IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TAYLOR TOM CONLEY, Appellant.	No. 37970-8-II UNPUBLISHED OPINION

HUNT, J. – Taylor Tom Conley appeals his jury trial conviction for the aggravated first degree murder of Brian Swehla. Conley argues that the trial court erred when it (1) admitted evidence of a text message, sent from Swehla's cellular telephone after the alleged time of his death, for the limited purpose of controverting the time of death; (2) refused to give the jury his proposed instructions on how to evaluate in-custody witness and eyewitness evidence; and (3) gave an improper premeditation instruction. Conley also argues that the lead detective improperly commented on his (Conley's) exercise of his Fifth Amendment right to silence and that cumulative error denied him a fair trial. In his pro se Statement of Additional Grounds for Review[1] (SAG), he asserts that the trial court erred in denying his motion for a mistrial after at least one juror saw

[1] RAP 10.10.

him in handcuffs in the hallway. We affirm.

FACTS

I. Background

On March 28, 2006, several boats moored in Columbia County, Oregon, were burglarized. Several guns were stolen from Taylor Tom Conley's father's boat and other nearby boats, including an old 12 gauge "pellet" shotgun, a .22 caliber automatic rifle, a Winchester semi-automatic .22 caliber firearm, and a Winchester 12 gauge shotgun.

A. Events of March 31, 2006

On March 31, 2006, Amy Lynn Hardesty had been fighting with her boyfriend Brian Swehla at their home. Around 1:00 am, Hardesty's friend Wayne "Hillbilly" Hamrick picked her up, after which they stayed up all night and used methamphetamine.

Around 3:00 am, James Carroll Zebley, drove Conley to Conley's mother's house. Conley invited Zebley to participate in a burglary. Declining, Zebley remained behind, but he allowed Conley to take his truck at about 4:45 am. Conley did not return for about six hours.

Sometime between 6:00 and 6:30 am that same morning, Jennifer Perry, Ronald Weller-Childers' girlfriend, was in her bedroom in her home when she heard a gun discharge. It blew a half-dollar sized hole through her bedroom wall and deposited shot in her futon. In the adjoining room, Perry found Weller-Childers and Conley holding a 12 gauge shotgun; she told them to leave, which they did, at around 7:00 am.

Between 8:20 and 9:00 am, Swehla's neighbors Rosemary Madison Daly, and Carmen Eastlick, noticed two men emerging from a wooded area near Swehla's house, carrying

backpacks and "rifles." 4A RP (June 5, 2008) at 405. Eastlick saw them run to a Toyota truck[2] parked in a nearby church lot, throw some heavy items into the back of the truck, take off most of their clothing, and drive away. Eastlick called the sheriff's offices; the responding deputies noticed nothing wrong at Swehla's house.

At about 10:30 am, Conley returned to his mother's house with Weller-Childers. Zebley saw what he believed were some guns Conley had earlier shown him rolled up in a blanket in the truck bed. Conley told Zebley that he (Zebley) might not want the truck back because he (Conley) had committed some burglaries with it. Conley offered to buy the truck. Zebley declined. Driving Zebley's truck, Conley then drove Zebley and Weller-Childers to Kelso, dropped Zebley in Kelso, and left with the truck, agreeing to return it in an hour and a half. Conley did not return.[3] Sometime after Conley dropped off Zebley, Weller-Childers apparently returned to Perry's house, quiet and upset.

Around 2:30 pm, Conley contacted Josh Derum at work and asked whether he wanted to buy some stolen guns, one of which he described as a nickel-plated 12 gauge shotgun. Derum replied that he was not interested. Conley told Derum that "he needed some money to get out of town because he just put a hole in somebody's head." 3 Report of Proceedings (RP) (June 4, 2008) at 373. Derum did not contact law enforcement.

Later that evening, as it was becoming dark, Conley returned to Perry's house, carrying

[2] Eastlick later testified that the truck she saw that morning looked like the photograph of Zebley's truck.

[3] Zebley found the truck on the side of the road three days later and took the truck.

some “stuff” that he was trying “to get rid of,” including what appeared to be a musical keyboard or a laptop computer. 6 RP (June 9, 2008) at 804. Perry heard Conley say under his breath that he had shot someone. Sometime that same evening, Perry’s friend Kevin “Canine” Brown,[4] 4A RP (June 5, 2008) at 469, an African-American man, came to her house carrying a shotgun stuffed in a duffle bag, refused to leave, and stayed for three days.

In the meantime, around daybreak that same day, Hardesty and Hamrick drove to Packwood, stopping for breakfast around 8:30 am.[5] Hamrick received a text message, apparently sent from Swehla’s cellular telephone around 9:12 am that morning, which stated something like, “Where is you?” 2 RP (June 3, 2008) at 139. Hamrick showed this message to Hardesty.

