

78611-9

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

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STATE OF WASHINGTON

Respondent,

v.

MATTHEW RUTH,

Appellant.

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STATE OF WASHINGTON  
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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

I. ISSUES..... 1

II. STATEMENT OF THE CASE ..... 3

    1. The Defense Case..... 10

    2. Sentencing..... 12

III. ARGUMENT ..... 13

    A. THE DEFENDANT FAILED TO PRESERVE FOR REVIEW THE ISSUE OF ALLEGED PROSECUTORIAL MISCONDUCT IN CROSS-EXAMINATION OF THE DEFENDANT ..... 13

    B. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT’S MOTION FOR MISTRIAL BASED ON THE PROSECUTOR’S COMMENTS DURING CLOSING ARGUMENT ..... 18

        1. The Court Did Not Abuse Its Discretion When It Denied The Defendant’s Motion For Mistrial Based On The Prosecutor’s Comment About The Defendant’s Version Of Events..... 19

        2. The Court Did Not Abuse Its Discretion When It Denied the Defendant’s Motion For Mistrial Based on the Prosecutor’s Response to The Defense Argument That The Defendant Had “No Other Options” Than To Shoot The Victims. .... 24

        3. The Defendant Did Not Object To The Prosecutor’s Comments During Closing Argument Regarding The Credibility Of The Victims. The Comments Were Not Error, And Were Not So Flagrant Or Ill Intentioned That They Could Not Have Been Neutralized By A Curative Instruction..... 28

    C. THE DEFENDANT’S RIGHT AGAINST SELF-INCRIMINATION WAS NOT VIOLATED WHEN THE PROSECUTOR IMPEACHED THE DEFENDANT ABOUT HIS PRE-CRIME FAILURE TO REPORT ALLEGED CRIMINAL ACTIVITY BY THE VICTIMS..... 31

D. THE DEFENDANT DID NOT SUFFER PREJUDICE WHEN HIS TRIAL ATTORNEY PROPOSED THE ERRONEOUS SELF-DEFENSE INSTRUCTION. .... 35

E. CUMULATIVE ERROR DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL. .... 39

F. THE IMPOSITION OF A 60 MONTH SENTENCE ENHANCEMENT WAS PROPER. THE JURY WAS INSTRUCTED THAT FOR THE SPECIAL VERDICT THEY HAD TO FIND THAT THE DEFENDANT WAS ARMED WITH A FIREARM. THE ERRONEOUS INCLUSION OF THE WORDS "DEADLY WEAPON" ON THE SPECIAL VERDICT FORM WAS ONE OF FORM OVER SUBSTANCE. .... 39

IV. CONCLUSION..... 43

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>In re Davis</u> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	35
<u>State v. Babich</u> , 68 Wn. App. 438, 842 P.2d 1053, <u>review denied</u> , 121 Wn.2d 1015 (1993) .....	15, 16
<u>State v. Brown</u> , 36 Wn. App. 549, 676 P.2d 525 (1984) .....	20
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997), <u>cert. denied</u> , 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).....	19, 20
<u>State v. Carnahan</u> , 130 Wn. App. 159, 122 P.3d 187 (2005).....	33
<u>State v. Coe</u> , 101 Wn.2d 772, 789, 684 P.2d 668 (1984) .....	39
<u>State v. Davis</u> , 35 Wn. App. 506, 667 P.2d 1117 (1983).....	20, 35
<u>State v. Dennison</u> , 72 Wn.2d 842, 435 P.2d 526 (1967).....	24
<u>State v. Dunaway</u> , 109 Wn.2d 207, 743 P.2d 1237 (1987).....	28
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	31, 32
<u>State v. Freeburg</u> , 105 Wn. App. 492, 20 P.3d 984 (2001).....	36, 37
<u>State v. Fricks</u> , 91 Wn.2d 391, 588 P.2d 1328 (1979) .....	33
<u>State v. Graham</u> , 59 Wn. App. 418, 798 P.2d 314 (1990).....	24
<u>State v. Grieff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	39
<u>State v. Heller</u> , 58 Wn. App. 414, 793 P.2d 461 (1990) .....	33
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991), <u>cert denied</u> , 516 U.S. 1160, 116 S.Ct. 1046, 134 L.Ed.2d 192 (1996).....	20, 22, 29
<u>State v. Hopson</u> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	19
<u>State v. Horton</u> , 116 Wn. App. 909, 68 P.3d 1145 (2003).....	30
<u>State v. Jeffries</u> , 105 Wn.2d 398, 717 P.2d 722 (1986) .....	35
<u>State v. Johnson</u> , 80 Wn. App. 337, 908 P.2d 900 (1996).....	20
<u>State v. Lewis</u> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	31, 33
<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992).....	14
<u>State v. Mak</u> , 105 Wn.2d 692, 718 P.2d 407, <u>cert. denied</u> , 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986) .....	19
<u>State v. Martin</u> , 41 Wn. App. 133, 703 P.2d 309, <u>review denied</u> , 104 Wn.2d 1016 (1985) .....	23
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	14
<u>State v. Miller</u> , 110 Wn. App. 283, 40 P.3d 692 (2002).....	20
<u>State v. Olson</u> , 30 Wn. App. 298, 633 P.2d 927 (1981) .....	14, 33
<u>State v. Papadopoulos</u> , 34 Wn. App. 397, 662 P.2d 59, (1983)...	20, 21
<u>State v. Pharr</u> , ___ Wn. App. ___, 126 P.3d 66, 69 (Division I 2006) .....	39, 40, 41, 42
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995) .....	17

<u>State v. Recuenco</u> , 154 Wn.2d 156, 110 P.3d 188 (2005), <u>cert. granted</u> , 126 S.Ct. 478 (2005).....	41
<u>State v. Rodriguez</u> , 146 Wn.2d 260, 45 P.3d 541 (2002).....	19, 38
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995)...	19, 24
<u>State v. Saavedra</u> , 128 Wn. App. 708, 116 P.3d 1076 (2005) .....	33
<u>State v. Sanchez</u> , 122 Wn. App. 579, 94 P.3d 384 (2004).....	14
<u>State v. Smith</u> , 67 Wash. App. 838, 841 P.2d 76 (1992).....	17
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	21, 30
<u>State v. Watkins</u> , 53 Wn. App. 264, 766 P.2d 484 (1989).....	31
<u>State v. Yoakum</u> , 37 Wn.2d 137, 222 P.2d 181 (1950).....	16

