

NO. 82736-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN L. MONDAY, JR.,

Petitioner.

2009 OCT -1 AM 7:58
STATE OF WASHINGTON
CLERK
b/h

SUPPLEMENTAL BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIAN M. McDONALD
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	5
1. MONDAY HAS FAILED TO SHOW THAT HE IS ENTITLED TO A NEW TRIAL BASED UPON PROSECUTORIAL MISCONDUCT	5
a. Opening Statement.....	7
b. Monday's Claim That The Prosecutor Engaged In Race-Baiting	9
c. The Prosecutor's Introductory Remarks In Closing Argument.....	14
d. Cumulative Error Does Not Justify Reversal.....	18
2. THE TRIAL COURT PROPERLY IMPOSED THE FIREARM ENHANCEMENTS	19
D. <u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Neder v. United States, 527 U.S. 1,
119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)..... 22

Washington State:

City of Seattle v. Patu, 147 Wn.2d 717,
58 P.3d 273 (2002)..... 20

State v. Bobic, 140 Wn.2d 250,
996 P.2d 610 (2000)..... 21

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997)..... 6, 7, 21

State v. Brown, 147 Wn.2d 330,
58 P.3d 889 (2002)..... 22

State v. Henderson, 114 Wn.2d 867,
792 P.2d 514 (1990)..... 20

State v. Laico, 97 Wn. App. 759,
987 P.2d 638 (1999)..... 21

State v. Lord, 117 Wn.2d 829,
822 P.2d 177 (1991)..... 21

State v. Lorenz, 152 Wn.2d 22,
93 P.3d 133 (2004)..... 21

State v. Marko, 107 Wn. App. 215,
27 P.3d 228 (2001)..... 21

State v. McKenzie, 157 Wn.2d 44,
134 P.3d 221 (2006)..... 6, 7, 8

<u>State v. Monday</u> , 147 Wn. App. 1049, 2008 WL 5330824 (2008).....	5, 10
<u>State v. Moses</u> , 145 Wn.2d 370, 37 P.3d 1216 (2002).....	21
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	21
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	6, 8
<u>State v. Strohm</u> , 75 Wn. App. 301, 879 P.2d 962 (1994).....	21
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	6, 16
<u>State v. Weber</u> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	18
<u>State v. Williams-Walker</u> , No. 78611-9	22
<u>State v. Wilson</u> , 71 Wn.2d 895, 431 P.2d 221 (1967).....	8

Statutes

Washington State:

RCW 9.41.010	19, 20, 21
RCW 9.94A.533.....	21

Rules and Regulations

Washington State:

RAP 2.5.....	21
--------------	----

Other Authorities

Bob Herbert, *A Triumph of Felons and Failure*,
N.Y. Times, August 24, 2006 11

In Eight Colors: Hush Your Mouth,
N.Y. Times, September 25, 2005..... 11

Stop Snitchin', 60 Minutes
(CBS television broadcast on April 22, 2007)..... 11

A. ISSUES PRESENTED

1. Whether the defendant has failed to show that prosecutorial misconduct justifies reversal of his convictions.

2. Whether the trial court properly imposed the firearm enhancements.

B. STATEMENT OF THE CASE

The facts of the crime are set forth in detail in the Brief of Respondent. In summary, on April 22, 2006, in the Pioneer Square area of Seattle, Antonio Saunders approached Francisco Green, accused him of telling lies, and attacked him. 15RP 37-42; 16RP 175-78; 19RP 39-40.¹ As the two men fought, defendant Kevin Monday, a friend of Saunders, intervened and began fighting with Green. 15RP 63-64; 19RP 39-46. Monday pulled out a gun and fired multiple shots, hitting Green four times in the back and side. 18RP 25-26; 19RP 52-55; 20RP 30-36. The shots hit two other men, Christopher Green (no relation to Francisco Green) and Michael Gradney, who were in a car nearby. 14RP 86-89, 140-41.

When the police arrived, the people surrounding Francisco Green were uncooperative; they refused to answer any questions, and, against an officer's instructions, placed Green in a vehicle and took him to

¹ The verbatim report of proceedings consists of twenty-three volumes. An index setting forth the relevant abbreviations is attached as Appendix A.

Harborview Medical Center. 11RP 25-32; 17RP 103-10. Green died a short time later. 14RP 47; 18RP 39-45. The two other men hit by the gunfire survived. 14RP 89-90, 115-17, 153-54.

The investigation into the crime was hampered by the reluctance of witnesses to talk to the police. 12RP 85; 18RP 83-84. Although they had been shot, neither Christopher Green nor Michael Gradney was forthcoming with information; they expressed concern about snitching. 12RP 32-34; 14RP 141-42; 18RP 85-88. Francisco Green's friend, Antonio Kidd, admitted that he knew who the shooter was, but he refused to say who it was, stating that he did not want to be a snitch. 11RP 97-99, 143-44; 14RP 54-57. Nakita Banks delayed reporting what she saw because she was concerned that she would be labeled a snitch. 19RP 28-29. When the police finally talked to her, she complained, "I already helped you guys as much as I can. I don't want to get killed. These people know where I live, where my family lives." 20RP 122-23.

The investigation progressed because a street musician had captured the shooting on film. Ex. 132; 12RP 75-78; 13RP 25-34; 19RP 125-35. After further investigation, a number of witnesses identified Monday as the shooter. 16RP 21, 33-35, 201-02; 19RP 167-79.

Upon his arrest, Monday first denied that he had been in Pioneer Square on the night of the shooting. 19RP 191-92, 202-12. He then

admitted that he was there, but denied that he was the shooter. 19RP 215-24. When the police showed Monday photographic stills from the video, he admitted that he was in the photo, but continued to insist that he was not the shooter. 19RP 240-43; 20RP 20. After the police pressed him to tell the truth, he began to cry and stated that "I didn't mean to kill that man, I didn't mean to take his life." 20RP 32-33. Monday claimed that Green had first pointed a gun at him and that he shot Green in self-defense. 20RP 33-36. The video does not support this claim. Ex. 132.

The State charged Monday with one count of first-degree murder, two counts of first-degree assault, and one count of second-degree unlawful possession of a firearm. CP 104-06. Counts I, II and III also contained special firearm allegations. CP 104-06.

Trial began in late April of 2007 and lasted over one month. Several witnesses expressed great reluctance to testify and recanted earlier statements to the police. As the trial court observed, "virtually every lay witness has been very reticent to testify in this case, and the memory of virtually every lay witness has had significant holes in places where one would not expect that they would have memory lapses." 18RP 98.

For example, Antonio Kidd insisted that he had nothing to say, claimed "the Fifth," and stated that he was prepared to be found in contempt. 14RP 6. After the court indicated that he was required to

testify, he responded:

You all put me in the middle of this mess. You all don't understand what goes on out in the street, man, you know? When I leave here tonight, I'm not going to see you all. I got to see the streets.

14RP 7-8. Kidd further complained that, "[t]hey want me to snitch on somebody; right? Do you understand what that means?" 14RP 8. Kidd first claimed that he was drunk on the night of the shooting, but, after he was confronted with his prior statements to the police, he admitted that was not true. 14RP 5, 13. Kidd admitted that he saw someone punch Francisco Green, but refused to identify the person, stating, "I'm not going there, I'm not doing that. I'm not pointing no fingers." 14RP 20.

Similarly, Antonio Saunders had told the police that Monday was the shooter, but he testified that he did not see who fired the shots and that he only identified Monday as the shooter because he thought that Monday had blamed him. 15RP 45-64, 106-15; 16RP 8-18; 19RP 167-79.

Annie Sykes, Saunders' girlfriend, admitted that she had told police that Monday was the shooter, but she testified that she had lied and that she never saw the shooter. 16RP 168; 17RP 11-12. Sykes acknowledged that there was a code on the street not to talk with the police. 17RP 19.

A police detective explained the code against snitching:

When I speak of the code, what I'm talking about is everyone... every witness told us, "I ain't naming nobody.

I not pointing a finger at nobody. There's no way I'm going to give up a name. I'm not cooperating." This is the code. You see this over and over. This is the anti-snitch, do not be a snitch, do not cooperate with the police at all costs....

18RP 82-83.

The defense presented no witnesses. 20RP 187-89. The jury convicted Monday as charged. CP 222-25. The trial court found Monday guilty of second-degree unlawful possession of a firearm. 23RP 6.