Hardesty returned to Swehla’s house around 8:30 or 9:00 pm, discovered him dead on his bedroom floor, and left for her grandmother’s house about five to seven minutes away. Hardesty did not mention that Swehla was dead; instead, she told her grandmother, Taletha Buell, that she (Hardesty) was concerned about Swehla, who had a history of being suicidal, and asked Buell to check on him. Buell’s daughter (Hardesty’s mother) drove Buell to Swehla’s house, where they found Swehla dead on his bedroom floor in a pool of blood, next to his gun safe. They immediately called 911.

Cowlitz County deputies and forensic investigators from the Washington State Patrol

[4] Although offered immunity, Brown refused to testify at Conley’s trial and was held in jail for contempt.

[5] Hardesty later provided the deputies with receipts showing that a breakfast and some clothing had been charged to her credit card around the time she claimed she and Hamrick had been out of town.

Crime Lab determined that (1) someone had entered Swehla's house by kicking in the door to the attached garage; (2) Swehla had been beaten with a straight, narrow, "rod-like" object and shot with a .22 caliber gun in or near one of the bedrooms;[6] and (3) he had been shot in the head with a shotgun after dragging himself from the other bedroom into the master bedroom. 5 RP (June 6, 2008) at 742. They found (1) two unspent 12 gauge shotgun shells on the kitchen floor; (2) two .22 caliber shell casings, fired by the same gun, in the hallway leading to the bedrooms; and (3) two .22 caliber bullets (fired by the same gun that had fired the two .22 caliber shell casings) in a closet at the end of the hallway. The deputies and investigators did not find any blood or finger prints from Conley or Weller-Childers in the house.[7]

B. Events After March 31

1. Conley's attempts to sell stolen guns and other items

A "couple of days" later, Conley telephoned Derum again and offered to sell him a pool table and a "Deuce Deuce," which Derum understood to mean a .22 caliber firearm. 3 RP (June 4, 2008) at 374. Again, Derum refused. On April 3, Derum read about Swehla's murder in the paper, immediately contacted the Sheriff's Office, reported his contacts with Conley, and provided a written statement.

On April 7, Conley attempted to sell several items at Darrin Wolf's house. Conley told Robert Courser that he was trying to leave town because deputies had questioned him about a

[6] The investigators found a jack handle stuffed behind the cushions of a loveseat in the first bedroom.

[7] They did, however, find a small amount of blood in the kitchen that did not match Swehla's, Conley's, Weller-Childers', or Hardesty's DNA.

murder. Courser and his friend James Patrick Stehman,[8] accompanied Conley to Conley's mother's house to see what Conley was selling. While there, Conley attempted to fix a small .25 or .22 caliber handgun. Conley told Courser that he (Conley) "had some things he had to take care of," mentioned some "loose ends," 4B RP (June 5, 2008) at 591, and told Stehman that he (Conley) wanted to find "Ronnie" before the deputies found him because "[Ronnie]" was "the only thing that linked" Conley to "what had happened."[9] 5 RP (June 6, 2008) at 770.

2. Hardesty interviews

Deputies interviewed Hardesty several times. She described her argument with Swehla, her travels with Hamrick on the day of the murder, and the text message from Swehla's phone to Hamrick's phone. But she initially denied having stopped at Swehla's house before sending her grandmother to check on him. After the deputies suggested that they might have seen her on a surveillance tape from Swehla's house,[10] she admitted that she had gone into Swehla's house before driving to her grandmother's house. Hardesty gave Hamrick's cellular telephone to the deputies, from which they photographed the text message from Swehla's phone.

3. Conley, Perry, and Weller-Childers interviews

The same day that Derum contacted the Sheriff's Office, deputies interviewed Conley. Deputy Sidney Ackler mentioned to Conley that the deputies could take partial latent prints from

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[8] Stehman did not talk to deputies until after they had arrested him on outstanding warrants.

[9] Although Stehman testified about this statement at trial, he admitted that Conley could have been less specific about his motivation for needing a gun and that he could have instead merely said that he needed "to tie up some loose ends." 5 RP (June 6, 2008) at 772.

[10] The investigating officers discovered that Swehla had installed two video cameras outside the house, which had been disabled.

ammunition and shotgun shells. Conley told the deputies that he was living in his mother's house.

A "couple of days" after April 3, a retired deputy told Ackler that he should talk to Perry, who had "come to his [the retired deputy's] home." 3 RP (June 4, 2008) at 315. After interviewing Perry, deputies interviewed Weller-Childers, who implicated Conley in the murder.

4. Search warrant for Conley's mother's house

The deputies immediately obtained a search warrant for Conley's mother's house, which they executed on April 8. They discovered some partially burned shotgun shell casings in a sauna furnace in an unattached outbuilding. In Conley's bedroom, they found a "float coat" stolen during the March 28 boat burglaries. 3 RP (June 4, 2008) at 320-21.

5. Zebley's truck and interview

On April 10, deputies located the truck that Eastlick had described; it was Zebley's truck. With Zebley's permission, the deputies impounded and searched the truck. Investigators found no blood or fingerprints from Conley or Weller-Childers or blood from Swehla.

