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NO. 64467-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KIRK RICARDO SAINTCALLE,

Appellant.

2010 DEC 15 PM 4:55
KING COUNTY COURTHOUSE
3RD AVENUE
SEATTLE, WA 98104

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JAMES ROGERS

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	4
C. <u>ARGUMENT</u>	15
1. THE DEFENDANT'S <u>BATSON</u> CLAIM IS WITHOUT FACTUAL OR LEGAL SUPPORT	15
a. The Facts	18
b. The Defendant's Burden	22
c. Valid Race-Neutral Reasons	26
2. THIS COURT HAS PREVIOUSLY RULED THAT THE RECORDING OF A JAIL PHONE CALL DOES NOT VIOLATE ARTICLE I, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION	26
3. THE JURY WAS PROPERLY INSTRUCTED ON THE STATE'S BURDEN OF PROVING THE ABSENCE OF DEFENSE OF OTHERS BEYOND A REASONABLE DOUBT	32
a. The Instructions	32
b. The Instructions Were Correct	35
4. THE DEFENDANT'S MISCONDUCT CLAIM IS WITHOUT MERIT	39
D. <u>CONCLUSION</u>	47

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Anderson v. Bessemer City, 470 U.S. 564,
105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) 17

Batson v. Kentucky, 476 U.S. 79,
106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)..... 1, 15, 16, 24-26

Swain v. Arizona, 380 U.S. 202,
85 S. Ct. 824, 13 L. Ed. 2d 759 (1965)..... 16

Washington State:

Blackburn v. Safeco Ins. Co., 49 Wn. App. 423,
744 P.2d 347 (1987), aff'd,
115 Wn.2d 82 (1990)..... 24

DCR, Inc. v. Pierce County, 92 Wn. App. 660,
964 P.2d 380 (1998), rev. denied,
137 Wn.2d 1030 (1999)..... 24

In re Pers. Restraint of Isadore, 151 Wn.2d 294,
88 P.3d 390 (2004)..... 23

In re Stranger Creek, 77 Wn.2d 649,
466 P.2d 508 (1970)..... 37

Kailin v. Clallam County, 152 Wn. App. 974,
220 P.3d 222 (2009)..... 23

Pedersen v. Klinkert, 56 Wn.2d 313,
352 P.2d 1025 (1960)..... 24

Sofia v. Fibreboard Corp., 112 Wn.2d 636,
771 P.2d 711 (1989)..... 18

State v. Acosta, 101 Wn.2d 612,
683 P.2d 1069 (1984)..... 35

<u>State v. Anderson</u> , 153 Wn. App. 417, 220 P.3d 1273 (2009).....	45
<u>State v. Archie</u> , 148 Wn. App. 198, 199 P.3d 1005, <u>rev. denied</u> , 166 Wn.2d 1016 (2009).....	1, 27, 28, 29
<u>State v. Berber</u> , 48 Wn. App. 583, 740 P.2d 863, <u>rev. denied</u> , 109 Wn.2d 1014 (1987).....	28
<u>State v. Boland</u> , 115 Wn.2d 571, 800 P.2d 1112 (1990).....	27
<u>State v. Campbell</u> , 103 Wn.2d 1, 691 P.2d 929 (1984).....	28
<u>State v. Christensen</u> , 153 Wn.2d 186, 102 P.3d 789 (2004).....	29
<u>State v. Deal</u> , 128 Wn.2d 693, 911 P.2d 996 (1996).....	31
<u>State v. Evans</u> , 96 Wn.2d 1, 633 P.2d 83 (1981).....	38
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996), <u>rev. denied</u> , 131 Wn.2d 1018 (1997)	40
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105, <u>cert. denied</u> , 516 U.S. 843 (1995)	37
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	27
<u>State v. Hall</u> , 168 Wn.2d 726, 230 P.3d 1048 (2010).....	27
<u>State v. Hightower</u> , 36 Wn. App. 536, 676 P.2d 1016, <u>rev. denied</u> , 101 Wn.2d 1013 (1984).....	30

<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	2, 37, 38, 39, 44, 45
<u>State v. Hopson</u> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	17, 18, 26
<u>State v. Jorden</u> , 160 Wn.2d 121, 156 P.3d 893 (2007).....	28
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	36
<u>State v. Leavitt</u> , 49 Wn. App. 348, 743 P.2d 270 (1987), <u>aff'd</u> , 111 Wn.2d 66 (1988).....	30
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	41
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	35, 38
<u>State v. Miles</u> , 160 Wn.2d 236, 156 P.3d 864 (2007).....	27
<u>State v. Millante</u> , 80 Wn. App. 237, 908 P.2d 374 (1995), <u>rev. denied</u> , 129 Wn.2d 1012 (1996).....	40
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	35, 36
<u>State v. Modica</u> , 164 Wn.2d 83, 186 P.3d 1062 (2008).....	27, 28
<u>State v. Moreno</u> , 132 Wn. App. 663, 132 P.3d 1137 (2006).....	40
<u>State v. Myrick</u> , 102 Wn.2d 506, 688 P.2d 151 (1984).....	28
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	36

<u>State v. Oster</u> , 147 Wn.2d 141, 52 P.3d 26 (2002).....	38
<u>State v. Potter</u> , 68 Wn. App. 134, 842 P.2d 481 (1992).....	24
<u>State v. Rhone</u> , 168 Wn.2d 645, 229 P.3d 752 (2010).....	23, 24, 25
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	39, 46
<u>State v. Sargent</u> , 40 Wn. App. 340, 698 P.2d 598 (1985).....	41
<u>State v. Savage</u> , 94 Wn.2d 569, 618 P.2d 82 (1980).....	38
<u>State v. Sullivan</u> , 69 Wn. App. 167, 847 P.2d 953 (1993).....	30
<u>State v. Templeton</u> , 148 Wn.2d 193, 59 P.3d 632 (2002).....	24
<u>State v. Weber</u> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	30

Constitutional Provisions

Washington State:

Const. art. I, § 7.....	1, 26, 27, 28, 31
-------------------------	-------------------

Statutes

Washington State:

RCW 9A.32.030	3
RCW 9A.36.021	32, 34

Rules and Regulations

Washington State:

CrR 3.6..... 29
RAP 2.5..... 36, 37

Other Authorities

WPIC 6.05..... 41
WPIC 10.01..... 33
WPIC 17.02..... 34
WPIC 35.19..... 32, 34
WPIC 35.50..... 33

A. ISSUES PRESENTED

1. The trial court seriously considered striking juror number 34 for cause, but in an abundance of caution and expressing reservations, the court allowed her to remain part of the venire. The court then allowed the State to use a peremptory challenge on her, a juror who happened to be the lone African-American in the venire. Should this Court reject the defendant's claim that the trial court abused its discretion in allowing the juror to be struck when he failed to make a *prima facie* showing of purposeful racial discrimination as required under Batson,¹ and there were ample race-neutral reasons supporting the use of a peremptory challenge?