Monday appealed, asserting numerous claims of error. In an unpublished opinion, the Court of Appeals affirmed Monday's convictions and sentence. State v. Monday, 147 Wn. App. 1049, 2008 WL 5330824 (2008). This Court granted review on two issues: (1) whether prosecutorial misconduct deprived Monday of a fair trial, and (2) whether imposition of the firearm enhancements violated Monday's jury trial right.

C. ARGUMENT

1. MONDAY HAS FAILED TO SHOW THAT HE IS ENTITLED TO A NEW TRIAL BASED UPON PROSECUTORIAL MISCONDUCT.

Monday argues that prosecutorial misconduct justifies reversal of his convictions. Trial in this case lasted over one month, and Monday complains about a few remarks made during opening statement and closing argument. Monday's experienced trial counsel did not object to virtually any of the prosecutor's remarks at issue, and a review of these remarks in the context of the total argument, the issues in the case, and the

evidence indicates why: he did not consider them unfairly prejudicial. Because Monday has not shown that the comments at issue were so flagrant and ill-intentioned that a curative instruction to the jury could not have cured any possible prejudice, this Court should affirm his convictions for murder and assault.

The law governing Monday's claim is well-settled. When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). To establish prejudice, the defendant must show a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks '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. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

Monday's experienced trial counsel was not reluctant to object

when he deemed it appropriate,² yet with the exception of one comment during opening statement, counsel did not object to the comments challenged on appeal. "Where the defense fails to object to an improper comment, the error is considered waived 'unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561). Defense counsel's failure to object to the remarks at the time that they are made strongly suggests to a court that the argument in question did not appear critically prejudicial to the defendant in the context of the trial. 157 Wn.2d at 53 n.2. Here, a review of the challenged comments in the context of the issues in the case reveals this to be the case.

a. Opening Statement.

During opening statement, the prosecutor stated that "[y]ou're going to learn that we take absolutely every single measure we can think of to make sure that no man is falsely accused, and no man is falsely convicted of something he didn't do." 10RP 13. Monday immediately objected and the trial court sustained the objection. Id. Monday then moved for a mistrial, arguing that the prosecutor had vouched for the

² Monday's counsel made numerous objections throughout the trial. See, e.g., 11RP 99; 12RP 33, 80, 82-84; 14RP 103-04; 18RP 82, 98-99; 19RP 194-98; 20RP 47, 64, 143.

credibility of the witnesses and its case. 11RP 4. The trial judge, noting that he had sustained the objection, observed that "I don't think it rises to the level of the State commenting on the credibility of a witness." 11RP 5. The judge indicated that he was willing to give a curative instruction, but Monday's counsel responded that, "I don't propose one at this time." 11RP 7. Monday never requested a curative instruction.

This Court has recognized that the trial court is in the best position to determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial. Stenson, 132 Wn.2d at 719. Explaining this deferential standard, the Court has repeatedly observed that the trial judge, having "seen and heard" the proceedings, "is in a better position to evaluate and adjudge than can we from a cold, printed record." McKenzie, 157 Wn.2d at 52 (quoting State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)).

Here, the trial court sustained the objection to the comment. While Monday unsuccessfully moved for a mistrial, he has never argued that the trial court abused its discretion in denying it. The court invited him to propose a curative instruction, but he never did so. Later in the trial, Monday's counsel essentially responded to this comment by pointing out that there have been individuals convicted of crimes who were later exonerated. 21RP 107. In any event, given that the jury was repeatedly

instructed that counsel's statements were not evidence,³ Monday cannot show any prejudice due to this remark.

b. Monday's Claim That The Prosecutor Engaged In Race-Baiting.

Monday argues that the prosecutor made "racist attacks" and engaged in "race-baiting tactics." Petition at 17-18. He claims that the prosecutor argued that "its own witnesses could not be trusted because they were 'black folk' and 'black folk' are inherently untrustworthy when it comes to testifying against another black person." Id. at 18.

This serious accusation is based upon a brief comment made by the prosecutor during closing argument and the prosecutor's occasional pronouncement of "police" during cross-examination of one witness. At trial, Monday did not perceive the prosecutor's comments as race-baiting and he made no objection. A review of the entire record and argument establishes that Monday's race-baiting claim is unfounded.