**FEDERAL CASES**

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) .....	42
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.E.2d 403 (2004) .....	42
<u>Delaware v. Van Arsdall</u> , 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) .....	17
<u>Doe v. United States</u> , 487 U.S. 201, 108 S.Ct. 2341, 101 L.Ed.2d 184 1988).....	32
<u>Jenkins v. Anderson</u> , 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) .....	33
<u>State v. Bess</u> , 593 F.2d 749 (6 <sup>th</sup> Cir. 1979).....	23
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2ed 674 (1984), <u>cert. denied</u> , 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986) .....	35

**OTHER CASES**

<u>State v. Fencil</u> , 109 Wis.2d 224, 325 N.W.2d 703 (1982).....	32
---	----

**U.S. CONSTITUTIONAL PROVISIONS**

Fifth Amendment.....	32
Sixth Amendment.....	40

**WASHINGTON STATUTES**

RCW 9.94A.533(4).....	13
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**COURT RULES**

RAP 2.5(1)(3).....	13
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## I. ISSUES

1. Defense counsel did not object when the Prosecutor asked the defendant on cross examination whether the defendant had reported “freak[ing] out” before shooting the victim. The defendant answered that he had not. Did the prosecutor’s question constitute a manifest error involving a constitutional right so that he may raise the issue for the first time on appeal?

2. Did the prosecutor’s question of the defendant outlined above violate the defendant’s right to confrontation?

3. During closing argument the prosecutor suggested the jury give no credence to the defendant’s self-defense claim because it made no sense in the context of the evidence. Did the trial court abuse its discretion when it denied the defendant’s motion for mistrial based on this alleged incident of prosecutorial misconduct?

4. During closing argument the Prosecutor pointed out the self-defense claim was not supported by the evidence. The defense argued in closing that shooting the victims was the defendant’s only option. In rebuttal, the prosecutor indicated that he had other options. Did the trial court abuse its discretion when it denied the

defendant's motion for mistrial based on this alleged instance of prosecutorial misconduct?

5. The defendant claimed self defense and testified that days before he shot the victims he observed the victims commit crimes and brag about killing people. Was the defendant's right against self-incrimination violated when the Prosecutor questioned him about his failure to report these alleged criminal activities to the police?

6. Is the defendant entitled to a new trial based on ineffective assistance of counsel where trial counsel proposed a self-defense instruction that has been disapproved by the courts, but under the facts of the defendant's case caused no prejudice?

7. Did the alleged errors noted above cumulatively deprive the defendant of his right to a fair trial?

8. The defendant's two charges bore firearm allegations. The jury was instructed that for the special verdict they had to find the defendant was armed with a firearm during his offenses. The jury was instructed a firearm was a "deadly weapon". The special verdict form, which was not objected

to by the defense, indicated “yes” to the question “Was the defendant armed with a “deadly weapon”. Did this violate the defendant’s right to a trial by jury?

## **II. STATEMENT OF THE CASE**

On November 5, 2003, the defendant lived in a fifth wheel trailer on the property of Candy Corder. Jeremy Custer rented a home from Ms. Corder on the same property in Lake Stevens. He was a quiet tenant, and had lived there about three years. The defendant had been homeless, and Jeremy Custer felt sorry for him so he helped him move into the trailer on Ms. Corder’s property. 1 RP 119; 120-21; 2RP 200-201; 206.

The defendant had no bathroom, so Mr. Custer regularly let him use the one at his home. At some point, the defendant’s girlfriend Renee Woerner started living in the trailer with the defendant. Mr. Custer and the defendant had a cordial relationship and they had not previously had a physical confrontation before November 5, 2003, although the defendant and his girlfriend told Ms. Corder that there were some problems brewing between the defendant and Mr. Custer. 1RP 121-22; 2RP 207.

On November 5, Mr. Custer was gone from home in the morning, and returned about 1:00 p.m. When he returned, his friend

Drew Eden, the defendant, Ms. Woerner, and another recent roommate of Mr. Custer's named Daniel Gist were at Mr. Custer's home. 1RP 122-23.

Mr. Custer noticed his expensive computer headphones were missing. Because Mr. Custer had previously noticed CDs, DVDs, and some "weed" missing, he asked the defendant if he could look in the fifth wheel trailer for his headphones. 1RP 124-5; 156-7.

The defendant, Mr. Custer, and Ms. Woerner went to the defendant's trailer while Mr. Eden stayed behind. 1RP 157-8.

The defendant initially let Mr. Custer look inside the trailer. The defendant stood by the door as Ms. Woerner sat on the bed. When Mr. Custer started to look around the defendant apparently changed his mind, because the defendant said "This is stupid. You're accusing me of stealing these head phones." Mr. Custer tried to explain that he was not accusing the defendant of such a thing, but the defendant started getting agitated. 1RP 125-27.

Mr. Custer was unarmed, sitting on a corner of the bed in the trailer, while an agitated and shouting defendant stood eight to ten feet away from him. 1RP 128-9; 160. Mr. Eden, who was still at Mr. Custer's home, about 10-20 feet away from the trailer, could

hear the defendant shouting in the trailer shouting at Mr. Custer. Mr. Eden could hear the defendant shouting swear words at Mr. Custer, as well as things like "this is not right. You're acting like the cops". 1RP 158.

Mr. Eden, unarmed, went to the defendant's trailer to investigate. He saw the defendant standing by the main entryway, facing Mr. Custer. Mr. Eden walked down a short hallway, even with the bathroom which is right next to the bedroom. The defendant was still shouting. Mr. Custer was calm the entire time. 1RP 159-61.

Neither Mr. Custer nor Mr. Eden threatened or touched the defendant. Between the front door and the bedroom was a cupboard. Out of this cupboard the defendant pulled a handkerchief-wrapped gun, and put it into his pocket. The defendant kept repeating that he believed Mr. Custer was "disrespecting" him by accusing the defendant of stealing. 1RP 161; 130.

The defendant got loud, and then calmed down, but he never let up on his angry tirade. Despite his anger, the defendant never told Mr. Custer to leave the trailer. The defendant cocked the gun while it was still in his pocket, then pulled it out and shot Mr.