2. The defendant challenges the admission of jail phone calls he made under article I, section 7 of the Washington Constitution. The defendant fails to cite contrary controlling case law directly on point. See State v. Archie, 148 Wn. App. 198, 199 P.3d 1005, rev. denied, 166 Wn.2d 1016 (2009). Should this Court reject the defendant's argument, the same argument that was raised and rejected by this Court in Archie?

¹ Referring to Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

3. The defendant claims that the "to convict" jury instructions for his three second-degree assault convictions were deficient because they did not include the "element" that the State must disprove "defense of others" beyond a reasonable doubt. The defendant fails to cite contrary controlling case law directly on point. See State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991). Should this Court reject the defendant's argument where the Supreme Court has ruled contrary to his position?

4. The defendant claims the prosecutor committed misconduct in closing argument. Should this Court reject this claim where the defendant failed to object in some instances and has failed to prove misconduct occurred or that he was prejudiced by the alleged misconduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On February 9, 2007, the defendant and a number of other perpetrators entered an apartment in Auburn, held three individuals inside at gunpoint (Tamara Brown, Latasha Ellis and Ronald

Robinson), and then robbed, shot and killed 35-year-old Anthony Johnson. As a result of these acts, the defendant was charged as follows:

- Count I: First-Degree Felony Murder² for the murder of Anthony Johnson.
- Count II: Second-Degree Assault for assaulting Tamara Brown with a deadly weapon.
- Count III: Second-Degree Assault for assaulting Latasha Ellis with a deadly weapon.
- Count IV: Second-Degree Assault for assaulting Ronald Robinson with a deadly weapon.

CP 29-31. Each count also carried a deadly weapon--firearm special allegation. Id.

A jury convicted the defendant as charged. CP 88-95. With multiple prior felony convictions, the defendant received a standard range sentence of 411 months, with a total sentence of 579 months with the firearm enhancements added. CP 97-105.

² Under a charge of "felony murder," the State does not have to prove the defendant possessed a premeditated intent to kill. Rather, as charged here, the State had to prove that while committing or attempting to commit first-degree burglary or first-degree robbery, the defendant, or an accomplice, caused the death of Anthony Johnson. See RCW 9A.32.030(1)(c); CP 29-31.

2. SUBSTANTIVE FACTS

Tamara Brown and Anthony Johnson began dating about eight months prior to Johnson's murder. 7RP³ 6. They lived together at the Cedar Townhome Apartments in Auburn. 7RP 5. Also living with them was Latasha Ellis, with her boyfriend, Ronald Robinson (aka Dooner) staying their frequently. 7RP 7-8.

In the early morning hours (2:45 a.m.) of February 9, 2007, officers responded to a shots fired call at the apartment. 5RP 144-45. When officers arrived, they found Anthony Johnson dead on the bathroom floor just off the entryway into the apartment. 5RP 147-49. Johnson had been shot three times, including one close-range shot to the face. 10RP 37-40. The murder weapon was a .45 caliber handgun. 10RP 69, 75. On the floor next to Johnson's body was a shoe track in blood. 6RP 51. The defendant was subsequently arrested after he was observed throwing a pair of shoes into a dumpster--shoes that were examined and found to

³ The verbatim report of proceedings is cited as follows: 1RP--9/07/07; 2RP--3/5/09; 3RP--3/9/09(1); 4RP--3/9/09(2); 5RP--3/10/09; 6RP--3/11/09; 7RP--3/12/09; 8RP--3/16/09; 9RP--3/17/09; 10RP--3/18/09; 11RP--3/25/09; 12RP--3/26/09; 13RP--3/30/09; 14RP--3/31/09; 15RP--4/1/09; 16RP--7/24/09; 17RP--10/16/09.

have the victim's blood on them. 8RP 41-42, 47-48, 83; 9RP 22-24, 47-48, 64-68.

Tamara Brown testified that in the early morning hours of February 9, 2007, Johnson was in the kitchen making dinner as she started up the stairs to the bedroom, when there was a knock at the door. 7RP 11. She continued up the stairs when she saw that Johnson was going to answer the door. 7RP 12. Ellis and Robinson were upstairs in Ellis' bedroom at the time. 7RP 11. However, after not hearing anything for a few minutes, Brown started down the stairs again only to find a number of men inside her apartment, including the defendant, Kirk Saintcalle (aka K-Dub), who was holding a handgun. 7RP 12-13.

The defendant turned towards Brown, pointed his gun at her and ordered her upstairs. 7RP 13. Brown was able to identify the defendant because he was the boyfriend of Brown's former roommate, Tisha (aka Diane Deever). 7RP 15-18; 9RP 127. Brown said that she was not that close to the defendant and that she had not seen or heard from him in months, except that he had called her that very day at the apartment and that he had spoken to both her and Johnson. 7RP 18-19.

The defendant forced Brown upstairs and then--at gunpoint-- he forced Brown, Ellis and Robinson to get into Ellis' closet and get down on their knees. 7RP 20-22. At some point, brothers Narada Roberts (aka little K-Dub) and Roderick Roberts came upstairs. 7RP 23-24. Narada had an SKS assault rifle that he pointed at the three victims in the bedroom. 7RP 23-24, 44. While in the bedroom, Narada took a small suitcase or box from Ellis' closet. 7RP 42.

Brown had met Narada once before on New Year's Eve. 7RP 25. On that date, Tisha had asked Brown to give Narada a ride somewhere and then later that evening, Narada had been violently assaulted and had to be taken to the hospital. 7RP 26.

After the Roberts brothers went back downstairs, Brown said she begged with the defendant not to let anything happen to Johnson. 7RP 28-29. The defendant said not to worry, that there is just something that has to be taken care of. 7RP 28. The defendant then went downstairs and the next thing Brown heard were shots being fired. 7RP 29. In heading downstairs, Brown saw Johnson dead on the floor. 7RP 36. She tried calling 911 on the apartment phone but it wasn't working. Id. She then ran to her sister's apartment and called 911. Id.

Brown admitted that she initially told the responding officer that the defendant was still in the bedroom when the shots were fired, but she testified that she was upset and not clear about things at the time. 7RP 39-40, 47. Officer Ryan Pryor, the initial responding officer, testified that Brown was hysterical when she was trying to tell him what had happened and that he never had a chance to have Brown review the statement he wrote to see if it was accurate. 10RP 12-13. In testifying, Brown also said she was never exactly sure how many men entered the apartment or how many guns there were. 7RP 39.

Ronald Robinson testified that he was upstairs when there was the knock at the door. 7RP 107. When he started down the stairs, he was forced back up by the defendant at gunpoint. 7RP 107, 109. Robinson, who is very familiar with guns, described the gun as a .45, the same caliber gun used to kill Johnson. 7RP 111-12; 10RP 61-75.

He testified that he was forced into the closet with the two girls, who he described as "traumatized," with Brown begging the defendant not to harm Johnson. 7RP 113. The defendant then took Robinson's cell phone from him. 7RP 114. Narada then came upstairs with an assault rifle and the defendant told him to watch

the victims. 7RP 114. Robinson testified that the defendant then went downstairs and the next thing he heard was the sound of gunshots. 7RP 114, 117. Narada then put the assault rifle to the head of Ellis and then Brown, asking them if they had kids and if they ever wanted to see them again. 7RP 117. Narada then grabbed something from the closet and ran downstairs. 7RP 117, 125.

Latasha Ellis testified similarly that she was up in her room when there was a knock at the door, that she started down only to be forced back upstairs at gunpoint by the defendant. 8RP 9-11. She was forced into the closet with the others and said that two other men came upstairs that she did not recognize, one with an assault rifle. 8RP 12-14. The defendant forced the three victims to the ground, pointing his gun at them. 8RP 14-16. When the person with the rifle came upstairs, Ellis testified, the defendant went back downstairs. 8RP 19. The individual with the rifle took her suitcase from the closet. 8RP 26. Ellis then heard gunshots from downstairs. 8RP 26-27.

Anna Hall is a friend of the defendant. 7RP 136. In the early morning hours of February 9th, the defendant left a phone message for her stating that he had gotten into some trouble and needed to

speak with her. 7RP 138-39. After the defendant was arrested, he called Hall and asked her to help get a friend to sell a gun so he could get some money on his books. 7RP 140-41.

Roderick and Narada Roberts both had been charged in the murder of Johnson, both had pled guilty to a reduced charge of second-degree murder and both testified at trial. 11RP 86-88; 12RP 102-03.

Roderick testified that he did not know the defendant that well but that his younger brother, Narada, and the defendant were like brothers. 11RP 49-51. On the night of the murder, Roderick, Narada and the defendant were at Roderick's mother's house, drinking Jack Daniels mixed with an energy drink. 11RP 53-54. Tisha also came over and an argument erupted between her and the defendant. 11RP 55-56. The argument was about Tisha allegedly having slept with Johnson while the defendant had been out of town. 11RP 58-59. The defendant had been gone from New Years until just two days before Johnson's murder. 11RP 57; 12RP 70, 73.

Roderick, Narada and the defendant then packed the assault rifle into a duffle bag and took a bus up to 216th in Federal Way to meet Devon Marbrow. 11RP 59-62. They, along with another

individual, Antoine Green, met up with Marbrow, who was driving a white Jeep. 11RP 63, 66. Marbrow had a .45 caliber handgun. 11RP 72. Roderick claimed that they were going to drive to Auburn and drop the defendant off at a friend's apartment (Marisa) living in the same complex as Johnson and Brown. 11RP 66-67. Along the way, the defendant had another argument with Tisha over the phone. 11RP 67.

When they got to the apartment complex, Marbrow took the assault rifle and the defendant took the .45 and they headed towards Brown's apartment. 11RP 74. Because of issues between Marisa and the defendant, the plan was that before the defendant went to Marisa's apartment, he was going to ask Brown if Marisa was setting the defendant up for anything. 12RP 13. The defendant knocked on the door and when Johnson answered, they all entered behind the defendant. 11RP 75.

Johnson and the defendant started arguing, with Johnson professing that he "didn't have nothing to do with that shit." 11RP 76. Apparently Johnson was referring to the New Years Eve assault on Narada. Id. At this time, the defendant was pointing a gun at Johnson. 11RP 77. Roderick then hit Johnson when he

thought Johnson was pulling a gun out, although Roderick testified it turned out to be a lighter shaped like a gun.⁴ 11RP 77, 81.

At one point, Roderick said he went upstairs and told Marbrow and the defendant that he was "outta here." 11RP 79-80. When Roderick went back downstairs, he admits to assaulting Johnson again. 11RP 77. He assaulted Johnson this time because he discovered that Johnson was with Narada when Narada was assaulted on New Years Eve. 11RP 83. He also said that he took Johnson's wallet from him, went through it, and took his driver's license so that if Johnson tried to retaliate for the assault, he knew how to find Johnson.⁵ 11RP 81.

Roderick testified that it was the defendant who actually shot Johnson, although he claimed he did not actually see it. 11RP 89. He said that the defendant talked about it later, saying he shot Johnson in the mouth because Tisha had had oral sex with Johnson. 11RP 91. He also told Roderick that he had heard Tisha was pregnant by Johnson and he wanted to make sure Johnson

⁴ Officers recovered a cigarette lighter on the floor next to Johnson's body that was shaped like a gun. 6RP 79.

⁵ Detectives recovered Johnson's wallet from next to his body and a plastic insert from the wallet underneath Johnson's body. 6RP 80, 98.

never saw the baby. 11RP 91. The defendant also told Roderick that he threw Robinson's cell phone in a dumpster. 11RP 98. Roderick admitted that when he was first contacted by the police, he lied about his involvement in Johnson's murder. 11RP 109-13.

Narada Roberts testified that he had been close friends with the defendant since 2001. 12RP 66-67. Narada said that the discussion prior to going over to Brown's apartment was about the assault upon him on New Years Eve. 12RP 73. Roderick and the defendant wanted to find out who it was that had assaulted him. 12RP 73. It was believed that Brown had information and the plan was to go there and find out. 12RP 74, 83. They were going to disable the phone and gain access via the defendant because he knew the people inside. 12RP 85-86. The defendant was armed with the .45. 12RP 88.

Once inside the apartment, the defendant took the victims upstairs, followed by Marbrow with the assault rifle. 12RP 91-92. Roderick went upstairs, found out who Johnson was, came downstairs and began assaulting him. 12RP 92. The defendant then came downstairs and shot Johnson. 12RP 94.

The defendant testified on his own behalf. He admitted that Narada was his best friend and that he considered Brown like a

mother to him. 13RP 42-43. He said that he learned that Narada had been assaulted and said that Narada and Roderick wanted to take action, including shooting someone, but that he advised against it. 13RP 44-46.

The three discussed the plan for the defendant to go talk to Marisa because Narada believed Marisa's son knew something about the assault. 13RP 47-48. When they arrived at the apartment with Marbrow and Green in the Jeep, the defendant told them to hold on, he was going to check in on Brown real quick. 13RP 51. However, when he started across the street to her apartment, the others followed, with one "dude" carrying the assault rifle. 13RP 51-52.