Deputies interviewed Zebley, who told them about the events of March 31. He also told them that (1) Conley had left some items in the truck that were still there when he (Zebley) recovered the truck, and (2) most of these items had been stolen when Zebley left the truck overnight at Derrin Wolf's house. Deputies searched Wolf's garage and found some ammunition.

II. Procedure

The State charged Conley with first degree aggravated murder or, in the alternative, first degree felony murder. The case was tried to a jury.

A. Testimony and Text Message Evidence

Hardesty testified about the time she had spent with Hamrick the day of the murder and about discovering Swehla's body. She also testified that Conley and Swehla's son had lived at Swehla's house, in which Swehla kept several guns in his gun safe but that Conley had moved out of the house about a year and a half before Swehla's murder.

Hardesty stated that at some point after the murder, Hamrick had told her "he had somebody for [her] to talk to" and "he knew that one of the guns that was used at [Swehla's] house went off in [Christina's] house and she had some pellets that [Hardesty] could take." 2 RP (June 3, 2008) at 157, 178, 179. Hardesty then met with a woman named Christina; Christina gave her (Hardesty) several "pellets," which Hardesty then gave to the deputies. 2 RP (June 3, 2008) at 157, 177-79.

Perry testified to the facts described above. About a week after the murder, she had dug some shotgun pellets out of her futon and given them to Hamrick to take to the Sheriff's Office. She had recently contacted the Sheriff's Office in an attempt to lower Weller-Childers' sentence and agreed to cooperate with the State and to provide testimony.

Weller-Childers had pleaded guilty to second degree murder and had been sentenced to 20 years in prison. His plea agreement required him to testify truthfully in Conley's trial. He testified that he had murdered Swehla with an African-American man, whose name Weller-Childers would not disclose for fear of retaliation, and that he (Weller-Childers) had stolen Swehla's cellular telephone and laptop computer during the burglary. Weller-Childers further testified that Conley had not been with him when he (Weller-Childers) committed the murder. The State impeached

Weller-Childers with his prior statement implicating Conley in the murder, which Weller-Childers admitted to having made.

Eastlick and Daly testified about the two men they had seen coming out of the woods near Swehla's house the morning of the murder; their descriptions of the two men differed. Daly knew both Conley and Weller-Childers, but she was unable to identify the men as Conley and Weller-Childers until after she had learned that the two men were suspects and she had talked to her daughter about the case. Eastlick was unable to identify anyone in the photomontages deputies had shown her soon after the murder; but she was able to identify Weller-Childers as one of the men when she saw him at his sentencing hearing.

Several witnesses testified about Conley's statements in jail, including a confession that he had shot someone with a 12 gauge shotgun. Defense evidence suggested that many of these witnesses had provided information in hopes of receiving some kind of benefit, such as release on electronic home monitoring or a reduced sentence. And some of the witnesses who had been in jail with Conley had had access to Conley's discovery materials and newspaper reports of the murder.

Deputy Ackler testified that during their interview, he told Conley that he (Ackler) was "aware of [Conley's] deceptions." 3RP (June 4, 2008) at 311. Sustaining defense counsel's objection, the trial court instructed the jury to ignore this testimony. Over further defense objections, Ackler testified that he had mentioned to Conley that investigators could take partial latent prints from the ammunition and shotgun shells. Immediately after this testimony, the State ceased questioning Ackler about the interview. Neither the State nor defense counsel asked

Ackler whether Conley had responded to Ackler's statement about the prints.

The State successfully argued that Conley should not be able to use the text message sent from Swehla's cellular telephone to Hamrick's cellular telephone as evidence that Hamrick was somehow connected to the murder.[11] The trial court ruled that Conley could use the text message only to raise an issue about when the murder had occurred. But the trial court did not instruct the jury about this limitation on use of the text message evidence.

B. Motion for Mistrial

Conley moved for a mistrial during the State's case-in-chief because, according to Conley, one or more jurors had seen him in handcuffs on their way to the jury room. Conley testified out of the jury's presence.[12] No jurors testified. The State argued that the jury was already aware that Conley was in custody and being held in jail; therefore, seeing him in handcuffs was not prejudicial. The trial court denied the motion for mistrial.

C. Jury Instructions

Defense counsel proposed and the trial gave the following cautionary jury instruction:

> The fact that there have been guards in the courtroom or you have seen the defendant restrained in any manner is not evidence. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations.

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[11] Conley had argued that the message was relevant to whether Hamrick was involved in the murder, that much of the evidence and many of the witnesses had some connection to Hamrick, and that showing a connection between the murder and Hamrick might cause the jury to question the credibility of much of the State's evidence.

[12] Conley testified that he was sitting in a chair in the hallway just before opening statements, he was wearing handcuffs, and his hands were not covered. One of the jurors looked right at him while on her way to the jury room, from about 30 to 35 feet away.

Clerk's Papers (CP) at 25 (Jury Instruction 3), CP at 50 (Defense Proposed Instruction 2).

The trial court refused two instructions that Conley proposed about how to evaluate eyewitness and in-custody witness testimony and evidence. Instead, it gave the usual introductory instruction,[13] which provides a non-exclusive list of facts the jury should consider when evaluating credibility issues. The trial court also instructed the jury on reasonable doubt.

