

NO. 45429-7-II

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

STATE OF WASHINGTON, RESPONDENT

v.

MARCIANO CARLOS ELLIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 12-1-03918-8

BRIEF OF RESPONDENT

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

1. Has defendant failed to show that the trial court abused its discretion when it admitted evidence that it found admissible under hearsay exceptions and allowed the prosecutor to cross examine defendant about his relevant work and salary history?
2. Has defendant failed to meet his burden of showing prosecutorial misconduct?
3. Has defendant failed to show that he is entitled to relief under the doctrine of cumulative error when he has failed to show the accumulation of any error, much less an accumulation of prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

On October 16, 2012, the Pierce County Prosecutor's Office charged MARCIANO CARLOS ELLIS, hereinafter "defendant" with one count of assault in the first degree with a firearm sentencing enhancement and one count of unlawful possession of a firearm in the first degree. CP 1-2. The case proceeded to trial before the Honorable Linda Lee on July

18, 2013. 1RP¹ 2. During the trial, the State moved to admit the 911 call made by the victim, Charles Roshau, and the defense objected based on hearsay. 2RP 51-54. The court admitted the call based on ER 803(a)(1), (2) and/or (3). 2RP 54.

Defendant made a half time motion moving to dismiss the charge of assault in the first degree which the court denied. 3RP 260-264. The jury found defendant guilty of the lesser included assault in the second degree and unlawful possession of a firearm. 6RP 373-374; CP 131-134. They also found defendant was armed with a firearm during the commission of the assault. 6RP 374; CP 135, 137.

Defendant stipulated to his offender score and was sentenced to 20 months on the assault conviction, followed by 36 months for the firearm enhancement, to be served consecutive to his time on counts 1 and 2 as flat time, and followed by 18 months of community custody. 8RP 405; CP 152-153, 139-149. On the unlawful possession of a firearm conviction, defendant was sentenced to 34 months for a total amount of time in custody of 70 months. 8RP 405; CP 139-149.

Defendant filed a timely notice of appeal. CP 154-166.

¹ The verbatim record of proceedings labeled "Volume 1" through "Volume 8" will be referred to as volume number followed by "RP." The remaining proceedings will be referred to by the date of the proceeding followed by "RP."

2. Facts

During September of 2012, Charles Roshau lived in the downstairs portion of his care provider's home. 2RP 47-48. Mr. Roshau has some cognitive brain damage after getting pneumonia from drug usage and being in a coma for four and half months. 2RP 56. He bakes "medibles" which are marijuana edibles and was hoping to start a business by handing out samples to dispensaries in the area. 2RP 50-51.

Defendant was helping Mr. Roshau make labels for his medibles and came over the morning of September 11, 2011. 2RP 56. After seeing something on defendant's computer, Mr. Roshau believed defendant had used his social security number and information to get approved for two car loans. 2RP 59-60, 104. That morning, Mr. Roshau confronted the defendant and told him he was not going to accept him stealing his identity. 2RP 60-61.

As Mr. Roshau turned around and began walking towards the kitchen to call his power of attorney, defendant shot him in the back and Mr. Roshau fell to the ground. 2RP 62, 64-65. When Mr. Roshau tried to get up, defendant kicked him and began asking about money. 2RP 67. Mr. Roshau told him that the lady next door had already called the cops and defendant fled. 2RP 67. Police recovered a nine millimeter shell casing from the floor of Mr. Roshau's home. 3RP 131-133.

Several days before the shooting, defendant had shown Mr. Roshau a Kel-Tek gun in an attempt to get Mr. Roshau to buy it. 2RP 72.

When Mr. Roshau was shot, he recognized the Kel-Tek gun and told police about it. 2RP 73. Mr. Roshau testified he also had a different gun in his home that defendant had brought over, but it did not work because it did not have a firing pin. 2RP 67-68. It was taped together with electrical tape and Mr. Roshau testified he kept it wrapped up in a bag underneath a table. 2RP 70-71. On cross examination, Mr. Roshau admitted he kept various weapons in his home for self-defense including, throwing stars, mace, kubotans and knives. 2RP 96-98. He also admitted he collected bullets and had them around his house and on display on a shelf. 2RP 93-94.

A Pierce County Sheriff's Department Forensic Investigator testified that the gun found in the bag at Mr. Roshau's home fell apart when he examined it, and firing the weapon would have been impossible. 3RP 137-138. A few days after the shooting, Mr. Roshau identified defendant in a photo montage as the person who shot him. 3RP 148-149.

Mr. Roshau's on again off again girlfriend, Colleena May, was at the apartment the morning of the shooting and heard defendant and Mr. Roshau arguing about a car loan. 3RP 160-163. She was in the same room as the two during the argument and saw defendant pull a gun from the back of his pants and shoot Mr. Roshau in the back. 3RP 165-166. Ms. May called 911 as Mr. Roshau was bleeding. 3RP 168-169. Ms. May admitted she occasionally takes medications for a chemical imbalance and schizophrenia that sometimes affects her memory. 3RP 167.

Defendant was later arrested after an officer ran a routine license check of a vehicle and found it to be registered to the defendant. 3RP 199-202. A search of defendant's motel room revealed the Kel-Tek firearm that was used to shoot Mr. Roshau. 3RP 207-211. Sarah Stockhausen, defendant's girlfriend who he was staying with in the motel, testified that the Kel-Tek gun found in the room was the defendant's. 3RP 216-217.

At the conclusion of the State's case, the court read several stipulations to the jury. 3RP 218-222. The first stipulation dealt with the chain of custody of several exhibits. 2RP 42; 3RP 218-220; CP 79-81. The second stipulation detailed how the spent nine millimeter shell casing recovered from Mr. Roshau's home was fired from the Kel-Tek nine millimeter handgun. 2RP 42; 3RP 220-221; CP 82-83. The third stipulation discussed how Mr. Roshau was shot in the buttocks and the bullet penetrated his scrotum and lodged in his penis before medical personnel removed it. 2RP 42; 3RP 221-222; CP 86-87. The fourth stipulation detailed how defendant had a previous conviction for a serious felony offense making him ineligible to possess a firearm. 2RP 42; 3RP 222; CP 84-85.

Defendant chose to testify at trial. 3RP 223. He said he went to Mr. Roshau's the morning of the 11th to gather his belongings and Mr. Roshau started trying to provoke a fight. 3RP 228-230. Defendant said he was concerned because Mr. Roshau was angry and kept several weapons in his home, including guns. 3RP 231-233. When defendant went to get

his cell phones from a chair, he testified he found the Kel-Tek nine which was Mr. Roshau's gun. 3RP 234. Defendant said he saw Mr. Roshau had a small black handgun in his hand and defendant fired the Kel-Tek gun to try to make noise and scare Mr. Roshau. 3RP 235.

Defendant denied intending to shoot Mr. Roshau, and said he took the Kel-Tek gun with him and left. 3RP 235-238. Defendant also denied ever using Mr. Roshau's information to obtain a car loan. 3RP 239-241. He said he was making about \$50,000 a year and had five cars of his own so he did not need to use Mr. Roshau's credit to get a car. 3RP 240-243. Defendant admitted that although he was a felon and could not have a gun, he kept the Kel-Tek gun he shot Mr. Roshau with for several weeks. 3RP 244-245.

C. ARGUMENT.

1. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE UNDER EXCEPTIONS TO THE HEARSAY RULE AND ALLOWING THE PROSECUTOR TO CROSS EXAMINE DEFENDANT ABOUT HIS RELEVANT WORK AND SALARY HISTORY.

An appellate court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State v. Larry*, 108 Wn. App. 894, 910, 34 P.3d 241 (2001); *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738

P.2d 306 (1987) (“The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse.”). A trial court abuses its discretion when its decision is based on manifestly unreasonable or untenable grounds.

Powell, 126 Wn.2d at 258.

- a. The Trial Court did not Abuse its Discretion in Admitting the 911 call as it was Relevant Evidence Admissible under Hearsay Exceptions ER 801(a)(1), (2) and (3).

Hearsay is a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Hearsay is inadmissible unless it qualifies as an exception under the rules of evidence, court rules, or by statute. ER 802. ER 803(a) describes several exceptions to the hearsay rule including:

- (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- (3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to

the execution, revocation, identification or terms of declarant's will.

In the present case, defendant challenges the court's admission of a 911 call between Mr. Roshua and the 911 operator alleging it was hearsay and not relevant to the issues in the case. During trial, in response to the defense objection, the State argued:

part of the State's obligation here is to show how much pain, agony, et cetera, the victim is in this case, whether it's for the greater offense of Assault in the First Degree or the lesser offense of Assault in the Second Degree, and clearly when you're listening -- this is right after he's been shot. You hear his voice, you hear the pain, and he does get into some specifics about who shot him, which is part of the State's burden of proof...

2RP 53. A review of the record and specifically the 911 call itself, shows the trial court properly admitted the call under hearsay exceptions ER 803(a)(1), (2) and (3), and the statements made on the call by Mr. Roshau were extremely relevant. 2RP 5. The call begins when Mr. Roshau picks up the phone after the 911 dispatcher calls back because of a previous hang up at the residence. Exhibit 11. Mr. Roshau's voice is agitated and shaking and he breathes heavily in pain as he says the defendant shot him. Exhibit 11. Mr. Roshau has difficulty answering questions and continually groans and says "ahhh" or "ohhhh" throughout the belabored conversation. Exhibit 11.

Much like the State argued during trial, the emotions exhibited and descriptions made by Mr. Roshau on the 911 call clearly fall under the

hearsay exceptions cited by the court and described above. Further, as the State also described, the fact that Mr. Roshau had been shot, who he had been shot by, and the circumstances of how he was shot, are undoubtedly relevant to the State's burden of proof. Given such, it cannot be said that the trial court abused its discretion in admitting the 911 call when it falls under several hearsay exceptions and contains relevant facts helpful to the State's case.

b. The Trial Court did not Abuse its Discretion
When it Allowed the State to Cross
Examine Defendant About his Relevant
Work and Salary History.

ER 611(b) governs the scope of cross examination saying it should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. It also gives trial courts broad discretion to permit inquiry into additional matters. *See* ER 611(b); *State v. Ferguson*, 100 Wn.2d 131, 138-139, 667 P.2d 68 (1983). In such a situation when "a general subject is unfolded, the cross-examination may develop and explore the various phases of that subject." *Ferguson*, 100 Wn.2d at 138-139. (*quoting State v. Robideau*, 70 Wn.2d 994, 997, 425 P.2d 880 (1967)). The trial court may exercise its discretion in determining the scope of inquiry and can grant considerable latitude in cross examination. *Ferguson*, 100 Wn.2d at 138-139.

Neither party may impeach a witness on collateral issues; that is, on facts not directly relevant to the trial issue. *State v. Descoteaux*, 94 Wn.2d 31, 37, 614 P.2d 179 (1980), *overruled on other grounds by State v. Danforth*, 97 Wn.2d 255, 257 n. 1, 643 P.2d 882 (1982). Facts are relevant if they have any tendency to make the existence of any consequential fact more or less probable. ER 401.

Questions of relevancy and the admissibility of testimonial evidence are within the sound discretion of the trial court and an appellate court reviews them only for manifest abuse of discretion. *In re Welfare of Shope*, 23 Wn. App. 567, 569, 596 P.2d 1361 (1979). An erroneous ruling with respect to such questions requires reversal only if there is a reasonable possibility that the testimony would have changed the outcome of the trial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

In the present case, Mr. Roshau alleged that the argument between the defendant and he began after Mr. Roshau confronted the defendant about how he was using Mr. Roshau's identity to obtain a car loan. 2RP 60-61. Defendant testified and denied using Mr. Roshau's identity to obtain a car loan saying Mr. Roshau was "delusional." 3RP 239-243. Defendant said he had his own credit, made between 30 to 50 thousand dollars a year and owned five vehicles. 3RP 239-243. Defendant also alleged that the reason he did not turn himself in after the shooting was

because he would lose his apprenticeship if he did not attend a laborer's school in Kingston. 3RP 245-249.