At trial, there was considerable testimony concerning a code against snitching. The comment at issue occurred during the prosecutor's discussion of the numerous witnesses who had seen the shooting but insisted that they could not identify the shooter:

[T]he only thing that can explain to you the reasons why witness after witness is called to this stand and flat out denies what cannot be denied on that video is the code.

³ See 8RP 158; 21RP 26; CP 172.

And the code is black folk don't testify against black folk. You don't snitch to the police. And whether it was the guy who was down there helping Francisco Green, trying to keep this killer off of him, or whether it was the people that were working with this killer to try and get Francisco Green, none of them could bring themselves to recognize what can't be denied....

21RP 29-30.

As the prosecutor continued to discuss the code against snitching at length, he did not discuss or emphasize race:

[W]hy is it that Antonio Saunders, Annie Sykes, DiVaughn Jones, Antonio Kidd and Felicia Barrett, who were all standing right there all said the exact same thing with very, very, very slight variations? I saw the shooting. I saw a guy hold his hand up, but I didn't see a gun and I didn't see the guy that was shooting.... [T]here is only one conceivable explanation for this, and it is called code.

Id. at 34-35; see also 21RP 37-38 (discussion of the code with no reference to race).

The Court of Appeals concluded that the mention of race during the discussion of the code was improper because the testimony at trial regarding the code against snitching did not refer specifically to African-Americans. Monday, 2008 WL 5330824 at *8. However, the court held that Monday failed to establish that these comments were prejudicial:

[T]he prosecutors comments were not about Monday or his conduct. Instead, they described the reluctance of witnesses, including those called by the State, to identify that Monday was the shooter. The fact that the witnesses did testify, despite the described reluctance on the street to

snitch or to testify, was used to strengthen the force of the argument. However, this is not an appeal to racial bias traditionally held contemptuous by the courts.

Id. at *9.

The Court of Appeals correctly concluded that the prosecutor's comments were not prejudicial. While a connection between race and the code against snitching was not clearly established by the testimony at trial,⁴ the prosecutor was not engaged in race-baiting. The comment was made during a discussion that focused on the code against snitching. Evidence of this code was overwhelming; numerous witnesses, including friends of the victim, admitted that they did not want to cooperate with the police.

A review of the full argument rebuts Monday's claim that the prosecutor argued that the African-American witnesses were inherently untrustworthy. In fact, the prosecutor argued that the jury should find credible much of the testimony elicited from the various African-

⁴ While virtually all of the lay witnesses and the defendant were African-American, no witness expressly testified that the code against snitching was connected to race. The prosecutor's mention of race may have been the result of his personal knowledge of the issue; there has been considerable reporting and publicity about the existence of a code against snitching in African-American communities. See *Stop Snitchin'*, 60 Minutes (CBS television broadcast on April 22, 2007), available at <http://www.cbsnews.com/stories/2007/04/19/60minutes/main2704565.shtml>; Bob Herbert, *A Triumph of Felons and Failure*, N.Y. Times, August 24, 2006, available at <http://select.nytimes.com/2006/08/24/opinion/24herbert.html>; *In Eight Colors: Hush Your Mouth*, N.Y. Times, September 25, 2005, available at <http://www.nytimes.com/2005/09/25/nyregion/thecity/25snit.html>.

American witnesses. The prosecutor argued that Antonio Saunders was honest in testifying that Monday told him that he had a gun. 21RP 29. The prosecutor argued that the jury should believe Nakita Banks' testimony, noting that "she has got no dog in this fight." 21RP 36. He argued that the witnesses' descriptions of the shooter were accurate. 21RP 112-14. Monday's characterization of the prosecutor's argument as race-baiting is not accurate.

The record shows that Monday's trial counsel paid close attention to the prosecutor's argument. He argued that the evidence of the code simply provided a reason to find the witnesses not credible and that it did not establish that Monday was the shooter. 21RP 79-80. "[T]he bottom line is the State's witnesses do not identify Kevin Monday, and the fact that they do not identify Kevin Monday as being the shooter means that you cannot use their testimony to decide that he was the shooter...." Id. Had Monday's counsel thought that the prosecutor improperly mentioned race in closing argument, he could have objected. The brief reference to race was not so flagrant and ill-intentioned that the trial court could not have cured any possible prejudice with a curative instruction to the jury.