Custer, hitting him first in the right arm while Mr. Custer sat on the bed. 1RP 131.

Mr. Custer looked down at his arm, then said to the defendant "You just shot me", hoping the defendant would realize what he had done. The defendant said nothing; he shot again, this time aiming lower and hitting Mr. Custer's right leg. 1RP 131-32.

Mr. Custer said "You're trying to kill me", and the defendant "kind of smiled". The defendant then shot Mr. Custer a third time, hitting him in his side as Mr. Custer scrambled to try to get out the window. The defendant aimed at Mr. Custer's head and shot a fourth time, but luckily missed. Mr. Custer thought the defendant was trying to kill him, and would succeed. 1RP 132-33; 141.

During the time he was shooting, the defendant yelled at Ms. Woerner to get out of the trailer, while she yelled at him to stop. Mr. Eden did not recall the defendant ever wanting Mr. Custer out of the trailer, and in fact was of the impression that he "definitely wanted [Mr. Custer] in the trailer." 1RP 164; 176.

Ms. Woerner left the bedroom, followed by Mr. Eden. The defendant shot Mr. Custer in the back as he fled the trailer. 1RP 134; 165.

As Mr. Custer came out of the trailer, he saw that the defendant was shooting at Mr. Eden, so he knocked the gun out of the defendant's hand, and then fell on the ground. The defendant picked up his gun and ran, while Mr. Eden and Mr. Custer ran the other way. 1RP 135.

After escaping, Mr. Custer went to his home, collected some of his expensive equipment, and then went to a friend's house about 10-12 minutes away. He did this because he had no insurance, his friend's mother was a nurse, and Mr. Custer wanted to find out how badly he was injured. 1RP 135-6.

Mr. Eden flagged down a car driven by Sarah Bryant. He told her he needed to go to the hospital because he had just been shot. Ms. Bryant complied with his request. 1RP 117; 167.

Police responded to the scene. They asked Mr. Eden to give a statement while he was on the Emergency Room table, on pain medication. Mr. Eden did not want to give a statement in that condition. Given Mr. Eden's condition, this was not an unusual situation, in the experience of at least one police detective. 1RP 104; 166-67.

Ms. Corder, the landlord, was gone the morning of November 5, and returned home after the shooting. She saw the

defendant. He told her that Mr. Custer had been out all night with a girl, that he had been shot, and that he did not know where he had been shot or how serious it was. 2RP 203.

Sgt. Suzanna Johnston of the Snohomish County Sheriff's Office went inside the defendant's trailer initially, and detected the distinct odor of burnt marijuana. Police searched the defendant's trailer and found five fired shell casings. All five casings were later forensically identified as having been fired from the Beretta .22 caliber semiautomatic pistol police found in the shed on the Corder property. 1 RP 23; 2 RP 68; 216.

On the bed in the defendant's trailer police saw what they thought was a blood stain. Later police went back and saw a hole in the wall just above the headboard of the bed which was a possible gunshot hole. During the first search of the trailer police found a punched drivers' license belonging to Jeremy Custer. They also found a Radio Shack name tag bearing the name "Jeremy". 2RP 72; 75-77.

Mr. Custer had never left any personal property in the trailer before the defendant moved in. Police found blood on a fence just across and to the east of the doorway of the trailer. 1RP 138; 2RP 77.

During a later search of the property on which the defendant lived, police found a Beretta .22 caliber handgun in a shed connected to a two-car garage. The gun was stuck in some pallets and two-by-four boards. The gun was forensically linked to the five fired shell casings found in the defendant's trailer. 2RP 84; 88; 216.

The defendant was charged with First Degree Assault, and was held in custody pending trial. CP 106-107; 2RP 183, 252.

While the defendant was in custody at the Snohomish County Jail, he approached an inmate named Jeremy Sheridan. The defendant told Mr. Sheridan that he had shot a couple of people and wanted them hurt or threatened so they would change their testimony, and that later he wanted them to disappear. During their conversations, the defendant wrote and gave to Mr. Sheridan several pages of notes giving contact information for the witnesses, and stating word for word how he wanted the statements changed. 2RP 184; 186.

Detective Kelly Willoth met with Mr. Sheridan at the jail. Mr. Sheridan told Detective Willoth about the defendant's attempt to have him tamper with witnesses, and gave her the notes the defendant had given him. Mr. Sheridan did not seek any reduction

in charges or jail time, nor any consideration from the State, in exchange for this information. 2RP 187; 193-4.

Mr. Sheridan turned over the information because although he was a “doper and a thief”, he believed it was wrong to kill people. 2RP 185; 187.

### **1. The Defense Case.**

At trial, the defendant presented a self-defense claim. In support of his claim the defendant testified that he got to know Jeremy Custer when Mr. Custer asked him to come to his home to help start a record label. The defendant saw people using drugs, but did not call the police because he was homeless, needed the money, and “in my line of work, that’s normal.” The defendant saw Mr. Custer and Mr. Eden (hereinafter “the victims”) with guns, but by that time he was “almost stuck there.” 2RP 222-23; 263-65.

Weeks before the shooting, around October, 2003, the defendant started getting “very scared” because of the “pounds and pounds and pounds of different drugs” he saw at Mr. Custer’s home, as well as conversation where he overheard Mr. Custer and others discussing how they robbed drug dealers, killed people and buried them underneath farms. 2RP 233-35.

The defendant testified that on November 1 he saw an armed confrontation at Mr. Custer's home between the victims and a group of others, over a drug debt. 2RP 237-8.

The defendant testified that on November 5 he saw the victims. He claimed Mr. Custer yelled at him for telling their landlord that Mr. Custer was dealing drugs. Mr. Custer was also suspicious about drugs missing from his home. 2RP 241-42.

The defendant claimed that he was frightened when the victims threatened to go to his trailer and rape his girlfriend "in her butt", make the defendant watch it, then kill the defendant and his girlfriend and bury them on a farm. 2RP 242-3.

The defendant testified that he ran back to his trailer, followed by the victims, and that he tried unsuccessfully to shut the door on them as his girlfriend sat on the bed screaming. The defendant said he kept telling his girlfriend to get out of the trailer. 2RP 243-44.

The defendant claimed that Mr. Custer and Mr. Eden pulled guns out as they came into the trailer, so he grabbed a .22 caliber firearm and shot only when Mr. Custer came at him and Mr. Eden headed toward his girlfriend. The defendant claimed he just shot

blindly and did not intend to shoot Mr. Eden in the back. 2RP 244-46; 276.

The defendant left the trailer after throwing the gun behind a barrel at the barn on the property, went to a friend's home, then left for California. 2RP 249; 251.

The defendant testified that while he was in custody in the Snohomish County Jail, Jeremy Sheridan approached him. The defendant claimed that due to overmedication he was oblivious to his surroundings. The defendant recalled that Mr. Sheridan conveyed that the victims felt bad for wrongfully putting the defendant in jail, and hatched a plan to get him out of jail. The plan involved having the defendant write out some notes to tell the victims what to say 2RP 252-57.

## **2. Sentencing<sup>1</sup>**

At sentencing, the defense argued that the court was prohibited from imposing any sentence enhancement at all, and was instead required to sentence the defendant within the standard range. The prosecutor responded that it was clearly a technical

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<sup>1</sup> On December 28, 2004, defendant's trial counsel was permitted to withdraw. 2 CP \_\_\_ (sub 98 withdrawal order).

deficiency in the verdict forms, as the jury was properly instructed on the law. 3RP 9-10.

The Court ruled that the only evidence of any type of weapon at trial was that of the firearm. The Court found that the jury was “well informed and unanimous in their understanding of what the special verdict called for; and it was the only evidence upon which they could have relied.” 3RP 11.

The defense argued that because the jury found that the defendant was armed with a “deadly weapon”, the court was restricted to imposing a 24 month enhancement pursuant to RCW 9.94A.533(4). The court ruled against the defense, citing Instruction 10 as being a correct instruction to the jury that the term “deadly weapon” includes any firearm. The court imposed 60 month sentence enhancements on each conviction. CP 32-35; 3RP 11-12; 25-26.

### **III. ARGUMENT**

#### **A. THE DEFENDANT FAILED TO PRESERVE FOR REVIEW THE ISSUE OF ALLEGED PROSECUTORIAL MISCONDUCT IN CROSS-EXAMINATION OF THE DEFENDANT**

When a defendant fails to object at trial, the issue is not preserved for appeal unless it is a “manifest error affecting a constitutional right.” RAP 2.5(1)(3). The defendant must identify a

constitutional error, then show in the context of the trial, how that error actually affected the rights of the defendant. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). A “manifest” error is “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Unless there is an affirmative showing of actual prejudice, the error is not manifest, and thus not reviewable. State v. Sanchez, 122 Wn. App. 579, 591, 94 P.3d 384 (2004).

When a defendant chooses to testify at trial, he is subject to cross-examination regarding any “material matters within the scope of his direct testimony.” State v. Olson, 30 Wn. App. 298, 301, 633 P.2d 927 (1981).

The defendant testified that when Mr. Eden threatened to rape his girlfriend and kill both of them “it totally freaked me out.” The defendant testified that the victims came after him with guns, and that he shot the victims only because he feared for his life. After the defendant shot the victims he ran to the home of his friend Donny Poole. 2RP 242-46; 251; 273.

The Prosecutor cross-examined the defendant regarding numerous facts and inconsistencies in the defendant's testimony.

At issue is the following exchange:

Q. (By Mr. Adcock) Did you tell Donny Poole that you just freaked out, got weirded out, and shot them?

A. I told Donny Poole that.

Q. Did you?

A. No, sir. I did not. I didn't tell Donny Poole anything about my case.

The defendant did not object to these questions. 2RP 279-80.

The Prosecutor did not press the issue further, nor did he re-visit this area during closing argument.

The defendant claimed he was "freaked out" by the victims' actions, and that he was afraid for his life when he shot the victims. It is reasonable to assume that the defendant, having lived through the disturbing scenario he recounted in his testimony, would have explained to his friend why he suddenly showed up on his doorstep in an excited state. The fact that he did not suggests, as the Prosecutor argued during closing, that the defendant's story was not credible. The question does not insinuate that the defendant confessed to his friend.

The defendant relies on State v. Babich, 68 Wn. App. 438, 842 P.2d 1053, review denied, 121 Wn.2d 1015 (1993) and State v.

Yoakum, 37 Wn.2d 137, 143-44, 222 P.2d 181 (1950). These cases are different from the present case because the prosecutors in each of those cases referred to an out of court recorded statement as if it were made, then did not produce the statement to prove that it was in fact made, but instead relied on the un-produced statement as evidence of the defendant's guilt.

Unlike the prosecutors in Babich and Yoakum, nothing in the record suggests that the Prosecutor referred to any document from which the jury could infer that the statement had been made and recorded. There was no violation of the defendant's right to confrontation because the prosecutor did not suggest by his question that there was any evidence that showed the defendant was guilty without producing the evidence.

The prosecutor did not refer to Danny Poole during closing argument, and did not claim that the defendant had confessed to anyone other than Jeremy Sheridan. The defendant has failed to show that there is any manifest error affecting a constitutional right. When viewed in its proper context, the Prosecutor's questioning was proper impeachment, not an insinuation that the defendant confessed in some tangible form. The defendant has made no showing of actual prejudice as a result of the questioning.

Even if the impeachment was error, it was harmless. Error is harmless unless the improper cross-examination was sufficient to affect the outcome of the trial. State v. Smith, 67 Wash. App. 838, 846, 841 P.2d 76 (1992). An error is harmless beyond a reasonable doubt where there is no reasonable probability that the outcome of the trial would have been different had the error not occurred. State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

In weighing the effect of any error, the court looks to factors such as “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” State v. Powell, 126 Wn.2d at 267), quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986).

Here, the jury would have returned a guilty verdict even without the impeachment in question. The question the Prosecutor asked did not clearly indicate a scenario contrary to self-defense, since being “freaked out” and “weirded out” can still be consistent with a reasonable belief which supports self defense.

The jury heard testimony from two eyewitnesses to the crimes. Their testimony was corroborated by the physical evidence in the case. The jury heard incriminating testimony from a witness who was incarcerated with the defendant, and who sought nothing in return for his testimony. That witness received detailed information from the defendant about getting witnesses to change their stories. This testimony was far more detailed and prominent to the jury than the brief questioning at issue.

**B. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT**

After the State's rebuttal closing, the defense moved for a mistrial. That motion was denied by the trial court. On appeal the defendant assigns as error two issues: 1) the Prosecutor's comment that he "wouldn't pay any attention" to the defendant's story; and 2) the Prosecutor's comment that the defendant had other options than to shoot the victims. A third ground is now raised on appeal, although the defendant did not object at trial or make it part of his mistrial motion: 3) the Prosecutor vouched for the credibility of the victims.

**1. The Court Did Not Abuse Its Discretion When It Denied The Defendant's Motion For Mistrial Based On The Prosecutor's Comment About The Defendant's Version Of Events.**

A trial court's denial of a motion for mistrial is reviewed under the abuse of discretion standard, and a reviewing court will find abuse of discretion only when "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)(citation omitted). There must be a "substantial likelihood" that the error prompting the mistrial motion affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). A trial court should grant a mistrial only when "the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be fairly tried." Rodriguez, 146 Wn. App. at 270, quoting State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

The defendant bears the burden of proof that the prosecutor's comments were both improper and prejudicial. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). A

prosecutor's alleged improper remark is reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Brown, 132 Wn.2d at 561

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express those inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94, 804 P.2d 577 (1991), cert denied, 516 U.S. 1160, 116 S.Ct. 1046, 134 L.#d.2d 192 (1996). A prosecutor may comment on the credibility of a witness as long as the remarks are based on the evidence and not on the prosecutor's personal opinion. State v. Johnson, 80 Wn. App. 337, 339, 908 P.2d 900 (1996), overruling on other grounds recognized in State v. Miller, 110 Wn. App. 283, 40 P.3d 692 (2002). A prosecutor arguing credibility commits misconduct only when it is "clear and unmistakable" that he is expressing a personal opinion rather than arguing inferences from the evidence. State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, (1983)<sup>2</sup>, (prosecutor in closing said the state's witnesses "testified honestly" and the "gist of what they said has been the truth." Held not

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<sup>2</sup> State v. Davis, 35 Wn. App. 506, 667 P.2d 1117 (1983), rejected the analysis in Papadopoulos on a point not pertinent here, as recognized in State v. Brown, 36 Wn. App. 549, 556, 676 P.2d 525 (1984).

improper), State v. Swan, 114 Wn.2d 613, 664, 790 P.2d 610 (1990).

As stated in Papadopoulos:

It 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 the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence.

34 Wn. App. at 400.

The jury was instructed that they were the sole judges of the credibility of the witnesses, and that they could take into account the demeanor of the witnesses who testified. CP 56.

During closing argument the Prosecutor underscored the jury's role in determining the credibility of witnesses:

The instruction says you and you alone determine the credibility of the witnesses in the case. The judge won't do it for you, I can't do it for you. You have to decide who is telling the truth and who isn't. That's the main function. The other corollary to that is, you can use your common sense. ...And if you do that, you'll have to conclude that the defendant's version of those events is not only preposterous, it's laughable.

(emphasis added). 2RP 295.

During rebuttal closing, the Prosecutor argued that the defendant's self defense claim was not credible. At one point the Prosecutor said:

The story about they were going to rape his girlfriend. Do you think those two men were going to do that? You saw them, you heard them. Do you think that they are big-time drug lords intent on wiping out people they didn't like? Again, ludicrous. Ridiculous. I wouldn't pay any attention to it based on the testimony you have heard here.

The defense did not object to this argument. 2RP 296. The defense later moved for a mistrial based in part on this argument. The Court denied the motion. 2RP 316-17.

Use of the phrase "I think" does not necessarily convey a personal opinion if the statements contain material supported by the evidence, and are not of such a nature that any error could have been obviated by a curative instruction. State v. Hoffman, 116 Wn.2d 51, 94, 804 P.2d 577 (1991), cert. denied, 516 U.S. 1160, 116 S.Ct. 1046, 134 L.Ed.2d 192 (1996).

The Prosecutor here did not convey his personal belief about the credibility of the defendant's story. Instead, he reminded the jury that they were the sole judges of the credibility of the witnesses, and directed the jury to view the defendant's story against the evidence in the case.

The defendant argues that the phrase “based on the testimony” has no meaning when analyzing whether a prosecutor is stating his personal belief, citing State v. Martin, 41 Wn. App. 133, 703 P.2d 309, review denied, 104 Wn.2d 1016 (1985). A footnote in that opinion cites to a federal case for the proposition that egregious errors of prosecutorial misconduct cannot be salvaged by tacking on the empty phrase “based on the evidence.” State v. Martin, 41 Wn. App. at 140, fn 3, citing State v. Bess, 593 F.2d 749, 754 (6<sup>th</sup> Cir. 1979). In Bess, the prosecutor told the jury the defendants would not have been charged if the United States did not believe they were guilty, and later stated that he personally believed the defendant was guilty beyond a reasonable doubt.

No such egregious error was made by the Prosecutor here. The Prosecutor’s remarks were consistently aimed at the fact that the defendant’s testimony was not credible when compared to the evidence in the case. The comment did not approach a statement of personal opinion.

The defendant has failed to show that the Prosecutor’s comments were either improper or prejudicial. Viewed in the context of the evidence at trial, instructions to the jury, and the Prosecutor’s entire closing argument, the phrase “I think” was not a

clear expression of the Prosecutor's personal belief about the credibility of the defendant, but a fleeting comment framing the issue in the context of the evidence in the case.

The trial court did not abuse its discretion when it denied the defendant's motion for mistrial.

**2. The Court Did Not Abuse Its Discretion When It Denied the Defendant's Motion For Mistrial Based on the Prosecutor's Response to The Defense Argument That The Defendant Had "No Other Options" Than To Shoot The Victims.**

A prosecutor's allegedly improper remarks are not grounds for reversal if they were made in response to the defendant's argument, unless they are not a pertinent reply or are so prejudicial that a curative instruction will not be effective. State v. Graham, 59 Wn. App. 418, 428-29, 798 P.2d 314 (1990), State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). "The prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

During closing argument, the defense portrayed the victims as dangerous armed drug users. The defense claimed that the defendant acted reasonably in pulling out a gun and shooting the

victims, and that the defendant “did the only thing he could think to do under the circumstances”. 2RP 303-4.

In response to this argument, the Prosecutor during rebuttal argued that, absent some reasonable, legal justification, the mere fact that the defendant was in his own home did not allow the defendant to shoot Mr. Custer and Mr. Eden. The prosecutor critiqued the defendant’s self-defense version, indicating that there was no evidence to substantiate it, and that the jury could decide for themselves whether Mr. Custer and Mr. Eden appeared like the type of people the defendant claimed they were and whether the defendant was in reasonable fear of injury. 2RP 309-11.

The Prosecutor during rebuttal argument said:

The only thing he could think to do. I like that. That’s what Mr. Stephens said. If you recall, the defendant was standing right next to the door, looking into the bedroom, when he pulls out the pistol and starts to blast. The door is right there. If he is so threatened, all he has to do is leave. Call the cops.

2RP 311.

Defense counsel objected. The court overruled the objection and indicated “[I]t is argument. The jurors will make their own determination.” The court denied a limiting instruction. 2RP 311-12.

The Prosecutor then continued:

He didn't have to pull out a gun. The bottom line is, he didn't have to because he wasn't threatened. There were options, in other words.

Just because the defendant believes this, it doesn't mean it's reasonable. Mr. Stephens said it was the only thing he could think of to do. That may be the case. Maybe that was the only thing he could think of to do. But the problem is, based on the circumstances, that was not a reasonable thing to do, that was not a reasonable belief that he was about to get injured. Again, given the facts, he was not entitled to use any force at all.

2RP 312 (emphasis added).

At the close of the case the defense moved for a mistrial.

2RP 316-17. The Trial Court denied the motion.

The Prosecutor did not argue that the defendant had a duty to retreat; he did respond to the defendant's claim that he acted in self defense, and did argue that the circumstances were not such that self defense was warranted. It was in this context that the Prosecutor made the statement regarding having other options. The Prosecutor argued that the defendant had other options because he was not threatened, not because he had a duty to retreat when threatened.

The Prosecutor's argument was consistent with the "no duty to retreat" instruction, Number 15, and with Instruction Number 17 regarding the lawful use of force. CP 71; 73. The Prosecutor's

argument questioned the defendant's claim that he had "reasonable grounds for believing" that he was being attacked. The Prosecutor did not argue that the defendant's belief had to be anything other than reasonable, or that the force used could only be a certain type of force.

When viewed in the context of the evidence in the case, the instructions to the jury, and the entire argument, the Prosecutor's comments were made in response to the defendant's closing argument and were properly critical of the defendant's claim of self defense. The defense cannot show that there is a "substantial likelihood" that this argument affected the jury's verdict, or that the defendant was so prejudiced that nothing short of a new trial can insure the defendant received a fair trial. Even if the remarks were improper, they were invited and are not so prejudicial that a curative instruction would not have alleviated any prejudice. The court did not abuse its discretion when it denied the defendant's motion for mistrial.

**3. The Defendant Did Not Object To The Prosecutor's Comments During Closing Argument Regarding The Credibility Of The Victims. The Comments Were Not Error, And Were Not So Flagrant Or Ill Intentioned That They Could Not Have Been Neutralized By A Curative Instruction.**

Failure to object to a remark constitutes a waiver, unless the comment is so flagrant or ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. State v. Dunaway, 109 Wn.2d 207, 221, 743 P.2d 1237 (1987).

The defense alleges that the Prosecutor committed misconduct when he addressed the jury about the credibility of the victims Mr. Eden and Mr. Custer. The defendant did not object to the Prosecutor's comments, and it was not one of the bases for the defendant's motion for mistrial.

The jury was instructed that they were the sole judges of the credibility of the witnesses, and that they could consider when they determined credibility they could consider a witness's "memory and manner while testifying." Instruction Number 1, CP 56.

The Prosecutor emphasized the jury's role as the sole judges of the credibility of the witnesses, then went on to explain why the State's witnesses were more credible than the defense witnesses. 2RP 295, 300-301.

The Prosecutor repeatedly asked the jury what they thought about the credibility of the two men they saw testify:

You saw [Mr. Custer and Mr. Eden's] demeanor on the stand. Do they look like murderous thugs? Did they sound like murderous thugs? Did they act like dealers of pounds and pounds and pounds of drugs? No.

2RP 294

Jeremy Custer and Drew Eden are fair and impartial normal young men in this day and age. They might smoke a little pot. They are into music. But they are basically good kids. I think you probably would be able to tell that from their testimony.

2RP 301.

[Ruth's] word is he saw them armed. They both testified that they don't own firearms. They don't look like guys that pack heat to you, do they?

2RP 311.

A prosecutor is allowed to draw reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d at 95. In the context of the entire argument and the evidence in the case, the Prosecutor did nothing other than ask the jury to determine the credibility of witnesses, and draw from the evidence reasonable inferences regarding the credibility of the victims. The defendant has not shown that the comments were improper, nor has he shown that there is a substantial likelihood that the comments affected the verdict.

Even if error, the comments were not so flagrant or ill intentioned that a curative instruction could not have obviated any alleged error. In fact, the defendant did not object to the comments or seek a curative instruction, which “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).

The defense relies on State v. Horton, 116 Wn. App. 909, 68 P.3d 1145 (2003), for the proposition that a prosecutor may not personally vouch for the credibility of a witness. The facts in Horton are different from this case.

The prosecutor in Horton told the jury that he personally believed the defendant lied on the stand. The Court found ineffective assistance of counsel when the defense attorney failed to object to this argument. Horton, 116 Wn. App. at 921.

The Prosecutor in the present case did not accuse the defendant of lying, nor did he state that the victims testified truthfully. The Prosecutor properly asked the jury to determine the credibility of the witnesses, then pointed to specific facts which were presented in evidence, and which bore on the defendant’s and witnesses’ credibility.

The defendant has not shown that the Prosecutor's comments were improper or prejudicial. The comments, even if erroneous, were not so flagrant or ill intentioned that a curative instruction could not have cured any alleged impropriety.

**C. THE DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION WAS NOT VIOLATED WHEN THE PROSECUTOR IMPEACHED THE DEFENDANT ABOUT HIS PRE-CRIME FAILURE TO REPORT ALLEGED CRIMINAL ACTIVITY BY THE VICTIMS.**

It is improper for the State to use a defendant's pre-arrest silence "to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). In Easter the defendant, having committed a crime, was questioned at the scene of an accident, and was later charged with vehicular assault. The defendant did not testify at trial<sup>3</sup>. The state commented on the defendant's silence at the scene, and the court found this violated the defendant's right to silence.

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<sup>3</sup> Even in pre-arrest silence cases, where the defendant elects to testify, the State may use the defendant's pre-arrest silence to impeach the defendant's credibility without improperly commenting on the exercise of the defendant's right to remain silent: Easter, 130 Wn.2d at 237; State v. Watkins, 53 Wn. App. 264, 273, 766 P.2d 484 (1989).

The court in Easter examined the right against self-incrimination, and indicated that it was “intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt. Easter, 130 Wn.2d at 236, citing Doe v. United States, 487 U.S. 201, 210-12, 108 S.Ct. 2341, 2347-49, 101 L.Ed.2d 184 1988).

The reason behind the rule is sound:

The Fifth Amendment protects a person from compelled self-incrimination at all times, not just upon arrest or during a custodial interrogation. Any time an individual is questioned by the police, that individual is compelled to do one of two things – either speak or remain silent. If both a person’s prearrest speech and silence may be used against that person, as the state suggests, that person has no choice that will prevent self-incrimination. This is a veritable ‘Catch-22.’

State v. Easter, 130 Wn.2d at 240, citing State v. Fencil, 109 Wis.2d 224, 237, 325 N.W.2d 703, 711 (1982).

The defendant cites no cases which hold that it is improper to question a defendant about silence which occurs before he commits any crime. All the cases cited by the defendant involve situations where a crime has been committed by the defendant, and the State seeks to use prearrest silence as proof that the defendant is guilty of that crime. See, e.g., State v. Easter, 130 Wn.2d 228, State v. Saavedra, 128 Wn. App. 708, 116 P.3d 1076

(2005), State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979), State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996), State v. Carnahan, 130 Wn. App. 159, 122 P.3d 187 (2005), State v. Heller, 58 Wn. App. 414, 793 P.2d 461 (1990).

Moreover, the silence the defendant was questioned about at trial had to do with the defendant's failure to report crimes committed by other people, not himself. The defendant does not have a fifth amendment right to remain silent in this context.

A defendant who testifies at trial is subject to cross-examination, just as any other witness, and may be cross-examined upon material matters within the scope of his direct testimony. State v. Olson, 30 Wn. App. 298, 300-01, 633 P.2d 927 (1981). Impeachment "follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." Jenkins v. Anderson, 447 U.S. 231, 238, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).

The Defendant testified that when he first came to Mr. Custer's home, he was concerned because there were a number of people there using drugs. 2RP 223-28. On cross-examination the Prosecutor questioned this claim, asking the defendant why he did not call police if he was in the presence of a "weird, crazy"

atmosphere, and illegal activity. There was no objection to this question. The defendant countered that the use of drugs was part of his musician lifestyle. 2RP 263.

During closing argument the Prosecutor questioned that if it was true that the defendant had seen large quantities of drugs at the victims' home, and if he had been so concerned about hearing the victims talk about murdering people, then why did he not go to the police? The Prosecutor answered his own question: "Because none of that is true." 2RP 294.

This is not a case where the prosecutor used post-crime but pre-arrest silence to infer that the defendant was guilty. The prosecutor's questioning of the defendant was proper impeachment of the defendant's claim he saw illegal activity on the part of the victims. The prosecutor pointed out the obvious question, which is, if the defendant was so upset by what he saw, why did he not call the police. The question impeached the defendant's direct testimony regarding the "reasonableness" of his belief that he needed to shoot the victims.

Even if the prosecutor's questions and argument were error, they were not flagrant or ill-intentioned, and a curative instruction would have obviated any perceived error.

**D. THE DEFENDANT DID NOT SUFFER PREJUDICE WHEN HIS TRIAL ATTORNEY PROPOSED THE ERRONEOUS SELF-DEFENSE INSTRUCTION.**

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's conduct was deficient, and that it resulted in prejudice. State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986), (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2ed 674 (1984), cert. denied, 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986)). The defense must establish both elements to prevail. In re Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

The general instruction on self-defense, proposed by the defense, and given by the court as Instruction No. 17, indicated that

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured or by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person or a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

CP 73; 82 (emphasis added).

The defense requested, and the Court gave, the following instruction:

A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

Instruction No. 16; CP 72 (emphasis added); RP2 284; CP 83.

While true that the “act on appearances” instruction, No. 16 should not use the great bodily harm language, the error will be deemed harmless where the defendant claims that he was faced with threat of gunshot at close range, because it satisfies both definitions. State v. Freeburg, 105 Wn. App. 492, 505, 20 P.3d 984 (2001).

The facts in State v. Freeburg, are similar to the facts here. In Freeburg, the defendant testified that he was threatened with a gun at close range, and thus took the gun from the victim and shot him. The trial court instructed the jury with the erroneous “act on appearances” instruction. The defendant claimed ineffective assistance of counsel because his attorney failed to object to the

erroneous instruction. Although the court found error, it found that the error was harmless.

Specifically, the court found that the defendant's claim that he was faced with deadly force met both definitions given to the jury, and there was "no likelihood whatsoever" that the use of the phrase "great bodily harm" affected the outcome of the trial, Freeburg, 105 Wn. App. at 505.

The defendant claimed that Mr. Eden and Mr. Custer threatened to rape his girlfriend and make him watch, then kill both of them and bury them on a farm. 2RP 242. The defendant testified that Mr. Eden and Mr. Custer barged into his trailer with guns. He said he thought he was going to die. 2RP 245. He claimed that he only started shooting when Mr. Custer "went for his gun". 2RP 246. The defendant claimed that these two men had pulled guns in his presence before, and had talked about murdering people and burying them. 2RP 235 .

This is identical to the situation in Freeburg, where the defendant claimed that the victim pointed a gun at him at close range, so the defendant grabbed it away from the victim and shot him.

The defendant claimed he was about to be shot in the trailer by two armed men. This “threat” satisfies both definitions given in the instructions. There is no likelihood that the outcome of the trial was affected by the “act on appearances” instruction. The error was harmless.

This case is factually different from State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004). In Rodriguez, the defendant was faced not with deadly force, but with a victim who threatened to “knock his teeth out”, then shoved him onto some steps. The court found ineffective assistance when the defense proposed the erroneous “act on appearances” instruction, because the jury could have easily found that the defendant had to believe he was in fear of death or at least permanent injury to prevail on his self-defense claim.

The only threat the defendant identified was a threat based on deadly force. This claim met both definitions given in the instructions. There is no likelihood that the trial was affected by the “act on appearances” instruction.

**E. CUMULATIVE ERROR DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL.**

An accumulation of a number of non-reversible errors may deny a defendant a fair trial if the combined effect compels it. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It does not apply, however, where there are few errors which have little or no effect on the outcome of the trial. State v. Grieff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). There were no errors at trial, as indicated above, that were harmful. The defendant's allegations of trial error fail individually, so there can be no cumulative error.

**F. THE IMPOSITION OF A 60 MONTH SENTENCE ENHANCEMENT WAS PROPER. THE JURY WAS INSTRUCTED THAT FOR THE SPECIAL VERDICT THEY HAD TO FIND THAT THE DEFENDANT WAS ARMED WITH A FIREARM. THE ERRONEOUS INCLUSION OF THE WORDS "DEADLY WEAPON" ON THE SPECIAL VERDICT FORM WAS ONE OF FORM OVER SUBSTANCE.**

A jury is presumed to follow the instructions, and verdicts "incorporate the instructions on which they are grounded, and reflect the facts required to be found as a basis for decision." State v. Pharr, \_\_\_ Wn. App. \_\_\_, 126 P.3d 66, 69 (Division I 2006)

Where the instructions properly inform the jury that to find a special verdict they must find that the defendant was armed with a firearm, technical deficiencies in the special verdict form will not

obviate the finding. Pharr, at 69. Pharr was issued after the filing of the Appellant's Brief and is on point.

In Pharr, the trial court instructed the jury that for the special verdict they had to find that the defendant was armed with a firearm. The special verdict form indicated "deadly weapon", so when the jury returned with a finding of "yes" on the special verdict form, the defense argued that the imposition of a five year firearms enhancement at sentencing violated his right to jury trial under the Sixth Amendment.

In the present case, the defendant was charged with two counts of First Degree Assault with a firearm allegation on each count. CP 85. The "to convict" instructions, numbers 11 and 13, instructed the jury on finding whether the defendant was armed with a firearm for purposes of finding him guilty of first degree assault. CP 67, 69. Instruction numbers 12 and 14 instructed the jury that the State had to prove that the defendant was armed with a firearm before they could find the special verdict. CP 68, 70. The Court defined "deadly weapon" as including "any firearm, whether loaded or not." Instruction 10; CP 66.

During closing argument, the prosecutor addressed the firearm allegation as follows:

There is a special verdict in this case, which simply means you must agree that a firearm was used to commit this crime. Obviously, that's the case. That was the method he used to commit the crime.

2RP 291 (emphasis added).

The special verdict form included a technical deficiency in that it referred to a deadly weapon, not a firearm. The defense did not object to the proposed special verdict form. 2 R2 284-85. The jury answered "yes" on both forms. CP 49 and 51. As in Pharr, the jury could not have found that the defendant was armed with anything other than a firearm.

The defendant claims that this case is controlled by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), cert. granted, 126 S.Ct. 478 (2005). Pharr distinguished Recuenco case on its facts and held that the difference in the instructions given to the jury compelled a result different from that in Recuenco. Pharr, 126 P.3d at 69. The facts of Recuenco are likewise different than the present case.

In Recuenco, the charge included a deadly weapon allegation. The instructions directed the jury to find the defendant was armed with a deadly weapon, and when the defense suggested that the definition of firearm should have been

submitted to the jury to explain the deadly weapon instruction, the prosecutor objected and said the firearm instruction was not appropriate. The jury returned a special verdict that the defendant was armed with a deadly weapon. Recuenco, 154 Wn.2d at 160.

In this case, the defendant was charged with firearm allegations, the jury was instructed that for the special verdict they had to find the defendant was armed with a firearm, and the prosecutor argued that the defendant was armed with a firearm. On this record, it cannot be disputed that the jury had to find the defendant armed with a firearm in order to find the special verdict. Under the facts of this case and given their instructions, they could not have found that he was armed with any other type of deadly weapon.

The verdict reflects a firearm finding, and there was no violation of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.E.2d 403 (2004) or Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Pharr, 126 P.3d at 69.

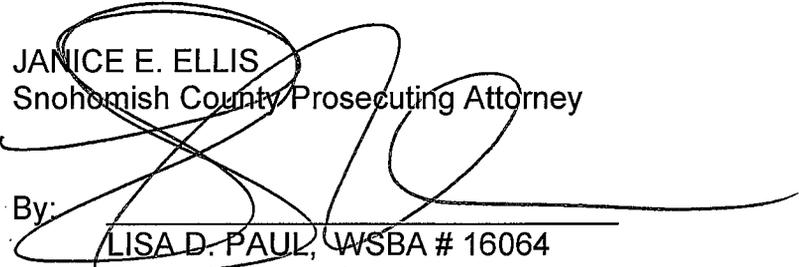
**IV. CONCLUSION**

For the foregoing reasons, the defendant's appeal should be denied.

Respectfully submitted on February 28, 2006.

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By:

  
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February 28, 2006

Richard D. Johnson, Court Administrator/Clerk  
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One Union Square  
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Seattle, WA 98101-4170

**Re: STATE V. MATTHEW R. RUTH  
COURT OF APPEALS NO. 56318-1-1**

Dear Mr. Johnson:

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 STATE OF WASHINGTON  
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The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

LISA D. PAUL  
Deputy Prosecuting Attorney

cc: Nielsen, Broman & Koch  
Appellant's attorney

On this day I mailed a properly stamped envelope addressed to the attorney for the defendant that contained a copy of this document.  
I certify under penalty of perjury under the laws of the State of Washington that this is true.  
Signed at the Snohomish County Prosecutor's Office  
this 28 day of Feb, 20 06

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

THE STATE OF WASHINGTON,

Respondent,

v.

MATTHEW R. RUTH,

Appellant.

No. 56318-1-I

AFFIDAVIT OF MAILING

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2006 MAR - 1 AM 10:58

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 28 day of February, 2006, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH  
1908 EAST MADISON STREET  
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 28 day of February, 2006.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal dashed line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit