IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ABEL EDUARDO CONTRERAS. Appellant.	No. 37259-2-II UNPUBLISHED OPINION

Hunt, J — Abel Eduardo Contreras appeals his convictions for first degree murder while armed with a firearm, three counts of second degree unlawful firearm possession, and attempting to elude a pursuing police vehicle. He argues that (1) the trial court erred by admitting a key witness's unsworn statement as substantive evidence rather than limiting its use to impeachment; (2) the trial court erred by denying his motion for mistrial following the State's reference to gang activity, which the parties had previously stipulated to exclude; (3) the State committed prosecutorial misconduct by bolstering its witnesses' credibility; (4) the State's impermissible comment on Contreras's guilt entitles him to a new trial; (5) the evidence is insufficient to support his convictions; (6) the trial court impermissibly commented on the evidence; and (7) cumulative error requires reversal. We affirm.

FACTS

Luis Bernal owed Abel Contreras several thousand dollars. On December 11, 2006, Contreras went to Bernal's apartment to collect that debt. In addition to Bernal, several other acquaintances were present: Kelly Kowalski, Roman Atofau, Jonathan Mayhall, and Tony Sakellis. Without threatening anyone at the time, Contreras showed his gun to them. Eventually he put the gun away.

I. Crimes

Sakellis and Bernal argued and Sakellis pointed a gun at Bernal's head.[1] Contreras then pointed a gun around the room and afterwards hit Bernal in the side of the head with it, fracturing Bernal's skull, and causing Bernal to fall bleeding to the floor. The gun discharged on impact and shot a bullet into the ceiling. Except for Contreras and the injured Bernal, everyone else fled the apartment.

Preparing to flee, Mayhall gathered his belongings, moved toward the door, looked over his shoulder, and saw Contreras point a gun toward Bernal. Seconds after exiting the apartment, Mayhall (and others fleeing the apartment) heard two or three more shots in close succession come from the apartment.

A neighbor called police reporting, "[S]hots fired and a man down." Report of Proceeding (RP) at 873. Police responded and found Bernal dead from multiple gunshot wounds. Bernal had three bullet holes in his back and an injury to his head. Police also found a bullet hole

[1] The record is unclear as to whether Sakellis pointed Contreras's gun or whether Sakellis arrived with and pointed his own gun. *See* Report of Proceeding (RP) at 756, 757.

in the ceiling, collected four shell casings from the scene, and determined that each had come from the same gun.

Two days later on December 13, police tried to apprehend Contreras while he was driving in his car. But Contreras fled by car when the pursuing police turned on their emergency lights. An extensive high speed chase ended when Contreras crashed his car, exited the car, and ran up a nearby hillside on foot to evade police. Using a tracking dog unit, the police located Contreras on foot and arrested him.

On December 15, Contreras's girlfriend, Jennifer Klepach, gave police an unsworn statement[2] that Contreras had come to her home the night of Bernal's death, discussed the circumstances surrounding the death, and apparently made inculpatory statements admitting that he had shot Bernal.[3]

II. Procedure

The State charged Contreras with murder in the first degree (RCW 9A.32.030(1)(a)) while armed with a firearm, RCW 9.41.010, Count I; felony murder in the second degree (RCW

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[2] The unsworn statement itself does not appear in the record. Contreras states in his brief that the statement "was tape recorded, but was not [taken] under oath." Br. of Appellant at 11. The State does not appear to contest this point. *See* Br. of Resp't at 11-14.

[3] Klepach's statements included:

> [State to Klepach]: Now, in that transcript [of Klepach's taped interview with police] you told detectives that [Contreras] called you the night of the murder and told you he shot [Bernal]? RP at 1484.
>
> . . .
>
> [State]: And isn't it true [Contreras] told you . . . he shot [Bernal] because he owed him $5000? RP at 1487.
>
> . . .
>
> [Klepach]: That's what I said in the taped statement.

RP at 1487.

9A.32.050(1)(b)) while armed with a firearm, RCW 9.41.010, Count II; unlawful possession of a firearm in the second degree (RCW 9.41.040(2)(a)(i)) on December 11, Counts VI and VII; unlawful possession of a firearm in the second degree (RCW 9.41.040(2)(a)(i)) on December 13, Count VIII; and attempting to elude a pursuing police vehicle (RCW 46.61.024(1)) on December 13, Count IX.

A. Reference to Gang Association

Before trial, the parties stipulated to exclude references to Contreras's or the witnesses' gang association.[4] In two instances at trial, however, police witnesses tangentially alluded to gang activity:

> [State]: Do you have a current kind of specialty of what kind of crimes you investigate?
> [Police witness]: Gang crimes and homicide.

RP at 1278.

> [State]: Any other statements that you recall [Contreras] making?
> [Police witness]: In my report I put a quote [omitted] . . . And we talked to him generally about his gang affiliations.

RP (Dec. 20, 2007) at 54. Contreras did not object to the first gang allusion. He did object to the second reference, and asked for a mistrial, which the trial court later denied. Sustaining the

[4] The following colloquy reflects this stipulation:

> [State]: We will stipulate to no reference to gang association unless or until it becomes relevant and we will have a hearing outside the presence of the jury.
>
> [Contreras]: I was going to say it didn't look like this was any kind of gang motivated activity here.
> . . .
> [Court]: The state has stipulated as to the gang association.

RP at 361.

objection, the trial court instructed the jury that the questions and response were "stricken." RP (Dec. 20, 2007) at 60.

B. Klepach's Testimony

At trial, Klepach admitted to having told the police about her conversation with Contreras the night of Bernal's death. She indicated Contreras had discussed the circumstances surrounding Bernal's death and had made inculpatory statements indicating that he shot Bernal over a money dispute. But she also testified, "I think I was a little bit confused and I talked more after that day to [Contreras] and I got more and I wasn't really listening to him the night that he came and told me . . . so I didn't pay close attention . . . I have [since] had many, many discussions and that it was not [Contreras] who originally hit [Bernal]." RP at 1489.

Contreras objected to the admission of any testimony concerning Klepach's prior unsworn statement to the police; he also requested a limiting instruction that such evidence could be considered only for impeachment purposes as a prior inconsistent statement. The trial court sustained the objection and gave the limiting instruction.

The State asked the trial court to give a new instruction allowing the jury to consider the substance of her unsworn statement.[5] Outside the jury's presence, the trial court engaged in an extended colloquy with counsel and later reversed its earlier ruling, thereby allowing the State to argue Klepach's prior unsworn statement to the police as substantive evidence of Contreras's guilt. But when the jury returned to the courtroom, the trial court did not withdraw its earlier

[5] The State stated: "Your Honor[,] I have no other questions. I would just ask for clarification from the Court to the jury that the evidence [Klepach] testified to from her transcript was not only impeachment evidence, it was for substantive evidence as well. She did admit that those were statements that she recalled them [sic] on December 15th." RP at 1498.

ruling or instruct the jury that it could use the statement for anything other than impeachment.

When the State asked Klepach whether she had voluntarily turned over to police two letters, she replied, "Well, as voluntarily as you can, when if you don't help them, you end up going to jail." RP at 1496. When the State repeated the question, Contreras objected on grounds that the question had already been asked and answered. The trial court overruled the objection, stating, "The question was asked but was not answered . . . [a]nswer the question." RP at 1496. Contreras again objected, stating, "Your Honor . . . I believe that was a comment on the evidence," RP at 1496, to which the trial court replied to Klepach, "Go ahead [and answer the question]." RP at 1496.

C. Witnesses' Fear of Testifying

In four instances, the State brought out that witnesses were afraid to testify. First, Mayhall nonresponsively[6] testified, "[O]riginally I was in fear for my safety, even my life to testify at this trial." RP at 1178.[7] Contreras objected and a colloquy ensued. But Contreras did not request a mistrial or limiting instruction, and the trial court gave none.

Second, in response to Contreras's attack on Tehra Luhtala's (Atofau's[8] girlfriend) credibility during recross,[9] the State asked her whether she was afraid to testify, to which she

[6] Mayhall's comment came as part of his answer to the State's question, "Are you in compliance with your probation at this time?" RP at 1178.

[7] The implication of such testimony, whether intended or not, is a greater likelihood of credibility when a witness testifies in spite of such fear. *See State v. Bourgeois*, 133 Wn.2d 389, 400-01, 945 P.2d 1120 (1997).

[8] Luhtala testified about her communications with Atofau the night of Bernal's murder.

[9] During recross, Contreras asked Luhtala, "You wouldn't have gone to the police department if

replied, "Yes." RP at 1398. Contreras objected, but the trial court instructed Luhtala to answer.

Third, in response to Contreras's opening the door to Kowalski's fear of Sakellis's retaliation for testifying at trial,[10] the State asked Kowalski, "Do you have some fear of retaliation by [Sakellis]?" to which Kowalski replied, "Yeah." RP (Dec. 20, 2007) at 42. Contreras did not object.

Fourth and finally, in closing argument, the State argued, "The reluctance and fear of these witnesses he [Contreras] is banking on them absolutely banking on them . . . other witnesses came in here and despite their fear testified and you get to evaluate their credibility." RP at 1655. Contreras did not object.

D. Police Tracking Dog

When asked to lay a foundation about how police dogs track suspects, a police officer testified that dogs respond to enhanced scent created "when a person is under great emotional distress," RP at 980, and from "fear or apprehension." RP at 980. Contreras objected to this testimony as an impermissible comment on Contreras's guilt, but the trial court overruled the objection, instead "allow[ing] a reasonable inquiry to establish the foundation." RP at 980-81. Contreras later asked for a mistrial, which the trial court denied. When the trial court offered to

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[police] hadn't gone to your mom's house, right?" RP at 1397, attacking what Luhtala had said earlier, "Not even encouragement[,] [my father] made me go but on my own I went down [to the police department]." RP at 1396.

[10] Contreras asked Kowalski, "And when [Sakellis] asked you to [change your testimony from saying that he had a gun to it being a remote control], did he say anything else?" RP (Dec. 20, 2007) at 41. Kowalski replied, "[He told me] [t]hat I wouldn't get hurt." RP (Dec. 20, 2007) at 41.

give a curative instruction, Contreras refused.

The jury found Contreras guilty of all charges.[11] The jury also found that Contreras was armed with a firearm for the purposes of both murder counts. The trial court sentenced Contreras to 476 months of confinement.

Contreras appeals.

ANALYSIS

I. Impeachment Limitation

Contreras argues the trial court erred by failing to give his proposed limiting instruction following testimony about Klepach's unsworn statement to police, thereby allowing the jury to consider such evidence as substantive proof, rather than merely for impeachment purposes as a prior inconsistent statement. We do not reach this argument because, contrary to Contreras's assertion on appeal, the trial court did give the limiting jury instruction that he had requested: "Ladies and gentlemen, this is not to be construed as substantive evidence." RP at 1484. Therefore, as the record shows, evidence of Klepach's prior unsworn statement to police about Contreras's inculpatory statements to her never came before the jury for their consideration as substantive evidence of his guilt.

Although during the colloquy the trial court reversed its earlier ruling and indicated it would allow the State to use the statement as substantive evidence, the trial court did not so advise the jury when it returned or retract its earlier limitation of the evidence to impeachment.

[11] The trial court subsequently vacated Contreras's conviction for second degree felony murder on double jeopardy grounds, in light of the Supreme Court's decision in *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007).

Thus, even though the State noted Contreras's inculpatory statements in closing argument, Contreras did not object. Moreover, the trial court instructed the jury that counsel's arguments are not evidence and that it must rely on the evidence admitted at trial in reaching its verdict. *See* Clerk's Papers (CP) at 113-114. We presume that the jury followed the trial court's earlier instruction that it could use the statement only for impeachment and that it did not, therefore, consider the statement as substantive evidence of Contreras's guilt. *See State v. Kirkman,* 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport,* 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); *State v. Cerny,* 78 Wn.2d 845, 850, 480 P.2d 199 (1971), *vacated on other grounds,* 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972)) ("Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary.").

Klepach's unsworn statement was never admitted as substantive evidence of Contreras's guilt. Nor did the trial court allow the jury to consider it as such. Therefore, Contreras's argument fails.

II. Gang Reference

Contreras argues that the trial court erred by denying his motion for a mistrial following the State's second reference to gang activity, which both parties had previously stipulated to exclude. We disagree.

We review denial of a motion for a mistrial for abuse of discretion, finding abuse only when no reasonable judge would have reached the same conclusion. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure a fair trial. We deem

prejudicial only errors affecting trial outcome. State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (citing *Hopson*, 113 Wn.2d at 284). The error alleged here does not meet this test.

Contreras failed to object to the State's first gang reference.[12] Therefore, he may not challenge it on appeal. *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000). The trial court sustained his objection to the second gang reference and instructed the jury, "[T]he last question and the last response are stricken." RP (Dec. 20, 2007) at 60. We presume the jury followed this instruction. *Kirkman,* 159 Wn.2d at 928.

Furthermore, Contreras fails to demonstrate prejudice warranting reversal. We agree with the State that (1) the police "never mentioned whether [Contreras] was affirmatively a gang member and there is no other testimonial evidence from which the jury could meaningfully infer [Contreras] belongs to a gang," CP at 203; and (2) "[Contreras] is unable to establish that the single . . . innocuous comment was so prejudicial that the only remedy is a new trial." CP at 203, "State's Memorandum Regarding Defendant's Mistrial." Again, Contreras's argument fails.

[12] We note that this gang reference was tangential, part of the testifying officer's description of his general assignments -- homicides and gangs:

> [State]: Do you have a current kind of specialty of what kind of crimes you investigate?
>
> [Police witness]: Gang crimes and homicide.

RP at 1278.

III. Witness Bolstering

Contreras argues the State committed prosecutorial misconduct by impermissibly bolstering witness credibility in four instances. *Bourgeois*, 133 Wn.2d at 400. Again, we disagree.

Contreras bears the burden of establishing both the impropriety and the prejudicial effect of the prosecutor's comments. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To establish prejudice, he must demonstrate a substantial likelihood that the misconduct affected the jury's verdict. *Brown*, 132 Wn.2d at 561. He fails to meet this burden here.

The first instance consisted of non-responsive testimony, wholly unrelated to the State's question;[13] thus, the State did not provoke the comment. We hold, therefore, that there was no prosecutorial impropriety or misconduct in this first instance.

We hold that the second instance constituted permissible rehabilitation testimony because Contreras had earlier attacked Luhtala's credibility. *See State v. Froehlich*, 96 Wn.2d 301, 305, 635 P.2d 127 (1981) ("[C]orroborating evidence is admissible . . . when a witness'[s] credibility has been attacked by the opposing party."); *see also Bourgeois*, 133 Wn.2d at 402 ("[T]he testimony of [witness] regarding his reluctance to testify was admissible because his credibility was attacked.").

We hold that the third instance[14] constituted permissible testimony because Contreras had

[13] Mayhall commented, "[O]riginally I was in fear for my safety, even my life to testify at this trial," in response to the State's question, "Are you in compliance with your probation at this time?" RP at 1178.

[14] The State asked Kowalski, "Do you have some fear of retaliation by [Sakellis]?"—to which Kowalski replied, "Yeah." RP (Dec. 20, 2007) at 42. Contreras did not object. Contreras

already opened the door to Kowalski's fear of retaliation by Sakellis for testifying at trial, evidence normally inadmissible had the State introduced it. Because Contreras introduced the evidence of Kowalski's fear, he (Contreras) gave the State the right to explore this line of questioning further and to introduce evidence explaining Kowalski's fear.

> A party may [. . .] choose to introduce evidence that would be inadmissible if offered by the opposing party . . . . [T]he introduction of inadmissible evidence is often said to 'open the door' both to cross-examination that would normally be improper and to the introduction of normally inadmissible evidence to explain or contradict the initial evidence.

State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (*quoting* Karl B. Tegland, 5 *Wash. Prac.* 41 (3rd ed. 1989) (some alterations in original)).

We hold that the fourth instance[15] also constituted permissible argument. Cases such as this, lacking eye-witnesses to the actual crime, often hinge on witness credibility. Contreras's defense hinged on attacking witness credibility.[16] A prosecutor has wide latitude in closing

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opened the door to Kowalski's fear of retaliation by Sakellis for testifying at trial by earlier asking Kowalski, "And when [Sakellis] asked you to [change your testimony from saying that he had a gun to it being a remote control], did he say anything else?," RP (Dec. 20, 2007) at 41, to which Kowalski replied, "[He told me] [t]hat I wouldn't get hurt." RP (Dec. 20, 2007) at 41.

[15] In closing argument, the State argued, "The reluctance and fear of these witnesses he is banking on them absolutely banking on them . . . other witnesses came in here and despite their fear testified and you get to evaluate their credibility." RP at 1655. Contreras did not object.

[16] *See* Contreras's closing argument:

> "[L]et's start with Mr. Mayhall . . . he was a daily doper . . . [w]e know he's a liar." RP at 1667.
>
> "[Mayhall] also tells you that [Sakellis] asked him to change his story." RP at 1668.
>
> "[T]hen we hear from Mr. Atofau with his theft and possession of stolen property and forgery convictions." RP at 1670.

argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995); *State v. Johnson*, 40 Wn. App. 371, 381, 699 P.2d 221 (1985). Because Contreras attacked witness credibility, the State was entitled to argue evidence supporting witness rehabilitation.[17] *See Froehlich*, 96 Wn.2d at 305 (corroborating evidence is admissible when witness's credibility attacked by opposing party); *see also Bourgeois*, 133 Wn.2d at 402 (State's witness's testimony about reluctance to testify admissible because credibility attacked). Contreras has not demonstrated reversible prosecutorial misconduct.

IV. No Comment on Guilt

Contreras next argues that the State commented impermissibly on his guilt when it asked police to lay a foundation about how police dogs track suspects, and a police witness testified that dogs respond to enhanced scent created "when a person is under great emotional distress," RP at 980, and from "fear or apprehension." RP at 980. We disagree.

Here, the police witness was merely laying a foundation about how police dogs track suspects, not testifying about Contreras. At this point in questioning, the State had not yet even

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"We have Kelly Kowalski herself with a forgery conviction." RP at 1671.

"Now, credibility determination applies to all the witnesses and it also applies to the officers." RP at 1674.

[17] That Contreras's closing argument attack on witness credibility occurred after the State's "rehabilitation" does not change this analysis. *See Bourgeois*, 133 Wn.2d at 402 ("[T]he testimony of [witness] regarding his reluctance to testify was admissible because his credibility was attacked. Although the attack occurred after [witness] was directly examined by the State, it was reasonable for the State to anticipate the attack and 'pull the sting' of the defense's cross-examination.").

asked the police officer about the specific events of December 13, the day of Contreras's arrest. Moreover, it was undisputed that police chased Contreras both by car and on foot. Thus even assuming, without deciding, that police testimony went beyond merely laying a foundation, the "great emotional distress," as well as "fear or apprehension," to which police alluded, could very well have referred to Contreras's having engaged in the chase itself—permissible circumstantial evidence. RP at 980. *See State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965) ("It is an accepted rule that evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence."). Therefore, we hold that the State did not impermissibly comment on Contreras's guilt.

Contreras cites *State v. Carlin*, in which police testified that a police dog tracked the defendant by following a "fresh guilt scent." 40 Wn. App. 698, 703, 700 P.2d 323 (1985), *overruled on other grounds by City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993). *Carlin* is clearly distinguishable. Here, in contrast, police made no mention of Contreras's guilt or innocence of any crime when they testified about his flight from them.

V. Sufficiency of Evidence

Next, Contreras argues that the State produced insufficient evidence to support the premeditation prong of first degree murder. RCW 9A.32.030(1)(a). We disagree.

The test for determining evidence sufficiency is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). We draw all

reasonable inferences from the evidence in favor of the State and interpret it most strongly against the defendant. *Gentry*, 125 Wn.2d at 597 (citing *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Ashcraft,* 71 Wn. App. 444, 454, 859 P.2d 60 (1993)).

The evidence showed that Contreras visited Bernal's apartment on December 11 to collect a debt. Contreras carried a gun on his person, and used it to hit Bernal in the side of the head. The blow to Bernal's head fractured Bernal's skull and the gun discharged on impact. Following the gunshot, everyone fled the apartment except for Contreras and the injured Bernal. One witness (Mayhall) saw Contreras point his gun toward Bernal. And seconds after exiting the apartment, witnesses heard two or three more shots in close succession come from the apartment. This evidence was more than sufficient to support the premeditation prong of the conviction.

VI. Cumulative Error

Finally, Contreras argues that he is entitled to reversal under the cumulative error doctrine. We disagree. The cumulative error doctrine applies when several errors occurred at the trial court level to deny the defendant a fair trial, even though no single error alone warrants reversal. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003).

Here, there is no accumulation of several errors. Rather, at most there is one possible error—the State's forbidden second reference to gang activity. Even if error, we have already held it was harmless because it had little or no effect on the outcome of the trial. And there was neither cumulative error nor any significant error that deprived Contreras of a fair trial. *See State v. Greiff,* 141 Wn.2d 910, 10 P.3d 390 (2000).

Contreras also argues that the trial court denied him a fair trial when it "[i]mpermissibly

[c]onveyed [i]ts [o]pinion [r]egarding [w]itness [t]estimony, [e]vidence [a]nd [t]he [d]efense [c]ase." Br. of Appellant at 62. But Contreras fails to explain in a meaningful way how the trial court's overruling his objection constituted inappropriate commentary on the evidence. RAP 10.3(a).[18] Therefore, we do not further consider this argument.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Van Deren, J.

[18] Contreras's imaginative explanation does not persuade us:

> The [trial] court overruled the objection saying the question was not answered and directed [Klepach] to answer the question—telegraphing the court's opinion that [Klepach's] answer on the nature of what she perceived as the consequences of not cooperating with law enforcement was the 'wrong' answer . . . . [T]he State again asked the question [following the trial court's overruling of the objection], and the chastised witness gave the "right" answer.

Br. of Appellant at 64-65.