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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

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NO. 64243-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,  
v.  
DARRELL JONES,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE MICHAEL J. FOX

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**BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

A. ISSUES PRESENTED..... 1

    1.    JONES, CHARGED WITH HARASSMENT FOR THREATENING HIS GIRLFRIEND'S SON, HAD PREVIOUSLY ASSAULTED HIS GIRLFRIEND. HIS GIRLFRIEND'S SON WAS AWARE OF THIS PRIOR ABUSE. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ADMITTING LIMITED INFORMATION ABOUT THE PRIOR ABUSE, AS IT WAS RELEVANT TO THE VICTIM'S REASONABLE FEAR THAT THE DEFENDANT WOULD CARRY OUT HIS THREAT? ..... 1

    2.    THE PROSECUTOR, IN REBUTTAL ARGUMENT, RESPONDED TO AN ARGUMENT RAISED BY DEFENSE. DEFENSE DID NOT OBJECT, AND THE PROSECUTOR'S STATEMENTS WERE NOT INFLAMMATORY OR A MISSTATEMENT OF THE LAW. HAS PROSECUTORIAL MISCONDUCT BEEN ESTABLISHED AND IS REVERSAL WARRANTED? ..... 1

    3.    IS REVERSAL WARRANTED UNDER THE "CUMULATIVE ERROR" DOCTRINE? ..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 4

    1.    JONES, CHARGED WITH HARASSMENT FOR THREATENING HIS GIRLFRIEND'S SON, HAD PREVIOUSLY ASSAULTED HIS GIRLFRIEND. HIS GIRLFRIEND'S SON WAS AWARE OF THIS PRIOR ABUSE. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING LIMITED INFORMATION ABOUT THE PRIOR ABUSE, AS IT WAS RELEVANT TO THE VICTIM'S REASONABLE FEAR THAT THE DEFENDANT WOULD CARRY OUT HIS THREAT ..... 4

2. THE PROSECUTOR, IN REBUTTAL ARGUMENT, RESPONDED TO AN ARGUMENT RAISED BY DEFENSE. DEFENSE DID NOT OBJECT, AND THE PROSECUTOR'S STATEMENTS WERE NOT INFLAMMATORY OR A MISSTATEMENT OF THE LAW. PROSECUTORIAL MISCONDUCT HAS NOT BEEN ESTABLISHED REVERSAL IS NOT WARRANTED..... 11

3. REVERSAL IS NOT WARRANTED UNDER THE "CUMULATIVE ERROR" DOCTRINE.. ..... 16

D. CONCLUSION..... 16

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>Marriage of Littlefield</u> , 133 Wn.2d 39, 940 P.2d 136 (1997).....	10
<u>State Ex. Rel. Carrol v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	9
<u>State v. Barragan</u> , 102 Wn.App. 754, 9 P.3d 942 (2000) .....	7
<u>State v. Binkin</u> , 79 Wn.App. 284, 902 P.2d 673 (1995).....	8
<u>State v. Bradford</u> , 56 Wn.App. 464, 783 P.2d 1133 (1989).....	9
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997) .....	11
<u>State v. Burkins</u> , 94 Wash.App. 677, 973 P.2d 15 (1999) .....	4, 9
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984) .....	16
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	12, 13, 15
<u>State v. Grant</u> , 83 Wash.App. 98, 920 P.2d 609 (1996).....	6, 7
<u>State v. Greiff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	16
<u>State v. Hepton</u> , 113 Wash.App. 673, 54 P.3d 233 (2002).....	4
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991) .....	12
<u>State v. Kilgore</u> , 147 Wash.2d 288, 53 P.3d 974 (2002) .....	8, 9
<u>State v. Klok</u> , 99 Wn. App. 81, 992 P.2d 1039 (2000).....	12
<u>State v. Lane</u> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	5
<u>State v. Lough</u> , 125 Wash.2d 847, 889 P.2d 487 (1995) .....	9
<u>State v. Magers</u> , 164 Wash.2d 174, 189 P.3d 126 (2008) .....	6, 7
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006) .....	11
<u>State v. Olivera-Avila</u> , 89 Wn.App. 313, 949 P.2d 824 (1997).....	10
<u>State v. Powell</u> , 126 Wn. 2d 244, 893 P.2d 615 (1995).....	5
<u>State v. Ragin</u> , 94 Wash.App. 407, 972 P.2d 519 (1999) .....	7
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990) .....	12, 15
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	13

State v. Wilson, 60 Wn. App. 887, 808 P.2d 754 (1991) ..... 5, 6

**WASHINGTON REGULATIONS AND RULES**

ER 404(b)..... 4, 5, 6, 8, 9

**A. ISSUES PRESENTED**

1. JONES, CHARGED WITH HARASSMENT FOR THREATENING HIS GIRLFRIEND'S SON, HAD PREVIOUSLY ASSAULTED HIS GIRLFRIEND. HIS GIRLFRIEND'S SON WAS AWARE OF THIS PRIOR ABUSE. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ADMITTING LIMITED INFORMATION ABOUT THE PRIOR ABUSE, AS IT WAS RELEVANT TO THE VICTIM'S REASONABLE FEAR THAT THE DEFENDANT WOULD CARRY OUT HIS THREAT?
2. THE PROSECUTOR, IN REBUTTAL ARGUMENT, RESPONDED TO AN ARGUMENT RAISED BY DEFENSE. DEFENSE DID NOT OBJECT, AND THE PROSECUTOR'S STATEMENTS WERE NOT INFLAMMATORY OR A MISSTATEMENT OF THE LAW. HAS PROSECUTORIAL MISCONDUCT BEEN ESTABLISHED AND IS REVERSAL WARRANTED?
3. IS REVERSAL WARRANTED UNDER THE "CUMULATIVE ERROR" DOCTRINE?

**B. STATEMENT OF THE CASE**

At the time of this offense Jimmy King was thirteen years old and the son of Jones' girlfriend. 8/26/09 RP 13-14.<sup>1</sup> King's mother had been dating Jones for a couple of years, on an off and on basis. Id. 14-15. On May 4, 2009, when King got home from school, Jones was in the house, much to the surprise of King. Id. King noticed that the front door was open and then saw pieces of the door on the floor. Id. 15. Jones then

came into the room where King was and asked where the phone was. Id. 16. After grabbing the phone Jones called King's mother. Id. 16-17. The two argued and Jones proceeded to throw the phone against the wall and smash the computer with a frying pan. Id. 18-19.

Jones then called King's mother again and told her that he had, "her heart right there, he could hurt her heart, speaking of [King]." Id. 20-21. He also told King's mother that "he is not afraid to hurt kids" and that "there is two sides to every man and that if she messed with him, he would get back." Id. 21. King heard the defendant say these things to his mother and took that to mean that Jones intended to harm him, as he is his mother's heart. Id.

Jones then held the phone up to King's face and hit King on the right side of his face. Id. 21. King, who had been sitting on the kitchen counter, fell into the sink when Jones hit him. Id. 20-21. Jones then put the phone up to King's ear and his mother, who was still on the phone, told King to go to his friend's house across the street. Id. 23. King tried to leave the house but Jones did not allow him to. Id. 23. Jones told King's mother, "The longer you take the more I'm going to hurt you." Id. 24. King pleaded with his mother to hurry home. Id.

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<sup>1</sup> For the sake of consistency, the State will refer to the verbatim report of proceedings as Jones did in his opening brief, e.g. "8/26/09 RP \_\_\_."

This continued, with King trying to leave, Jones not allowing him to leave, and King's mother hearing continued threats from Jones. Id. 25. Jones even told King that he had a gun and that he was going to shoot King. Id. Eventually the police arrived. Id. 26. After separating King from Jones the officers asked King what happened and he broke down crying. Id. 27. King ran out of the house and found his mom. Id.

King also recalled for the jury a prior incident in 2008 when Jones assaulted his mother. Id. 37. King remembered that his mom did not pick him up after school like she usually did and his cousin came to pick him up and told him that his mom was "hurt." Id. 37-38. When King saw his mother he observed that she was "really, really, really bad" and her face was "swollen and bloody." Id. 38.

Within a month of that Jones asked King about it. Id. Jones said, "JJ, why haven't you talked to me about me and your mom's fight? You are her son, and you are supposed to stick up for her. You are supposed to talk to people who do harm to her." Id. King remembers thinking, "How can you tell me to stick up for my mom when you did this to her in the first place?" Id. 38-39.

King County Sheriff's Detective Belford was the assigned investigator on this prior incident (and on this case). He remembered that King's mother had been at home, sleeping, when the defendant came in

and woke her up with repeated punches and kicks. Id. 73-74. The prosecutor filed charges but the case had to be later dismissed because King's mother would not cooperate with the prosecution. Id. 74.

When Jones was assaulting and threatening him on May 4, 2009, King remembered that prior incident. Id. 39. That was one of the reasons that King was desperate to get out of the house and away from Jones. Id. 39. King testified, "After he hit me, I realized he could do anything he wanted or he would try to do anything he wanted if he felt like it. He could do what he did to my mom to me, easily." Id.

C. **ARGUMENT**

1. **JONES, CHARGED WITH HARASSMENT FOR THREATENING HIS GIRLFRIEND'S SON, HAD PREVIOUSLY ASSAULTED HIS GIRLFRIEND. HIS GIRLFRIEND'S SON WAS AWARE OF THIS PRIOR ABUSE. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING LIMITED INFORMATION ABOUT THE PRIOR ABUSE, AS IT WAS RELEVANT TO THE VICTIM'S REASONABLE FEAR THAT THE DEFENDANT WOULD CARRY OUT HIS THREAT.**

In a criminal case, evidence of prior bad acts is generally not admissible to prove that the defendant acted in conformity with previous behavior. ER 404(b), State v. Burkins, 94 Wash.App. 677, 973 P.2d 15 (1999); State v. Hepton, 113 Wash.App. 673, 54 P.3d 233 (2002).

However, prior bad acts or other character evidence may be admissible, “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

The rule, although it sets out particular bases for admission, is not exclusive. See, State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). If evidence of prior bad acts is admitted for purposes other than those set forth in 404(b), then the trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. State v. Powell, 126 Wn. 2d 244, 259, 893 P.2d 615 (1995).

Courts have deviated from the non-exclusive list, allowing 404(b) evidence to be admitted for diverse purposes. See, Powell, 126 Wn. 2d 244 (1995) (allowing evidence of defendant’s prior assaults and threats against murder victim to complete the context of the murder – as “res gestae”); State v. Wilson, 60 Wn. App. 887, 808 P.2d 754 (1991) (evidence of prior assaults admissible to show victim’s fear of the defendant, thus explaining her delay in reporting the incident).

Courts have specifically deviated from the non-exclusive list in domestic violence cases, recognizing the unique circumstances that such cases present. Evidence of a defendant's prior acts of violence against a

victim are generally admissible in a domestic violence trial to help the jury assess the victim's credibility and to explain to the jury any recantations or minimizations by the victim. See, State v. Magers, 164 Wash.2d 174, 189 P.3d 126 (2008); State v. Grant, 83 Wash.App. 98, 920 P.2d 609 (1996); State v. Wilson, 60 Wash.App. 887, 808 P.2d 754, *review denied*, 117 Wash.2d 1010, 816 P.2d 1224 (1991).

In State v. Grant, evidence of the defendant's prior assaults was admissible under ER 404(b) because it was relevant and necessary to assess a domestic violence victim's credibility as a witness and accordingly to prove the crime of assault actually occurred. State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996). In Grant, the history of domestic violence explained the domestic violence victim's actions as "Ms. Grant's [the victim's] credibility was a central issue at trial. The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect of such a relationship has on the victim." Grant, 83 Wn. App. at 108.

Further, the court in Grant thoroughly examined the reasons why a domestic violence victim may minimize or recant at trial. Id. at 108. The court acknowledged that victims may be coerced into lying or changing their story; and victims may minimize or deny abuse out of a sense of hopelessness or mistrust of the ability of judicial system to help them; and

many victims stay with their abusers out of fear of escalating violence, as most victims know from past experience that the violence often heightens once they seek help. Id.

The court outlined that these reasons are multiple and make prior domestic violence between the parties an exception to the typical preclusions under 404(b). The information is not offered to show that an assault occurred in the past, and so the present charged assault must have occurred. Instead, the information is offered to give the jury the whole picture, and not give undue credibility to a denial or recantation or inconsistent testimony by the victim.

Recently the Supreme Court reaffirmed the holdings and rationale of Grant in State v. Magers, 164 Wash.2d 174, 189 P.3d 126 (2008) (We adopt this rationale and conclude that prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim).

Moreover, in prosecutions for harassment, evidence of prior acts of violence may be admissible to explain the victim's fear and the reasonableness of that fear. State v. Barragan, 102 Wn.App. 754, 9 P.3d 942 (2000); See also, State Ragin, 94 Wash.App. 407, 972 P.2d 519 (1999) (jury entitled to know what [the victim] knew at the time [the defendant] threatened him to decide whether a reasonable person knowing

what [the victim] knew would believe [the defendant] would carry out the threat); State v. Binkin, 79 Wn.App. 284, 902 P.2d 673 (1995), *abrogated on other grounds*, 147 Wn.2d 288 (2002) (evidence that defendant's aggressiveness had been increasing over time admissible to determine whether the victim's fear that the threat would be carried out is reasonable).

Here, King had witnessed the injuries that his mother had previously suffered at the hands of Jones. King testified as to the injuries that he observed and he testified how that impacted his fear of Jones when Jones was threatening him. The evidence was relevant to show that King's fear that Jones would carry out his threats was reasonable. The trial court did not abuse its discretion in admitting such evidence.

The procedure for admitting ER 404(b) evidence is now clear and was set out with particularity in State v. Kilgore, 147 Wash.2d 288, 53 P.3d 974 (2002). In Kilgore the Supreme Court clarified that a trial court is not required to conduct an evidentiary hearing, prior to admitting evidence of other crimes, wrongs, or acts, to determine whether the acts occurred. Id. As the Supreme Court explained, "Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose and would undoubtedly cause unnecessary delay in the trial process." Kilgore, 147 Wash.2d at 294-95, 53 P.3d 974.

Rather, a trial court may properly rely on the State's offer of proof in determining the admissibility of ER 404(b) evidence. Id.

Before admitting evidence under ER 404(b) a trial court must:

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove the element of the crime charged, and (4) weigh probative value against the prejudicial effect.

Kilgore at 296, 53 P.3d 974 (citing State v. Lough, 125 Wash.2d 847, 853, 889 P.2d 487 (1995)). A trial court's failure to articulate its balancing process is harmless error where the record as a whole is sufficient to allow effective appellate review of the trial court's decision. State v. Bradford, 56 Wn.App. 464, 468, 783 P.2d 1133 (1989).

A trial court's decision to admit evidence of other crimes, wrongs, or acts will not be disturbed on appeal absent an abuse of discretion. State v. Burkins, 94 Wash.App. 677, 687, 973 P.2d 15 (1999). A trial court abuses its discretion only if its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State Ex. Rel. Carrol v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A decision is manifestly unreasonable if it falls outside the range of acceptable choices, given the facts and the applicable legal standard; if the record does not support the factual findings; or if the court misapplies

the law. Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 136 (1997),  
State v. Olivera-Avila, 89 Wn.App. 313, 949 P.2d 824 (1997).

Here, the trial court, outside of the presence of the jurors, conducted an evidentiary hearing. 7/23/09 RP 100-108. Jimmy King testified that in 2008 Jones had beaten his mother. Id. 101. He testified that he was picked up by his cousin and when he got into the car he saw that his mother's face was bruised and swollen and bloody and "it was horrible." Id. He further testified that approximately a month later Jones asked him about it, confronting King and asking King why he had not questioned Jones about it and why King had not stood up for his mother and confronted Jones. Id. 101-02. King also testified that this incident was on his mind when Jones was threatening him and affected the fear he felt when threatened by Jones. Id. 105-06.

The court then ruled that the above testimony was admissible, as it was relevant to "show whether or not [King's] fear was reasonable." Id. 107. The court found that the prior abuse had occurred by a preponderance of the evidence. Id. The court then balanced the prejudicial effect of such evidence and found that the probative value of the evidence outweighed the prejudicial effect of such evidence. Id.

The trial court properly applied each Kilgore factor in its analysis. The trial court made a finding by a preponderance that the event occurred;

identified the relevancy and purpose for the admissibility of such evidence and weighted the probative value against the prejudicial effect of such evidence. The trial court did not abuse its discretion in admitting evidence of Jones prior abuse of King's mother.

**2. THE PROSECUTOR, IN REBUTTAL ARGUMENT, RESPONDED TO AN ARGUMENT RAISED BY DEFENSE. DEFENSE DID NOT OBJECT, AND THE PROSECUTOR'S STATEMENTS WERE NOT INFLAMMATORY OR A MISSTATEMENT OF THE LAW. PROSECUTORIAL MISCONDUCT HAS NOT BEEN ESTABLISHED AND REVERSAL IS NOT WARRANTED.**

To establish prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudice is established only if the defendant demonstrates a substantial likelihood that the misconduct affected the jury's verdict. Id. at 52. The impropriety and prejudicial impact of a prosecutor's remarks, "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor is given wide latitude in closing argument to draw and express reasonable

inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

The failure to object to alleged misconduct constitutes a waiver of that claim "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." State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995) (citation omitted).

The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial . . . in the context of the trial. Moreover, counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for a new trial or on appeal.

State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (internal quotations omitted). Even if a prosecutor's remarks touch on a constitutional right, the failure to object to such comments constitutes a waiver of review. State v. Klok, 99 Wn. App. 81, 992 P.2d 1039 (2000).

Jones did not object to the remark that he now alleges is misconduct. Nor did Jones move for a mistrial immediately following the argument or at any time after the verdict. This failure to object or move for a mistrial constitutes a waiver of his claim of error.

The failure of Jones' counsel to object is strong evidence that the remark was not so prejudicial that his right to a fair trial was violated. See

Swan, 114 Wn.2d at 661. Nor has Jones demonstrated that a curative instruction would not have remedied any potential prejudice arising from the prosecutor's remark. See, e.g., State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (prosecutor's argument that defense counsel's mischaracterization was "an example of what people go through in a criminal justice system when they deal with defense attorneys. . . [and a] classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing," improperly disparaged defense counsel but was not sufficiently flagrant that no instruction could have cured it). Therefore, this Court should decline to consider his claim.

Should the court opt to consider his claim, reversal is not warranted as the prosecutor's remarks in closing were not improper, and certainly were not "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." Gentry, 125 Wn.2d at 640.

During closing argument the defense attorney focused on the absence of Jimmy King and his mother from trial, stating to the jurors,

[You] are the triers of fact. You weigh the credibility of the evidence. You weigh the credibility of witnesses. And the defense submits that in this case, you can't, because the key witness, the star witness of the State, was not before you...

8/26/09 RP 144. Defense further argued that the jurors "do not have the ability to fairly and properly judge the credibility of [King's] testimony simply based on hearing someone mouth the words." Id. 145-46. Defense later repeated his theme and told the jurors:

There are only two people in that room, Mr. Jones and Jimmy King. You cannot weigh the credibility of Jimmy King's testimony. If you cannot weigh the credibility of Jimmy King's testimony, then the State has not met its burden.

Id. 162.

In rebuttal, and in direct response to the arguments raised by defense, the prosecutor argued:

Ladies and gentlemen, Mr. Stoddard can stand here all afternoon and tell you that Jimmy and Ola Mae are liars, and it doesn't make it true. He can tell you all day long that the State can't prove its case because you didn't have an opportunity to physically see Jimmy or to hear Jimmy. Well, that's offensive, and let me tell you why that's offensive. Three reasons: First of all, Judge Fox told you how you were to consider Jimmy's testimony. He testified under oath, just like the other officers did. He swore to tell the truth, but this is why it's offensive: it's offensive because if you were all hearing-impaired or sight-impaired, you would still be qualified to sit on this jury. There would be accommodations made for you so that you could perceive Jimmy's testimony. You don't have to be able to see and hear and smell Jimmy Lee King to believe him. That is why it is offensive that Mr. Stoddard should ask you to just throw away, to totally discount Jimmy King's testimony.

Id. 168-69. The prosecutor's remarks, while possibly inartful, were intended to explain to the jury that they certainly could assess Jimmy King's testimony and credibility even though they did not get to hear or see his testimony and observe his demeanor while testifying.

The prosecutor's remarks were correcting a statement by defense that the jurors were somehow precluded from assessing King's credibility solely because he did not personally appear in court and his prior testimony was read into the record. The remarks by the prosecutor were not inflammatory, did not misstate the law and did not denigrate defense.

The defense attorney objected to earlier comments by the prosecutor. See 8/26/09 RP 137. However, the defense attorney did not object to the statements at issue on appeal, which is strong evidence that the remarks were not so prejudicial that Jones' right to a fair trial was violated. See Swan, 114 Wn.2d at 661. Nor is there any evidence that the prosecutor's remarks were "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." Gentry, 125 Wn.2d at 640. Reversal is not warranted.

**3. REVERSAL IS NOT WARRANTED UNDER THE "CUMULATIVE ERROR" DOCTRINE.**

Jones alleges that the cumulative effect of the above trial errors deprived him of his right to a fair trial. An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). However, to seek reversal pursuant to the "cumulative error" doctrine, a defendant must establish the presence of multiple trial errors *and* that the accumulated prejudice affected the verdict. Where errors have little or no effect on the outcome of trial, the doctrine is inapplicable. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, as explained above, Jones cannot meet his burden. His claim fails.

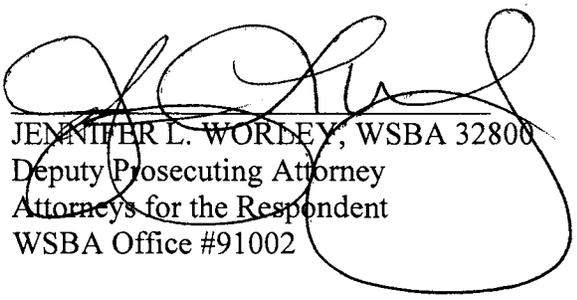
**D. CONCLUSION**

For the foregoing reasons the State respectfully asks this court to affirm Jones' conviction.

DATED this \_\_\_\_\_ day of July, 2010.

RESPECTFULLY submitted,

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