The State sought to cross examine defendant on these matters by questioning defendant about his salary records and if necessary, impeach defendant by introducing testimony from his supervisor at the laborer's school, Michael Koontz, that defendant did not attend the training in Kingston. 4RP 267-285. After hearing much discussion and argument and reviewing the relevant cases, the trial court gave a detailed ruling:

We always start -- at least this Court starts with the rule, ER 611, which deals with the scope of cross examination. And cross examination is a very general -- puts a general limitation to the subject matter of the direct examination and matters affecting the credibility of the witness. That's the rule. And if I hear [defense counsel] correctly, he says that his general inquiry as to where he worked, which elicited the testimony of Local 242, did not -- should not open the door for the [state]² to cross examine as extensively as it did as to how [defendant] earned every single that we went through through [*sic*] cross examination.

However, based on my recollection of the testimony and the questioning and [defendant]'s testimony, [defendant] brought up the fact on cross examination that he didn't need to get this car loan, which the victim testified to as why he was so angry that morning when [defendant] was in the apartment. As I indicated earlier, [defendant] voluntarily testified that he didn't need -- he didn't do the car loan. He didn't need it because at the time he had five cars and he worked for Local 242 since 2008, 2009-ish, making \$50,000 a year.

² The record indicates that the trial court says "defense" here, but when looked at in context, it is apparent she is referencing the State's cross examination of the defendant.

It is at that point that the State began to inquire on a yearly basis the amount [defendant] earned. And [defendant], based on that cross examination, did testify that he -- in 2008 he made tens of thousands of dollars. In 2009 he made 30 to \$50,000. In 2010, he guessed that he made \$40,000. And in 2011, he worked under the table mostly.

As cross examination progressed, and I believe [the prosecutor] went on to question about the possession of this firearm, the Kel-Tec nine-millimeter, [defendant] testified that he -- he knew he eventually had to turn himself in, and he testified that he was thinking that he would do that after he came back from Kingston, that Kingston school, based on his apprenticeship, and that was September 17th. And then [defendant] became a bit combative with [the prosecutor] and indicated that he should ask -- he did not know. He should ask Michael Koontz of Local 242 in Seattle, and invited [the prosecutor] to ask Michael Koontz these -- answers to the questions [the prosecutor] had.

While initially it may be a collateral matter, the defendant opened the door to this. And I'm going to allow the State to inquire into the particulars of -- if it comes to it, the particulars of the testimony as to the credibility of [defendant] through Mr. Koontz, based on the testimony that [defendant] has given.

4RP 285-287.

As discussed in the court's ruling, the inquiry into these matters stemmed originally from defendant's responses to questions on cross examination. The question of defendant's financial situation was relevant because it went directly to what the victim testified the initial motivation behind the argument was. Similarly, the question about attending the laborer's class was relevant because defendant claimed that was his reason for continuing to carry the gun unlawfully and not turn himself in after the

shooting. The State only sought to impeach defendant on these matters after exploring the issue and obtaining evidence contradicting defendant's statements on cross examination. Such contradictions directly impact defendant's credibility and the story he presented to the jury.

As a result, the trial court did not abuse its discretion in allowing the State to initially cross examine defendant on these issues and then impeach defendant with conflicting evidence. Such matters were relevant to material issues in the case and originally brought up by defendant himself. The trial court properly allowed the State to explore them on cross examination and impeach defendant's credibility on his alleged motivations and story with evidence to the contrary.

2. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 8 L.Ed.2d 834, 82 S. Ct. 955 (1962).

Alleged misconduct is reviewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)). Improper comments are not deemed prejudicial unless “there is a substantial likelihood the misconduct affected the jury’s verdict.” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original]. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Id.*

In addition to the general principal of issue preservation, it is important for trial counsel to object to improper argument. Timely objections serve to discourage a prosecutor from escalating improper comments on a topic or theme that has been rejected by the court. *See, e.g., State v. Warren*, 165 Wn.2d 17, 195 P. 3d 940 (2008). Proper objections may stop repetitive or continuing improper questions or argument in trial. *See e.g., State v. Mckenzie*, 157 Wn.2d 44, 53 n. 2, 134 P.3d 221 (2006). A timely objection gives the trial court the opportunity to instruct the jury or otherwise cure the error, insuring a fair trial and

avoiding a costly retrial. *See, e.g., Warren*, 165 Wn.2d at 25. The trial court is in the best position to determine whether misconduct or improper argument prejudiced the defendant. *See State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). In other words, the best time and place to address an improper argument is in the trial court, where the court can take remedial action.

Failure to object or move for mistrial at the time of the argument “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). In *Swan*, the Court further observed that “[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” *Id.*, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

In determining whether prosecutorial misconduct warrants the grant of relief, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983).

- a. Defendant has failed to show that the prosecutor expressed his personal opinion and such an expression could not have been cured by an instruction to the jury.

The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. *State v. Anderson*, 153 Wn. App. 417, 427-428, 220 P.3d 1273 (2009). The State is entitled to comment upon the quality and quantity of evidence the defense presents and such argument does not necessarily suggest that the burden of proof rests with the defense. *Id.* at 428.

However, it is impermissible for a prosecutor to express a personal opinion as to the credibility of a witness or the guilt of a defendant. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To determine whether the prosecutor is expressing a personal opinion about the defendant's guilt, independent of the evidence, the appellate court reviews the challenged comments in context. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). Further,

[i]t is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in light of the total argument, ... it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is *clear and*

unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

McKenzie, 157 Wn.2d at 53-54 (emphasis in original)(quoting *State v. Papadopoulos*, 34 Wn. App. 347, 400, 662 P.2d 59 (1983)).

Defendant cites five statements by the prosecutor in closing argument where he alleges the prosecutor expressed his personal opinion on witness credibility and the strength of the evidence. Brief of Appellant, 15. Not a single one of the five statements was objected to during trial. 5RP 342-342, 363, 365. As stated above, the failure to object to the argument in the trial court waives any claim of error unless the remark was so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson*, 132 Wn.2d at 719. The Washington Supreme Court has stated that "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured" because the critical question is "has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

A review of the prosecutor's comments in the present case in the context of their arguments show the prosecutor was drawing inferences from the evidence and making comments about credibility based upon the evidence. The prosecutor never says "It's my opinion" or "I believe" at

any point; rather his comments ask the jury to recall defendant's testimony and then evaluate his credibility based upon that. When viewed in context, it is apparent the comments are not expressions of the prosecutor's personal opinion. Not only has defendant failed to show the prosecutor's comments were expressions of his personal opinion, defendant makes no argument in his brief as to how the prosecutor's comments were so flagrant and ill intentioned that *no* curative instruction could have eliminated the prejudice. Because defendant has failed to make this argument, these claims are waived on appeal by lack of an objection in the trial court.

- b. Defendant has failed to show that the prosecutor misstated the law on self defense and such a statement could not have been cured by an instruction to the jury.

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). The defendant is denied a fair trial when the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict. *Id.* A jury is presumed to follow the court's instructions. *State v. Hopson*, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989).

In the present case, defendant argues the prosecutor's statement in closing argument misstated the law on self-defense when the prosecutor

told the jury it could judge the defendant's actions by whether they themselves would have done the same thing. Brief of Appellant, 16.

However, when the statement is looked at in the context of the argument, it is evident that the prosecutor is attempting to properly explain the reasonable person standard to the jury. He states:

[t]hat's what the paragraph's essentially telling you. The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident. That's a pretty reasonable standard. What would a reasonably prudent person do? And in some ways, hopefully what we have here is a pretty typical average jury, and, you know, you're the reasonable prudent people, and maybe it's a question of what would you do?

5RP 341.

The crux of the argument the prosecutor is making is that the standard is that of a reasonable person. He does not say the standard is what those individual jurors would do if they were faced with that situation; rather, he attempts to liken the jurors to reasonable people and say what would a reasonable person do in such a situation. Furthermore, if the jury is in any way confused by the prosecutor's argument, the presumption is that the jury will follow the court's instructions on the law and defer to what the written packet of instructions tells them.

Defense counsel's reference to *State v. Walker* is also notable in order to distinguish it from the present case. 164 Wn. App. 724, 265 P.3d

191 (2011). In *Walker*, this Court reversed a conviction based upon cumulative error, one of which was prosecutorial misconduct for misstating the law on self defense and the reasonable person standard to the jury. There, not only did the defense object to the argument, the prosecutor had five power point slides defining reasonable person which stated "the entire case turned on, whether 'I would do it too, if I knew what he knew.'" *Walker*, 164 Wn. App. at 735-736. Throughout his closing and rebuttal the prosecutor made multiple references to this theme of whether the jury would do what the defendant had done. *Id.* The prosecutor's singular statement at the tail end of his argument properly describing the reasonable person standard in the present case in no way compares to the misconduct described in *Walker*.

Furthermore, defense counsel again failed to object to the prosecutor's statement on this point and thus, the lack of objection waives the issue on appeal. 5RP 341. Defendant is unable to show that the statement was a misstatement of the law, much less meet the higher burden showing that any alleged error was so flagrant and ill intentioned that it could not have been cured by an instruction.

- c. Defendant has failed to show that the prosecutor misstated or brought in extraneous evidence to the jury.

The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from

the evidence. *State v. Anderson*, 153 Wn. App. 417,427-428, 220 P.3d 1273 (2009). Arguments which include extraneous inflammatory rhetoric, personal opinion, or facts unsupported by the record are considered improper. See *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984); *State v. Music*, 79 Wn.2d 699, 489 P.2d 159 (1971); *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956); *State v. Claflin*, 38 Wn. App. 847, 690 P.2d 1186 (1984).

Defendant cites four statements by the prosecutor during closing argument where he allegedly misstates the evidence. Brief of Appellant, 18-19. Again, in the present case, defense counsel failed to object to any of these arguments during the closing argument. Thus, the lack of objection waives the arguments on appeal except where defendant can show that the misconduct was so flagrant and ill-intentioned that it could not have been cured by an instruction.

In each of these statements, the prosecutor is making an argument about the defendant's actions and drawing inferences based on the testimony that was presented to the court. Furthermore, the jury was instructed that:

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

CP 93-130, Instruction No. 1. Not only is defendant unable to show how any of the prosecutor's statements were misstatements of the evidence, he also fails to show how they rise to the standard of flagrant or ill-intentioned as defendant is required to meet in this case. Further, if there was any confusion, the jury need only look to the instructions which clearly state that the court's instructions are the law, not the attorney's statements.

In each of the instances defendant has cited on appeal, he fails to meet his burden of showing any evidence of prosecutorial misconduct in the present case. Not only this, but defense counsel failed to object to every statement during the trial. As a result, defendant's burden on appeal requires him to show that the errors were so flagrant and ill intentioned they could not have been cured by an instruction. Defendant is unable to show any of the errors were prosecutorial misconduct, let alone meet the standard that they were so flagrant and ill intentioned they could not be cured by an instruction. Defendant fails to meet his burden in the present case.

3. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing

court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). A defendant is entitled to a fair trial but not a perfect one, for “there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232 (1973). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect

trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal...”).

The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93 94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See, Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See, Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802

P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the state was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State’s sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts as to cumulative error), or because the errors centered around a key issue, *see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant’s credibility, combined with two errors

relating to credibility of state witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated, some so many times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that any prejudicial error occurred at his trial, much less that there was an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: June 13, 2014.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/13/14 Chelsea Miller
Date Signature

PIERCE COUNTY PROSECUTOR

June 13, 2014 - 4:31 PM

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