

NO. 48068-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

GARY BROWN JR.,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONSES TO ASSIGNMENTS OF ERROR

1. **Anthony Snodgrass' prior statement was admissible as substantive evidence pursuant to *State v. Smith* because Mr. Snodgrass' testimony was inconsistent with his statement, which was taken under oath at a proceeding.**
2. **The trial court did not act as a prosecutor, but made a *sua sponte* ER 403 objection to the prosecutor's waste of time.**
3. **There is no evidence in the record that the State called witness Anthony Snodgrass for the purpose of impeachment. Mr. Snodgrass was a logical witness who became uncooperative.**
4. **The jury was properly instructed to disregard a witness' outburst, and juries are presumed to follow instructions.**
5. **Failing to object to admissible testimony does not constitute ineffective assistance. Defendant cannot show prejudice from a failure to request a mistrial. Defendant is simply rearguing previous assignments of error.**
6. **Edna Ferry's testimony was not "double hearsay," and does not implicate the confrontation clause because Ms. Ferry's testimony consisted of what Defendant, a party opponent, had told her, and her testimony was offered against Defendant for the purpose of proving the Defendant's belief in that statement.**
7. **Joe Mohr's testimony was not an expert opinion, but based upon his experience and admissible under ER 701.**
8. **Cumulative error doctrine is inapplicable because of the insufficient number of actual errors.**
9. **The question of appellate costs is not yet ripe.**

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

Lucky Russell lives in Humptulips. RP at 17. He saw a fire next door to his house on April 22nd, 2014. RP at 19. Dave Crosby and Dan Evans were with him. RP at 22. Mr. Russell saw a green van that pulled up, stopped, and left, then heard a loud boom, and saw flames coming out of a trailer. RP at 20. Mr. Crosby also recalled seeing the green van at the fire, which he recognized as belonging to Edna and Gary (Defendant) because of the taped up plastic over the window. RP at 29-30. Mr. Russell identified Exhibit #1 as a photograph of the van. RP at 21. Mr. Crosby also identified Exhibit #1 as the van in question. RP at 30. Mr. Russell knew the usual occupants of the green van to be Defendant and Edna. RP at 21-22. Mr. Russell knew the occupants of the burning trailer as Sally and J.J. RP at 23.

Danny "Joe" Mohr, Sr. is a volunteer firefighter with Grays Harbor Fire District #17. RP at 45-46. He has been a volunteer firefighter for twelve years. RP at 47. He has fought about ten to twelve trailer fires. RP at 56. Mr. Mohr was the first to arrive at to the trailer fire on the day in question. RP at 48. Mr. Mohr testified that in trailer fires he had previously fought, the trailer is gutted instantly when oxygen is let into the trailer. RP at 56. Mr. Mohr found this fire different than the other trailer

fires he had fought, because the fire was concentrated to one area. RP at 57. He first started to attack the base of the fire, but he found that the fire moved with the water. RP at 55. Mr. Mohr testified that he had seen fire behave this way when the fire had been started with diesel. RP at 57-58.

Michael Anderson lived in a camp trailer on the same property. RP at 64. Mr. Anderson cannot read or write. RP at 82. Mr. Anderson was there the day Sally and J.J.'s trailer burned. RP at 66. He saw Defendant on the property before the fire started. RP at 66. Mr. Anderson testified that Defendant was putting gas in milk jugs. RP at 67. Mr. Anderson said that Defendant took one of his towels, ripped it in half, and walked towards J.J. and Sally's trailer. RP at 68. Mr. Anderson testified that he then went about his business, and first found out about the fire when his dog started barking. RP at 68-69.

Edna Ferry was in a relationship with Defendant in April of 2014. RP at 84-85. She owned the green van identified by the prior witnesses as the one leaving the scene of the fire. RP at 85. Ms. Ferry said that Defendant told her there was "a mention" of burning down the trailer. RP at 91. Ms. Ferry also testified that Defendant had told her that Brandi and Jose wanted J.J. and Sally "out of there." RP at 92.

Ms. Ferry testified that she took Defendant, in her van, to the place where the fire occurred and left him there the day of the fire, sometime before the fire happened. RP at 87. Ms. Ferry testified that Defendant asked about a gas can in her van, but she told him that nothing was leaving her van. RP at 88.

J.J. is John J. Haskey. RP at 135. Mr. Haskey testified that Jose and Brandi were his neighbors, and that he got along with Jose, but not Brandi. RP at 136. He explained that their relationship deteriorated during the time they lived on the property. RP at 138. Mr. Haskey testified that on the day of the fire he and Sally had left the trailer to borrow a mallet and froe from Bruce Brown. RP at 138. Mr. Haskey said that Mr. Brown had given him a ride to the store, when they saw a fire truck flying by, and they hurried to the trailer, but found it totally engulfed. RP at 141. Mr. Haskey testified said that they only used the sliding glass door and one other door. RP at 141-42. He said that when they arrived, one of the doors still had a padlock on it, but the sliding glass door was broke[n]. RP at 143. He explained that they locked the sliding door by putting a stick in the track. RP at 142.

When Sally Emery testified, the court could sense her hostility towards Defendant, and observed that she was in tears. RP at 157-58. Ms.

Emery's cats had died in the fire. RP at 163-64. When asked what happened to the trailer she used to live in, she blurted out, "Gary [Defendant] burned it." Defendant objected, but was overruled. RP at 159. After Ms. Emery's testimony, the court sustained the objection, struck the response, and instructed the jury to disregard. RP at 244.

Lt. James Sande is a professional firefighter with Grays Harbor Fire District #2. RP at 253. He is a fifth-generation firefighter and started as a volunteer firefighter at age 16. RP at 254. He has been through multiple fire academies, and is certified through AFSAP, a national accreditation. RP at 257. He became interested in investigating fires because he helped his father, an arson investigator. RP at 255. He teaches fire behavior for his department and is a code inspector. RP at 270. Lt. Sande was involved in the investigation of the fire. RP at 261.

Lt. Sande explained that the two panes of the sliding glass door in the trailer were broken in different ways. RP at 278. The non-movable part of the door's glass had shattered from heat damage, whereas the movable side's glass was pebbled. RP at 278. Lt. Sande testified that the pebbled glass was in two layers, one covered with soot. RP at 278. He also noted there was still a piece of wood in the track of the door. *Id.* Lt.

Sande opined that this indicated that the movable side of the sliding glass door was broken before the fire started. RP at 279.

Lt. Sande testified that the circular burn pattern in the roof suggested that the fire was in the middle of the living room. RP at 268. Lt. Sande testified that the circular pattern in the roof and the amorphous burn pattern on the floor below was indicative of an ignitable liquid. RP at 268. Lt. Sande opined that the fire started in the living room, probably just in from the sliding glass door, and that it was started with an ignitable liquid and an open flame. RP at 284.

Anthony Snodgrass testified that Defendant had come to his house, and that he gave Defendant a ride to Aberdeen. RP at 313. Mr. Snodgrass testified that he didn't recall what he and Defendant talked about on the ride to Aberdeen. RP at 313. Mr. Snodgrass admitted that he had given a statement to Detective Wallace about the conversation, but claimed that reading the statement would "probably not" refresh his recollection. RP at 314. He acknowledged that Exhibit #54 was his statement, and that he had signed it. *Id.* He was permitted to read the statement, but continued to be evasive in his responses. RP at 315.

The State was granted permission to treat Mr. Snodgrass as hostile. RP at 315. He admitted that the statement was about a conversation with

Defendant. RP at 315. Mr. Snodgrass claimed Defendant told him that “they” were accusing him (Defendant) of burning down the trailer. RP at 316. When the State pointed out that this was not what he had said in the statement, Mr. Snodgrass again claimed he didn’t remember. *Id.*

After a few more moments of Mr. Snodgrass’ evasive replies, the court had the jury taken from the courtroom and admonished the prosecutor, saying,

You have passed up refreshing his recollection about 15 minutes ago. I granted you permission to treat him as a hostile witness. Take the statement from him, and read it to him, and ask him if that's what he told Detective Wallace. Do something besides continuing to just run in circles here, and have him be evasive. We are not getting anywhere. There is a way for you to impeach him with that statement, and I want you to do so.

RP at 318. The prosecutor then asked Mr. Snodgrass leading questions based on the statement, and Mr. Snodgrass admitted that was what he had told Detective Wallace. RP at 319-20.

Sgt. Wallace was the follow-up investigator on the case. RP at 326. Sgt. Wallace identified Exhibit #54 as Mr. Snodgrass’ statement.¹

¹ The Report of Proceedings identifies the statement as “four” on page 332. This appears to be in error, as Exhibit 54 was eventually admitted as the statement, then replaced with Exhibit 57. Exhibit 4 was a photograph. RP at 125-26.

RP at 332. He testified that he took the statement from Mr. Snodgrass.

RP at 332. Sgt. Wallace testified that it was standard procedure to take a statement, and that he gave Mr. Snodgrass ample opportunity to review the statement and make any additions or changes before he signed it. RP at 334. The statement was signed under the penalty of perjury. Exhibit 54. The State then moved to admit the exhibit. RP at 334. Defendant objected, but the court admitted the exhibit, finding that Mr. Snodgrass' testimony was inconsistent with the statement. RP at 334-35.

The statement says,

Approximately 1 month ago, I stopped by Gary Taylor's house on Tuffree Road on my way to town to get groceries. Gary told me that the police were just at his house to arrest him for arson. Gary told me that he saw the police coming down the driveway and he ducked into the brush to avoid them. Gary told or asked me to get him out of the area. I agreed to take Gary to Aberdeen to one of his friends [*sic*] house. While driving to town I asked Gary why the police wanted him for arson. Gary told me that he fucked up and that he caught a house on fire for somebody in trade for a truck. Gary told me that a guy named Jose was going to give him a truck for burning out the neighbor's next to his trailer. I knew there was a fire in a trailer on Kirkpatrick Road, just down from the Humptulips store. Gary verified that was the trailer he burnt down. Gary told me that he used gasoline to burn the trailer down. Gary was also mad at Edna Ferry for catching her and Dondi Blackburn in bed together. Gary told me he was going to kill Edna and Dondi for sleeping together.

Exhibit 54. The parties prepared a redacted version, omitting the part about Defendant wanting to kill Edna Ferry. RP at 346-47. By stipulation, the redacted version was admitted as Exhibit 57. RP at 421.

ARGUMENT

1. Anthony Snodgrass' prior inconsistent statement was admissible as substantive evidence pursuant to *State v. Smith*.

Defendant claims that a prior inconsistent statement of a witness is admissible only for impeachment purposes, and complains that Mr. Snodgrass' statement was admitted as substantive evidence in violation of law. This is wrong.

Prior inconsistent statements are admissible as substantive evidence.

If a prior inconsistent statement satisfies the elements of ER 801(d)(1)(i), the statement is admissible as substantive evidence. *State v. Thach*, 126 Wn. App. 297, 307, 106 P.3d 782, 788 (2005) (citing *State v. Smith*, 97 Wash.2d 856, 863, 651 P.2d 207 (1982).) *Smith*'s holding and *Thach*'s application were recently reaffirmed by the Supreme Court. *See State v. Otton*, 185 Wn.2d 673, 690, 374 P.3d 1108, 1116 (2016).

“To determine whether a statement is admissible, the trial court considers the *Smith* factors.” *Thach* at 308. The *Smith* factors are, (1) whether the witness voluntarily made the statement; (2) whether there

were minimal guaranties of truthfulness; (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement. *Id.*

Sgt. Wallace's testimony easily establishes that Mr. Snodgrass made the statement voluntarily, and that no threats or promises were made to get him to make the statement. Sgt. Wallace also testified about how he took the statement; that he read the statement to Mr. Snodgrass, that he allowed him to re-read it to make sure it was accurate, and that he gave him the opportunity to make changes or additions, and that Mr. Snodgrass did not, and that he had the option of signing it or not signing it, and that Mr. Snodgrass chose to sign it, satisfying the minimal guarantee of truth factor.

The third *Smith* factor is to satisfy ER 801(d)(1)(i)'s requirement that the statement be given under oath at a "proceeding." *See State v. Smith*, 97 Wash.2d 856, 859, 651 P.2d 207 (1982). A sworn statement taken in a police investigation to establish probable cause, which results in the filing of an Information was taken in an "other proceeding." *Smith* at 862. Sgt. Wallace testified that he interviewed Mr. Snodgrass as part of

his investigation, that taking statements from witnesses was part of his standard procedure. RP at 333. This information was forwarded to the prosecuting attorney, who filed charges against Defendant for arson by way of an Information. CP at 1. Finally, Mr. Snodgrass was available for cross-examination concerning the statement, satisfying the final factor.

Because all four *Smith* factors were satisfied, it was not error to introduce Snodgrass' statement as substantive evidence.

Mr. Snodgrass' testimony was inconsistent with his statement.

Defendant asserts that Mr. Snodgrass' credibility was not at issue because he provided no substantive testimony and only claimed not to remember. Defendant relied on *State v. Allen S.* for the proposition that impeachment in this case was improper. However, the decision in *Allen S.* specifically excluded "...statements admitted for substantive use under a hearsay exemption or exception such as ER 801(d)(1)(i)." *State v. Allen S.*, 98 Wn. App. 452, 466 n. 59, 989 P.2d 1222, 1230 (1999). In this case the statement was admitted for substantive use, so *Allen S.* is inapplicable.

Defendant claims the situation in *Allen S.* is identical to the situation here. However, the differences are illuminating. In *Allen S.* the defendant was charged with raping his children. *Id.* at 454. A jail inmate named Spry asked to speak to a sheriff's deputy, and said "that 'he was

willing to provide information about [S] and others so he could cut himself a better deal.” *Id.* at 455 (alteration in original.) Spry told Deputy Fuscher that the defendant “had admitted to getting ‘high on crank’ and doing ‘some fucked up things to his children.’” *Id.*

On the witness stand Spry claimed to have no recollection of speaking to Deputy Fuscher. *Id.* at 457. Spry claimed to have no memory of ever saying anything about the defendant. *Id.* Spry gave no testimony except that he did not recall making statements consistent with the State’s questions. *Id.* at Deputy Fuscher then testified as to what Spry had told him, and the court gave a limiting instruction that the testimony was “...for the limited purpose of impeaching Joshua Spry.” *Id.* at 458. This court reversed the defendant’s conviction, ruling that a party may not “impeach a person who claims at trial not to remember anything relevant to the case.” *Id.* at 453.

In the instant case Mr. Snodgrass gave evidence. He conceded that the statement was his, and that he had given it to Sgt. Wallace. He then admitted to the contents of the statement. Mr. Snodgrass also claimed that Defendant had come to his house, and that Defendant had said he was *accused* of burning the trailer. The last two claims are not consistent with his statement.

Defendant appears to claim that a witness claiming not to remember a statement is not inconsistent. However, *Allen S.* specifically contradicts this position. As observed by the *Allen S.* court, “[f]or hearsay purposes, a person makes inconsistent statements if he or she says ‘I can’t remember the event’ on one occasion, and describes the event on another occasion.” *Id.* at 468 n. 66 (citing *State v. Miles*, 73 Wash.2d 67, 71, 436 P.2d 198 (1968) and *State v. Stepp*, 18 Wash.App. 304, 310, 569 P.2d 1169 (1977).) The *Allen S.* court also noted that “...Spry’s out-of-court statements were inconsistent with his trial testimony.” *Id.* at 468.

Anthony Snodgrass’ testimony was inconsistent with his statement, both because he claimed not to remember and because he gave testimony that contradicted the statement. The statement was properly admitted.

2. The judge did not assume the role of prosecutor, but made a *sua sponte* objection.

Defendant next argues that the judge assumed the role of prosecutor for admonishing the prosecutor not to waste time. The cited cases are inapposite and there is no authority to support his argument.

The trial court may make *sua sponte* rulings on evidence.

Defendant likens the court’s admonishment to trial judges calling and questioning witnesses in the presence of the jury. No such thing happened here. The judge never questioned Snodgrass or even addressed

him. This action of the court is properly characterized as a *sua sponte* ER 403 ruling, based on waste of time. Recently this court recognized the trial court's prerogative to act on its own accord.

In *In re Estate of Hayes* the trial court struck portions of a declaration that it considered improper opinion testimony. *Hayes*, 185 Wn. App. 567, 591, 342 P.3d 1161 (2015). In affirming, division three of this court noted that, "The prevailing, if not universal, rule is that a trial judge has the authority to exclude improper evidence even in the absence of an objection." *Id.* This court went on to note, "A court even has discretion in a jury trial to exclude evidence *sua sponte* if it believes it will mislead a jury or is unduly prejudicial." *Id.* (citing *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 734 S.E.2d 148, 157 (2012).)

Although no evidence was struck or excluded in the instant case, the situation is analogous. In *Hayes* the court simply ruled on the admissibility of the portions of the declaration under ER 701. *See id.* at 595. In the instant case the court ruled under ER 403, which reads, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

There was no violation of the separation of powers. The court acted within its authority to act *sua sponte*. This court should affirm the conviction.

Defendant did not object, so this issue is not preserved for appeal.

Even assuming there was error, Defendant did not object below. Generally, appellate courts “will not review any claim of error that was not raised in the trial court.” *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177, 1180 (2013) (citing RAP 2.5.) “This rule affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Id.* (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wash.2d 495, 498, 687 P.2d 212 (1984).)

Because the error was not preserved for appeal, this court should decline to reach the issue.

3. There is no evidence that the State called Anthony Snodgrass for the sole purpose of impeachment.

Defendant next complains that the State called Mr. Snodgrass just to impeach him. There is nothing in the record to support this assertion.

In *U.S. v. Crouch*, 731 F.2d 621 (9th Cir. 1984), cited by Defendant for this rule, the prosecution made an offer of proof of its witness, Linda Gonzalez, in chambers. *Crouch* at 622. Gonzalez denied making the statements the prosecution wanted to elicit. *Id.* The

prosecution proceeded to call her anyway. *Id.* This was solid evidence in the record that the prosecution called Linda Gonzalez solely for impeachment purposes. No such evidence exists here.

In fact, the record suggests that the State did not plan to impeach Mr. Snodgrass. The State used an unredacted copy of Mr. Snodgrass' statement to impeach him, then later stipulated to a redacted copy. Had the State been planning to impeach Mr. Snodgrass from the start, the prosecution would have been prepared with a redacted statement, since the State offered no resistance to omitting the highly prejudicial passage concerning Defendant's plans to commit homicide.

Defendant also cites to *State v. Hancock*. In *Hancock* the only evidence in the record to suggest that the State called a witness solely for impeachment purposes was a line in an appellate brief that the prosecutor "had 'some indication that Mrs. Hancock would not testify favorably...'" and the fact that she "...did not testify on direct examination to any matters unrelated to her out-of-court statements to Detective Ostrander." *State v. Hancock*, 109 Wn.2d 760, 763, 748 P.2d 611, 613 (1988). The defense argued that this showed the State's improper motive. *Id.* at 764.

Although the *Hancock* court agreed that the practice of calling a witness for the sole purpose of impeachment is improper, the court found

that there was no evidence this had occurred. The court observed that the defendant's wife was a logical witness for the State to call because she lived at the house where the incidents were alleged to have taken place, and had a relationship with the defendant and the victims. *Id.* at 765. Further, the court observed that the "State was entitled to expect her to testify under oath no differently from the apparently voluntary statement she gave to the detective." *Id.*

In the instant case Mr. Snodgrass was a logical witness for the State to call. He had told the police, essentially, that Defendant had confessed to him. No prosecutor would fail to call such a witness.

In the case at bar, there is no evidence that the State knew that Mr. Snodgrass would become hostile and refuse to testify. The State was entitled to assume he would testify consistent with his statement. This court should reject Defendant's argument and uphold the conviction.

Impeachment evidence vs. substantive evidence.

Defendant also claims that the State improperly argued Mr. Snodgrass' statement was improperly argued to be substantive evidence. The statement was properly admitted as substantive evidence, so this assignment of error is without merit. This argument is addressed in the response to the first assignment of error.

4. The jury was instructed to disregard the outburst, and is presumed to have followed that instruction.

Defendant next claims that the judge's instructions were insufficient to cure prejudice he suffered from Ms. Emery's outburst. However, the outburst was not serious, and the jury was instructed to disregard.

To determine the effect of an irregularity, appellate courts "examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014, 1020 (1989) (citing *State v. Mak*, 105 Wash.2d 692, 718 P.2d 407 (1986).) A "trial judge is best suited to judge the prejudice of a statement" *Id.* (quoting *State v. Weber*, 99 Wash.2d 158, 166, 659 P.2d 1102 (1983).)

In the instant case Ms. Emery's remark was not so serious. In the context of Ms. Emery's demeanor, it was clear that she was upset and that she blamed Defendant for the fire and the death of her cats. Additionally, her outburst is cumulative to Mr. Snodgrass' statement that Defendant confessed to burning down the trailer, and arguably, the State's whole case. Finally, the court properly instructed the jury to disregard.

Defendant points to *State v. Miles* for support of his proposition that the jury should not be presumed to have followed the instruction.

However, in *Miles*, the police officer testified that he had received a Teletype that two wanted subjects (the defendants) were headed for Spokane and were going to duplicate the robbery at issue. *State v. Miles*, 73 Wn.2d 67, 68, 436 P.2d 198, 199 (1968). The difference is that the testimony in *Miles* suggested other bad acts of the defendant. This type of testimony is generally found to be too serious to cure with an instruction. *See also Miles*, *State v. Escalona*, 49 Wn. App. 251, 252, 742 P.2d 190, 191 (1987) and *State v. Babcock*, 145 Wn. App. 157, 158, 185 P.3d 1213, 1214 (2008).

The distinction was noted in *State v. Emery*. In *Emery* the defendant and Olson were both charged with rape in a joint trial. *State v. Emery*, 174 Wn.2d 741, 746, 278 P.3d 653, 657 (2012). During the defendant's testimony "Olson interrupted Emery, saying, 'You are sitting there lying, man.... This is perjury.... I [have] been wrongly accused.'" *Id.* at 750. The court instructed the jury to disregard. *Id.* Both were convicted. *Id.* at 751.

The Supreme Court noted that Olson's outbursts were distinguishable from the testimony in *Miles* because it did not involve accusations of other bad acts. *Id.* at 765-66. The court repeated the rule

that, “jurors are presumed to follow the court's instructions.” *Id.* at 76. (citing *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009).)

Ms. Emery’s outburst was not serious, cumulative, and the jury was instructed to disregard. The outburst does not warrant reversal.

5. Defendant’s trial counsel was not ineffective because Mr. Snodgrass’ testimony was not objectionable.

Defendant attempts to reargue the prior assignments of error by claiming ineffective assistance of counsel. The issue of Mr. Snodgrass’ statement is addressed above, as is the issue of Ms. Emery’s outburst. Trial counsel was not ineffective for failing to request a limiting instruction because Mr. Snodgrass’ statement was properly admitted as substantive evidence. Trial counsel was not ineffective for not requesting a mistrial, because the objection was initially overruled. The jury was later instructed to disregard Ms. Emery’s outburst.

6. Edna Ferry did not testify as to “double hearsay.”

Defendant next complains that Edna Ferry’s statement that Defendant said that Brandi and Jose wanted J.J. and Sally “out of there,” was “double hearsay” (presumably hearsay within hearsay.) However, it was not hearsay at all because it was Defendant’s statement.

The Hearsay Rule.

“‘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 not admissible except as provided by these rules, by other court rules, or by statute.” ER 802. “A statement is not hearsay if... The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity[;] or (ii) a statement of which the party has manifested an adoption or belief in its truth...” ER 801(d)(2).

“Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.” ER 805.

The statement cannot be hearsay within hearsay because it was a statement of a party opponent.

Defendant claims that the statement is hearsay within hearsay. This is wrong. As noted by the trial court when overruling the objection, the words Edna Ferry testified to were those of Defendant, a party opponent, offered against him. *See* RP at 92. Even if what Brandi and Jose said was hearsay (which it is not) the statement cannot be hearsay within hearsay.

The alleged statement of Brandi and Jose within Defendant's statement was offered to show Defendant's belief in the statement.

That Defendant believed that Brandi and Jose wanted J.J. and Sally "out of there" was not offered for the truth of the matter (i.e. what Brandi and Jose wanted.) The statement was to prove Defendant's belief that Brandi and Jose wanted J.J. and Sally "out of there," because it gives a motive to the arson. Defendant manifested a belief in this statement by repeating it, and then burning down the trailer.

Even if it were offered to prove the truth of the matter asserted, such evidence falls under the hearsay exception of ER 803(a)(3), allowing "[a] statement of the declarant's then existing state of mind, emotion... (such as intent, plan, motive, [or] design...)." In the instant case the alleged hearsay statement was a statement of Brandi and Jose's state of mind; that they wanted J.J. and Sally out of the trailer.