The defendant admitted to knocking on the door and when Johnson opened the door, they all went in, with Narada calling Johnson a "bitch-ass" and saying that he was there the night he was assaulted. 13RP 52-53. Roderick and "his homeboy" then slammed Johnson against the wall. 13RP 53. The group then spotted Brown and one of them said, "let's skin that bitch down." 13RP 54. The defendant said no, that he had it covered. 13RP 54.

The defendant admitted having a gun out but claimed this was only because Narada had pulled out a gun and when someone

pulls out a gun, you pull out your gun--that's what you do.

13RP 55. The defendant then took Brown upstairs, telling her that everything was going to be all right. 13RP 55-56. He says that he asked for Robinson's phone and he gave it to him, at which point he threw the phone aside. 13RP 55-56.

The defendant claimed that Roderick, Narada, and the "dude" with the SKS all came upstairs at different times. 13RP 57. The defendant claimed that Narada and Roderick both had guns as well. 13RP 55, 57. While the defendant was upstairs, he claims he heard two shots and that when he went downstairs he heard a third shot. 13RP 58-59. The defendant claimed his gun was a 9mm, that he later left it in a laundry basket at Narada's mother's house, and that Roderick disposed of the guns. 13RP 61, 63. The defendant also claims that he did not hear about the relationship between Tisha and Johnson until after the murder. 13RP 66.

The defendant denied ever confessing to Roderick that he had shot Johnson. 13RP 66. To the contrary, he claims Roderick told him that Narada shot Johnson twice, but that when Narada would not kill Johnson, Roderick shot him point blank. 13RP 67. He claims the whole situation "caught me off guard." 13RP 68. He

had his gun out and did what he did because, he claimed, he felt like he did not have any choice. 13RP 70.

On cross, he admitted pointing the gun at all three victims upstairs and that they were afraid of him. 13RP 126, 133-35. He admitted that he called Anna that morning and said he was in trouble, that he later asked her to delete messages he had left, and that he told her that he was passed out drunk that night. 13RP 121-22.

In closing, the defense was that the defendant had nothing to do with the murder, robbery or burglary, and that he assaulted the three victims upstairs to defend them from the others.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE DEFENDANT'S BATSON CLAIM IS WITHOUT FACTUAL OR LEGAL SUPPORT.

The defendant claims the trial court violated his right to equal protection by allowing the State to use a peremptory challenge on the lone African-American juror in the venire. This claim must be rejected for two reasons. First, the defendant failed in his initial burden to make a *prima facie* showing of purposeful racial

discrimination as required by Batson, supra. Second, the trial court did not abuse its discretion in finding there were valid race-neutral reasons to excuse the juror.

The peremptory challenge system is a necessary part of trial by jury. Batson, 476 U.S. at 91 n.15, (citing Swain v. Arizona, 380 U.S. 202, 219, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965)). In placing limits upon the use of peremptory challenges, the Supreme Court has sought to "accommodate the prosecutor's [and defendant's] historical privilege of peremptory challenge free of judicial control." Batson, at 91. Still, a party's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause. Id. at 89 ("[a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all...the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race").

"As in any equal protection case, the burden is, of course, on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination." Id. at 93 (citations omitted). The Supreme Court has set forth a three-part test that takes into consideration the purpose and need for an

unfettered peremptory challenge system, the requirements of the Equal Protection Clause, and the burden on the person alleging an equal protection violation.

Initially, a defendant raising such a challenge must make a *prima facie* case for purposeful discrimination. Id. at 96. To make such a showing, a defendant must provide evidence that raises an inference that a peremptory challenge was used to exclude a venire member on account of the member's race. Id. If, and only if, the defendant meets this burden, then the burden shifts to the prosecutor to come forward with a race-neutral explanation for challenging the venire member. Id. at 97. The reasons given need not rise to the level justifying the exercise of a challenge for cause. Id. Finally, the trial court must determine whether the defendant has established purposeful discrimination. Id. at 98.

The trial court's determination is "a finding of fact entitled to appropriate deference by a reviewing court." Id. at 98 (citing Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)). An abuse of discretion is shown only when a reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d

273, 284, 778 P.2d 1014 (1989) (citing Sofia v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)).

a. The Facts.

Juror number 34 is a middle school counselor working in the inner city of Seattle. 4RP 65-66. She believes money can buy you freedom in the criminal justice system, except if you are a person of color. 4RP 66-67. After providing this information, juror number 34 was asked if she could be fair. Her response was twofold. First, she said that because she was a Christian, she felt that she could be fair. However, she added, "[b]ut also it's kind of hard and I haven't mentioned this before...but I lost a friend two weeks ago to a murder, so it's kind of difficult sitting here even though I don't know the facts of this particular case, and I would like to think that I can be fair because I'm a Christian. I did lose someone two weeks ago." 4RP 67-68. The prosecutor was able to identify the exact case, a murder that happened in downtown Seattle. 4RP 68.

The prosecutor tried to follow up on juror number 34's somewhat tentative answers about her ability to serve as a juror:

Prosecutor: At the same time we don't put people in a position where it's going to cause them a lot of emotional pain. At this point, do you think you can sit

in this case and listen to the facts and make a decision based solely on the evidence presented in trial here and be fair to both sides?

Juror 34: I'd like to think that I could be, but kind of what you just mentioned, just the freshness and the rawness of the death of a friend, I am wondering if that would kind of go through my mind. I like to think that I am fair and can listen, be impartial, but I don't know. I have never been on a murder trial and I have just lost a friend two weeks prior to a murder.

4RP 69-70.

The next day, the prosecutor followed up again with the juror.

Prosecutor: [I want to] [g]o back to a couple of people. Juror No. 34, sorry to focus on you again after yesterday, but I just want to try and go back and touch base with you. I know you mentioned yesterday that you had some recent events in your life that may make it difficult for you to serve as jurors in [this case]. Have you done any more thinking about that today?

Juror 34: Yes. I thought about it last night as well as this morning and you know, my thought is I don't want to be a part of this jury because of the situations and the circumstances that I just went through. But I'm thinking if ever I was put in a situation where I needed 12 people who could be honest and look through all the facts or I guess I'm saying who could be like me, I would want me. So sometimes you have to do things that you don't want to do.

Prosecutor: So is that something you can set aside?

Juror 34: I mean, I have never been in this situation where I have lost somebody. You just went to the funeral. He is young, only 24. And to be called to jury

duty to perhaps be on a jury of a murder suspect, I don't know how I'm going to react, you know. I don't know. I'm not an emotional person but I'm thinking as we go through it and I hear the testimony and I see the pictures, I don't know. I mean, I'm just being honest. I don't know how I'm going to feel.

4RP 41-43.