When Conley objected to the wording of the trial court's premeditation instruction, arguing that it should mention something "with regards to malice of forethought [sic]," the trial court declined to change the wording. 7 RP (June 10, 2008) at 918. Again, the trial court's instructions did not include an instruction limiting the jury's use of the text message evidence from Swehla's cellular phone.

D. Closing Arguments

In closing argument, the State emphasized various witness testimonies which, taken as a whole, showed that Conley was involved in Swehla's murder; the State warned the jury that the defense would try to undermine this testimony by emphasizing that most of the witnesses were drug addicts with motivation to lie. The State did not argue, however, that Conley's failure to respond to Ackler's statement about the latent fingerprints from ammunition and shell casings showed that Conley was guilty.

In his closing, defense counsel emphasized Weller-Childers' testimony implicating a person other than Conley in the murder. Defense counsel also emphasized that most of the

[13] 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 1.02, at 13-15 (3d ed. 2008) (WPIC).

evidence tying Conley to the crime came from people with whom he had spoken in jail who had access to his discovery materials and who could benefit by providing evidence against him.

Defense counsel argued that (1) the text message sent from Swehla's phone was "to of all people Mr. Hamrick," 7 RP (June 10, 2008) at 1051, and was relevant to Swehla's time of death; (2) Hamrick, who did not testify, was connected to many of the witnesses and some of the evidence; (3) there were inconsistencies among the various eyewitness testimonies and some of the witnesses were unable to identify Conley or Weller-Childers until after they had learned more about the murder.

In rebuttal, the State argued that the text message sent to Hamrick's phone was a "red herring[ ]," 7 RP (June 10, 2008) at 1078, particularly with respect to the time it was sent. The State also argued:

> So if we give defense the benefit of the argument that that cell phone was used to make a call to [Hamrick] at 9:12, all that tells you is that Mr. [Wellers-]Childers and Mr. Conley called [Hamrick] at 9:12. And wouldn't that be interesting? It certainly is interesting. But it certainly does not say that the defendant was not at Swehla's house and did not shoot him in the back of the head with a 12-gauge firearm.

7 RP (June 10, 2008) at 1078.

E. Verdict

The jury found Conley guilty of premeditated first degree murder. It also found the following aggravating factors: (1) The murder was committed in the course of, in furtherance of, or in immediate flight from a robbery; and (2) the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of residential burglary.[14] The trial court sentenced Conley to life in prison without the possibility of parole. He appeals.

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[14] The jury also found Conley guilty of first degree felony murder while armed with a firearm. The trial court dismissed the felony murder conviction at sentencing.

ANALYSIS

I. Text Message Evidence

Conley first argues that the trial court violated his due process rights under the Sixth and Fourteenth Amendments to the Constitution when it admitted the text message sent from Swehla's cellular telephone to Hamrick's cellular telephone for the sole purpose of controverting the time of the murder. Conley contends that in so doing, the trial court limited his ability to argue that this text message was evidence that Hamrick was somehow involved in the murder and, thus, any evidence involving Hamrick, such as Hardesty's alibi, Perry's testimony, and the shotgun pellets, was unreliable.

The State acknowledges that the text message was potentially relevant to Hamrick's and Hardesty's credibility and to the weight of Hamrick's testimony and any other evidence obtained through Hamrick or Hardesty, but it asserts that the trial court properly limited the use of this evidence because it did not establish that someone *other than* Conley actually committed the murder. In his reply brief, Conley counters that the trial court erred in refusing to allow the text message to be used as "'other suspects'" evidence under *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), after determining that the evidence was not "explicitly exculpatory." Reply Br. of Appellant at 1.

Although the trial court properly refused to allow the text message to be used as evidence that someone else committed the murder, we agree with Conley that it was relevant and admissible for credibility, reliability, and weight issues. But because the trial court never advised the jury that it had limited the purpose for which the jury could consider the text message and

Conley's closing argument suggested that the jury examine the evidence carefully in light of this curious text message, any potential error was harmless.

A. Standard of Review

Because the trial court never cautioned the jury that it could consider the text message only as evidence of the time of the murder,[15] the only potential effect the trial court's ruling had was to limit the scope of Conley's closing argument. The trial court has broad discretion over the scope of counsel's closing arguments.[16] If a trial court "goes too far in limiting the scope of closing argument, a defendant's constitutional rights [such as the right to effective assistance of counsel and right to due process] may be implicated." *State v. Frost*, 160 Wn.2d 765, 772, 161 ___P.3d 361 (2007), *cert. denied*, 552 U.S. 1145 (2008). Any such error, however, is subject to harmless error analysis. *Frost*, 160 Wn.2d at 779, 782. And we can affirm if convinced beyond a reasonable doubt that a reasonable fact finder would have reached the same result absent the error. *Frost*, 160 Wn.2d at 782 (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986)).

B. Harmless Error

As noted above, we agree with the State's assertion that the trial court's refusal to allow Conley to use the text message evidence to prove that someone other than Conley committed the

[15] In addition, the jury was not present when the trial court and the parties addressed the admissibility of the text message.

[16] *State v. Frost*, 160 Wn.2d 765, 771-72, 161 P.3d 361 (2007) (citing *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975); *State v. Perez-Cervantes*, 141 Wn.2d 468, 474-75, 6 P.3d 1160 (2000); *City of Seattle v. Erickson*, 55 Wash. 675, 677, 104 P. 1128 (1909), *cert. denied*, 552 U.S. 1145 (2008)).

murder was proper.[17] To the extent the trial court's ruling precluded this argument, there was no error. But we agree with Conley that the text message evidence was relevant and admissible for credibility, reliability, and weight purposes because it arguably connected Hamrick and, possibly, Hardesty, to the people who killed Swehla—a connection that could put any evidence related to Hamrick or Hardesty at issue. We do not, however, agree that the trial court's ruling in any way prevented Conley from presenting this weight, reliability, and credibility issue to the jury.

In closing argument, Conley's counsel repeatedly pointed out the numerous connections between Hamrick and the witnesses who had provided evidence against Conley, emphasizing that the text message was sent to Hamrick, "of all people," 7 RP (June 10, 2008) at 1051; and the

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[17] A defendant has no right to introduce evidence that a third party committed the charged crime unless the defendant first establishes a sufficient foundation. *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993), *review denied*, 123 Wn.2d 1031 (1994). That foundation requires a nexus between the third person and the crime. *Condon*, 72 Wn. App. at 647. Motive, ability, and opportunity to commit a crime alone are not sufficient. *Condon*, 72 Wn. App. at 647; *State v. Rehak*, 67 Wn. App. 157, 163, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). Only when the offered testimony would evidence a "step taken by the third party that indicates an intention to act" on the motive or opportunity does the trial court abuse its discretion in refusing to allow the evidence for this purpose. *Rehak*, 67 Wn. App. at 163. Under these standards, the trial court did not err to the extent it refused to admit the text message for the purpose of showing that someone other than Conley killed Swehla. Although there was arguably evidence from Weller-Childers connecting another party to the actual murder, the chain of events linking the text message to that evidence was too attenuated to be relevant.

Conley argues that under *Holmes*, the trial court was required to admit the text message evidence for a broader purpose and that the State is relying on outdated, pre-*Holmes* cases to support its argument. Conley's reliance on *Holmes* is misplaced. In *Holmes*, the Supreme Court held that the trial court cannot exclude other suspect evidence simply because the State has presented strong evidence, particularly strong forensic evidence, against the defendant that, if believed, strongly supports a guilty verdict. *Holmes*, 547 U.S. at 329-31. The *Holmes* court did not hold that a trial court could not exclude other suspect evidence when there was an inadequate foundation tying a third person to the crime; in fact, it essentially reaffirmed this foundational requirement. *Holmes*, 547 U.S. at 327.

State's rebuttal argument suggested that the text message could have connected Hamrick to the murder. Although defense counsel did not expressly argue that the text message implicated Hamrick and that Hamrick might, therefore, have been involved in providing false evidence against Conley, that theory was implicit in the closing arguments. Accordingly, Conley has not demonstrated that the trial court's ruling limited his ability to argue that Hamrick and Hardesty were somehow connected to the murder and that the jury should view any evidence related to Hamrick or Hardesty with caution. Because the trial court's ruling did not impair Conley's ability to make his credibility, reliability, and weight arguments, any error in the trial court's ruling was not reasonably likely to have affected the jury's verdict and was clearly harmless.

II. Instructions

Conley next argues that the trial court made several instructional errors. We disagree.

A. Standard of Review

We review for abuse of discretion a trial court's decision to reject a requested jury instruction. *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998). We review de novo the adequacy of challenged jury instructions. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005) (citing *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003)). Jury instructions are sufficient if they permit each party to argue its theory of the case, are not misleading, and properly inform the jury of the applicable law when read as a whole. *Picard*, 90 Wn. App. at 902.

When substantial evidence supports the defendant's theory of the case, he is entitled to have his theory submitted to the jury under appropriate instructions. *See State v. Washington*, 36

Wn. App. 792, 793, 677 P.2d 786, *review denied*, 101 Wn.2d 1015 (1984). But a defendant "is not entitled to put his argument in the court's instructions," *State v. Lane*, 4 Wn. App. 745, 748, 484 P.2d 432 (citing *State v. Dana*, 73 Wn.2d 533, 536, 439 P.2d 403 (1968), *State v. Hayes*, 3 Wn. App. 544, 545, 475 P.2d 885 (1970)), *review denied*, 79 Wn.2d 1007 (1971); thus, "it is axiomatic that the trial court has considerable discretion in how the instructions will be worded." *Dana*, 73 Wn.2d at 536 (citing *Roberts v. Goerig*, 68 Wn.2d 442, 413 P.2d 626 (1966)).

B. Credibility of In-Custody Witnesses

Conley argues that the trial court erred when it refused to give the jury his proposed instruction 8, which expanded the trial court's instruction about how to evaluate witness testimony. Conley's proposed instruction provided:

> The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.
>
> An in-custody informant is someone, other than a codefendant, accomplice or coconspirator, whose testimony is based on statements the defendant allegedly made while both the defendant and the informant were held within a correctional institution.

CP at 57. This instruction would have been superfluous because the trial court already included a standard general instruction about the jury's duty to weigh the evidence and to assess witness credibility in jury instruction 1.

Jury instruction 1 stated, in pertinent part:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity

> of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; *any personal interest that the witness might have in the outcome or the issues*; *any bias or prejudice that the witness may have shown*; the reasonableness of the witness's statements in the context of all of the other evidence; and *any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony*.

CP at 22 (emphasis added); *see also* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 1.02, at 13-15 (3d ed. 2008) (WPIC).

In closing, defense counsel repeatedly argued that several of the witnesses (Weller-Childers, Perry, Stehman, and those to whom Conley reportedly confessed to while in jail) were either receiving or attempting to obtain benefits for themselves or for another person when they provided evidence or testimony against Conley. Although Conley's proposed instruction described more specific factors the jury could consider, the trial court's refusal to give Conley's proposed instruction did not prevent him from arguing that the jury should be cautious when considering testimony or evidence provided by witnesses who were hoping to benefit from their help with this case.

Furthermore, as we note above, Conley was "not entitled to put his argument in the court's instructions." *Lane*, 4 Wn. App. at 748 (citing *Dana*, 73 Wn.2d at 536; *Hayes*, 3 Wn. App. at 545). None of the authorities Conley cites demonstrate that an instruction such as the one he proposed was mandatory.[18] Accordingly, Conley's argument fails.

[18] For example, Conley argues that his proposed instruction was analogous to WPIC 6.05, WPIC at 184, which the trial court must give whenever there is uncorroborated accomplice testimony. But WPIC 6.05 pertains solely to accomplice testimony; it does not attempt to instruct the jury about how to weigh non-accomplice testimony. Furthermore, WPIC 6.05 is mandatory only when accomplice testimony is uncorroborated, which is clearly not the case here in light of the testimony about Conley's incriminating statements to others who were not in custody and

C. Eyewitness Identification

Conley next argues that the trial court erred in refusing to give the jury his proposed instruction 7, which also would have expanded the trial court's instructions on how to consider witness testimony. Conley's proposed instruction 7 provided:

> You have heard eyewitness testimony identifying the defendant. As with any other witness you must decide whether an eyewitness gave truthful and accurate testimony.
>
> In evaluating identification testimony, consider the following questions:
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> Did the witness know or have contact with the defendant before the event?
>
> How well could the witness see the perpetrator?
>
> What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance and duration of observation?
>
> How closely was the witness paying attention?
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> Was the witness under stress when he or she made the observation?
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> Did the witness give a description and how does that description compare with the defendant?
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> How much time passed between the event and the time the witness identified the defendant?
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> Was the witness asked to pick the perpetrator out of a group?
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> Did the witness ever fail to identify the defendant?
>
> Did the witness ever change his or her mind about the identification?
>
> Are the witness and defendant of different races?
>
> Was the witness able to identify other participants to the crime?
>
> Were there other circumstances affecting the witness's ability to make an accurate identification?

CP at 55-56. Conley argues that the law and the facts supported this instruction, that this instruction was necessary because eyewitness identification is risky and often inaccurate, and that

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Zebley's testimony implicating Conley.

Furthermore, neither of the other cases that Conley cites is on point: Neither *Banks v. Dretke*, 540 U.S. 668, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004), nor *Plascencia v. Alameida*, 467 F.3d 1190, 1199-1200 (9th Cir. 2006) (citing 9th Cir. Crim. Jury Instr. 4.9) hold that a specific credibility instruction is required in a similar context, unless such an instruction is otherwise required by statute, which is not the case here.

this instruction was necessary to his defense.[19]

As we note above, the court's instruction 1 provided:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: *the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying*; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and *any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony*.

CP at 22 (emphasis added). Again, although the court's instruction was not as detailed as Conley's proposed instruction, it did not prevent him from arguing the factors enumerated in his proposed instruction. On the contrary, in closing argument, defense counsel emphasized many of these factors and discussed the problems with the eyewitness identifications.

The court's instruction provided Conley the opportunity to present his argument. He fails to direct us to any authority requiring the trial court to give a more detailed jury instruction on evaluating eyewitness testimony.[20]

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[19] Although he cites no WPIC or Washington case law, Conley cites several cases from other jurisdictions and the Ninth Circuit Model Criminal Jury Instruction 4.14 to demonstrate that other jurisdictions use such an instruction and, perhaps, to suggest that we should reevaluate Washington's approach to scientific theories suggesting the fallibility of eyewitness testimony.

[20] Although some of the authorities Conley cites suggest that other jurisdictions may require or allow similar jury instructions, none establish that such an instruction is mandatory under Washington law. *See United States v. Wade*, 388 U.S. 218, 230, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (not addressing jury instructions); *State v. Ledbetter*, 275 Conn. 534, 881 A.2d 290, 314-20 (2005), *cert. denied*, 547 U.S. 1082 (2006) (emphasizing recent psychological studies, requiring a similar cautionary instruction unless there is no significant risk of misidentification, and setting out specific language)); *Brodes v. State*, 279 Ga. 435, 614 S.E.2d 766, 771(2005) (rejecting instructions allowing the jury to consider witness's certainty as a factor when

As we noted earlier, Conley "is not entitled to put his argument in the court's instructions."[21] The trial court was not required to give his proposed instruction. Furthermore, it would have been error for the trial court to have given Conley's proposed instruction because it would have been an impermissible comment on the evidence. *See Brodes v. State*, 614 S.E.2d 766, 771, 614 S.E.2d 766 (Ga. 2005) (recognizing that several jurisdictions, including Washington, have held that such instructions are "superfluous" or are an impermissible comment on the evidence) (citations omitted). Accordingly, this argument fails.

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determining witness identification reliability but noting that it had already given the jury a pattern instruction similar to the one proposed here); *State v. Hunt*, 275 Kan. 811, 69 P.3d 571, 576 (2003) (adopting factors similar to those in the proposed instruction as a model for examining eyewitness identification and stating that when requested and when the testimony is key to the case, the trial court should give such a cautionary instruction); *State v. Romero*, 191 N.J. 59, 922 A.2d 693, 702-03 (2007) (holding that in light of recent "social science research," additional language enumerating factors that might potentially affect eyewitness identification and cautioning jury to submit such evidence to close, critical scrutiny is required); *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991) (holding that if eyewitness testimony is central to case and the defendant requests such an instruction, the trial court should give the instruction) (citing *State v. Long*, 721 P.2d 483 (Utah 1986), *holding modified by State v. Clopten*, 223 P.3d 1103, 1113 (Utah 2009)), *modified on other grounds by State v. Thurman*, 846 P.2d 1256, 1270 n.11 (Utah 1993); *see also* Ninth Circuit Model Criminal Jury Instruction 4.14 (setting out five factors similar to those proposed and commenting that a district court may give this instruction where appropriate and that it may be most appropriate when the district court excludes offered exert witness testimony regarding eyewitness identification) (citing *United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996), *cert. denied*, 520 U.S. 1193 (1997), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499 (2008); *United States v. Rincon*, 28 F.3d 921, 925-26 (9th Cir. 1994), *cert. denied*, 513 U.S. 1029 (1994)).

[21] *Lane*, 4 Wn. App. at 748 (citing *Dana*, 73 Wn.2d at 536; *Hayes*, 3 Wn. App. at 545); *see also State v. Johnson*, 49 Wn. App. 432, 440-41, 743 P.2d 290 (1987), *review denied*, 110 Wn.2d 1005 (1988); *see also State v. Guzman-Cuellar*, 47 Wn. App. 326, 337, 734 P.2d 966, (holding that defense proposed instruction cautioning jury about reliability of eyewitness identification testimony was unnecessary when court's instructions advised jury of the reasonable doubts standard and "[t]he factors that could affect the accuracy of the eyewitness identifications are best left to argument by counsel."), *review denied*, 108 Wn.2d 1027 (1987).

D. Premeditation

Conley next argues that the trial court erred in giving jury instruction 12, modeled on WPIC 26.01.01, which defined "premeditation." He contends that this instruction was inadequate because it did not require proof of deliberate formation of an intent to take a human life. Br. of Appellant at 41. This argument fails.

Instruction 12 provided:

> Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP at 36 (Jury Instruction 12). In taking exception to this instruction, Conley did not propose alternative language that would have corrected the alleged deficiencies.

Conley argues that (1) the first sentence of the instruction fails to narrow the deliberative process "to premeditation specifically on the taking of a human life"; (2) the second sentence then refers to "any deliberation"; and (3) taken as a whole, the instruction allows a jury to find premeditation if the defendant deliberated about *anything* before taking a human life. Br. of Appellant at 43. Conley neglects, however, to note that the second sentence of instruction 12 refers to forming "an intent to take human life" and that the last sentence provides, "The law requires some time, however long or short, *in which a design to kill is deliberately formed*." CP at 36 (emphasis added). Read as a whole, the instruction correctly states the law and links premeditation to forming an intent to take a human life.

Furthermore, jury instruction 11 provided: "A person commits the crime of premeditated murder in the first degree when, with a *premeditated intent to cause the death of another person*, he causes the death of such person." CP at 35 (emphasis added). This language requires premeditated intent to cause the death of another person for purposes of establishing premeditated first degree murder. Considering the jury instructions as a whole, as we must, Conley's argument lacks merit.

III. Comment on Right to Silence

Conley next argues that Ackler improperly commented on his (Conley's) constitutional right to remain silent[22] by first commenting on Conley's "deceptions," 3 RP (June 4, 2008) at 311, and then stating that he (Ackler) had told Conley that the investigators could lift latent fingerprints from ammunition and shotgun shells. Conley asserts that these portions of Ackler's testimony suggested that he (Conley) did not respond to Ackler's comment about the ammunition and shotgun shells and that this lack of reaction was incriminating. We disagree.

"A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) (citing *Tortolito v. State*, 901 P.2d 387, 391 (Wyo. 1995)). Here, however, not only was there no testimony implying that Conley's silence was an indication of guilt, there was absolutely no reference to Conley's silence, explicit or implicit. Ackler testified about what he had told Conley; Ackler made no reference to whether Conley had responded. Nor did the State refer in closing argument to any failure of Conley to

[22] U.S. Const. amend. V.

respond to the deputy's statements.

Furthermore, Conley's characterization of inferences that could be drawn from Ackler's testimony is speculative. First, the trial court struck the portion of Ackler's testimony referring to Conley's "deceptions" and told the jury to disregard that statement. We presume that the jury follows the trial court's instructions. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). Second, the trial court's striking of Ackler's testimony does not suggest that Conley refused to respond to any of Ackler's questions. On the contrary, that Conley had been deceptive on previous occasions suggests he participated in at least some of the investigation. Third, Ackler testified only to what he had told Conley, a statement that would not necessarily have elicited a response. And this testimony did not indicate one way or the other whether Conley responded. The record contains no comment on Conley's silence; nor can any such comment be reasonably inferred. Therefore, this argument also fails.

IV. Handcuffs

In his SAG, Conley contends that the trial court erred when it denied his motion for mistrial based on at least one juror's having seen him in handcuffs in the hallway. In his Reply Brief, Conley's appellate counsel asserts that a juror's seeing Conley in handcuffs was prejudicial because (1) although the jury knew that Conley had been in custody, it "did not necessarily know that he was still held in custody awaiting his trial"; and (2) it was unlikely that the jury was aware of the standard protocol requiring a defendant to be transported in handcuffs. Reply Br. of Appellant at 14. This argument fails.

We review a trial court's decision to deny a motion for mistrial for abuse of discretion;

such abuse occurs when no reasonable court would have reached the same conclusion.[23] A new trial is not required simply because a juror briefly sees the defendant in handcuffs; rather, the defendant must also establish that the incident prejudiced him.[24] Nothing in the record contradicts the trial court's conclusion that the juror or jurors' briefly seeing Conley in handcuffs while in the hallway was prejudicial to Conley given that the jury already knew Conley had been in custody. Furthermore, the trial court gave the jury a curative instruction, directing it not to consider Conley's being in handcuffs as evidence of guilt.

Again, we presume that a jury follows a trial court's instructions. *Swan*, 114 Wn.2d at 661-62. And Conley presents no evidence overcoming that presumption. Accordingly, we hold that the trial court did not abuse its discretion when it denied Conley's motion for mistrial.[25]

V. Cumulative Error

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[23] *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995); *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

[24] *State v. Ollison*, 68 Wn.2d 65, 69, 411 P.2d 419 (denying motion for mistrial where there was no prejudicial error shown by accidental viewing of defendants in handcuffs and counsel failed to request curative instruction), *cert. denied*, 385 U.S. 874 (1966); *State v. Early*, 70 Wn. App. 452, 462, 853 P.2d 964 (1993) (holding that trial court properly denied motion for mistrial because defendant's mere appearance in handcuffs during jury selection did not prejudice the jurors against defendant), *review denied*, 123 Wn.2d 1004 (1994); *see also State v. Elmore*, 139 Wn.2d 250, 274, 985 P.2d 289 (1999) (defendant's claim of unconstitutional shackling is subject to harmless error analysis), *cert. denied*, 531 U.S. 837 (2000).

[25] Conley cites *Holbrook v. Flynn*, 475 U.S. 560, 160 S. Ct. 1340, 89 L. Ed. 2d 525 (1986), and *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999), for the premise that the use of shackling and/or appearance in prison garb are inherently prejudicial and will lead to negative inferences by the jury. But these cases involved or discussed defendants who either appeared in the courtroom shackled and/or in prison garb throughout the proceedings or there was conspicuous police presence in the courtroom. *Holbrook*, 475 U.S. at 570-71; *Finch*, 137 Wn.2d at 850. Thus, they are inapposite here.

Finally, Conley argues that cumulative error deprived him of a fair trial. The cumulative error doctrine applies when several errors occurred to deny the defendant a fair trial, but none alone warrants reversal. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). The defendant bears the burden of proving an accumulation of errors of sufficient magnitude that retrial is necessary. *State v. Price*, 126 Wn. App. 617, 655, 109 P.3d 27, *review denied*, 155 Wn.2d 1018 (2005).

The only possible error here is the trial court's limiting the text message evidence. As discussed above, that error was harmless; accordingly, Conley does not establish cumulative error.

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, PJ.

We concur:

Quinn-Brintnall, J.

Houghton, JPT.