IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 66663-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
STEPHEN TERRY HARVEY,	)	
	)	
Appellant.	)	FILED: October 24, 2011
	)	

Leach, A.C.J. — Stephen Harvey appeals his conviction for vehicular homicide while driving under the influence. Harvey argues that the trial court should have suppressed the results of his blood alcohol test, which he claims the State obtained in violation of his privacy rights under article 1, section 7 of the Washington State Constitution. Alternatively, Harvey contends that the trial court should have excluded the test results for failure to comply with Washington Administrative Code requirements. Because sufficient untainted evidence established probable cause to arrest Harvey for vehicular homicide, the State had implied consent to draw Harvey's blood. We therefore do not reach the issue of whether Harvey's privacy rights were violated. Additionally, the State met its prima

facie burden of proving that the blood test complied with the WACs. We thus hold that the trial court properly admitted the blood test evidence.

Harvey also alleges several other trial errors. He argues that the trial court abused its discretion by excluding statements Harvey made to his arresting officer and by admitting a photograph of the victim with her family. He claims that his attorney provided ineffective assistance by failing to object to testimony that the victim had children. Harvey also contends that the trial court violated the appearance of fairness doctrine by sustaining its own objection during direct examination of a defense witness. Finally, Harvey argues that cumulative error denied him a fair trial. Finding no error, we affirm.

FACTS

On the evening of January 21, 2008, Jessica Torres was driving home from work when a car traveling in the opposite direction crossed the center line and collided with her car. Nearby residents heard the collision and called 911. Medics pronounced Torres dead at the scene. The other driver survived, and medics transported him to the hospital.

Sergeant Mike Merrill of the Kitsap County Sheriff's Office called Deputy David Corn, a certified drug recognition expert, and asked him to go to the hospital to contact the driver. When Corn arrived at the hospital's emergency room, he identified himself to the staff, told them he was investigating a fatality motor vehicle collision, and explained he was there to observe the driver. Hospital staff informed

Corn that the driver was in the CAT (computerized axial tomography) scan laboratory. When Corn asked for the driver's name, a nurse handed him a clipboard with the driver's medical chart and the aid car paramedic's report and notes. The documents on the clipboard identified the driver as "John Doe" and included the notation "ETOH," which Corn recognized as a reference to alcohol. After reading the medical chart, Corn called the paramedic, who confirmed that he had smelled intoxicants on the driver.

Corn asked the nurse to take him to the CAT scan laboratory, where the unconscious driver had just emerged from the machine. Corn recognized him from a previous encounter as Stephen Harvey. When Corn asked the nurse whether she had checked Harvey's eyes to see if his pupils were reacting normally to light, she opened Harvey's eyelids. Corn observed that Harvey's eyes appeared normal. At that time, Corn smelled alcohol on Harvey's breath.

Corn called Merrill and reported Harvey's identity. Merrill told Corn there was evidence of recklessness, speed, and alcohol at the scene. Based on his and Merrill's observations, Corn determined that he had probable cause to arrest Harvey for vehicular homicide. As Corn read Harvey his Miranda[1] rights, Harvey regained consciousness. After the arrest, a phlebotomist drew Harvey's blood sample. Harvey did not consent to this procedure and submitted only because Corn told him it was mandatory.

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Chris Johnston, a toxicologist at the Washington State Toxicology Laboratory, tested Harvey's blood sample using gas chromatography. The results showed a blood alcohol concentration of .10 grams per 100 milliliters of blood, .02 grams over the legal limit.[2]

The State charged Harvey with one count of vehicular homicide under RCW 46.61.520(1)(a), alleging that he had operated a vehicle while under the influence of alcohol, causing Torres's death.

Before trial, Harvey moved to suppress the results of the blood alcohol test, arguing the evidence was the product of an illegal search of his medical information and body. The trial court denied Harvey's suppression motion and entered the following conclusions of law:

> II. That Corn had probable cause to arrest the Defendant for Vehicular Homicide.
>
> III. That the Defendant had no reasonable expectation of privacy in the areas of the emergency room in which the Defendant was housed. Therefore, there was no illegal search or seizure of the Defendant or his blood in violation of either the Washington or United States Constitutions.
>
> IV. That law enforcement and/or fire personnel caused the Defendant to be transported to the hospital, and therefore, the hospital's release of information regarding the Defendant's identity and diagnosis was not a violation of the Washington Medical Records Act. Even if it were, the appropriate remedy is not suppression of evidence in a criminal case.

