima back on early morning hours of January 8th, 2010.

...

... Today he gets on the stand...and he - - he expects you to believe him today after admitting that - - that he's - - lied in the past.

What's the difference between then and now? Well, I'll tell you what's the difference. Number one, he's had time to think about it. He's had time to perfect whatever story he wants to tell.

Plus, he's got the advantage of sitting through and listening to all of the testimony from all the witnesses presented to you in the past couple weeks. Then he neatly fills in and completes the story and has an explanation for why things happened and why he wasn't there.

He said he was in Portland eating at a restaurant...There's no evidence to corroborate the defendant's story...

- (RP 1992, L 7-16, 17-25; RP 1993 L 1-11).

When the prosecutor's comment is viewed in the context in which it was made, it is clear the prosecutor was not making an argument that the defendant was not credible simply because he had the advantage of attending his own trial. Rather, the prosecutor was making an argument that the defendant was not credible because his *story* had changed. The defendant's testimony at trial was contradictory to the evidence. The

defendant's testimony at trial was also was contradictory to his prior statements. The jury was instructed that one of its most important roles would be to evaluate the credibility of the witnesses in order to determine whether the State had proven its case. (Instruction No. 1; CP 90). Consequently, it was appropriate for the prosecutor to argue *how* the defendant's story had changed and it was appropriate for the prosecutor to argue reasonable inferences as to *why* the defendant's story had changed. Each of these arguments pertained to the defendant's credibility, or lack thereof. The prosecutor's comment was not improper.

Whether or not the prosecutor's comment was improper was not implicated by the Washington Supreme Court's recent holding in *State v. Martin*. 171 Wn.2d 521. The issue in *Martin* was whether the prosecutor violated the defendant's right to be present at trial when he questioned the defendant about "tailoring his testimony" during cross examination. *Id.* at 523. The Court found such questioning was appropriate, stating: "where the credibility of the defendant is key, it is fair to permit the prosecutor to ask questions that will assist the finder of fact in determining whether the defendant is honestly describing what happened." *Id.* at 536. The Court did not state to what extent a prosecutor could comment about "tailoring testimony" during closing argument. However, the Court supported the general proposition that a prosecutor does not act improperly when he

attacks the credibility of a defendant who testifies at trial because the defendant puts his credibility at issue when he decides to testify. *Id.* at 536. In light of *Martin*, this Court should still find the prosecutor's comment was *not* improper.

If this Court finds prosecutor's comment was improper, it should also find the prosecutor's comment does not warrant reversal because it was not so flagrant and ill-intentioned that any resulting prejudice could not be cured by an appropriate instruction. The comment to which the defendant assigns error was singular and isolated. It was not a recurrent theme throughout the prosecutor's closing argument. It was made during rebuttal closing, presumably in an attempt to respond to the defendant's closing argument. Defense counsel did not object to the prosecutor's argument, he did not request a curative instruction, and he did not move for a mistrial. Clearly, the prosecutor's comment appeared to be of little moment at the time it was made and in the context of the trial.

In addition, the trial court properly instructed the jury that they were the sole judges of credibility (Instruction No. 1; CP 90); that they could give such weight and credibility to the defendant's out of court statements as they saw fit (Instruction No. 9; CP 99); and that the lawyers' comments were not evidence (Instruction No. 1; CP 90).

Certainly, if the prosecutor's comment resulted in *any* prejudice, that prejudice could have been cured by an additional reference by the court to any of the jury's instructions.

None of the jury's questions to the court during its deliberations pertained to the defendant's right to attend trial, to the defendant's presumption of innocence, or to the State's burden of proof. (CP 116). It is the defendant's burden to demonstrate that either of the prosecutor's comments, to which he did not object at trial, was so flagrant and ill-intentioned that it could not be cured by an appropriate instruction. The defendant has not met this burden.

Lastly, this Court should not review the defendant's companion-claim that defense counsel was ineffective when he failed to object to the prosecutor's comments. The defendant has not provided any authority or analysis to support his claim. RAP 2.5(a).

This Court should find the prosecutor's comments were not improper. If the prosecutor's comments were improper, they were not so flagrant and ill-intentioned that they could not be cured by an appropriate curative instruction. The defendant's convictions should be affirmed.

VIII. Response to Assignment of Error H: the defendant failed to preserve any alleged error in the special verdict instruction; in the alternative, any error was harmless.

The defendant claims, in light of the Washington Supreme Court's holding in *State v. Bashaw*, this Court must reverse the firearm enhancement for Count One because the trial court's special verdict instruction was erroneous. *Br. of Appellant*, p. 38 (citing *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010)). Further, even though the Court in *Bashaw* applied a harmless error standard of review, the defendant argues this Court should review the instructional error for structural error. *Br. of Appellant*, p. 39.

The court reviews challenges to jury instructions de novo. *Bashaw*, 169 Wn.2d at 140 (citing *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 315 (2009)). However, “[i]t has long been the law in Washington that an appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009) (quoting *State v. Lyskoski*, 47 Wn.2d 102, 108, 287 P.2d 114 (1955)). The purpose of this rule is to “encourag[e] the efficient use of judicial resources.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). An exception to this rule applies only when the appealing party can demonstrate that the claimed error is a “manifest error affecting a constitutional right.” RAP

2.5(a): *Scott*, 110 Wn.2d at 926-27. Challenges to jury instructions do not automatically give rise to a claim of manifest error affecting a constitutional right. *O'Hara*, 167 Wn.2d at 102. Therefore, in order for the Court to accept review of an instructional error that was not preserved at the trial court, the appealing party must "identify a constitutional error in the instruction and show how the alleged error actually affected the [appellant]'s rights at trial." *See Scott*, at 926-27.

In *Bashaw*, the trial court provided a special verdict instruction in which it instructed the jury that it must unanimously agree whether the State had proven, or had failed to prove, the presence of a "school bus route" sentencing aggravator. *Bashaw*, at 139. On review, the Supreme Court found it was error to instruct the jury that it must unanimously agree whether the State had *failed* to prove the presence of the sentencing aggravator. *Id.* at 147. Without reaching whether this instructional error constituted manifest error affecting a constitutional right, the Court reviewed the error under a constitutional harmless error standard. *Id.* at 143, 147 (finding error was not harmless because the State had not proven the accuracy of the device that was used to measure the distance between the criminal activity and the school bus route).

Subsequently, in *State v. Ryan*, the defendant raised a similar claim of error on appeal when the trial court instructed the jury that it must

unanimously agree whether the State had proven or failed to prove the presence of two sentencing aggravators and one deadly weapon enhancement. *State v. Ryan*, 160 Wn. App. 944, 948-49, 252 P.3d 895 (2011), *review granted* 2011 Wash. LEXIS 619 (Wash., Aug. 9, 2011). The defendant did not object to the special verdict instruction at the time of trial. *Ryan*, 160 Wn. App. at 948. However, on review, Division One found it was “constrained” by the Court’s holding in *Bashaw* to review this assignment of error. *Id.*, 984-49. Division One concluded the Supreme Court *must have* found the defendant’s claim of error in *Bashaw* was manifest error affecting a constitutional right because it reviewed the claim of error under a constitutional harmless error standard. *Id.* Following in the Supreme Court’s footsteps, the Court in *Ryan* went on to review the defendant’s claim of error under a harmless error analysis. *Id.* at 950.

In contrast, in *State v. Nunez*, Division Three found it was not constrained by the Court’s decision in *Bashaw* to review a similar claim of error regarding the language in a special verdict instruction when the defendant failed to object to the instruction at the time of trial. *State v. Nunez*, 160 Wn. App. 150, 154, 157, 160, 248 P.3d 103 (2011), *review granted* 2011 Wash. LEXIS 616 (Wash., Aug. 9, 2011), *consolidated for review with State v. Ryan*. Division Three found the instructional error did

not automatically constitute manifest error affecting a constitutional right. the defendant failed to demonstrate that the error was manifest error affecting a constitutional right, and it was not constrained by the Court's decision in *Bashaw*, because the Court in *Bashaw* never actually *found* a similar instructional error was manifest error affecting a constitutional right. *Ryan*, 160 Wn. App. at 157, 160. Consequently, Division Three declined review of the defendant's assignment of error because he failed to preserve the issue for appeal. *Id.*, at 157.

In this case, the trial court provided the following special verdict instruction to the jury, regarding the firearm enhancement for Count One (Attempted Murder in the First Degree):

[y]ou will also be given a special verdict form for the crime of Attempted Murder in the First Degree, as charged in Count 1. ...Because this is a criminal case, all twelve of you must agree in order answer the special verdict form. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. In you unanimously have a reasonable doubt as to this question, you must answer "no".

(Instruction No. 22, CP 113). The defendant did not object to this instruction and he did not propose an alternate instruction.

While recognizing both *Ryan* and *Nunez* are currently under review at the Supreme Court, this Court should follow the lead of Division Three in *Nunez* and decline review of the defendant's assignment of error

regarding the special verdict instruction. The defendant failed to preserve this issue for appeal and he has not demonstrated manifest error affecting a constitutional right. In *Bashaw*, the Court never actually found a similar instructional error constituted manifest error affecting a constitutional right. In fact, the Court stated its holding was “not compelled by constitutional protections against double jeopardy;” rather, it was compelled by “common law precedent” of the Court. *Bashaw*, at 146.

In the alternative, this Court should find any error in the special verdict instruction regarding the firearm enhancement was harmless beyond a reasonable doubt. Jose Muro sustained life-threatening injuries when he was shot, with bullets from a firearm, in the shoulders, hand, stomach, and head. There was no dispute at trial that the means by which the perpetrator attempted to murder Jose Muro was by shooting him, with a firearm. When the jury unanimously found the defendant guilty of Attempted Murder in the First Degree, it necessarily, unanimously, found the State had proven the presence of the firearm enhancement. This Court should affirm the jury’s finding of the firearm enhancement for Count One

D. CONCLUSION

The defendant's convictions should be affirmed.

DATED this 11 day of November, 2011.

Respectfully submitted:

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