The State then moved to excuse juror number 34 for cause.

4RP 65. The State was concerned because juror number 34 said she did not know how she would react to the case. 4RP 65-66.

The State also pointed out that there were many general questions asked that she did not respond to that seemed pertinent to her situation.⁶ 4RP 66. The prosecutor described that she had been watching juror number 34, her lack of response to pertinent questions and that she did not seem--for whatever reason--to be fully aware of what was going on. 4RP 67. The Court said that he would take it under advisement and noted that juror number 34 was the only African-American in the venire. 4RP 67. At the same time, the court expressed concern as well and noted that it was leaning towards excusing juror number 34, that she was very emotional

⁶ There were questions about violent crime, firearms, possible difficulties following the law, difficulties because this was a murder case and difficulties because of the gruesome nature of the expected evidence--all questions to which juror number 34 did not respond. 4RP 16-19, 49-50.

about the death of her friend, and that she admitted she did not know how she was going to react to seeing the evidence in the case. 4RP 67.

Later, after considering the issue, the court ruled that "[d]espite my reservations," he was going to deny the motion to excuse juror number 34 for cause. 4RP 100.

When the State then indicated that it was going to use a peremptory challenge on juror 34, the defense objected. 4RP 100-01. The prosecutor said that the murder case involved a person juror number 34 directly worked with, that it occurred at 23rd and Cherry a few weeks ago, that the victim was the same race as the victim in the current case (African-American) and that the crime scene photos in this case are disturbing and very bloody. 4RP 101-02. The prosecutor added that juror 34 appeared to be having a difficult time, that her eyes were closed at times and she seemed "very checked-out." 4RP 101. The State said that they did not believe juror number 34 was in a good position to handle the evidence she would be subjected to, and they did not want to risk losing her during the course of trial. 4RP 102. The court agreed

and allowed the State to exercise a peremptory challenge on juror number 34.

The court based its determination on both juror number 34's answers and "how she appeared." 4RP 105. The court discussed how she was clearly upset by the recent murder of her friend in a "well-known case to all counsel here at the table." 4RP 105. The court noted that she continues to express her concern over how she would react to viewing the graphic evidence she would be required to view. These concerns, the court stated, are valid race-neutral reasons to allow the State to excuse juror number 34. 4RP 105.

b. The Defendant's Burden.

The defendant did not make, or attempt to make, a *prima facie* showing of purposeful discrimination. Instead, on appeal, he claims that the law in Washington is that there is a bright-line rule that the exercise of a peremptory challenge against the sole member of a particular race in the venire establishes a *prima facie* case of purposeful discrimination. Def. br. at 13. The defendant

relies on State v. Rhone,⁷ to support his assertion. The defendant is incorrect.

In Rhone, the Court was asked to decide "the question of whether a prosecutor's peremptory challenge of the only African-American venire member in a trial of an African-American defendant amounts to a *prima facie* case of discrimination." The Court said no. Four justices dissented and said that they would adopt a bright-line rule that a defendant establishes a *prima facie* case of purposeful discrimination under such circumstances. Rhone, 168 Wn.2d at 659. Justice Madsen, concurring in the result, stated, "I agree with the lead opinion in this case. However, going forward, I agree with the rule advocated by the dissent." Id. at 658.

There is no bright-line rule that applies to the defendant's case. First, "a plurality opinion has limited precedential value and is not binding on the courts." Kailin v. Clallam County, 152 Wn. App. 974, 985, 220 P.3d 222 (2009) (quoting In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004)). This is especially true when, as here, the defendant must base his claim

⁷ 168 Wn.2d 645, 229 P.3d 752 (2010).

on counting votes of the dissent and a comment by a concurring justice that is clearly dicta.⁸

Second, it is highly questionable that the Supreme Court could enact a bright-line rule outside of official rulemaking procedures⁹ as such a bright-line rule is clearly not required under the Supreme Court's Equal Protection Clause jurisprudence. In support of adoption of a bright-line rule, Justice Alexander seems to acknowledge that the basis for enacting such a rule is that "the benefits of such a rule far outweigh the State's minimal burden to provide a race-neutral explanation for its challenge." Rhone, at 759-60 (Alexander in dissent). This, however, ignores the United States Supreme Court's holding that in "any equal protection case, the burden is, of course, on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination." Batson, at 93. Further, a bright-line rule ignores the history and importance of the use of unfettered

⁸ "Dicta" is language in an opinion that was not necessary to the decision in the case. State v. Potter, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992); Pedersen v. Klinkert, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960). Dicta is not binding on the courts and statements in dicta need not be followed. DCR, Inc. v. Pierce County, 92 Wn. App. 660, 683 n.16, 964 P.2d 380 (1998), rev. denied, 137 Wn.2d 1030 (1999); Blackburn v. Safeco Ins. Co., 49 Wn. App. 423, 425, 744 P.2d 347 (1987), aff'd, 115 Wn.2d 82 (1990).

⁹ See State v. Templeton, 148 Wn.2d 193, 212-13, 59 P.3d 632 (2002) (discussing the limitations of the Supreme Court's rule making power).

peremptory challenges by all parties and the balance achieved by the United States Supreme Court precedent placing a burden on the challenging party. In addition, the presumption created by a bright-line rule--that any particular prosecutor is acting in a purposeful racist manner, is repugnant to trial practitioners such a presumption applies and to a system that presumes innocence of an accused but invidious motives of attorneys representing the State--considerations not addressed the Court.

Third, and the most obvious reason the proposed bright-line rule does not apply is because the Court said it does not apply. Four dissenting justices propose adopting a bright-line rule. Justice Madsen in concurring with majority said she would be in favor of adopting a bright-line rule but she agreed with the majority that a rule did not exist and added that "going forward, I agree with the rule advocated by the dissent." Rhone, at 658 (Madsen concurring). Rhone was decided on April 1, 2010. A jury was selected in this case over a year earlier in March of 2009. Rhone does not apply to the defendant's case, he never made a *prima facie* showing of purposeful discrimination and therefore his Batson claim must be denied.

c. Valid Race-Neutral Reasons.

The State provided ample race-neutral reasons in support of using a peremptory challenge. The court agreed. The court's ruling is subject to an abuse of discretion standard, that no reasonable judge would have ruled as the judge did here. Batson, at 98; Hopson, 113 Wn.2d at 284.

This was a murder case that was occurring just two weeks after juror number 34's friend and co-worker was murdered. By her own admission, she did not know how she would react to the evidence in the case. As both the prosecutor and the court noted, she appeared to be having difficulties. It is also evident that the court came close to striking the juror for cause. The risk of a mistrial was a concern, a valid concern. The defendant cannot show that the trial court abused its discretion in allowing the State to use a peremptory challenge on juror number 34.

2. THIS COURT HAS PREVIOUSLY RULED THAT THE RECORDING OF A JAIL PHONE CALL DOES NOT VIOLATE ARTICLE I, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION.

The defendant contends that jail phone calls are private affairs that, if recorded, violate article I, section 7 of the State

Constitution.¹⁰ The defendant is incorrect and fails to cite relevant case law directly on point. In State v. Modica, the Supreme Court held that jail phone calls are not private and that any expectation of privacy in the recorded calls is not reasonable.¹¹ In State v. Archie,¹² this Court held that the recording of jail phone calls does not violate article I, section 7 of the Washington Constitution.

The defendant fails to cite or distinguish these cases. Instead, the defendant cites to a number of other dissimilar situations wherein courts have found a private affair, within the meaning of article I, section 7, has been violated. Specifically, he argues that since banking records,¹³ telephone call records¹⁴ and garbage¹⁵ are private affairs within the meaning of article I, section 7, then a jail phone conversation must also be a private

¹⁰ The State played a portion of certain jail phone calls for impeachment purposes only after the defendant testified. 13RP 122. No calls were introduced in the State's case-in-chief.

¹¹ 164 Wn.2d 83, 186 P.3d 1062 (2008); also State v. Hall, 168 Wn.2d 726, 729 n.1, 230 P.3d 1048 (2010) ("Phone calls made from the King County jail are automatically recorded. Given that all parties are very clearly informed of this, we held this practice does not violate a prisoner's statutory right to privacy").

¹² 148 Wn. App. 198, 199 P.3d 1005, rev. denied, 166 Wn.2d 1016 (2009).

¹³ State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007).

¹⁴ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

¹⁵ State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990).

affair. But in none of the cases cited was the person alleging an article I, section 7 violation a jail inmate with a reduced expectation of privacy. See Modica, 164 Wn.2d at 88 (citing State v. Campbell, 103 Wn.2d 1, 23, 691 P.2d 929 (1984)). Further, in none of these cases cited was the aggrieved party fully aware that the item they considered private was in fact going to be searched--as is the case with jail phone calls.

In determining whether a privacy interest merits article I, section 7 protection, the court asks several questions: whether the information obtained reveals intimate or discrete details of a person's life, what expectation of privacy a person has in the information sought, and whether there are historical protections afforded to the perceived interest. Archie, 148 Wn. App. at 202 (citing State v. Jorden, 160 Wn.2d 121, 126, 156 P.3d 893 (2007)). The person alleging a violation of article I, section 7 must prove that their expectation of privacy is "reasonable." State v. Berber, 48 Wn. App. 583, 587, 740 P.2d 863, rev. denied, 109 Wn.2d 1014 (1987); State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984). The individual must first, by their conduct, exhibit a subjective expectation of privacy, and second, this subjective

expectation of privacy must be objectively reasonable.¹⁶ State v. Christensen, 153 Wn.2d 186, 193, 102 P.3d 789 (2004). As this Court held in Archie, jail phone calls do not meet this test, they are "not private affairs deserving of article I, section 7 protection." Archie, at 204.

This issue is also not properly before this Court. CrR 3.6 requires that a motion "to suppress physical, oral or identification evidence...shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion." That was not done in this case. The court noted that the defendant was not asking to hold a CrR 3.6 hearing. 2RP 8. Instead, in his trial brief, the defendant merely included a section titled "Exclude Jail Recordings." CP 35. There were no facts contained in this section as required by CrR 3.6 and no hearing was ever held. When the issue came up prior to trial, the motion was deferred. 2RP 21. The defendant did not raise the issue again during the course of trial. Post-trial, but before the jury returned a verdict, the court addressed the issue and denied the defense

¹⁶ While the defendant failed to make a sufficient record below, he did testify that he was fully aware his calls were being recorded. 13RP 160.

motion, saying the issue had been raised before in other cases and rejected. 14RP 107-08.

When the court deferred ruling on the issue, the defendant was obligated to raise the issue prior to the evidence being admitted. State v. Leavitt, 49 Wn. App. 348, 357, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66 (1988) (holding that objection one day after hearsay was admitted was too late to preserve issue for appeal); State v. Hightower, 36 Wn. App. 536, 545, 676 P.2d 1016, rev. denied, 101 Wn.2d 1013 (1984) (challenges to testimony of State's expert witnesses not preserved for appeal due in part to untimely objections at trial). He may not lay in wait, determine how the trial went and then raise the motion. State v. Sullivan, 69 Wn. App. 167, 172-73, 847 P.2d 953 (1993) (“[a] party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal”), rev. denied, 122 Wn.2d 1002 (1993); also State v. Weber, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006) (defendant had a duty to object even though he received a pretrial ruling allegedly excluding the admitted evidence--the failure to object prevents the trial court from timely addressing the alleged error). The defendant had a duty to make a record and object prior to the admission of the

records; his failure to timely object and make a full record constitutes waiver of the right to appeal.

Finally, even if the recordings were inadmissible, any error was harmless. Admission of evidence seized in violation of article I, section 7 is harmless error if the reviewing court is convinced beyond a reasonable doubt that any rational finder of fact would have reached the same result absent the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Here, absent the allegedly improperly admitted "evidence," the result of the trial would have been the same. The jail recordings were very limited and were used solely for impeachment purposes. There was no "confession" on tape. They contained nothing more than the defendant using derogatory terms to describe some of the State's witnesses, his attempt to get rid of the gun--a gun that during his testimony he admitted he possessed, and his claim to a civilian non-testifying witness--that he was passed-out drunk that night. Considering the extensive eyewitness testimony, any error was harmless.

3. THE JURY WAS PROPERLY INSTRUCTED ON THE STATE'S BURDEN OF PROVING THE ABSENCE OF DEFENSE OF OTHERS BEYOND A REASONABLE DOUBT.

The defendant argues that the trial court's instructions to the jury were inadequate on the issue of defense of others.

Specifically, the defendant argues that the "to convict" instructions for assault in the second degree omitted an essential element because it did not include the State's burden to disprove self-defense beyond a reasonable doubt. This claim should be rejected. First, the issue is not properly before the Court. And second, the defendant's position is contrary to existing Supreme Court precedent.

a. The Instructions.

The jury was instructed that "[a] person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon." CP 79; WPIC 35.19; RCW 9A.36.021(1)(c).

They were instructed that:

An assault is an intentional touching or striking of another person that is harmful or offensive. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 77; WPIC 35.50.

The jury was provided with the *mens rea* instruction for the crime as follows:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

CP 83; WPIC 10.01.

And in pertinent part, the "to convict" instructions for the second-degree assault charges read as follows:

To convict the defendant of the crime of Assault in the Second Degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt.

- (1) That on or about February 9, 2007, the defendant - as principal or an accomplice - assaulted Tammy Brown with a deadly weapon; and
- (2) That the acts occurred in the State of Washington.

CP 80; WPIC 35.19 (with accomplice liability language added);

RCW 9A.36.021(1)(c).¹⁷

Finally, the jury was provided with the WPIC defense of other instruction as follows:

It is a defense to a charge of Assault in the Second Degree as charged in Counts II-IV that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used or offered 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, and when the force is not more than is necessary.

The person using or offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used or offered to be used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to the charges of Assault in the Second Degree and charged in Counts II, III and IV.

CP 84; WPIC 17.02.

¹⁷ The "to convict" instructions for counts III and IV were identical with the exception of the named victims. CP 81-82.

b. The Instructions Were Correct.

The defendant never objected to the "to convict" instructions below. He claims, however, that he can raise this issue for the first time on appeal because omission of "an element" from a "to convict" instruction is of constitutional magnitude that may be raised for the first time on appeal. This legal premise is true. See State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005).¹⁸ However, his legal assertion--that disproving the defense of others is an element of the crime, is false.

Disproving that a defendant acted in the defense of others is not an element of the crime of assault, it negates an element of the crime. See State v. McCullum, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983) (self-defense negates the intent element of murder); State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984) ("self-defense negates the knowledge element of second degree assault"). There is no discernable difference between self-defense and defense of other defenses in this regard. Thus, the defendant cannot rely on

¹⁸ In Mills, the reasonable fear of a threat to kill element of the charge of felony harassment was not included in the "to convict" instruction. The trial court intended to place this element in a special verdict instruction. The Supreme Court held that this would have been constitutionally permissible, but the Court reversed the conviction because the trial court failed to fully define the element in the special verdict instruction.

his "omitted elements" claim to get around his failure to object below.

An unpreserved claim of error will not be heard unless the claimed error is a "manifest error affecting a constitutional right." RAP 2.5(a). Where an actual element is omitted from the "to convict" instruction, constitutional error has occurred. See Mills, supra. This is because such error relieves the State of its burden of proving each element beyond a reasonable doubt. Id. But the Supreme Court has ruled that a claim of error in a self-defense instruction cannot be raised for the first time on appeal if the error alleged is not of constitutional dimension and is not "manifest" under RAP 2.5. An error is "manifest" for these purposes only if there has been actual prejudice, meaning that the defendant has made a plausible showing that the alleged error "had practical and identifiable consequences in the trial of the case." State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (citing State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)).

Here, the separate defense of others instruction accurately states the law and correctly allocates the burden of proof. Thus, the defendant cannot prove "manifest" constitutional error that resulted in practical and identifiable consequences. Therefore,

under RAP 2.5, the defendant's claim cannot be reviewed for the first time on appeal.

In any event, in a case not cited by the defendant, the Supreme Court has rejected this exact argument made in the context of a self-defense case. See State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991). Hoffman, who was charged with aggravated first-degree murder, raised a claim of self-defense. The trial court provided a separate self-defense instruction that allocated the burden of proof to the State to disprove self-defense beyond a reasonable doubt. Hoffman argued that the instruction "must be part of the 'to convict' instruction which sets forth the elements of the crime of murder in the first degree." Hoffman, 116 Wn.2d at 109. The Supreme Court rejected this argument, stating "[w]e perceive no error in this instructional mode." Id.

Generally, the doctrine of *stare decisis* requires a court to hold firm to a prior decision. State v. Gentry, 125 Wn.2d 570, 587 n.12, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). The doctrine of *stare decisis* can be overcome only by a clear showing that an established rule is incorrect and harmful. In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). Here, the only difference between Hoffman and the defendant's case is that

Hoffman claimed self-defense, the defendant claimed defense of others. However, in order to overcome the dictates of Hoffman, the defendant would either have to show that the nature of the defense somehow makes a difference to the analysis applied, or that Hoffman is incorrect and harmful. The defendant does neither.

Finally, even were there error here, it would be harmless beyond a reasonable doubt. See State v. Evans, 96 Wn.2d 1, 5-10, 633 P.2d 83 (1981). "An error in instructions is harmless if it is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. McCullum, 98 Wn.2d 484, 497, 656 P.2d 1064 (1983) (quoting State v. Savage, 94 Wn.2d 569, 578, 618 P.2d 82 (1980)). As stated above, the instructions here were substantively accurate and appropriately allocated the burden of proof. This type of error--if error at all--is harmless. See State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002) (charged with felony violation of a no-contact order--the element that the defendant had prior no-contact order convictions was permissibly contained in a separate special verdict instruction).

4. THE DEFENDANT'S MISCONDUCT CLAIM IS WITHOUT MERIT.

The defendant cites to four passages in closing argument that he says are misconduct so egregious that his conviction must be reversed. The defendant's argument is without merit. His argument is based on faulty premises and taking individual sentences out of context.

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). A conviction will be reversed only where the defendant can prove that there is a substantial likelihood that the misconduct affected the verdict. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). The failure to object to an improper remark constitutes a waiver of such error unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Hoffman, at 93.

The first passage the defendant cites and claims constitutes misconduct is as follows:

And I want to talk to you about the testimony of these two co-defendant's [referring to Roderick and Narada

Roberts] at this time that came in and testified to you.
. . . what we know is they took responsibility. They
indicated a willingness to take the responsibility.

Def. br. at 32 citing 14RP 39. The defendant objected, stating
"Invades the province of the jury. Defendant's due process rights."
14RP 39. Whatever that objection was intended to mean, the court
overruled the objection. Id.

The defendant cites to two cases, State v. Moreno,¹⁹ and
State v. Fleming,²⁰ claims that it is improper for the prosecutor to
state or imply that a person who pleads guilty is more credible than
a person who exercises his constitutional right to trial. Def. br. at
32. The cases cited say no such thing. In Fleming, the prosecutor
commented on the defendant's exercise of his right to remain silent.
In Moreno, the prosecutor commented on the defendant's right to a
trial. The prosecutor did not do that here.

A prosecutor is free to comment on the credibility of a
witness and argue all reasonable inferences about credibility based
on the evidence. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d
374 (1995), rev. denied, 129 Wn.2d 1012 (1996). Error does not

¹⁹ 132 Wn. App. 663, 132 P.3d 1137 (2006).

²⁰ 83 Wn. App. 209, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997).

occur until such time as it is "clear and unmistakable" that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985).

The entire statement, taken in context, is as follows:

And I want to talk to you about the testimony of these two co-defendants at this time that came in an testified to you. Again, you're instructed by the Court, and I totally condone that instruction that you are to assess their credibility very carefully, scrutinize it, because I'm telling you, folks, I'm not naive.²¹ I'm not saying that just because they took that witness stand and told you the details of what happened that you should wholeheartedly believe it hook, line, and sinker. I mean, we are all aware of the fact that they had a motive to get a deal. **But what we know is they took responsibility. They indicated a willingness to take responsibility . . .**They plead guilty. . .And what we know is they provided us details about what happened. Details that you can take as evidence, however you see fit. And recommendation is when you take into consideration these two statements look for corroboration. Carefully scrutinize what they're telling you. I'm not arguing against that in any way. And I didn't, and in no way absolve them of their responsibility. They plead guilty to murder.

²¹ The jury was instructed as follows:

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

CP 68; WPIC 6.05. Jurors are presumed to follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

14RP 39-40.²² The prosecutor was neither vouching for the witnesses nor improperly commenting on a right of the defendant. Instead, the prosecutor was asking the jury to review the testimony of the two co-defendants carefully, look at their motive, the fact that they admitted guilt but that a deal was made and the jury should look for evidence to corroborate their testimony. The defendant simply cannot show this is misconduct.

Next, the defendant cites to the following highlighted passage:

Prosecutor: We have never attempted during any of the presentation of this case to you to hide evidence. **We have never tried to hide the fact that Tammy Brown was confused and that's my impression. She is genuinely confused about where Mr. Saintcalle was at the time the shots were fired. Her belief currently and I think she's honestly trying to tell you the truth.**

Defense Attorney: Your Honor, I object.

Prosecutor: Whether she is right or wrong.

Defense Attorney: To the witness. I mean, to the State trying to accredit a witness to -- the jury are the determiners of credibility, your Honor. It's improper for counsel to kind of put dress up the witness.

²² The highlighted portion is the only portion cited by the defendant.

The Court: Objection overruled. This is argument, and jury weights the evidence independently. This is argument. You may proceed.

Prosecutor: I'm going to agree with Mr. Womack [defense attorney] on that point because that is the truth about this entire trial. Right? My opinion doesn't mean anything. It's you as a group who will make decisions about what the evidence was. What someone said. What someone's credibility is. It's not enough my belief doesn't carry the day in this courtroom. But what I'm telling you is we can infer from the testimony of Ms. Brown that she may be honestly trying to tell us the truth, but that may be an example of where someone could be incorrect or inaccurate. Not be accurate, but they're honestly trying to tell you the truth. That's my point about that topic."

14RP 89-90.²³

It is only by taking the single passage out of context that the defendant can claim that it is clear and unmistakable that the prosecutor was vouching for the credibility of the witness and expressing her personal opinion. But taken in context, it is clear the "I think" phrase used by the prosecutor is a nuance in speech that while shouldn't be used, was not an attempt to express a personal opinion. In fact, although the court overruled the defense objection, the prosecutor went on to explain that what she meant was that you could infer certain things about the testimony of the witness based

²³ The highlighted portion is the passage cited by the defendant. The remainder of the passage is included here to put the passage in context.

on the evidence--a perfectly permissible argument. This is similar to the situation in Hoffman, wherein the Court found no misconduct when the prosecutor used the phrase, "I think the evidence shows," and the record showed that "[a]ll of the statements objected to in this connection contained material which was supported by the evidence." Hoffman, at 94.

This is consistent with the next passage challenged on appeal--although unobjected to below:

They [the Roberts brothers] took the witness stand, and they told you a version of events about what happened, and once again it's up to you as a jury to decide what evidence you glean from that. I think what's apparent when you assess the testimony of the Roberts brothers is the good news is it doesn't appear they have talked to one another or reconciled their stories.²⁴ **And here's my impression. That Mr. Roderick Roberts has a tendency to minimize. He has a tendency to minimize his own involvement. He has a tendency to minimize his understanding of what was going on. And Narada Roberts doesn't do that.** He may not be as smart or cagey. He may have other reasons, but recall the testimony of Narada and what he told us. . . . That's what he told us [after describing the testimony]. And [it] makes sense when you consider the fact that those three individuals, Mr. Saintcalle and the Roberts brothers leave that home carrying an assault weapon.

²⁴ The brothers' testimony was not necessarily consistent in many respects.

14RP 90-91. Again the prosecutor discussed the testimony and the facts revealed at trial to support the certain inferences that the jury could adduce about the testimony of Narada and Roderick Roberts. The defendant cannot show this was misconduct.

Finally, the defendant cites to yet another passage--
unobjected to:

But because I hope you would realize that as we stand before you that **our [the prosecutor's] mission here in this trial and throughout this trial has been to present you with evidence that will let you tell the truth of what happened.** And what I mean by that is, ladies and gentlemen, we didn't pick and choose the witnesses, and we didn't pick and choose what evidence you got. The bottom line is if there was evidence good, bad, or ugly we provided it to you.

14RP 89. If defense counsel felt this was misconduct, he certainly could have lodged an objection. Had he objected, a court's curative instruction certainly could have obviated any potential prejudice. Thus, the defendant's failure to object bars review. Hoffman, at 93.

Further, this is not akin to the Anderson²⁵ case cited by the defendant. In Anderson, Division Two held that the prosecutor's repeated pronouncement that the jury's job was to "declare the truth," was misconduct. Whatever the propriety of this holding,

²⁵ State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

here, taken in context, the prosecutor was merely telling the jury that it was their role to weigh the evidence, the "good, bad, or ugly," and reach a decision. This was not misconduct.

In any event, even were this court to find the prosecutor committed misconduct, nothing was said or done that was so egregious or so prejudicial that the defendant cannot meet his burden of proving there is a substantial likelihood that the alleged misconduct affected the verdict. Russell, at 86. He cannot show that the verdict was based on anything other than the jury's evaluation of the evidence--evidence that put him at the scene with a gun (later admitted by him), with motive and evidence showing that he was fully involved in the commission of all four crimes. The only contrary evidence being the defendant's rather incredulous testimony that he held three people at gunpoint to protect them and that he had nothing whatsoever to do with the burglary and robbery--the basis for the felony murder charge--committed by the four other men he came to the apartment with.

D. **CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 13 day of December, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

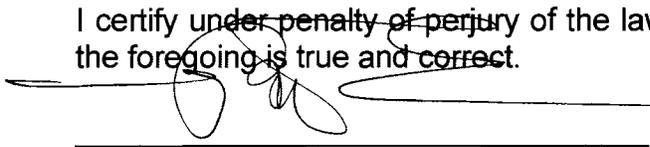
By: 

DENNIS J. McCURDY, WSBA #21975
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Attorneys for Respondent
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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 Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SAINTCALLE, Cause No. 64467-0-1, in the Court of Appeals, Division I, 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.



Name
Done in Seattle, Washington

12-13-10
Date