The statement is not excluded by the hearsay rule, because it was a party opponent's statement of what he believed to be true, the state of mind of Brandi and Jose. There was no error.

Defendant's confrontation right is not implicated.

Defendant argues that allowing Ms. Ferry to testify that Defendant said Brandi and Jose wanted J.J. and Sally "out of there" implicates his

confrontation right. However, statements that Brandi and Jose wanted J.J. and Sally “out of there” are nontestimonial.

The confrontation clause applies to those who “bear testimony” against the accused. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364, 158 L. Ed. 2d 177 (2004). Brandi and Jose’s wishes were not testimony against Defendant. What was at issue was *Defendant’s* belief.

Defendant’s right to confront witnesses does not extend to Brandi and Jose because their alleged statements were nontestimonial. This assignment of error is without merit.

7. Joe Mohr testified as to his experience, not as an expert.

Defendant claims that volunteer firefighter Danny “Joe” Mohr, Sr. was allowed to testify as an expert. However, Mr. Mohr’s testimony was limited to his past experience fighting fires, and admissible under ER 701.

Non-experts may testify as to their opinions based upon experience.

In *State v. Kunze* Detective Nolan testified that she had observed at the crime scene, “among other things, severed phone lines and open drawers and cabinets with undisturbed contents.” *Kunze*, 97 Wn. App. 832, 858, 988 P.2d 977, 992 (1999). Detective Nolan testified that she thought “...the scene was unusual, and that it ‘may have been staged’ to

look like a burglary.” *Id.* Sgt. Gebo of the Seattle Police Department “...offered a similar opinion after viewing photos of the scene.” *Id.*

This court upheld this testimony,² finding that, “...they were testifying to inferences readily understandable by the jury... each one's opinion was supported by a rational basis of knowledge; that the trial court could rationally find that each one's opinion would be helpful to the jury; and thus that the trial court did not abuse its discretion.” *Id.*

The situation in the instant case is analogous. Mr. Mohr testified that this fire was different than the other trailer fires he had fought, because the fire was concentrated in one place, rather than engulfing the trailer all at once. RP at 56-57. He then testified that when he sprayed the base of the fire, it moved, which was like fires he had fought in the past that had been started with diesel. RP at 57-58. He reiterated that he wasn't an investigator and didn't know how the fire started. RP at 57.

Like the police in *Kunze*, Mr. Mohr's testimony was based upon his experience, and was easily understandable. This was permissible lay opinion evidence under ER 701. It was not error to allow this testimony.

² Kunze's conviction was overturned on other grounds.

This court should disregard Defendant’s citation to a periodical.

Defense council cites to an article in “The ABA Journal,” apparently to discredit Mr. Mohr’s testimony. This periodical is not in the record. The court should not consider it.

8. Because the assignment of error are not errors, the cumulative error doctrine is inapplicable.

Defendant next argues that cumulative error doctrine warrants reversal. Although there are numerous assignments of error, when the analysis is complete the State anticipates the number of actual errors found will be lower than what is required for cumulative error doctrine to apply. The State asks this court to confirm the conviction.

9. The issue of appellate costs is not yet ripe.

Finally, Defendant asks this court not to impose appellate costs if the State prevails and moves to impose costs. However, the issue is not yet ripe because the State has not yet asked for costs, or even prevailed.

“Three requirements compose a claim fit for judicial determination: if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678, 685 (2008) (quoting *First United Methodist Church v. Hr'g Exam'r*, 129 Wash.2d 238, 255–56, 916 P.2d 374 (1996).)

Because no party has yet prevailed, and costs have not been requested, this issue is not ripe. This issue should not be decided unless and until the State both prevails, and asks for costs.

CONCLUSION

Although Defendant's assignments of error are numerous, they are without merit. The complained-of errors of the court are not errors. Therefore, cumulative error doctrine is inapplicable and trial; counsel was not ineffective. This court should affirm Defendant's conviction for Arson.

DATED this 21st day of October, 2016.

Respectfully Submitted,

BY: s/ Jason F. Walker
JASON F. WALKER
Chief Criminal Deputy
WSBA #44358

GRAYS HARBOR COUNTY PROSECUTOR

October 21, 2016 - 4:27 PM

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