During trial, Harvey again moved to exclude the blood test results, this time

[2] RCW 46.61.502(1)(a).

on the bases that the test was not performed in compliance with WAC requirements and the test results were not helpful to the jury and should be excluded under ER 702. The court ruled that the State had met its prima facie burden of showing the blood alcohol test complied with WAC requirements and was admissible.

A jury found Harvey guilty as charged. Harvey appeals.

ANALYSIS

Right to Privacy

Harvey claims that the trial court erred by denying his motion to suppress the blood test evidence because it was obtained as the result of an illegal search. We review conclusions of law in an order pertaining to the suppression of evidence de novo.[3] Unchallenged findings of fact are verities on appeal.[4]

Article I, section 7 of the Washington State Constitution prohibits a warrantless search unless an exception to the warrant requirement applies.[5] Under the exclusionary rule, the State may not present evidence seized during an illegal search in its case-in-chief.[6] Additionally, evidence derived from an illegal search may also be subject to suppression as fruit of the poisonous tree.[7]

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[3] State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

[4] State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

[5] State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Exceptions to the warrant requirement include: exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and investigative stops. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

[6] Gaines, 154 Wn.2d at 716-17.

[7] Gaines, 154 Wn.2d at 717.

We need not decide whether the trial court should have suppressed Harvey's blood test results as the fruit of an illegal search. The record demonstrates that Corn had probable cause to arrest Harvey for vehicular homicide and thus implied consent to obtain his blood sample without the allegedly tainted hospital evidence.

Probable cause must support a warrantless arrest.[8] Probable cause exists "when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed."[9] Under the "fellow officer" rule, an officer who does not personally possess sufficient information to constitute probable cause may make a warrantless arrest if "(1) he acts upon the direction or as a result of a communication from a fellow officer, and (2) the police, as a whole, possess sufficient information to constitute probable cause."[10]

A person is guilty of vehicular homicide when he causes the death of another person while driving (1) under the influence of alcohol or drugs, (2) in a reckless manner, or (3) with disregard for the safety of others.[11] RCW 46.20.308(3) gives an officer the authority to obtain a blood sample for testing without consent when an individual is under arrest for vehicular homicide.

Here, the impetus for Harvey's arrest was Corn's second phone conversation

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[8] RCW 10.31.100 ("A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant.").

[9] State v. Huff, 64 Wn. App. 641, 646, 826 P.2d 698 (1992).

[10] State v. Maesse, 29 Wn. App. 642, 646-47, 629 P.2d 1349 (1981).

[11] RCW 46.61.520.

with Merrill. The evidence provided to Corn in that conversation was untainted. Merrill told Corn there was evidence of excessive speed, recklessness, and alcohol on the scene and that the driver had crossed the center line, hitting Torres head on and killing her. These facts gave Corn probable cause to arrest Harvey under the vehicular homicide statute. And once Corn had lawfully arrested Harvey, by statute he had implied consent to draw and test Harvey's blood. Therefore, the trial court did not err by denying Harvey's motion to suppress the blood alcohol evidence.

In his reply brief, Harvey argues that the State cannot show that Corn would have called Merrill if he had been deprived of access to Harvey in the hospital. But he cites no authority to support this argument. We generally do not consider an argument unsupported by any citation to authority.[12] Additionally, in a case of this seriousness, it strains credulity to believe that Corn would not have communicated with his supervising officer during the course of his investigation at the hospital. We hold that the trial court properly admitted the evidence.

Compliance with the Washington Administrative Code

Harvey argues the handling of his blood did not comply with WAC requirements, rendering the blood test results unreliable and subject to exclusion under ER 702. Specifically, he claims there was insufficient enzyme preservative to prevent blood contamination when the blood remained unrefrigerated for 63 hours before it was tested. This court reviews a trial court's ruling on the admission of a

[12] Cowiche Canyon Conservancy v. Bosley 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

blood alcohol test result for an abuse of discretion.[13] "A court abuses its discretion when it exercises it on untenable grounds or for untenable reasons."[14]

WAC 448-14-020(3)(b) provides, "Blood samples for alcohol analysis must be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxide."

To introduce the results of a blood alcohol test, the State has the burden of proving that the analysis was performed in compliance with the regulations contained in WAC 448-14.[15] A testing method meeting those requirements provides sufficient assurance of the test results' accuracy and reliability to allow for their general admissibility.[16] Under the blood alcohol statute, a trial court assumes the truth of the State's evidence and draws all reasonable inferences from it in the light most favorable to the State.[17] Once the State makes a prima facie showing of WAC compliance, the court admits the test results, and the jury determines the weight to be given this evidence.[18]

Here, Johnston, the State toxicologist, testified that all blood vials the toxicology lab provides to law enforcement contain an anticoagulant and an enzyme preservative in powder form. According to Corn, the vials he provided to the

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[13] State v. Hultenschmidt, 125 Wn. App. 259, 264, 102 P.3d 192 (2004).
[14] Hultenschmidt, 125 Wn. App. at 264.
[15] State v. Reier, 127 Wn. App. 753, 756, 112 P.3d 566 (2005).
[16] State v. Straka, 116 Wn.2d 859, 870, 810 P.2d 888 (1991).
[17] RCW 46.61.506(4)(b).
[18] RCW 46.61.506(4)(c).

phlebotomist taking Harvey's blood were intact and contained a white powder. Johnston said that when he received the vials containing Harvey's blood, they were undamaged and sealed with the blood in a usable condition. Based on his observations, Johnston concluded that Harvey's blood sample had been mixed with enzyme preservative and anticoagulant. Given this testimony, we hold that the State met its prima facie burden of demonstrating that the blood test complied with the WACs.[19]

The defense was entitled to challenge the accuracy of the test results, as it did.[20] Johnston underwent a thorough and lengthy cross-examination. Additionally, the defense presented the expert testimony of a metrologist, who questioned the reliability of the State's blood test procedures.[21] This evidence went to the weight, not the admissibility, of the blood test results. The trial court did not abuse its discretion by admitting Harvey's blood test results.

Exclusion of Harvey's Statements about Corn

Harvey claims the trial court violated his Sixth Amendment right to present a defense and cross-examine witnesses when it excluded evidence that Harvey called Corn a "liar" and a "dirty cop" upon seeing him in the hospital. We review a trial court's decision to limit the scope of cross-examination for an abuse of discretion.[22]

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[19] Harvey argues in his reply brief that this case is like State v. Bosio, 107 Wn. App. 462, 27 P.3d 636 (2001). But there, the blood test results were inadmissible because there was no evidence that enzyme preservative was added to the blood. 107 Wn. App. at 468. Therefore, Bosio is inapposite.

[20] Straka, 116 Wn.2d at 875.

[21] A metrologist studies the science of measurements.

Both the state and federal constitutions guarantee an accused the right to compulsory process to compel the attendance of witnesses.[23] That guarantee includes "'the right to present a defense, the right to present the defendant's version of the facts . . . to the jury so it may decide where the truth lies.'"[24] This right is not absolute and is limited to the admission of relevant, otherwise admissible evidence.[25]

Here, Corn testified that Harvey was "argumentative" and "combative" when he regained consciousness in the hospital and that he took Harvey's belligerence as a sign of impairment. But Corn also explained that based on a previous encounter when Corn was called to Harvey's house for a medical emergency involving Harvey's wife, "Mr. Harvey doesn't care for me, wanted to know why I was [at the hospital], argued with me."

On cross-examination, the defense sought to elicit testimony that in addition to acting belligerently, Harvey had called Corn a "dirty cop" and a "liar." The trial court excluded the testimony in part because it was duplicative. During cross-examination, Corn again stated that Harvey's argumentative behavior was related in part to the previous incident at Harvey's house.

A trial court has broad discretion under ER 403 to exclude evidence that is

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[22] State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).
[23] State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).
[24] Maupin, 128 Wn.2d at 924 (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).
[25] State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

needlessly cumulative or duplicative. Because the jury already heard that Harvey did not care for Corn and that Harvey's belligerent attitude was partially a response to this personal opinion, the trial court did not abuse its discretion in excluding Harvey's statements as duplicative.

Further, any error would be harmless.[26] When determining whether a trial court error was harmless, we ask whether "'within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'"[27] Here, we find that it would not have been. In addition to the blood evidence, the State presented substantial circumstantial evidence that Harvey was intoxicated at the time of the collision. The jury heard that Harvey was driving 87 miles per hour in a 50-miles-per-hour zone; an investigating officer found a half-empty, one-liter bottle of whiskey in Harvey's car; a paramedic smelled alcohol on Harvey when he was in the ambulance; and a witness at the scene observed signs of intoxication, including the odor of alcohol, trouble maintaining balance, slurred speech, and watery, bloodshot eyes. Excluding Harvey's statements did not materially affect the outcome of his trial.