Other than this comment, the other evidence that Monday cites as evidence that the prosecutor engaged in race-baiting was the prosecutor's apparent pronunciation of the word "police" when questioning Annie

Sykes. Though the State called Sykes as a witness, she was clearly hostile, and the court allowed the prosecutor to use leading questions with her. 16RP 185. Sykes repeatedly testified that she had lied to the police, the prosecutor and defense counsel in her previous statements concerning what she knew about the shooting and her identification of Monday as the shooter. 16RP 157, 184-87, 193; 17RP 5, 11, 39, 49. Sykes complained that the police had been "sweating" her because they kept coming by her mother's house, seeking to interview her. 16RP 168-71; 17RP 8, 47.

During the second day of Sykes's testimony, the court reporter transcribed the pronunciation of police as "po-leese" on several, though not all, of the times that the word was used. 17RP 19, 22, 23, 50-52.⁵ There was no objection or discussion of this pronunciation at trial, but on appeal Monday claims that it "lent an appearance of racial bigotry in questioning an African-American witness...." Brief of Appellant at 50-51.

The notion that the accent lent an air of racial bigotry is unsupported by the record; virtually all of the other civilian witnesses were African-American, and there is no indication that the prosecutor used any accent in questioning them. Sykes's family had moved to the Seattle

⁵ It is unclear from the record who first used the pronunciation "po-leese." It was never discussed at trial, and only the court reporter during the second day of Sykes's testimony transcribed the word this way. A different court reporter transcribed the first day of Sykes's testimony, and it is unknown whether he would have indicated this pronunciation. 16RP 146-209.

area from Mississippi,⁶ and she apparently used this pronunciation. To the extent that use of the accent was improper, a proper objection could have prevented any repetition and any prejudice could have been easily cured by admonition of the prosecutor and instruction to the jury. Monday's counsel made objections throughout the prosecutor's examination of Sykes,⁷ but he did not object to the pronunciation of police, indicating that he did not view it as offensive or improper.

c. The Prosecutor's Introductory Remarks In Closing Argument.

Monday offers a variety of objections to the prosecutor's introductory remarks during closing argument. The comments, challenged for the first time on appeal, were made at the beginning of argument:

Seventeen years and eleven months ago yesterday I signed on, I signed on to serve at the pleasure of Norman K. Maleng. I never imagined in a million years I would get to try as many murder cases as I have in the last 15 years, and I never imagined I would ever get to try one, a doozy, like this one....

And two things stood out at me very shortly into my career as a prosecutor, two tenets that all good prosecutors, I think, believe. One is that when you have got a really, really, really strong case, it's hard to come up with something really, really, really compelling to say. And the other is that the word of a criminal defendant is inherently unreliable. Both of those tenets have proven true time and

⁶ 16RP 142.

⁷ 16RP 156, 164-65, 180, 182, 185; 17RP 44, 71, 78.

time again over the years, and they have done it specifically in this case over the last five weeks-four weeks.

I never imagined that when I signed on to serve at the pleasure of Norm Maleng, and this won't be the last murder case I will try, but it will be the last one I will try under his name. I [never] imagined I would call eight witnesses who simply will not or cannot bring themselves to admit what cannot be denied.

21RP 26-27.

On appeal, Monday offers a number of arguments as to why these introductory comments were improper. However, the comments at issue were introductory remarks and must be read in that light. The prosecutor's argument continues for another 40 pages of transcript. 21RP 27-67. He devoted the rest of his argument to a discussion of the evidence, the testimony of the witnesses, and the jury instructions. Id. While some of the prosecutor's introductory remarks were stated too broadly, they were not so flagrant and ill-intentioned that an appropriate objection and curative instruction could not have cured any possible prejudice.

With respect to Monday's specific complaints, he argues that the prosecutor's comments concerning his personal background and experience were not based upon evidence at trial. However, no juror, following the court's instruction that counsel's argument was not evidence,

would have viewed the prosecutor's remarks as such.⁸ The prosecutor mentioned his background as a rhetorical device to begin his discussion of the case. Monday can not show any prejudice by this remark. It is not uncommon during a criminal trial that the attorneys, both prosecutor and defense counsel, occasionally reveal personal information about themselves or use personal anecdotes as a means of launching their arguments. No case has held that this is improper. This was certainly not the type of comment that was so flagrant and ill-intentioned that an objection and curative instruction could not have cured any prejudice.

Monday next claims that the prosecutor's passing reference to King County Prosecuting Attorney Norm Maleng was an attempt to appeal to the jury's sympathy. However, the prosecutor's reference to Norm Maleng's death was indirect and brief. While this reference was unnecessary, it was not the type of comment justifying reversal of Monday's convictions.

Monday argues that the prosecutor's theme that criminal defendants are inherently unreliable was an improper personal opinion and was not based upon evidence admitted at trial. While this theme was framed too broadly, the prosecutor proceeded to appropriately focus his

⁸ See Warren, 165 Wn.2d at 29 (holding that prosecutor's discussion of matter outside the record was not prejudicial because the jury was presumed to follow the court's instructions that counsel's arguments were not evidence).

argument on Monday's statements to the police and explained why certain portions were not credible. 21RP 44-60. The prosecutor did not argue that the jury should consider some other extraneous source in concluding that Monday had lied to the police when he first denied he was the shooter. Moreover, given that Monday acknowledged that he had repeatedly lied to the police when he discussed the shooting, he cannot show that the prosecutor's statement concerning the unreliability of criminal defendants was prejudicial.

Nor did Monday's counsel deem the comment terribly prejudicial. Rather than object, Monday's counsel chose to take advantage of the overly broad nature of the comment:

As far as the argument made by the State that... the statements of criminal defendants are inherently unreliable. The only thing I can say to that is that it's clearly self-serving from a prosecutor's point of view, but I think it would be hard to make that argument or statement to somebody who has been wrongfully convicted. And it's all too often you see news stories of people who have spent years in prison, and at some ultimate time they find out, well, this isn't really the person who committed the crime. So to say that all defendants, criminal defendants are inherently unreliable, I would think those persons wrongfully convicted would beg to differ.

21RP 107.

Monday also challenges the appropriateness of the prosecutor's comment that "when you have got a really, really, really strong case, it's

hard to come up with something really, really, really compelling to say." The prosecutor's further argument demonstrated that this assertion was based upon the evidence; he did not suggest that anything other than the evidence established that this was a strong case. This was fair argument.

d. Cumulative Error Does Not Justify Reversal.

Monday argues that the cumulative effect of these comments justifies reversal.⁹ Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). However, the doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. Id.

The brief, challenged comments were not so prejudicial to overcome the strong evidence against Monday. Monday admitted to police detectives that he committed the shooting. The videotape did not support his self-defense claim, and none of the witnesses to the shooting supported the notion that the shooting was committed in self-defense. The strength of the evidence overcame any possible prejudice caused by the comments of the prosecutor.

⁹ Monday also previously complained about certain instances where the prosecutor referred to himself during examination of a witness, though he does not discuss these in his petition. Brief of Appellant at 51-53. Monday has acknowledged that none of these unobjected-to comments were, in and of themselves, improper. Id. at 53.

2. THE TRIAL COURT PROPERLY IMPOSED THE FIREARM ENHANCEMENTS.

Monday asks the Court to strike the firearm enhancements on his murder and assault convictions because the trial court did not instruct the jury with the definition of the term "firearm" in RCW 9.41.010(1). This Court should reject this claim for several reasons. First, Monday is barred from asserting this claim on appeal because the doctrine of invited error prohibits him from challenging firearm instructions that he proposed. In addition, this Court has repeatedly held that a defendant may not, for the first time on appeal, allege error based upon the failure to provide a definitional instruction. Finally, any error was clearly harmless; it was undisputed that the gun used in the murder and assaults was a firearm as defined under RCW 9.41.010(1).

The State alleged firearm enhancements on the first-degree murder and first-degree assault counts. CP 104-06. The special verdict asked: "was the defendant Kevin Monday, Jr., armed with a firearm at the time of the commission of the crime..." CP 225. The instruction for the special verdict form stated that "[f]or purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crimes in counts I, II and III." CP 221. The instruction further explained that, "[a] pistol,

revolver, or any other firearm is a deadly weapon whether loaded or unloaded." Id. Monday proposed these instructions. CP 158, 169; 21RP 12.

For the first time on appeal, Monday claimed that the trial court erred by giving the instructions that he proposed and by not further defining the term "firearm."¹⁰ He argued that the court should have instructed the jury that, under RCW 9.41.010(1), a firearm was "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." Brief of Appellant at 65-69.

At the outset, Monday is barred from complaining about these instructions because he proposed them. Under the invited error doctrine, a party may not request an instruction and later complain on appeal that the requested instruction was given. City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002). Specifically, a defendant cannot claim on appeal that a to-convict instruction omitted an essential element if he proposed the challenged instruction. Id. at 720-21; State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990).

In addition, citing RAP 2.5(a), this Court has repeatedly held that the failure to define individual terms in the jury instructions is not an error

¹⁰ Monday also argued that the trial court lacked authority to submit the firearm enhancement to the jury. Brief of Appellant at 57-65. He abandoned this argument in his petition for review.

of constitutional magnitude that can be raised for the first time on appeal. Brown, 132 Wn.2d at 612; State v. Lord, 117 Wn.2d 829, 880, 822 P.2d 177 (1991); State v. Scott, 110 Wn.2d 682, 688 n.5, 689, 757 P.2d 492 (1988). While Monday characterizes the definition of firearm as establishing elements of the enhancement, he does not cite any authority for this proposition. The appellate courts have distinguished between elements and definitional terms; in doing so, the courts have noted that definitional terms are typically found in other statutory sections.¹¹ Here, the relevant statute simply provides for an enhanced penalty if "the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010." RCW 9.94A.533. The definition referred to is, in fact, a definition of the term firearm; it does not set forth elements. Accordingly, under the doctrine of invited error and RAP 2.5(a), Monday is barred from raising this issue on appeal.¹²

¹¹ See State v. Lorenz, 152 Wn.2d 22, 35, 93 P.3d 133 (2004) (holding that "sexual gratification" is not an essential element of first degree child molestation but a definitional term); State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999) (definition of "great bodily harm" does not add an element to the assault statute); State v. Marko, 107 Wn. App. 215, 219-20, 27 P.3d 228 (2001) (definition of threat does not create additional elements; rather, it merely defines an element); State v. Strohm, 75 Wn. App. 301, 308-09, 879 P.2d 962 (1994) (definitional term does not add elements to the criminal statute).

¹² While the State has not previously argued that Monday waived a challenge to the firearm instructions, the State is entitled to argue any grounds supported by the record to sustain the lower court's order. State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 610 (2000). This Court may affirm the Court of Appeals' decision on different grounds. State v. Moses, 145 Wn.2d 370, 372, 37 P.3d 1216 (2002).

Finally, even if Monday's challenge was not waived, any error in defining the term "firearm" was harmless beyond a reasonable doubt. When an element is omitted from a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). In this murder case, the evidence was overwhelming and undisputed that the firearm was a weapon from which projectiles could be fired.¹³

D. CONCLUSION

For all the foregoing reasons, Monday's convictions should be affirmed.

DATED this 30th day of September, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
BRIAN M. McDONALD, WSBA #19986
Senior Deputy Prosecuting Attorney
Attorneys for Respondent,
Office WSBA #91002

¹³ This Court has several consolidated cases before it involving similar, though not identical, issues concerning the firearm enhancement. State v. Williams-Walker, No. 78611-9. A review of the briefing indicates that an issue in those cases is whether a firearm enhancement was appropriate when the jury was asked whether the defendant was armed with a deadly weapon. In Monday's case, the special verdict form asked whether Monday was armed with a firearm.

APPENDIX A

Abbreviations for the Verbatim Report of Proceedings

1RP	March 19, 2007
2RP	April 30, May 14, 16, 21 and 23 2007
3RP	April 30, 2007
4RP	May 1, 2007
5RP	May 2, 2007
6RP	May 3, 2007
7RP	May 7, 2007
8RP	May 8, 2007
9RP	May 9, 2007
10RP	May 10, 2007 (Opening Statement);
11RP	May 10, 2007
12RP	May 14, 2007
13RP	May 15, 2007
14RP	May 16, 2007
15RP	May 17, 2007
16RP	May 21, 2007
17RP	May 22, 2007
18RP	May 23, 2007
19RP	May 24, 2007
20RP	May 29, 2007
21RP	May 30, 2007
22RP	May 31, 2007
23RP	July 5, 2007

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in STATE V. KEVIN MONDAY, Cause No. 82736-2, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

9/30/09

Date