Ineffective Assistance of Counsel

Harvey contends that his trial counsel provided ineffective assistance by

[26] Because excluding Harvey's statements did not prevent him from arguing his theory of the case, we apply the nonconstitutional harmless error standard. See State v. Anderson, 112 Wn. App. 828, 837, 51 P.3d 179 (2002).

[27] State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

failing to object to the victim's husband's testimony that the victim had two children. Claims of ineffective assistance are mixed questions of fact and law that this court reviews de novo.[28]

To prevail on a claim of ineffective assistance, a defendant must satisfy the two-prong test under Strickland v. Washington.[29] First, a defendant must show a deficiency in counsel's representation. Counsel's representation is deficient if it falls below an objective standard of reasonableness.[30] Second, a defendant must show that the deficient performance resulted in prejudice.[31] Prejudice occurs when it is reasonably probable that but for counsel's errors, "'the result of the proceeding would have been different.'"[32] Failure to establish either prong is fatal to a claim of ineffective assistance.[33] We presume counsel was effective. The defendant has the burden of demonstrating that there was no legitimate strategic or tactical reason for the challenged conduct.[34] This court evaluates counsel's performance in the context of the entire record.[35]

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[28] In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

[29] 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[30] State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

[31] Stenson, 132 Wn.2d at 705-06.

[32] State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting Strickland, 466 U.S. at 694).

[33] State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

[34] State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

[35] Strickland, 466 U.S. at 695-96 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."); McFarland, 127 Wn.2d at 335 ("Competency of counsel is determined based upon the entire record below.").

Harvey argues that counsel's failure to object was objectively unreasonable because the testimony was irrelevant and prejudicial. We, however, agree with the State that counsel could have made an objectively reasonable trial decision not to emphasize the testimony by objecting to it.

Also, Harvey cannot establish prejudice. The testimony about the victim's children was very brief, while the testimony regarding the accident, Harvey's speed, and his intoxication was considerable. We presume the jury followed the law and the court's instructions when it found Harvey guilty and did not base its decision on an emotional response to the fact that the victim was a mother.[36] Harvey has not established that the outcome of his trial would have been different if Harvey's counsel had objected to Mr. Torres's testimony.

Admission of Family Photograph

Harvey next claims that the trial court abused its discretion by admitting the Torres family photograph over Harvey's objection. Again, this court reviews a trial court's evidentiary rulings for an abuse of discretion.[37] "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole."[38]

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[36] State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006); Strickland, 466 U.S. at 694 ("In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.").

[37] State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983).

[38] Bourgeois, 133 Wn.2d at 403.

Before trial, the trial court admitted an in-life photograph of the victim without objection. But when the State sought to introduce a second in-life photograph of the victim with her family during Mr. Torres's testimony, Harvey objected under ER 403. The court overruled the objection and admitted the photograph.

Again, Harvey's challenge fails because he cannot demonstrate prejudice. Like the testimony regarding Torres's children, the photograph was of minor significance in reference to the overall, overwhelming evidence as a whole. Harvey may be correct that such evidence rouses the jury's sympathy, but he has not shown that this jury abandoned its duty to decide the case according to the court's instructions.

Prosecutorial Misconduct

Harvey describes three instances of prosecutorial misconduct. To prevail on a claim of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect.[39] "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."[40] A defendant establishes prejudice only if there is a substantial likelihood the misconduct affected the jury's verdict.[41] In examining whether the prejudice could have been remedied by a curative instruction, we "do

[39] State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).
[40] State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).
[41] Roberts, 142 Wn.2d at 533 (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury."[42]

Here, Harvey did not object to the prosecutor's statements or request a curative instruction. He thus waived the error unless he can show that the prosecutor's remarks were so "flagrant and ill intentioned" that they resulted in an enduring prejudice that a curative instruction could not have remedied. We find that Harvey has not made the required showing.

First, Harvey asserts that the prosecutor committed reversible misconduct by disparaging defense counsel during closing argument:

> Ladies and gentlemen, every Defendant has the right to a trial. They have a right to a trial by a jury of their peers. They have a right to require the State to prove each element beyond a reasonable doubt. Don't believe for an instant that all of this is because there are actually issues with the State's evidence. The Defense' [sic] strategy, in this case, has been one of confusion of the issues. Listen to what they're saying and analyze it for yourself.

And during the State's final closing argument, the prosecutor said,

> There are a couple of themes, if you listen to the Defense's case. And Counsel indicated that they weren't throwing everything at the wall to see what sticks. And I would suggest that, yes, in fact, they are. There are a number of issues that they raised that were irrelevant. And, in fact, one of them—and I'll just give you a couple of examples—one of them was this apparent rise in the road. I'm not sure I'm going to find it at this point. The road rises and comes to a crest where the collision was.

A prosecutor may comment disparagingly on a defense argument[43] but may

[42] State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).
[43] State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997); State v.

not disparage defense counsel or argue in a manner that impugns counsel's integrity.[44] Here, when viewed in isolation, the prosecutor's brief comments may appear to have impugned the role of defense counsel. But when placed in context of the entire argument, the remarks focused more on the merits of the defense than on the character of defense counsel. In other words, the remarks emphasized that the weight of evidence favored conviction and responded to defense counsel's argument. Under these circumstances, the prosecutor's statements were not so flagrant and ill intentioned that a proper limiting instruction could not have cured them. Harvey has therefore waived any claim of error on appeal.

Second, Harvey claims the prosecutor committed misconduct by improperly shifting the burden of proof to the defense. Harvey points to comments made by the prosecutor during closing argument that asked the jury to consider why the defense did not present an accident reconstruction expert contradicting the State's, a determination of the uncertainty measurement in the toxicology results, or the results of an independent toxicology report. The State has the burden to prove every element of the crime beyond a reasonable doubt.[45] The defendant has no

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Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

[44] See Warren, 165 Wn.2d at 29-30 (remarks disparaging defense attorneys in general and calling defense argument a "'classic example of taking these facts and completely twisting them . . . and hoping that you are not smart enough to figure out what in fact they are doing'" were not so flagrant and ill intentioned as to be incurable); State v. Negrete, 72 Wn. App. 62, 66, 863 P.2d 137 (1993) (remark that defense counsel "'is being paid to twist the words of the witnesses'" was curable) (emphasis omitted); Lindgren v. Lane, 925 F.2d 198, 204 (7th Cir. 1991) (single reference to defense counsel's argument being the "'tricks'" and "'illusions'" of a "'magician'" was not so egregious as to warrant habeas relief).

obligation to present evidence. It was improper for the prosecutor to comment on Harvey's failure to do so. But our Supreme Court held in State v. Warren[46] that such comments may be cured by a timely and thorough instruction. Having not requested a curative instruction, Harvey has waived the error on appeal.

Third, Harvey contends the prosecutor committed misconduct by allowing Torres to testify that he and the victim had two children and by introducing the family photograph into evidence. As discussed above, no prejudice resulted from the introduction of this evidence. Harvey's claim fails.

Appearance of Fairness

Next, Harvey contends the trial court violated the appearance of fairness doctrine. A judicial proceeding must have an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.[47] To prevail on a violation of the appearance of fairness doctrine claim, a defendant must identify evidence of a judge's actual or potential bias.[48]

Here, the challenged judicial conduct occurred when the trial court interrupted the testimony of the defense's expert, stating, "I'm going to call for a sidebar, at this point." During the sidebar, the trial court instructed defense counsel to stop pursuing his particular line of inquiry because it concerned breath tests, not

[45] In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).
[46] 165 Wn.2d 17, 28, 195 P.3d 940 (2008).
[47] State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995).
[48] State v. Post, 118 Wn.2d 596, 618-19, 826 P.2d 172, 837 P.2d 599 (1992).

blood tests. Back on the record and in front of the jury, the trial court stated, "Strangely enough, my objection is sustained." Defense counsel did not object to the trial court's comment.

Therefore, Harvey raises the issue for the first time in this court. We do not generally consider issues raised for the first time on appeal.[49] An exception is made for manifest constitutional errors.[50] But "[o]ur appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally based."[51] Because Harvey raises an issue of nonconstitutional dimensions, we do not consider it further.

Cumulative Error

Finally, Harvey argues that cumulative error denied him a fair trial. Because he failed to establish error, we disagree.

[49] State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998).
[50] State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988).
[51] City of Bellevue v. King County Boundary Review Bd., 90 Wn.2d 856, 863, 586 P.2d 470 (1978); see also Tolias, 135 Wn.2d at 140.

CONCLUSION

We affirm.

Leach, A.C.J.

WE CONCUR: